The Hague Academy of International Law

The Perplexities of Modern International Law

Shabtai Rosenne

Martinus Nijhoff Publishers

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THE HAGUE ACADEMY OF INTERNATIONAL LAW

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by

SHABTAI ROSENNE

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To E.R.

פִּיהָ פָּתְחָה בְחָכְמָה וְתוֹרַת-חֶסֶד עַל-לְשׁוֹנָהּ.
משלי ל״א כ״ו

She openeth her mouth with wisdom; And the law of kindness is on her tongue.
Proverbs 31:26

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PREFACE

This is a revised and updated version of the General Course in Public International Law which I delivered at the Hague Academy of International Law in the year 2001. That General Course was published in volume 291 of the *Recueil des cours/Collected Courses* of that Academy under the title *The Perplexities of Modern International Law*. The Curatorium has agreed that I could publish this new and revised edition. Apart from correction of minor typographical errors, the principal changes consist in the introduction of two sections in chapter VIII, on maritime spaces, namely sections 8.09 and 8.10, on the protection and preservation of the marine environment and on marine archaeology, one section in chapter IX, section 9.06 on the protection of the environment, and two sections in chapter XII, sections 12.10 and 12.11 on conferences and the international civil service. Those sections were included in my lectures and seminars, but for reasons of space had to be omitted from the original publication. I have also brought the material up to date, to the end of the year 2002. This is principally a matter for the adjustment of references in light of newly published primary sources. Otherwise the material is essentially as it was originally published.

With pleasure I acknowledge the valuable assistance that I received from Mr Jonathan Stanley, BA (Hons.) (Toronto), a London-based, free-lance legal researcher and media commentator on law, who has been persistent in ferreting out obscure and not so obscure books, papers and other documents that I required. I could not have completed these lectures without his assistance and most helpful critiques. My son Daniel helped me with the technical aspects of the section on cyberspace (§ 9.05). I also wish to thank others who helped me by responding to my repeated requests for material: Mr Alan Baker and the staff of the Office of the Legal Adviser of the Israel Ministry for Foreign Affairs and the documents officer, Mr Richard Simmonds, of the Permanent Mission of Israel to the United Nations in New York, and the librarians of the Hebrew University and National Library in Jerusalem, the Peace Palace Library

in The Hague, the Max Planck Institute for Comparative Public and International Law in Heidelberg, the Center of Oceans Law and Policy of the University of Virginia School of Law and the Treaty Section of the UN Office of Legal Affairs. I am also grateful to Professor Wybo P. Heere for preparing the index to this volume. Other libraries that I have frequently consulted through their internet services are the Library of Congress and the British Library.

I would also like to thank Ms Annebeth Rosenboom and her colleagues for seeing this book through the press.

Jerusalem, April 2003

Sh.R.

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ABBREVIATIONS

(Also the abbreviations listed in the Blue Book, 16th edition)

adv. op.	advisory opinion
AJIL	*American Journal of International Law* since 1907
Annuaire IDI	Institut de Droit international, *Annuaire*/Institute of International Law, *Yearbook*, since 1873
BFSP	British and Foreign State Papers, 170 vols. 1812-1977
BYIL	*British Year Book of International Law*, 73 vols. since 1924
CTS	*Consolidated Treaty Series*, ed. Clive Parry, 231 vols. (Dobbs Ferry NY, Oceana Publications, 1969-1981)
Developments	Sh. Rosenne, *Developments in the Law of Treaties 1945-1986* (Cambridge University Press, 1989)
ECOSOC	United Nations, Economic and Social Council
ECJR	European Court of Justice, *Reports*
EJIL	*European Journal of International Law*
EPIL	*Encyclopedia of Public International Law*, R. Bernhardt, ed., 12 instalments (Amsterdam, North Holland Publishing Company, 1981-1990; Library ed. 4 vols. 1992-2000)
ETS	European Treaty Series
GAOR	United Nations, General Assembly, *Official Records*
GA/RES/	Resolution of the United Nations General Assembly
ICC	International Criminal Court
ICJ	International Court of Justice
ICJ Rep.	International Court of Justice, Reports of Judgments. Advisory Opinions and Orders
ICLQ	*International and Comparative Law Quarterly*
ICRC	International Committee of the Red Cross

ICSID	International Centre for the Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
ILC Rep.	Report of the International Law Commission on the work of its [...] session [dates]. Published initially as a supplement to the *Official Records* of the General Assembly and republished, after editing, in the YBILC.
ILR	International Law Reports (formerly *Annual Digest and Reports of International Law Cases* (since 1932).
IsLR	*Israel Law Review*
IsYBHR	*Israel Yearbook on Human Rights*
ITLOS	International Tribunal for the Law of the Sea
ITLOS Rep.	International Tribunal for the Law of the Sea, Reports of Judgments, Advisory Opinions and Orders
Law and Practice	Sh. Rosenne, *The Law and Practice of the International Court 1920-1996* (The Hague, Martinus Nijhoff, 1997)
LNTS	League of Nations, *Treaty Series*, 204 vols. (Geneva, League of Nations, 1920-1946)
NATO	North Atlantic Treaty Organization
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
Recueil des cours	Académie de Droit international, *Recueil des Cours*/Academy of International Law, *Collected Courses*, 295 vols. since 1923
Rep.	Report(s)
RIAA	United Nations, *Reports of International Arbitral Awards*, 22 vols. since 1948
SCOR	United Nations, Security Council, *Official Records*
S/RES/	Resolution of the United Nations Security Council.
Sup.	Supplement
UNCITRAL	United Nations Commission for International Trade Law
UNJYB	United Nations, *Juridical Yearbook* (New York, United Nations, since 1963)

UNTS	United Nations, *Treaty Series,* continuing (New York, United Nations, since 1946)
WTO	World Trade Organization
YBILC	*Yearbook of the International Law Commission* (Geneva/New York, United Nations, since 1949)
YBUNL	*Yearbook of United Nations Law*

DOCUMENTATION

As far as possible documents are cited by reference to their printed versions and official number. Most modern documents are available on an appropriate website. Treaties are cited by reference to one of the standard treaty collections (see chapter II note 2 below). Treaties that have been registered with the United Nations but not yet printed in the UNTS are cited by reference to their registration number. Decisions of the Permanent Court of International Justice, the International Court of Justice, the International Tribunal for the Law of the Sea and the two *Ad hoc* criminal tribunals are cited by reference to their official *Reports*. Where these are not available, they have been taken from the respective websites, and for the criminal tribunals the case number is added. Resolutions of standing organs of international organizations are taken from the *Official Records* or from the websites.

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CASES

All cases are from the PCIJ or the ICJ unless otherwise indicated

CHAPTER I

SOME WORDS OF INTRODUCTION: THE UNITY OF INTERNATIONAL LAW

> *International law, perhaps more than almost any other department of law, is one which is fuelled and fired by idealism. Its goal is no less than an international society of peace and freedom which lives according to law and settles its disputes harmoniously and without recourse to force.*
>
> Judge Christopher Weeramantry, Preface,
> *Religion and International Law*
> (Mark W. Janis and Carolyn Evans, eds. 1999), p. vii.

I am very honoured that this venerable Academy of International Law has invited me to deliver the first General Course in English in this twenty-first century. The century just ended has seen the greatest transformation of human society in all of recorded history.

> The last hundred, or hundred and twenty, years have witnessed a radical transformation of Western civilization, and of humanity as a whole. . . . They manifested . . . the tensions between cultural tradition and modern sensibility and between ethnicity and cosmopolitanism, the rise of a lower class population to the centers of sophisticated culture, the crucial role of language in group identity, processes of urbanization, immigration, secularization, democratization, mass education, the new centrality of science and communications; and so on.[1]

With that, the pattern of international relations and of international law based on the sovereign nation State and the Peace of Westphalia (1648) has also witnessed radical transformation.[2] The whole system that existed one hundred

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1 B. Harshav, *Language in Time of Revolution* vii (Stanford University Press, 1999).

2 For the Treaty of Osnabruck and the Treaty of Münster (the Peace of Westphalia), see 1 CTS 119, 273. For a broad conspectus of the history of international law, see J. H. W. Verzijl, *International Law in Historical Perspective*, (Leyden, Sijthoff; The Hague, Nijhoff, 1968–1998). The more than 295 volumes of the *Recueil des cours/Collected Courses* of the Academy of International Law give an excellent overview of the develop-

years ago has been swept away in a series of bloody wars, revolutions and social upheavals (violent and non-violent), but I cannot say that the new system is yet firmly established and in place. The world is groping towards it. The very language in which this General Course is being delivered is symptomatic of the changes. One hundred years ago, had this Academy existed then, the General Course (and all the others) would have been in French without any simultaneous translation. Gone are the days when a budding international lawyer, and indeed any budding diplomat, was expected to be as fluent in French as in his mother tongue. I am not sure that diplomacy and international law are the better off for current monolingualism! French is still the second diplomatic language.

My career has been spent in practising international law as the legal adviser of a Government of a new State, which has faced four wars (1948, 1956, 1967, 1973) and periods of armistice and armed belligerency and other tensions between them, followed by some peace treaties. That is a hard school in which to practice international law, little of which was learned in Law School. So often harsh political realities, internal and external, are in open contradiction to what received rules of international law lead one to expect or to require.

I have given this course the title *The perplexities of modern international law*. That is inspired by the major work of the medieval Jewish philosopher and jurist, Moses Maimonides (1135–1214), *The Guide for the Perplexed*. The perplexities follow from conviction that universal peace will become a reality when we have a workable, rational, balanced and accepted general system of international law and competent, impartial and appropriate instruments to enforce it when necessary, that is in times of crisis. The world has not yet reached that state. That is what it is trying to find.

I have no particular theory to propound to you, no general philosophy of international law. Governments do not want philosophers as their legal advisers.[3] However, there is one element to which I attach importance, that is

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ment of international law during the twentieth century, and the changing interests of all students of the law.

3 For a wide-ranging account of the work of legal advisers, see UN, Office of Legal Affairs, *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (1999). And note the following recent statement of one of the legal advisers of the Foreign and Commonwealth Office in London: 'It was important to work on theory, because rules were not always clear. Theory was important in making state practice and judicial decisions coherent, but it had to be balanced by a background in fieldwork. In addition those who taught international law should talk to those who practised it, they could not simply rely on the published texts and works of other authors and on judicial decisions'. A. Aust in the London meeting of the International Law Association 2000, Report of the Sixty-ninth

the close linkage between law and history. This has two major consequences. The first, and the more important, is that every 'precedent', whether legal or other, must first be placed in its historical and temporal context before we can see if it is applicable in new circumstances. Its date, and its social and political context, are significant, and may weaken its value as a precedent in other, later, circumstances, or strengthen it. The second is that I am also convinced that the historical evolution of any notion or concept is important for an understanding of its current implications. We need to know why a rule has come into existence and developed in a certain way, what it is trying to achieve. A rule of law comes into existence in response to some actual or anticipated mischief.

§ 1.01. The transformation of international law

As the new century and the new millennium begin, let us first take a brief look at how international law stood more than one hundred years ago, and how it has become transformed. The first half of the twentieth century was one of the bloodiest, one of the most horrendous, in the recorded history of humankind. With its two world wars and countless regional and local wars, civil wars and violent internal unrest throughout, and their millions of military and civilian casualties and Holocausts, displaced persons and refugees, it saw the collapse of the regime based on the Peace of Westphalia of 1648. Europe and the legitimacy of the European systems of imperial rule were at the core of that system. Founded on the supreme sovereignty of the State in which any idea of self-determination and outside interference in its internal affairs was anathema, its central features were that the use of armed force to further national policy was legitimate, and that a state of war between two or more countries, with its impact on other States designated as 'neutral', was a recognized condition of international relations and was one regulated by the law. In that context, what international law there was (it was not much) did not enter into the domestic sphere except to the extent that the State permitted it.

Through the century, however, the international community, and with it international law, have undergone a continuous run of fundamental change, which became accelerated during the second half of the century. Cumulatively,

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Conference, London, at 217 (London, ILA, 2000). For a practitioner's description of the role of a legal adviser to an international organization, cf. O. Schachter, *International Law in Theory and Practice* 18 (Dordrecht, Nijhoff, 1991).

these changes have led to the perplexity that so many of us feel today.[4] The changes in the international community are the consequence of many factors, both internal to the States and externally. Internally, universal education, universal suffrage, and the rise to political power of sections of the population deprived of this before 1914, have led in many countries, but especially in those with a western democratic constitutional, social, economic and military system, to deepened interest in foreign affairs and increasing parliamentary control over a country's foreign policy. Externally, the decolonization process that started after the First World War was completed at a quickened pace after the Second, and with it changes in the nature, structure and function of the State, have altered the total power structure especially of the former colonial empires. Decolonization has deprived them of easy access to valuable raw materials and to unlimited manpower. At the same time it has produced a world of great inequalities, especially between the industrialized and wealthy States of the Northern Hemisphere and the largely agricultural and overpopulated countries of the Southern Hemisphere and of parts of Asia. This is finding expression in the opposition, sometimes violent, to what has come to be known as *globalization*. The world's population has increased from around 1,618,200,000 people in 1900 to more than six billion people in 2000, an increase of something more than 270%, and it would have been more but for the terrible casualties of the two World Wars. It is estimated that in the present state of medical science the world's population doubles itself every forty years. This alone is creating innumerable, in fact intolerable, strains on the international community, which has only begun to reorganize international law to cope with these new pressures.

We can gauge the changes in the nature, scope and standing of international law from the opening words of the series of *Digests* produced by the State Department of the United States of America. The *Digest* of 1906 commences:

> It is . . . apparent that from the beginning the science in question denoted something more than positive legislation of independent states, and the term "international law", which has in recent times so generally superseded the earlier titles, serves to emphasize this fact. It denotes a body of obligations which is, in a sense, independent of and superior to such legislation. The Government of the United States has on various occasions announced the principle that international law, as a system, is binding upon nations,

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4 Two who symbolize today's perplexities are M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Instruments* (Helsinki, Finnish Lawyers' Publishing Company, 1989) and *Gentle Civilizer of Nations: The Rise and Fall of International Law 1874-1960* (Cambridge University Press, 2002); and Ph. Allott, *Eunomia – New Order for a New World* (2nd ed., Oxford University Press, 2001).

> not merely as something to which they may be tacitly assumed to have agreed, but also as a fundamental condition of their admission to full and equal participation in the intercourse of civilized states.[5]

The next *Digest*, that of Hackworth, was issued commencing in 1940. The following paragraph introduces us to international law:

> International law consists of a body of rules governing the relations between states. It is a system of jurisprudence which, for the most part, has evolved out of the experiences and the necessities of situations that have arisen from time to time. It has developed with the progress of civilization and with the increasing realization by nations that their relations *inter se*, if not their existence, must be governed by and depend upon rules of law fairly certain and generally reasonable.

And (reflecting Austinian criticisms) it continues: 'Whether international law is law in a strictly legal or Austinian sense, depends upon the meaning attributed to the word "law"'.[6]

Whiteman's *Digest* started appearing in 1963. Its opening paragraph reads:

> International law is the standard of conduct, at a given time, for states and other entities subject thereto. It comprises the rights, privileges, powers and immunities of states and entities invoking its provisions, as well as the correlative fundamental duties, absence of rights, liabilities and disabilities. International law is, more or less, in a continual state of change and development. In certain of its aspects its change is gradual: in others it is avulsive [given to sudden change]. International law is based largely on custom, e.g., on practice, and whereas certain customs are recognized as obligatory, others are

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5 John Bassett Moore, 1 *A Digest of international Law as embodied in diplomatic discussions, treaties and other international agreements, international awards, the decisions of municipal courts, and the writings of jurists, and especially in documents, published and unpublished, issued by Presidents and Secretaries of State of the United States and the decisions of Courts, federal and state* 2 (Washington, Government Printing Office, 1906). The full title of this important *Digest* is frequently overlooked. Its approach is not universal, but national. There had been two earlier *Digests*: J. L. Cadwalader, *Digest of the Published Opinions of the Attorneys-General and of the Leading Decisions of the Federal Courts, with reference to International Law, Treaties, and Kindred Subjects* (revised ed. Washington, 1877); and F. Wharton, *A Digest of the International Law of the United States taken from Documents issued by Presidents and Secretaries of State, and from Decisions of Federal Courts and Opinions of Attorneys-General* (Washington, 1886). Neither contains any comparable introductory indication.

6 G. H. Hackworth, 1 *Digest of International Law* 1 (Washington, Government Printing Office, 1940, Department of State Publication 1506).

> in retrogression and are recognized as nonobligatory, depending on the subject matter and its status at a particular time.[7]

What do we see in that? Those quotations show both regression and progression. In 1906 John Bassett Moore spoke of *law*. For Hackworth this had become 'rules'. In 1963 Whiteman reduced that to a standard of conduct based on custom. On the other hand, while both Moore and Hackworth speak of *nations*, Whiteman, writing as the decolonization process of the 1960s was well under way and with many intergovernmental international organisations operating in different fields of human activity, speaks of *states and other entities*, without at that introductory stage suggesting what those other entities might be. But above all we see a trend toward revaluing the function of international law in civilized international conduct. The juxtaposition of those quotations from major legal publications of what is today the world's most powerful State is symptomatic. As the century drew to an end and the new century and millennium dawned, a new revolution appeared, the hi-tech revolution which we are all now witnessing, and the end of which is not in sight. International law is going to have to face new problems, and while law is not to be confused with ethics and morality, there are certainly looming major issues that will require a careful intermixture of all three.

§ 1.02. The impact of the nineteenth century

The story of how this came about begins in the nineteenth century, and we should look more closely at the impact of the nineteenth century on the evolution of general international law. That evolution consists in its transformation from a set of rules, not many, governing the relations *inter se* of a handful of European States, many of whose rulers were linked by family ties, to the international society of today numbering something like 200 independent or semi-independent political units, most of them republics with elected heads of State or Government, and other semi-political units that are also brought within the scope of international law, as are individuals. The Congress of Vienna of 1815 after the Napoleonic Wars reorganized the European political system based on autocratic rule in the States.[8] That system accepted the colonization of the

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7 Marjorie M. Whiteman, I *Digest of International Law* 1 (Washington, Government Printing Office, State Department Publication 7403, released June 1963).

8 For the Final Act of the Congress of Vienna, with 17 annexed instruments, see 64 CTS 453.

non-European areas of the world as part of the world order. It also made a start in dealing with human rights on a universal scale, by beginning the process of the abolition of the slave trade. Further political and territorial adjustments took place after the Crimean War at the Congress of Paris (1856) and after the Russo-Turkish War at the Congress of Berlin (1878). However, they left untouched the basic conceptual structure of the law and of the national state organization and the international community. The unification of Germany and of Italy was matched by burgeoning disintegration into independent States of the European possessions of the Ottoman Empire and accelerative moves for national liberation in other polyethnic empires and countries, especially the Habsburg.

Two major processes that flourished in the twentieth century and came to exercise profound influences on international law and relations have their roots in the nineteenth. The first was the industrial revolution. Within a short time this turned agricultural Europe into a continent that was highly industrialized in the west, but progressively less as one approaches the Urals. It also hastened the progress of democracy, authority exercised in the State by a generally elected government subject to the rule of law.[9] North America followed this process, soon overtaking Western Europe. Those industrialized countries were only partly self-sufficient in basic materials, and were hungry for cheap food and labour and even more so for raw materials. That led to the European scramble for colonies and their assets, especially in Africa and Asia, and attempts to exercise economic and political control over the Latin American continent. Possession of overseas territories and spheres of influence became a symbol of national prestige in the European system. These developments also led to heavy increases in the military budgets of the major Powers. Many saw in that a danger to the international society as a whole.

The second, related, process was the flourishing of organized labour, leading to the trade unions and the international labour movement, socialism, as opposed to unrestricted capitalism characteristic of the entrepreneurs of the industrial revolution. That went on to develop as Marxism and communism, with their heavy emphasis on class interests of workers and peasants. This in turn has produced a large quantity of national and international labour legislation. This

9 Cf. G. H. Fox and B. R. Roth (eds.), *Democratic Governance and International Law* (Cambridge University Press, 2000). Although 'rule of law' is a complicated and ill-defined notion, for present purposes it can be taken to mean that the governing authorities in a country are themselves subject to the law, and that *Staatsraison* cannot be set up against the law.

process reached its zenith in the period 1919–1939, when organized labour received international recognition in the constitution of the International Labour Organization (part of the 1919 Peace Treaties), accompanied by a split between the socialist movement and the socialist governments that first came into power in Western Europe, and the communist international coinciding with the consolidation of communism in the Soviet Union. The Soviet Union developed a social, political, legal, economic and military system that distanced itself from the accepted notions of the West. With that came the expansion of universal education, especially in the more industrialized parts of Europe, and the extension of the suffrage in democratic countries until the whole of the adult population enjoyed it., leading to the welfare state. The century also saw the final abolition of the slave trade, although its ravages are still with us and the trade itself has not yet been entirely stamped out.

The impact of the industrial revolution on the development of international law was slow but steady. The invention of the steam engine opened the way to dramatic developments in sea and rail[10] transport of persons and goods. Their military aspects first became evident in the American Civil War (1861–1865). Two more important developments appeared towards the end of the nineteenth century. One was the invention of the internal combustion engine. That lead first to the motor car[11] and shortly afterwards to aircraft[12] (and on the international level, matched by the scramble for control over land-based petroleum resources, especially in the Middle East). The second was the discovery and harnessing of electricity, both for energy and, through the development of the telephone and radio, for communications, leading to general improvement in the standard of living. That in turn laid the basis for extensive scientific and technological advances throughout the twentieth century, spectacular strides forward in military technology in all arms, and the harnessing

10 The first treaty relating to international railways was concluded between Belgium, France and Prussia on 8 October 1848, but it never entered into force. 102 CTS 361. The major European railroads were constructed with military uses in mind. This was well brought out by the refusal of the German delegation at the 1907 Peace Conference to accept the idea that disputes arising out of the network of treaties governing transport by rail would be suitable for compulsory arbitration. See *Developments* 273.

11 The first relevant international agreement was the Convention with respect to the circulation of motor vehicles of 11 October 1909, 209 CTS 361.

12 The Convention relating to the regulation of aerial navigation of 13 October 1919 was the earliest instrument dealing with international civil aviation. 11 LNTS 173.

of nuclear energy, both for military and for peaceful purposes,[13] for the production of new weapons of mass destruction, and for the development of new sources of energy that have opened the way to the conquest of outer space. At the Congress of Vienna a delegate might have had to wait two or three weeks before receiving instructions from his capital. By the time of the second Hague Conference of 1907 this had become a matter of hours. Today knowledge of events is worldwide and instantaneous. Today the world is a trigger's pull away from a nuclear cataclysm, whether military or civilian.

Against this background, the Geneva Red Cross Conference of 1864 marks the onset of the transformation of international law. That Conference, at which 26 European States participated (some of them German principalities later absorbed into the German Empire) adopted the first Geneva Convention for the amelioration of the condition of the wounded in the armies in the field.[14] The body that it recognized – the International Committee of the Red Cross – is probably the most important and the most widely known and respected competent body of international significance operating in the international sphere today – more even than the United Nations. That Conference saw the beginnings of what is now commonly called 'international humanitarian law', leading in turn to the adoption, only in 1998, of the Statute of the first permanent International Criminal Court with jurisdiction to try individuals for major breaches of that branch of the law (see chapter V § 5.08 below).

The 1815 settlement of Vienna and the later Congresses had managed to keep the peace in Europe between the European Empires for almost one hundred years, to 1914. Major localized breaches of the peace did occur, the most important being the Crimean War (1854), the wars between Czarist Russia and the Ottoman Empire, the Prussian wars against Denmark (1864), Austria (1866), and France (1870–1871), the Spanish-American War of 1898, the Boer War (1899–1902), the Russo-Japanese War of 1904–1905 signifying the entry of Asian Powers into the world scene, and the war between Italy and the Ottoman Empire of 1911–1912 leading to the end of Ottoman rule in Africa and the beginnings of Italian colonization there. A series of Balkan wars, respecting territories similar to those in crisis today, was the preliminary to the Great War

13 The earliest agreement relating to atomic energy is the Agreed Declaration relating to Atomic Energy of 15 November 1945. 3 UNTS 129. The first resolution adopted by the UN General Assembly was on the establishment of a commission to deal with the problems raised by the discovery of atomic energy. A/Res. 1 (I), 24 January 1946. And see A. E. Gotlieb, 'The Impact of Technology on the Development of Contemporary International Law', 170 *Recueil des cours* 125 (1981-I).

14 129 CTS 361.

of 1914. On the other hand, tension and warfare (frequently conducted by surrogates) were endemic on the rift line between the European Empires and the Ottoman Empire, especially in the Balkans, and in the Far East between Russia and the British Empire, and with China and Japan, and between the colonial powers themselves over their non-European possessions and spheres of influence. The internal tensions inside the great continental European empires, especially the polyethnic Habsburg and Romanov Empires, coupled with the ever increasing burden of military budgets, contributed to European instability, although for the most part European diplomacy could keep those tensions under control. These tensions led to the growth of nationalist movements with their increasing demands for self-determination and independence. It was otherwise regarding the scramble for colonies and spheres of influence, especially in Africa and in Asia. To some extent the General Act of the Conference of Berlin respecting the Congo (1885) regulated imperial competition in Africa.[15]

Things were different on the American Continent, north and south. By the middle of the 19th century most of the American States, with their large population of political and religious refugees from all parts of Europe, had liberated themselves from European colonialism, although in places United States superiority had overtaken European domination. However, this process took place at the expense of the original indigenous populations and the destruction of vibrant cultures and civilizations. This started with the independence of the United States in 1776, and with it the beginning of the movement for political co-ordination that has culminated to date in the Organization of American States.[16] The political independence of most of the Latin American countries followed during the next fifty years. Small relics of British, French, Dutch and for a while Spanish imperial possessions remained (some even to this day). However, except for the United States of America, it was not until the Hague Peace Conference of 1907 that the American States received full recognition

15 165 CTS 485, abrogated by the Act regarding navigation and economic co-operation between the States of the Niger basin of 1963, 587 UNTS 9. It is interesting to note that territorial disputes between the new independent States of Africa are coming before the ICJ or before arbitration tribunals in the form of boundary litigation, for both land and maritime boundaries. The Organization of African Unity has encouraged the judicial settlement of this type of dispute, and found the ICJ a useful forum for this purpose.

16 Cf. the proclamation of Andrés Bello of 7 December 1824 A los Gobiernos de las Repúblicas de Colombia, Méjico, Río de la Plata, Chile y Guatemala. 2 *Selected Writings of Bolivar* 456 (trans. V. Lecuna, New York, Colonial Press, 1951).

by the European Powers and were invited to participate on a footing of equality in the great international conferences of that epoch.[17]

§ 1.03. An alternative to war: arbitration

Throughout the century, quietly and unobtrusively, procedures of international arbitration had taken place for the settlement of international disputes, even between Great Powers. By that process, either joint commissions of the contending parties (especially the two English-speaking nations, Great Britain and the United States of America sharing the same basic common law) or, especially for the Latin American States (with their common heritage of *Hispanidad)*, a third party such as a mutually acceptable head of State, had settled many disputes that had arisen between States.[18] Many of those disputes were over minor day-to-day matters frequently occurring in the relations of States. Some were more serious, and related to territorial claims and counter-claims, especially in Latin America where, notwithstanding the doctrine of *uti possidetis* as the basis for the boundaries of the newly independent States, the boundaries and administrative dividing lines of the former Spanish and Portuguese possessions and the titles on which they rested were not always clear.[19] The *Alabama* arbitration between the United Kingdom and the United States (1871–1872)

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17 Cf. the Protocol of adhesion to the Hague Conventions of July 29, 1899, of 15 January 1902 (other than Convention No. I) and the Protocol for the accession of non-signatory powers to the Convention for the pacific settlement of international disputes of July 29, 1899, of 14 June 1907. 190 CTS 340 and 100 BFSP 276. Those instruments opened the way to the participation of the American States in the 1907 Conference.

18 There are four major collections of the arbitrations of this period: J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a party* (Washington, Government Printing Office, 1898); A. de la Pradelle and N. Politis, *Recueil des arbitrages internationaux*. (3rd ed. Paris, Les éditions internationales, 1954, 1957); H. la Fontaine, *La Pasicrisie internationale 1794-1900: Histoire documentaire des arbitrages internationaux* (2nd ed. The Hague, Kluwer Law International, 1997); UN, *Reports of International Arbitral Awards*, commencing in 1948 (continuing). See also A. M. Stuyt, *Survey of International Arbitrations 1797–1989* (The Hague, Nijhoff, 1990); V. Coussirat-Coustère and P. M. Eisemann (eds.), *Repertory of International Arbitral Jurisprudence (1797–1988)* (Dordrecht, Nijhoff, 1989). And see Sh. Rosenne (ed.), *The Hague Peace Conferences of 1899 and 1907 and International Arbitration: Reports and Documents* (The Hague, Asser Press, 2001). Decisions of the ICJ and many arbitrations are now reproduced (in English) in the *International Law Reports*, and in the *International Legal Materials*.

19 The heavy written and oral pleadings in the *Land, Island and Maritime Frontier Dispute* case well illustrate the lack of clarity of those documents. ICJ Rep. 1992, 351.

was the highlight.[20] That dispute arose out of a major incident in the American Civil War. It led to great tension on both sides of the Atlantic. That tension was defused when the two Governments agreed to submit the dispute to arbitration by a specially constituted arbitral commission consisting of three neutral members, together with one appointed by each party. The Award, rendered on 14 September 1872, favoured the United States and the United Kingdom duly complied with it. The sight of two major Powers submitting a grave dispute to neutral arbitrament and the losing party then complying with the decision gave a great fillip to the idea that responsible international neutral arbitrators applying rules of international law could settle important disputes between sovereign States. It encouraged the growth of a peace movement, in which the Interparliamentary Union and several distinguished individuals played important roles, precursors of the modern Non-governmental Organizations.

The growing burden of military expenditure led the Czar Nicolas II to take the initiative in convening the First Peace Conference of 1899 and the Second Conference of 1907. If his prime objective was disarmament and the reduction of military budgets (in which he was unsuccessful) he also included what today is called the pacific settlement of disputes among the matters to be regulated by international agreement. However, the creation of standing machinery for the judicial settlement of international disputes had to await until after the First World War (1914-1918). The League of Nations was the first universal international organization with functions directed primarily at the maintenance of international peace and security, although two major Powers outside Europe – the United States of America and the boycotted Union of Soviet Socialist Republics – were not members of the League (except the Soviet Union for a short time from 1934). As envisaged in the Covenant of the League of Nations, the League established the Permanent Court of International Justice in 1920, the first standing and permanent international judicial organ to decide disputes between States on the basis of international law and to render advisory opinions.

The last quarter of the nineteenth century and the first decade of the twentieth (up to 1914) was a period of intensive international law making. Attention in particular was turned to the *jus in bello*, both regarding the weapons that could be used and about the behaviour of individuals in the conduct of hostilities. This reflected growing anxiety at the impact of rapidly developing military technology as the international situation progressively deteriorated into the First World War. This work took place on two levels, the intergovernmental

20 J. B. Moore, above note 18, vol. I, 547.

and the non-governmental, although frequently the same personalities were active in both spheres. On the diplomatic level, there is the Saint Petersburg Declaration of 11 December 1868 regulating the use in time of war of projectiles under 400 grams weight,[21] the final protocol of the Brussels Conference on the rules of military warfare of 27 August 1874,[22] the series of conventions and declarations adopted by the First Hague Peace Conference on 29 July 1899,[23] various Conventions and Declarations adopted at the Second Hague Peace Conference of 1907,[24] and the Final Protocol of the London Naval Conference with annexed Declaration of London of 26 February 1909.[25] On the non-governmental level, the Institute of International Law, established in 1873,[26] and the International Law Association, established in the same year,[27] undertook important pioneering work in producing sets of draft rules dealing with specific topics of contemporary international concern. Senior diplomats, government lawyers and academics took part in the work of those bodies, always in their personal capacities and not as representatives (a system continued to this day). Their work frequently served as the point of departure for diplomatic action designed to change the unofficial but authoritative statements of the law into binding treaties.

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21 138 CTS 297.

22 148 CTS 133. This instrument, which was subject to ratification, did not enter into force, but its substance became incorporated in the later Hague Conventions of 1899 and 1907.

23 Convention with respect to the law and customs of war on land, with annexed regulations, Convention for the adaptation to maritime warfare of the principles of the Geneva Convention of August 22, 1864, Declaration respecting the prohibition on the discharge of projectiles from balloons, etc., Declaration respecting the prohibition on the use of projectiles diffusing asphyxiating gases, Declaration respecting the use of expanding (dumdum) bullets, all in 187 CTS.

24 These are all reproduced in 205 CTS.

25 208 CTS 338; N. Ronzitti (ed.), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* (Dordrecht, Nijhoff, 1988). The Declaration of London was subject to ratification but never entered into force. It was applied temporarily by the principal naval belligerents during the early part of the First World War, but was withdrawn by the British Government on 7 July 1916. It has been raised in the pleadings in the *Oil Platforms* case (pending).

26 See Institut de Droit international, *Livre du centennaire 1873–1973, Evolution et perspectives du droit international* (Basle, 1973). And see G. Fitzmaurice, 'The Contribution of the Institute of International Law to the Development of International Law', 138 *Recueil des cours* 203 (1973-I).

27 Its original name was the Association for the Reform and Codification of the Law of Nations. And see M. Bos (ed.), *The Present State of International Law and Other Essays, written in honour of the Centenary Celebration of the International Law Association* (Deventer, Kluwer, 1973).

The period also saw the beginnings of what are today called *international intergovernmental organizations*. These were not international organizations as we now know them, with wide international responsibilities, broad membership, and a largely common structure with recognized personality under international law and frequently in internal law also. They were rather administrative clearing houses as international intercommunication, both of States and of individuals, intensified. Telegraphic unions between neighbouring European and later American States started coming into existence in the middle of the century, leading to today's International Telecommunication Union.[28] The Treaty of 3 May 1875 established the General Postal Union, a precursor of the Universal Postal Union.[29] International regulation of public health matters, now concentrated in the World Health Organization, began with the International Sanitary Convention of 30 January 1892 which was of particular concern to navigation through the Suez Canal.[30] The two Peace Conferences were forerunners of the League of Nations in providing deliberative organs for a wide range of issues of concern to the international community, with each State having one vote. That was a major departure from the earlier practice (remaining today under different names) of having these matters formally decided on the basis of the mutual accommodation of a few Great Powers. Those Conferences also saw the beginnings of non-governmental concern with the progress of the Conferences, and of controlled publicity about the progress of their work.

Two World Wars (1914–1918 and 1939–1945), and the economic and social calamities between them, swept away that autocratic and Euro-centred order of things. The Charter of the United Nations (1945) has made two major changes and has turned the substance and the role of international law into new directions that could not have been foreseen one hundred years ago. The first is the duty of all members of the UN to 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 Charter, and to seek to settle their international disputes by peaceful means of their choice. This excludes the use of armed force as a function of a State's foreign

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28 The first telegraphic convention was concluded between Belgium, France and Prussia (also for other States of the Austro-Prussian Telegraph Union and the Netherlands) on 4 October 1852. 109 CTS 27. The earliest instrument regarding 'wireless telegraphy' was the Final Protocol of the preliminary conference respecting wireless telegraphy of 13 August 1903. 194 CTS 11.

29 147 CTS 136.

30 176 CTS 395. See further on this, the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* adv. op., ICJ Rep. 1980, 73, 77 (para. 13).

policy except when the use of force is consistent with the Charter (further in chapter IV below). The second is the raising of human rights into a matter of planetary concern (chapter VI below). Much international law is now set out in treaty form, the treaty replacing custom as the principal constituent element in the thesaurus of international law. Third party judicial settlement of international disputes, whether through standing international tribunals or on an *ad hoc* basis, is also becoming more common (even if insufficiently used).

The international law of the end of the twentieth century is hardly the same thing as the international law of the beginning of the century. It protects not only the interests of the modern State (no longer coinciding with the interests of ruling monarchs), but also the interests of individuals of all races, colours, creeds and gender. Yet many fundamental problems existing one hundred years ago have still not been resolved and adapted to the new conditions to general satisfaction. These include the enforcement of the law, and remedies for violations of the law. It is here that international law is at its weakest.

That is the background for my approach to the international law of today, at the beginning of the twenty-first century.

§ 1.04. What is international law today?

What, then, is this international law? Essentially, international law is a law of co-ordination, not, as is most national law, a law of subordination. The expression *law of co-ordination* means that its own actors have created and apply it between themselves, and are responsible for enforcing it. These actors remain, as before, the independent sovereign States (acting directly or indirectly through intergovernmental organizations for their common purposes). International intergovernmental organizations, as distinct from the States composing them, are not actors in that sense. They do not as such create general international law. The same can be said of individual human beings as such. The name usually given to the law that the States create in this way is *positive international law*. That law has no superior sovereign power, and it is difficult if not impossible to put one's finger on its 'basic norm'. It has no formalized legislature, no clearly delineated separation of executive, legislative and judicial powers, no regular and hierarchical court system (more in chapter III), no easy mechanism for correcting or adjusting possibly undesirable consequences of a major judicial decision, no clear system of precedents and no clear distinction between political and judicial precedents, no centralization – in fact none of the attributes and trappings usually associated with law within a State. On the other hand, it does have some intellectual and conceptual affinities with public

law in general and with constitutional law in particular (despite the absence of any international constitution), particularly to the extent that constitutional law crises can often only be resolved by the interaction of internal political processes and not by the judiciary. International law also has affinities with other specialized branches of national law such as labour law, where clashes of group interests looking to the future rather than individual rights and duties established in the past can be the issue in major labour disputes. International law is the product of the co-ordinated wills of its own subjects, what we might call the agreed rules of the game. To pick up a phrase once used by the ICJ, 'international law is intended to govern the stability of the international order'.[31]

At the beginning of the twentieth century the international order was Euro-centred. The law was made by and for the European Powers, both in Europe itself and in their overseas possessions. The major non-European power of that epoch, the United States of America, was in the nature of things regarded as part of that system. By the end of the century this was no longer so. The challenge commenced late in the nineteenth century by the Latin American States, but their European origins restrained to some extent the degree to which they could exert a specific Latin American doctrine of international law. The fundamental innovations in the pattern of international relations after 1945 have changed this beyond recognition. As a former President of the ICJ, Judge S. M. Schwebel, put it in a speech at the 54th session of the General Assembly in 1999: 'Perforce, the Permanent Court of International Justice was Euro-centred. The International Court of Justice today is universal in its clientele'.[32] Underlying that statement is the understanding that the international law applied by the PCIJ was Euro-centred, while the law applied by the ICJ today is truly universal. It is significant that the arbitral tribunal that determined the dispute between Eritrea and Yemen over maritime boundaries was unenthusiastic about applying European conceptions of the acquisition of territorial sovereignty in an area in which the concepts of Islam prevailed and which had once been part of the Ottoman Empire.[33] This is posing a new problem for international law

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31 *Legality of the Threat or Use of Nuclear Weapons* adv. op., ICJ Rep. 1996(I), 226, 263 (para. 98) (hereafter *Nuclear Weapons).* For my appreciation of that case, see Sh. Rosenne, 'The Nuclear Weapons Advisory Opinions of 8 July 1996', 27 IsYBHR 263 (1997).

32 54 GAOR, A/54/PV.39 at 3 (16 October 1999).

33 *Eritrea/Yemen Territorial Sovereignty and Scope of the Dispute*, Award of 9 October 1998, 114 ILR 1, 33 (para. 99). The Tribunal was composed of Sir Robert Jennings (President), Schwebel, El-Kosheri, Highet and Higgins. And see *Note on Article 9 of*

which, to be truly universal, must accommodate regional and sectorial concepts. This is discussed in the next section.

The functions of international law are different from the functions of law within a State. International law is not directly concerned with the rights and duties, as a matter of dispute regulation and dispute settlement, of individual persons, physical or moral, except where the States have agreed that this is to be. It is primarily concerned with the relations between themselves of groups enjoying international personality, especially the independent States. International law is essential in the drafting of important diplomatic documents (whether legally binding or not) and treaties. It is functionally significant, although not controlling, in the field of international crisis and dispute management, including peacekeeping, peacemaking, and dispute prevention and control and the new process of re-creating State authority. While international law (especially treaties) may seem to give rights to and to impose duties on individuals, that is always the outcome of an agreement between States. Responsibility for observing the agreement and conversely responsibility for its breach, and the concomitant reliefs and remedies, enure to the State and not to the individual, except where the States have agreed otherwise.[34] In brief, international law is a comprehensive and sophisticated legal system that, despite its voluntarist basis, operates exclusively in the international political environment where the principal actors are sovereign independent States. It is a formal binding conduct-regulating system for those actors. Its primary purpose is to effect the reconciliation of conflicting group interests, and of conflicting group rights and duties. The group in question is normally the State, itself personifying the human beings composing it, or in special cases, a group in the process of becoming an independent State, *in statu nascendi*. The notion of a community of sovereign independent States supplies the key to understanding the statement that international law is a law of co-ordination, not of subordination.

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the Statute of the Permanent Court of International Justice and the Position of the Moslem Legal System and the Moslem Civilization among the Main Forms of Civilization and the Principal Legal Systems of the World presented by the Delegations of the Moslem States of the Near East, submitted to the Washington Committee of Jurists (1945), XIV *Documents of the United Nations Conference on International Organization, San Francisco 1945* (UNCIO), 375.

34 An important example of this is Art. 139 of the UN Convention on the Law of the Sea 1982, on responsibility and liability to ensure compliance and liability for damage in connection with activities in the international seabed Area carried out by natural or juridical persons possessing the nationality of a State party. 1833 UNTS 3.

§ 1.05. The accommodation of regional and sectorial concerns

As stated, the beginnings of a concept of regional international law applicable only to States in a given region, as opposed to the Euro-centred general international law, first made its modern appearance during the nineteenth century, as the Latin American States gained their independence from Spain and Portugal, and less from England, France and the Netherlands. This approach has been developed through the workings of the United Nations and to some extent it is responsible for what can only be regarded as a massive rewriting of the Charter through practice, especially in the last quarter of the century.

Regionalism is built into the Charter through two provisions. The first is Chapter VIII (Articles 52 to 54) on regional security organizations working by delegation from the Security Council. The second is through Article 9 of the Statute of the International Court of Justice, requiring the representation of the main forms of civilization and of the principal legal systems of the world in the composition of the Court. That, which is little more than a refined rephrasing of the principle of equitable geographical distribution required for other UN bodies, is the more important. But it is in the General Assembly, and through the General Assembly in all other organs of the United Nations, that regionalism has hardened. At the same time, the Statute of the PCIJ, and since the Statutes of the present Court, of the International Law Commission, of the new International Criminal Court and all other international law applying organs, have consecrated a controlled regionalism in general international law. As far as concerns international law, the ICJ has recognized that regional customs can exist but it has to be proven that a rule of regional customary law has been established in such a manner that it has become binding on the States concerned.[35]

Regionalism in that sense has to be kept distinct from sectorization. With the increase in the number of peoples and of cultures that are now brought within the framework of the general international system and of universal international law, it has become necessary to make some allowance for differences of approach and of concept, but without impairing the unity of the general legal régime, especially a régime established by an international treaty of universal impact. This has been to some extent recognized by the ILC in its 1999 draft guidelines on reservations to treaties. Guideline 1.4.5. addresses

35 *Asylum* case, ICJ Rep. 1950, 266, 276.

statements concerning modalities of implementation of a treaty at the internal level:

> A unilateral statement formulated by a State . . . whereby that State . . . indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect its rights and obligations towards the other contracting parties, constitutes an informative statement.

As such, it is outside the scope of the guidelines.[36] The Commentary calls those 'informative declarations', and it gives as an example, very important to sectorization, information of the internal authorities that will be responsible for implementing the treaty, regardless of how the State will discharge its obligations or how it will exercise its rights under the treaty. The existence of any such informative declaration does not relieve the State of its obligations towards other contracting parties or towards the international community as a whole if the treaty embodies *erga omnes* duties. Yet there is a serious risk that through reservations and other declarations designed to protect religious and cultural heritages, formal acceptance of a treaty may become illusory. There is no reason why the underlying theory of this guideline should not also be applicable to rules of customary international law. The more international law permeates into the inner world of societies and cultures and even subcultures, the more necessary this becomes, provided that it can be done without impairing the integrity of international law as a whole. The concept of 'fair trial' furnishes a good example of this. There is no universally held definition of what is a fair trial, and one only has to look at the difference between Anglo-American criminal procedures and say French criminal procedures to see the differences. Yet if there is no universally held definition of what fair trial means, it is not difficult, in many cases, to determine if a trial was fair or not.[37]

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36 ILC Rep. 2001 chapter VI para. 156. Examples of this are Israel's reservations to the Convention on the Declaration of Death of Missing Persons 1950, indicating that the effect to be given to declarations of death 'will depend upon the extent to which the appropriate Religious Court exercising jurisdiction in a given case will be able to recognize the same in accordance with is own religious law'; and to Art. 23 of the Covenant on Civil and Political Rights, indicating that matters of personal status are governed in Israel by the religious law of the parties concerned, and to the extent that such law is inconsistent with its obligations under the Covenant, Israel reserves the right to apply that law. 119 UNTS 99 and 999 UNTS 171. These are also examples of sectorization in a polynomous State.

37 As examples, see the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Merits) case (hereafter *Qatar-Bahrain*) case, Judgment of 16 March 2001

The existence of this faculty is particularly important when rules of international law, conventional or customary, are intended to operate within the context of the national society, human rights rules for example, although not *per se* limited to that.[38] It allows the normative texts to be drawn up in axiomatic terms avoiding excessive detail, since it leaves the application of the norms to regional or local or other accepted organs. On the other hand, there is no doubt that it has adversely affected compliance with agreed international standards especially as regards underprivileged elements of the national societies, women and children for example. If the treaty sets up a standing controlling or supervisory body to which the contracting parties are required to report from time to time, that should usually be sufficient to ensure that the sectorial application does not conflict with the object and purpose of the treaty. But above all, the development of this faculty, rendered necessary by the large number of States that are now independent, operates at one and the same time as a safeguard and as an essential element in maintaining the integrity of the overall international legal system. Sectorization in the sense used here is the necessary counterpart to the globalization of the law and of international relations generally, but it needs to be brought under stricter control than is now prevalent.

Sectorization as I have used the term must not be confused with different branches of international law itself, for international law, whatever labels are applied, is a unitary whole. The law of the sea, the law of the environment, the law of treaties, the law of responsibility, the law of diplomatic and consular relations, and all other specialities, do not sit in separate and disjointed compartments. They all go together and one cannot be properly understood and applied in isolation from any other. Treaties and responsibility are the glue that binds the parts together.

Another form of sectorization has been identified. The lack of enthusiasm of the Arbitral Tribunal that decided the dispute between Eritrea and Yemen over maritime boundaries about applying European conceptions of the acquisition of territorial sovereignty in an area in which the concepts of Islam prevailed and which had once been part of the Ottoman Empire has been mentioned. The

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(para. 142). The other decisions in this case, both on jurisdiction and admissibility, are at ICJ Rep. 1994 112 and 1995 6. That was followed, as a matter of international criminal law, by the judgment of the Rwanda Appeals Chamber of 1 June 2001 in *Prosecutor* v. *Akayesu*, Case ICTR-96-4-A.

38 Cf. A. Bozeman, *The Future of Law in a Multicultural World* (Princeton University Press, 1991).

Tribunal included the following passage in its first Award of 1998 on territorial sovereignty and the scope of the dispute:

> In making this Award on sovereignty, the Tribunal has been aware that Western ideas of territorial sovereignty are strange to peoples brought up in the Islamic tradition and familiar with notions of territory very different from those recognized in contemporary international law.[39]

The Tribunal amplified this in its second Award on maritime delimitation: "The sovereignty that the Tribunal has awarded to Yemen over [certain islands] is not of course a 'conditional' sovereignty, but a sovereignty that nevertheless respects and embraces and is subject to the Islamic legal concepts of the region."[40] This strangeness of Western ideas is not limited to concepts of territorial sovereignty and other facets of received international law. It is encountered in other branches of the law, and especially in those new spheres where treaty law, partly reflecting 'Western' social and political concepts, comes up against deeply held and cherished religious beliefs and cultural traditions. However, I should mention here one striking instance of this. Many cultures and civilizations fight shy of litigation, of going to court to settle a dispute. Continuing negotiation until agreement is reached is the preferred method of settling disputes. I have encountered responsible statesmen and lawyers who find it difficult to accept any idea that a binding decision by an international court or tribunal could be an appropriate method of settling a dispute. This cultural factor is frequently overlooked by those who are urging that greater use should be made of international judicial facilities for the settlement of international disputes. For some cultural systems, a court decision would be an imposed solution, with all the disadvantages of such a decision.

This sectorization, together with the rapid technological and scientific developments, in turn is increasing pressures for an integrated interdisciplinary approach to the making of new rules of international law, their interpretation

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39 Above note 33, 137 (para. 525). For an earlier exposition of the same idea, see the *Western Sahara* adv. op. ICJ Rep. 1975, 12, 41 (paras. 87, 88). The Court came close to this in para. 236 of its Judgment on the merits in the *Qatar-Bahrain* case (above note 37), when it referred to pearl fishing as a 'right which was common to the [Arab] coastal population'.

40 *Phase Two: Maritime Delimitation* (Eritrea/Yemen), Award of 17 December 1999 119 ILR 417, 448 (para. 94). The Award cited El-Kosheri, 'History of the Law of Nations: Islam', II EPIL, 809.

and their application at all levels. This interdisciplinary approach alludes not merely to different disciplines of the law, although that is certainly highly desirable.[41] It is demanding at least co-ordination, and in fact much closer co-operation with other branches of human endeavour, including the applied sciences. It is curious that the ILC has only once found it appropriate to consult with experts, and only once found it necessary to request the General Assembly to arrange for a broader dialogue between experts of different disciplines, in both cases in connection with its work on the law of the sea.[42] General Assembly resolution 56/93, 12 December 2001, on reproductive cloning referred to the need for a multidisciplinary approach to the elaboration by the international community of an appropriate response to the problem, and required the *ad hoc* committee which it established to work with the participation of experts on genetics and bioethics. The multidisciplinary requirement demands proper expert and continuous dialogue, and even participation in decision-making, when other disciplines and sciences are involved. Excessive compartmentalization of international law only brings discredit on it.

Distinct from sectorization is what the International Court of Justice has termed a 'self-contained regime'.[43] A self-contained regime in that sense is a body of law, conventional and customary, governing a given activity by a State. The expression was first used in relation to the régime governing diplomatic and consular relations. A State is free to enter into diplomatic or consular relations with other States and international entities. If it does so, it is bound

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41 In 1994 the ILC produced its draft on an International Criminal Court without the participation of experts on criminal law or military law. This stands in marked contrast to the intersessional committees that worked on the topic in the 1950s. Further in chapter. IV below. Little of this draft survived the later more professional examinations leading to the Rome Statute of 1998.

42 In 1952 the Commission asked its special rapporteur on the law of the sea (J. P. A. François) to consult with experts in order to seek clarification of certain technical aspects of the problem of the delimitation of the territorial sea. ILC Rep. 1952 (A/2163) para. 39, YBILC 1952/II at 68. In 1953 the Commission recommended consultations with the Food and Agriculture Organization in connection with its draft articles on fisheries on the high seas. ILC Report 1953 (A/2456) para. 102, YBILC 1953/II at 219. In resolution 900 (X), 14 December 1954, the General Assembly recognized that the topic required consideration on a wide international basis by qualified experts, and convened the International Technical Conference on the Conservation of the Living Resources of the Sea. That Conference was in session in Rome early in 1955. For its report, see doc. A/CONF.10/6. The concept of the exclusive economic zone can trace its political origin to that Conference.

43 *United States Diplomatic and Consular Staff in Tehran* case, ICJ Rep. 1980, 3, 40 (para. 86).

to conduct itself in accordance with all the rules of that regime, whether customary or conventional. Failure to apply them will give rise to an instance of international responsibility. A self-contained regime of this kind, open to States at will, is to be distinguished from specialized branches of international law to which States are subject by their very quality of being a State with the relevant characteristics. For example, a coastal State, by the mere fact of its having a coast on the oceans and direct access to the sea, is subject to the law of the sea, with all the rights and all the duties of a coastal State. The law of the sea, or the law of the environment, are not self-contained regimes in that sense. They apply *erga omnes* and a State is not free to decide whether to be bound by those branches of the law. The law of international relations in the broadest sense is probably the best known self-contained régime in this sense, followed closely by the law of treaties (since no State is obliged to enter into any treaty if it does not so wish). A peculiarity of a self-contained régime is that it contains its own fundamental principles and rules, such as, in the first instance the inviolability of diplomatic personnel and premises, and in the second the basic rule of *pacta servanda sunt*, from which a State cannot contract out. It also contains within its reach remedies for breach, this without prejudice to other branches of the law which might come into play in a specific case.

Finally, let me recall that international law, like all law, is ultimately addressed to human beings: not to abstract entities such as States but to the men and women responsible for the conduct of their affairs. Regulating human conduct – that is what brings international law squarely into the general discipline of the law.

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CHAPTER II

WHERE TO FIND THE LAW

The most difficult thing about international law is finding it.

G.R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreement* 308 (Oxford University Press, 2000).

§ 2.01. The general thesaurus of international law

The passages from the American Digests cited in the previous chapter clearly depict the great variety of sources from which rules of international law are derived. Those rules are distilled from a pot-pourri of materials, scattered, and in many languages. The raw material is disorganized, and little of it is complete. For example, the United Nations *Treaty Series* only publishes treaties already in force that have been registered with the Secretariat as required by Article 102 of the Charter, and there is no time-limit within which treaties are to be registered. There is no systematic publication of treaties that have been signed before their entry into force, not even of treaties concluded under the auspices of the UN or other international organizations, each country and each organization having its own practice. There is no systematic and timely publication of international arbitral awards. Publication of decisions of all existing international courts and tribunals in citable printed form is heavily in arrears although in principle the material should be immediately available on the appropriate website, not a satisfactory substitute. The existence of contemporary diplomatic correspondence can frequently only be gleaned from the press or through parliamentary proceedings. With a properly equipped computer much primary material is available on websites, although these are not always easy to use and they are not always complete or fully updated. There is no standard system of referencing material taken from websites. Yet it is important to know where to look for the raw materials, if possible in a reliable primary source, and how to read them.

Most general works on international law have a chapter on the 'sources' of international law. That is a misleading expression, since it confuses the nonjuridical factors that give to international law its quality of law with the elemental factors from which a principle or a rule of international law can be traced. Yet the expression does have a certain convenience, as it encapsulates the main elements to be examined in order to produce a well crafted and convincing course of legal reasoning. The fact is that States need and want international law, as the framework within which they conduct their mutual relations. This is not only an international need. It is now also a domestic need. Domestic public opinion, especially parliamentary opinion, frequently requires to know the authority under international law for a given action. Increasing international intercommunication of individuals is bringing more international law questions into national courts. This functional approach makes it unnecessary for the practising international lawyer to engage in philosophical speculations, interesting though they may be, about whether international law is or is not 'law', or what is its binding force and how it is derived.

When a practising international lawyer is asked for advice, he or she initially has to look at two preliminary matters. One is the purpose for which the advice is required. The second is, where is the most appropriate place to search for the answer. The question will always be policy directed, either looking to the future, or referring to action already taken that has encountered opposition from other international entities. With regard to the purpose, there is a difference if the question relates to the possibility of recourse to judicial or other third-party settlement, when an attempt to forecast the likely outcome would have to be made. If, however, the question relates to the legal aspects of proposed action, the advice has to consider the prospect that it will not be accepted by other international entities affected by it. The international legal adviser cannot be confined within the four walls of judicial or other precedent or of black letter texts. Frequently the advice is required for something for which there is no clear precedent or other authority, and the action to be taken may well form a precedent in future cases. Here I would utter a word of warning against hasty reasoning by analogy. As a technique of interpretation, analogy has its place. But it should be used with care and always keeping in mind Samuel Butler's observation that though analogy is often misleading, it is the least misleading thing that we have. Here I would utter a second word of warning. If analogy is unavoidable, it should if possible be an analogy of an international character. As Judge Sidhwa of 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 (commonly known as the Yugoslav War Crimes Tribunal (ICTY)) said:

> International law is not totally grounded in national concepts, though at times it borrows ideas from national jurisdictions to meet the international range of its objects. For the most part, it seeks to keep itself free of rigid, strict and inflexible national rules and principles where they tend to be dogmatic or obstruct a fair, liberal or equitable approach to a problem.[1]

Article 38 (1) of the Statute of the ICJ (hereafter *Statute*) is usually taken as the root statement of what has to be applied in establishing a rule of international law. By that:

> The Court, whose function is to determine 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 [not here relevant], judicial decisions and the teachings of the most qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

That provision, itself a compromise, is not well drafted. It is outdated and does not meet modern requirements. It has led to much controversy and misunderstanding, especially on the theoretical and philosophical level. It is a political statement drawn up in political organs, the Assembly of the League of Nations in 1920 and the San Francisco Conference at which the United Nations was established in 1945. It is not a hierarchical listing of the materials, although treaties come first since a treaty is normally, in relation to customary law, *lex specialis* for its parties. What that means can be stated briefly. The international legal adviser first has to classify correctly the legal problem to be faced. When that is done – not always easy – the adviser has to establish whether any international treaty is applicable or relevant. A treaty will be applicable if on a reasonable construction, the matter is seen to come within the scope of a treaty binding the parties. It will be relevant if there is a general treaty or a widely

1 *Prosecutor* v. *Tadić*, Separate opinion of Judge Sidhwa on the defence motion for interlocutory appeal on jurisdiction, ICTY, Judicial Rep. 1994–1995(I) at 553 (para. 11).

accepted treaty clause that sets out generally recognized rules of international law, so that the rule in question is to be applied as a rule of customary international law. This is of particular significance today. Since 1946 there has been a veritable explosion in treaty-making, only partly the result of the expansion of the international community.[2] Mainly under UN auspices many important topics of general international law have been refashioned in treaty form, following the processes of codification and progressive development of international law for which the Charter calls (see § 2.09 below). The law of treaties is a self-contained regime of international law (see chapter X below[3]).

Noting why treaties come first in this search after the law is important for at least two reasons. The first is the technical one already mentioned, embodied in the Latin phrase *lex specialis derogat generali*, the particular has priority over the general. The second is more fundamental. A written black letter text is preferable to an unwritten rule, not because it is clearer (that is not always so!), but because a written text establishes the parameters of legitimate debate

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2 See chapter X § 10.02 below. Current collections of treaties are: *Consolidated Treaty Series* (CTS), Clive Parry (ed.), 231 volumes covering the period 1648 to 1919 (Dobbs Ferry NY, Oceana, 1969–1981); League of Nations *Treaty Series* (LNTS), 204 volumes covering the period 1919 to 1945; United Nations *Treaty Series* (UNTS), 1946 to date (approximately 2,200 volumes at the end of 2002). UNTS is available on the UN website at http://www.un.org/Depts/Treaty. See also the data base of the UN treaty collection, http://untreaty.un.org. Art. 18 of the League Covenant and Art. 102 of the UN Charter set out the obligation to register and the sanction for non-registration. The UN publishes a monthly *Statement of Treaties and International Agreements registered or filed and recorded with the Secretariat during the month of –* (doc. ST/LEG/SER.A/–), following on a similar publication issued by the Secretariat of the League of Nations between January 1930 and February 1940. The UN Secretariat also issues annually *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December [last]*, doc. ST/LEG/SER.E/- (since 2003 on CD-ROM) with daily updates available on the above website. It also publishes daily in the *Journal of the United Nations* issued in New York information regarding actions on treaties registered with it. The Secretariat circulated more than one thousand four hundred depositary notices in the year 2001 alone, regarding multilateral treaties deposited with it. On the registration of treaties, see *Developments* 398. See also Ch. L. Wiktor, *Multilateral Treaty Calendar/Répertoire des traités multilatéraux 1648–1995,* (The Hague, Nijhoff, 1998).

3 The law of treaties is now embodied in the Vienna Convention on the Law of Treaties of 1969, in force from 27 January 1980, 1155 UNTS 331; the Vienna Convention on Succession of States in respect of Treaties of 1978, in force from 6 November 1996, 1946 UNTS 3; and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986, UN Conference on the Law of Treaties between States and International Organizations or between International Organizations, II *Official Records* (A/CONF.129/15), not yet in force but widely applied.

over the existence, the meaning and the application of the rule. A basic rule of interpretation, expressed in Article 32 of the Vienna Convention on the Law of Treaties but applicable to written texts generally, is that it must not leave the meaning ambiguous or obscure or lead to a result that is manifestly absurd or unreasonable. Any text is open to more than one interpretation – perhaps the Ten Commandments, unequalled for their terseness, are the best example.[4] Interpretation, however, together with application has to be controlled, and the written text supplies control. That does not exclude an unexpected interpretation or application of the instrument, but that is another matter, and the unexpected is not the same as the absurd or the unreasonable. If no rule of treaty law is applicable or relevant, attention has to be turned to customary international law, an elusive matter (§ 2.03 below). Rules of customary law must also be interpreted and applied in good faith and sensibly, and the existence of a rule of customary law may be challenged.

Most 'codification' treaties include in their preamble a statement to the effect that the rules of customary international law will continue to govern questions not regulated by the present convention. That is a difficult passage, since it refers to the tricky question of the relations between customary and conventional law without clarifying it in any way. At the 1969 Conference on the Law of Treaties an important debate took place between the representatives of Switzerland (P. Ruegger) and Uruguay (E. Jiménez de Aréchaga).[5] The Swiss view was that although the Conference had succeeded in reducing a new and substantial part of customary law to writing, yet gaps remained so occasionally it would still be necessary to fall back on custom. Uruguay's view was that the Swiss approach did not reflect international reality and would introduce an element of confusion. Questions not regulated by the Convention would

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4 Exodus XX:2–14, repeated with slight differences in Deuteronomy V:6–18. In the Hebrew original, the sixth, seventh, eighth and ninth commandments are each enunciated in two words only. That has not prevented mountains of interpretation.

5 UN Conference on the Law of Treaties, second session, II *Official Records*, 31st and 32nd plenary meetings. That discussion is summarized in *Developments* at p. 7. That clause was first introduced in the preamble of the Vienna Convention on the Law of Diplomatic Relations, 1961, where it attracted a similar debate. UN Conference on Diplomatic Intercourse and Immunities, I *Official Records*, Committee of the Whole, 39th meeting. The debate was repeated in the Conference on the Law of the Sea. See University of Virginia, Center for Oceans Law and Policy, I *The United Nations Convention on the Law of the Sea 1982: A Commentary* 464 (M. Nordquist, ed., Dordrecht, Nijhoff, 1985) (hereafter the *Virginia Commentary*). See further on this, O. Schachter, 'Entangled Treaty and Custom', *International Law at a Time of Perplexity* 717 (Y. Dinstein and M. Tabory, eds., Dordrecht, Nijhoff, 1989).

continue to be governed by the general rules of international law, in conformity with Article 38 of the Statute of the Court. State practice has tended to prefer the Swiss approach. Viewed in retrospect, there is little to choose between the two points of view, although the inclusion of this clause in the preamble without any substantive provision in the body of the treaty, while it indicates an intention not to stifle the development of the law, may not be of great advantage.

A caveat applicable to rules of both customary and conventional law relates to that elusive factor *time*. Any document of international law must always be read in the context of its date. There is a branch of international law, as of all law, going under the name of the *intertemporal law*. That is a feature of the relativity of the rules of law, itself an aspect of interpretation.[6] However, the impact of time goes beyond that. Like all law, a rule of international law must be read, evaluated and applied in light of all the circumstances that gave rise to its creation. Dissociated from that temporal context, it immediately assumes a new hue, even if it does not fall into disuse entirely. The law of blockade in time of war is a good example. When those rules evolved, the fighting navies consisted of sailing ships, and the basis of the law was the assumption that a fleet of sailing men-o'-war would, as it were, establish themselves as a wall, preventing all entry into and egress from the blockaded enemy coast. Already in the American Civil War the advent of the steamship was displacing the underlying factual premiss of the rule. That led to the 'long-distance blockade' of the Second World War and since then to the application at sea of economic sanctions on the basis of a binding decision of the Security Council.

§ 2.02. The bilateralism of applied law

The fundamental distinction between treaty (or conventional) law, that is rules of international law expressed in a treaty, and customary law is that treaty law is in principle binding only on the parties to the treaty, while customary law is binding on all members of the international community to whom it is addressed. There can be a major difference in the application of the rule in the many instances in which the applicable treaty contains provisions for a procedure to control its interpretation or application, including a procedure for settling

6 See on this, the Institute of International Law, resolutions of 1975 on the intertemporal problem in public international law and of 1981 on the intertemporal problem in private international law. 53 Annuaire IDI at 536 (1975); 59/II ibid. at 246 (1981). In the law of treaties, it is governed by Art. 30 of the Conventions on the Law of Treaties (above note 3).

disputes arising out of the treaty. Such provisions operate only between the parties to the treaty. There is no direct equivalent for a rule of customary law, binding generally. There is an indirect equivalent if both parties involved in a dispute have accepted the compulsory jurisdiction of the ICJ or of some other body empowered to settle disputes with binding force (see chapter III § 3.05 below), but that refers today to only a small number of the States that are parties to the Statute and have accepted that form of jurisdiction.

The rules of law, whether treaty law or customary law, are usually couched in universalistic terms extending to the whole of the international community or, in the case of a treaty rule, all the entities that come within the treaty's scope. Against this, the application of any given rule of law is usually a matter between the entities concerned, and for other international entities is *res inter alios acta*, a matter affecting third parties and not opposable to those between which there is an issue.[7] Today, with the increasing number of treaties and other law-declaring instruments addressed to all States (to take the most prominent international entity), the tendency to see the rules of law as addressed to the world at large and imposing obligations *erga omnes*, is great, although relatively few treaties do impose obligations in favour of the rest of the international community.[8] But as seen, provisions dealing with enforcement or application of those rules are limited to those entities that have given their consent to the procedure sought to be applied. Tension thus exists throughout international law between the generalized expression of the rules of the law and the bilateralism of the application of the law. This tension is increasing as the number of treaties and other instruments of wide geographical application grows.[9] One function of the international legal organs, including the established

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7 Taken from I. Brownlie, *Principles of Public International Law*, 5th ed. xlviii (Oxford, Clarendon Press, 1998).

8 Sh. Rosenne, 'Some Reflections *Erga Omnes*', *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* 509 (The Hague, Nijhoff, 1998). The distinction between a rule addressed *erga omnes* and an obligation that is owed *erga omnes* must be kept in mind. Not every rule that is addressed *erga omnes* creates an obligation that is owed to the international community as a whole. See chapter XI § 11.04 below.

9 Cf. Sh. Rosenne, 'Bilateralism and Community Interest in the Codified Law of Treaties', *International Law in a Changing World: Essays in honor of Phillip C. Jessup* 202 (New York, Columbia University Press, 1972); B. Simma, 'Bilateralism and Community Interest in the Law of State Responsibility', *International Law at a Time of Perplexity*, above note 5, 821. And cf. J. N. Moore, 'Enhancing Compliance with International Law: A Neglected Remedy', 39 *Va. J. Int'l L.* 881 (1999).

international courts and tribunals as well as the non-governmental organizations active in the field, is to seek practical solutions to this tension.

The different decisions of the ICJ on the Convention on the Prevention and Punishment of the Crime of Genocide supply an illustration of this. The Court first expressed itself in 1951, in an advisory opinion on the question of reservations to that Convention. It pointed out that the Convention was manifestly adopted for a purely humanitarian and civilizing purpose and that the contracting States

> do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.[10]

However, when faced with a contentious case alleging breaches of that Convention by the respondent and the respondent filed counter-claims making similar allegations against the applicant State, the Court treated this as a bilateral matter, a dispute between two States concerning the interpretation, application or fulfilment of the Genocide Convention within the terms of its compromissory clause (Article IX). Recalling the *erga omnes* character of the obligations flowing from the Genocide Convention, recognized by both parties, the Court said:

> the argument drawn from the absence of reciprocity in the scheme of the Convention is not determinative as regards the assessment of whether there is a legal connection between the principal claim and the counter-claim, in so far as the two Parties pursue, with their respective claims, the same legal aim, namely the establishment of legal responsibility for violations of the Genocide Convention.[11]

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10 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (hereafter *Reservations to Genocide Convention)* adv. op., ICJ Rep. 1951, 15, 23. It was purely by chance that the question was asked in respect of that Convention which, when the Sixth Committee adopted its resolution, was the only treaty deposited with the Secretary-General in connection with which the problem had arisen.

11 *Application of the Convention for the Prevention and Punishment of the Crime of Genocide* (hereafter *Application of Genocide Convention*) (Bosnia & Herzegovina *v.* Yugoslavia [Serbia & Montenegro]) (Counter-claims) case, ibid. 1997, 243, 258 (para. 35). The counter-claims were later withdrawn. Ibid. 2001, Order of 10 September. The other phases of this case are Provisional Measures and Further Provisional Measures, 1993, 3, 325, and Preliminary Objections, 1996(II), 595. This case is pending.

The *East Timor* case also supplies a good illustration of this tension. That case concerned the validity of the Australian/Indonesian Agreement of 11 December 1989 regarding the delimitation of the continental shelf between Australia and East Timor, then occupied by Indonesia in violation of resolutions of the General Assembly and the Security Council. The gravamen of Portugal's complaint was that the Agreement violated rights of the people of East Timor. In its judgment on preliminary objections, the Court held that

> Portugal's assertion that the right of peoples to self-determination, as is evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination has been recognized by the United Nations Charter and in the jurisprudence of the Court . . . ; it is one of the essential principles of contemporary international law. However, the Court considers that the *erga omnes* character of the norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. When this is so, the Court cannot act, even if the right in question is a right *erga omnes*.[12]

The Court found that since Indonesia was not a party to the litigation it could not adjudicate on *that* dispute. That exemplifies the tension between the general principle addressed to all States and the peoples of non-self-governing territories, and the inability of judicial enforcement machinery to give effect to that principle because of the equally fundamental rule that the jurisdiction of international courts and tribunals in a contentious case requires the consent of the States directly concerned.

Against this, other procedures exist and can be developed to obtain authoritative guidance from a competent institution independent of any parties, when the international community needs it. One is the advisory procedure of the International Court of Justice and of other international courts and tribunals (see chapter III § 3.10 below). On the other hand, international law has not developed any system of class action. All existing judicial procedures require the applicant State (or other internationally recognised entity) to establish its *locus standi in judicio*, its concrete legal right to bring the action in question.

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12 *East Timor* case, ICJ Rep. 1995, 90, 102 (para. 29). The Court concluded its judgment by reminding both parties that the Territory of East Timor 'remains a non-self-governing territory and its people has the right to self-determination' (p. 106, para. 37). Indonesia's occupation of the territory came to an end in 1999, when new agreements were reached regarding that delimitation (see chapter XI note 43 below).

The nearest approach to this is in Article 48 of the draft articles on the responsibility of States for internationally wrongful acts adopted by the ILC in 2001 (see chapter XI § 11.04 below). That article addresses the invocation of responsibility by a State other than an injured State, and it remains to be seen how international courts and tribunals will apply that provision having regard to the current strict rules about *locus standi*.

In dealing with the evolution of international law, one noticeable element today is the marked tendency to accord a more definite position in it to the individual human person and a person's rights. However, when the international community wishes to grant rights or impose duties on individuals, it can only do so through a treaty between States.[13] This has led both to human rights law and to international humanitarian law. Since each has its roots in treaties between States, there are elements of overlapping, duplication and contradictions between the rights and duties of States under the treaties, and the rights and duties of individuals deriving from those treaties.

§ 2.03. International customary law

Following Article 38 (1) (*b*) of the Statute, customary international law is the second major component of international law. If in international law conventional law occupies a place roughly corresponding to black-letter texts in internal legal systems, customary law corresponds to the general unwritten law in internal legal systems (as opposed to particular customs or usages, such as the 'custom of the trade', *lex mercatoria*, or as a recent arbitration put it, *lex pescatoria* referring to a local binding custom of fisherfolk[14]). Leaving aside the philosophical and theoretical controversies (from which political undertones are not absent) which the Statute has provoked, today in the general theory and in the thesaurus of public international law, customary law is positive law as much as conventional law. It comprises the rules of law derived from the consistent conduct of States acting in the belief that the law requires them to act in that way. That psychological element goes under the name of *opinio juris sive necessitatis*. The ICJ has put it this way:

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13 Cf. J. P. Kelly, 'The Twilight of Customary International Law', 40 *Va. J. Int'l L.* 499 (2000).

14 *Eritrea/Yemen Territorial Sovereignty and Scope of the Dispute*, Award of 9 October 1998, 114 ILR 2, 91 para. 340.

> It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.[15]

To establish a rule of customary law, two requirements must be met. The first is that there is State practice consistent with the rule. The second is the existence of an understanding that the law or the nature of things requires States to act in that way. Practice alone, no matter of how many or which States, cannot establish a rule of customary international law. The term *practice of States* means their conduct, not statements of policy.

A State's practice can be deduced from any of the organs of the State, including its judicial organs, although internal judicial precedent as a buttress to the international practice of a State is fragile. National legislation as an internal evidence of State practice, and insistence on other States acting in that way as external evidence of State practice, are surer as evidence of State practice. Accordingly, the principal element of customary law is the conduct of States (not the conduct of a single State, which may, however, if consistent be regarded as a persistent objector not bound by an emerging rule of customary law to which it is opposed[16]). It is not necessary that this conduct should have been pursued over a long period of time, although assertions of spontaneous production of customary rules must be treated with reserve. It is more important to establish that there is wide acceptance of the view that the conduct conforms to the law and is required by the law, with experience of conduct consistent with that. In that sense, customary law can supply a dynamic element to the law alongside its postulating a series of fundamental principles. A good example of this dynamism meeting a need itself the outcome of rapid modern technological advances is the development of the law of the continental shelf, now consolidated in Articles 76 to 84 and Annex II of the UN Convention on the Law of the Sea of 1982 (see chapter VIII § 8.05 below). Its origins hardly go

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15 *Libya/Malta Continental Shelf* case, ICJ Rep. 1985, 13, 29 (para. 27); *Military and Paramilitary Activities in and against Nicaragua* (Merits) (hereafter *Nicaragua*) case, ICJ Rep. 1986, 14, 97 (para. 183). The other phases of this case are Provisional Measures and Jurisdiction and Admissibility, 1984, 169, 392, Discontinuance, 1991, 47. For a fuller statement of the constituent elements of a rule of customary law, see the *North Sea Continental Shelf* cases (joined), ICJ Rep.1969, 3, 44 (para. 77).

16 The classic illustration of this is Norway's consistent application of the system of straight baselines for the delimitation of the landward boundary of its territorial sea, the notoriety of that system, and the absence of protest. See the *Fisheries* case, ICJ Rep. 1951, 116.

back before 1945, and its general outlines, though not all its details, had become well established by 1958.[17] Another powerful illustration is the rapid evolution of a code of law for activities in outer space during the 1960s (chapter IX § 9.04 below).

Since customary law is based on the practice of States in their international relations, rules of law laid down by national legislatures or in national case law for the internal aspect of a State's international relations may have persuasive and indicative value, at times great. However, the important thing is international practice, whether or not conforming to those internal rules, followed by a State in its international relations and accepted by other States. This observation has particular reference to statements made in parliamentary debates on questions of international law, internal legislation, and internal judicial decisions.

The evidence of customary law is scattered, elusive and unsystematic, although recent years have seen improvements. Diplomatic correspondence and official statements made for international consumption are prime sources. These can be press conferences or television broadcasts of which permanent contemporary records can be made. The material is so widely scattered that as far back as 1949 the General Assembly initiated action to render it more accessible. The later expansion of the international community has shown how timely that was. Article 24 of the Statute of the ILC requires the Commission to consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law. The Council of Europe has taken this in hand and under its impact many national journals and yearbooks of international law contain a section on national practice, following the classifications recommended by the Council of Europe.[18] The general patterns that emerged from those

17 Convention on the Continental Shelf 1958, 449 UNTS 311.

18 For the relevant documentation, see *Ways and Means of Making the Evidence of Customary International Law more readily Available: Preparatory Work within the purview of article 24 of the Statute of the International Law Commission*: memorandum submitted by the Secretary-General (doc. A/CN.4/6); M. O. Hudson, *Working Paper* (A/CN.4/16 + Add.1) YBILC 1950/II; ILC Rep. 1950 Part II A/1316,YBILC 1950/II at 367; Recommendation of the Committee of Ministers of the Council of Europe No. R (97) 11, 12 June 1997, replacing earlier recommendations: http://cm.coe.int/ta/rec/1997/7r11.html. Modern electronic data storing and retrieval systems and the powerful research engines now available are making research into State practice easier.

discussions indicate the types of research tools available for elucidating the rules of customary international law, and their limitations.

At the start, the ILC warned that perhaps one ought not to insist too rigidly on the differentiation between conventional and customary international law. A principle or rule of customary law might be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the States parties to it so long as it is in force, and it would continue to be binding as a rule of customary law for other States. Frequently reliance is placed upon conventional formulation by certain States of a practice followed by other States in efforts to establish the existence of a customary rule. Even multilateral conventions signed but not brought into force can be regarded as having value as evidence of customary law.[19] That warning was timely. Today we can go further. The ICJ has when appropriate cited draft treaties before their final conclusion,[20] and draft articles of the ILC adopted on first reading.[21]

Conventional law requires positive action by a State for that State to become bound by any of a treaty's rules. Customary law is in principle binding on all States unless that State is an established persistent objector. Acquiescence over a period of time in an apparently exceptional position will become opposable to every State acquiescing in it. This general rule, even with the substantial modification produced by the concept of the persistent objector, has increasingly come under attack as the international community has expanded. Ideas developed by Latin American jurists after independence from Spain during the nineteenth century are at the spearhead of that attack. They started developing the theme that a newly independent State could not be bound by a rule of customary law in the creation of which it had no hand and which it was not willing to accept.

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19 ILC Rep. 1950 (see previous note) para. 29. The Vienna Convention on the Law of Treaties adopted in 1969, was first cited in an opinion in the ICJ in 1970. Separate opinion of Judge Ammoun in the *Barcelona Traction, Light and Power Company, Ltd* (New Application: 1962) (Second Phase) (hereafter *Barcelona Traction*) case, ICJ Rep. 1970, at. 303.

20 *Libya/Tunisia Continental Shelf* case, ICJ Rep. 1982, 18. Unexpectedly, the articles in the then current draft of the convention on the law of the sea found to be relevant in that case were not adopted in the final version of that Convention. For the Court's refusal to consider whether a provision in a treaty that had not entered into force was a rule of customary rule, see *Gabčíkovo-Nagymaros Project* case, ICJ Rep.1997, 7, 71 (para. 123).

21 *Gabčíkovo-Nagymaros Project* case, previous note at 39 (para. 50); *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (hereafter *Immunity from Legal Process*) adv. op. ICJ Rep.1999, 62, 87 (para. 62).

The Bolshevik Revolution gave impetus to that approach, and some of Lenin's teachings about capitalist international law and the means common in his day for its enforcement increased those pressures.[22] It became a political force after the Second World War with the ascendancy of the USSR as a major Power. Later, following the massive decolonization of the 1960s many newly independent States, both individually and in regional and other groups, have been adopting a similar attitude. This has had a major impact both on preparatory work in organs like the ILC and other *ad hoc* bodies, and even more so in the diplomatic conferences. Its impact is also felt in the non-governmental organs such as the Institute of International Law and the International Law Association. This is having profound influence on customary international law. It provides one of the main motive forces for the replacement of unwritten customary law by written law, in the making of which all existing States have had a hand. The dissolution of the USSR has not brought any appreciable change in this respect. Some Communist approaches to international law, such as a heavy emphasis on legal positivism, have a respectable lineage in pre-1917 Russian internationalists.

A distinction is current between general customary international law and regional customary law. In an international tribunal of universal jurisdiction where international law is the *lex fori*, the principle of *curia jura novit* leaves to the tribunal to establish what the customary rule is. However, if a universal court faces a problem of regional customary law, the party relying on that custom has to prove it.[23] In regional courts, the same principle allows those courts to apply the regional customary law, including where necessary sectoral regional law.

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22 Lenin's views on questions of international law are conveniently collected in Ленин о международной политике и международном праве (Moscow, Institut Mezhdunarodnykh Otnosheniy, 1958). See also « Ленин », II Дипломатический словарь 139 (Moscow, Nauka, 1985). The major modern exposition of international law from the communist point of view is G. I. Tunkin, 'Co-existence and International Law', 95 *Recueil des cours* 1 (1958-III) written during the high tension of the Cold War, and other works of this eminent Soviet jurist, notably his 'International Law in the International System 'Politics, Law and Force in the Interstate System', in 147 *Recueil des cours* 1 (1975-IV) and 219 ibid. 227 (1989-VII). On the Bolshevik challenge to international law, cf. O. J. Lissitzyn, *International Law Today and Tomorrow* 67 (Dobbs Ferry NY, Oceana Publications, 1965). Discussed further in Sh. Rosenne, 'The Role of Controversy in International Legal Development', *The Structure and Process of International Law* 1147, 1151, R. St. J. Macdonald and D. M. Johnston, eds. The Hague, Nijhoff, 1983).

23 *Asylum* case, ICJ Rep. 1950, 266, 276.

§ 2.04. The intertwining of customary and treaty law

Two provisions of the Vienna Conventions on the Law of Treaties deal with the problem of the coincidence of customary rule with a rule embodied in a treaty. Article 38, in the section on treaties and third States, on rules in a treaty becoming binding on third States through international custom, provides that nothing in the rules relating to treaties and third States precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such. Article 43, in the section on the invalidity, termination and suspension of the operation of a treaty, concerns obligations imposed by international law independently of a treaty. It lays down that the invalidity, termination or denunciation of a treaty, the withdrawal of a party from it or the suspension of its operation 'shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty'.

At first the ICJ adopted a cautious approach to this feature. In the *North Sea Continental Shelf* cases it faced the problem of whether parts of the 1958 Convention on the Continental Shelf, which was not applicable since one of the parties was not a party to that Convention, was applicable as customary law. The question was whether the equidistance rule for the delimitation of the continental shelf embodied in Article 6 of that Convention was applicable as a rule of customary law. The Court answered that question in the negative. If the Convention was not in its origins or inception declaratory of a mandatory rule of customary international law, neither had its subsequent effect been constitutive of such a rule; State practice up to date had equally been insufficient for the purpose.[24] Since then the Court has clarified the matter, as illustrated by the following passage:

> [E]ven if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability.[25]

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24 *North Sea Continental Shelf* cases, above note 15, 45 (para. 79). At the same time the Court found that some other provisions of that Convention, to which no reservations were permitted, could be regarded as reflecting, or as crystallizing, received or emergent rules of customary international law (p. 38, para. 63).

25 *Nicaragua* (Merits), above note 15, 94 (para. 175).

The importance of this principle will become apparent when we consider the enormous quantity of customary international law now incorporated in codification and other treaties intended to state the law in general terms. One thing is certain. The existence of this rule complicates the ascertainment of the appropriate rule of law in any set of circumstances.

§ 2.05. General principles of law and equitable principles

Article 38 (1) (*c*) of the Statute refers to 'the general principles of law recognized by civilized nations'. That is not an allusion to the general principles of *international* law (really part of customary law). It is broader and embraces the general principles of law recognized by the community of States as a whole. Some writers of extreme positivist leanings consider that the general principles of law must be reflected in one of the components of positive international law, whether customary or conventional. However, the practice of States and of international courts and tribunals seems to prefer the broader view. It is also reasonably clear that while shared concepts of internal law can be used as a fall back, there are severe limits to that because of the characteristic differences between international law and the internal law of any State, between the law of co-ordination and the law of subordination. Both the ICJ and the ILC have encountered difficulties when trying to apply abstract jurisprudential ideas unrelated to the basic features of international law. A good example of this is provided by the advisory opinion on *Reservations to the Genocide Convention*. Here the Court pointed out that it was a generally recognized principle that a multilateral treaty is the result of an agreement freely concluded, and that this principle is linked to the notion of the integrity of the treaty as adopted. 'This concept, which is directly inspired by the notion of contract, is of undisputed value as a principle.' However, when applied in a concrete case it would be proper to refer to a variety of circumstances that would lead to a more flexible application of the principle.[26]

It accordingly appears that the reference to 'general principles of law' does not imply generalizations reached by application of comparative law and abstract legal science (although that is not to be excluded and is frequently met in individual judicial opinions). It refers more to the particularization of an underlying sense of what is just in the circumstances. With an independent existence, their validity in international law does not derive from any consent of the parties

26 Above note 10 at 21.

or from State practice as such, provided that they are norms that States should recognize or are what Hersch Lauterpacht has called 'socially realizable morality'.[27] The Statute places this element on a footing of formal equality with the two positivist elements of custom and treaty, and thus is positivist recognition of the Grotian concept of the co-existence, implying no subordination, of positive law and the so-called natural law of nations (in the Grotian sense). The absence of subordination means that a norm of positive law cannot be invalidated by a general principle of law – although a general principle will have to give way before a positive norm not because they are inherently in an hierarchical relationship, but because the positive norm, whether conventional or customary (in that order) will be *lex specialis* in relation to the general principle.

Before international courts and tribunals became as widespread as they are today and the judicial settlement of international disputes was still experimental, that kind of provision was important in enabling the courts and tribunals to function. It was designed to avoid a refusal to decide a case on the ground that there was no applicable rule of law, known as a *non liquet*. It brings a healthy and refreshing element into international law generally. Today, with the vast extension of the scope of positive international law, coupled with a general hesitation on the part of international courts and tribunals to rely on general principles of law, this provision may have lost some of its earlier significance.

On the other hand, both modern treaty drafting and modern case law of all types of international courts and tribunals have breathed new life into the link between the general principles of justice and 'equity'. Like all systems of law, international law has faced the need to allow the introduction of equitable principles to moderate the application of the rules of law and in that way produce a result that is 'just' in the circumstances. In that context, 'equity' is not a system such as it was in its historical origins in England, and it has never required special forums for its application. It is more the inclusion of reasonableness and good faith in the application of a rule of law. As such it is of general application, as the Institute of International Law well brought out in a resolution adopted as far back as 1937:

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27 H. Lauterpacht, *The Development of International Law by the International Court* 172 (London, Stevens, 1958).

> L'équité est normalement inhérente à une saine application du droit, et . . . le juge international, aussi bien que le juge interne, est, par sa tâche même, appelé à en tenir compte dans la mesure compatible avec le respect du droit.[28]

Obviously this brings a measure of discretion into the application of a rule of law in concrete circumstances, but it is a discretion itself subject to the law, not a whimsical discretion. To generalize, if the application of the rule should lead to a result which is manifestly absurd or intellectually unacceptable, there will be need to introduce appropriate equitable principles and balances to produce a result which in the circumstances is reasonable and not manifestly absurd. In that sense, equitable principles meaning reasonableness are inherent in the legal system. In treaty law very often appropriate qualifications such as 'reasonable' will appear to state this positively. In other cases, interpretation must not lead to a result which is manifestly absurd or unreasonable.[29]

It is appropriate to conclude this section with a major pronouncement of the International Court:

> Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it. In the course of the history of legal systems the term "equity" has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law. Moreover, when applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice. Application of equitable principles is to be distinguished from a decision *ex aequo et bono*. The Court can take such a decision only on condition that the parties agree (Art. 38, para. 2, of the Statute), and the Court is then freed from the strict application of legal rules in order to bring about an appropriate settlement. The task of the Court in the present case is quite different: it is bound to apply equitable principles as part of

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28 40 Annuaire IDI 271 (1937). 'Equity is normally inherent in a healthy application of the law, and … the international judge, like the internal judge, is obliged by the very nature of his task to take account of it to the extent compatible with respect for the law.' See further my 'Equitable Principles and the Compulsory Jurisdiction of the International Court of Justice', and 'The Position of the International Court on the Foundations of the Principle of Equity in International Law', Sh. Rosenne, *An International Law Miscellany* 181, 201 (The Hague, Nijhoff, 1993).

29 Vienna Conventions on the Law of Treaties, Art. 32. Above note 3. Note the decision of the Arbitral Tribunal in the *Southern Bluefin Tuna* case refusing to apply a result that would be 'artificial'. Award of 4 August 2000, 119 ILR 508, 550 (para. 54).

international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result. While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice.[30]

§ 2.06. Judicial decisions

Article 38 (1) (*d*) of the Statute refers to 'judicial decisions', which it places among the subsidiary means for the determination of the rules of international law'. The term *judicial decisions* includes judgments, advisory opinions and orders of the ICJ and of other standing and *ad hoc* courts and awards of international arbitral tribunals.[31] In one form or another this may be said now to apply to all international courts and tribunals which reach their decision in application of international law. It may also extend, but with caution, to what are called 'treaty monitoring bodies' or 'treaty controlling bodies' reaching their decisions in a quasi-judicial way although without the authoritative character of a *res judicata*, and without the guarantees of judicial procedure and judicial independence. Case law, or jurisprudence as it is sometimes called, is not positive law since it is not made by States. However, it is made on the authority of States and with their participation. That puts it in a special position among the components of international law. International judicial and arbitral decisions are today relatively accessible, both in hard copy and virtually immediately in electronic form. Details are given in chapter III.

Like all legal instruments, every international judicial pronouncement must first be read as a whole in its context before any attempt is made to analyse it and deduce from it any statements of principle or rules of law. It states the law as at its date.[32] The context embraces the proceedings that led to the

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30 *Tunisia/Libya Continental Shelf* case, above note 20, 60 (para. 71); *Libya/Malta Continental Shelf* case, above note 15, 39 (para. 45); *Frontier Dispute* (Burkina Faso/Mali) case, ICJ Rep. 1986, 554, 633 (para. 149). This has been particularly evident in modern maritime delimitation cases, starting with the *North Sea Continental Shelf* cases, above note 15.

31 The International Court has issued a warning regarding claims commissions since their decisions rest upon the terms of their constituent instruments and therefore cannot easily give rise to generalizations going beyond the special circumstances of each case. *Barcelona Traction* case, above note 19, 40 (para. 63).

32 As the Institute of International Law has put it, a judicial pronouncement to the effect that a particular provision of a codification convention is or is not declaratory of customary law, or has or has not crystallized as, or has or has not generated, a rule of customary law states the law as at the date upon which it was made. Resolution of 1 September

pronouncement, and for an advisory opinion that includes the proceedings in the body that made the request. The pronouncement will also include the court's own assessment of the facts, its own definition of the dispute that it is asked to decide,[33] its own statement of the law relating to those facts and that dispute, and the operative provision (*dispositif*). The operative provision is the 'decision' and the relations between the reasons and the decision determine the place of the judicial pronouncement in the general thesaurus of international law. As a general rule, it is the operative clause that is binding on the parties in the sense that they are obliged to comply with it if it is executory and not merely declaratory. The findings and reasoning constitute the necessary steps to the operative clause, and if necessary can be invoked to interpret it.[34] Careful reading of a judicial pronouncement should have full regard for the pleadings wherever possible and for all the individual opinions appended to it. It is only by contrasting all of these, by setting thesis against antithesis, that the reader can establish with some degree of finesse what was really decided and what is the real significance of any dictum appearing in the pronouncement. Attention should also be given to whether a particular issue was contested or conceded, and whether the court or tribunal reached its conclusions after adversarial pleading or not. A remarkable demonstration of the significance of adversarial pleading can be seen in the following sentence written by Hersch Lauterpacht after he became a judge of the ICJ: 'Clearly, any views expressed here are liable to change in the light of further study, reflection, *or argument* [italics supplied]'.[35] Modern international litigation is complex. Any case may raise more than one issue of fact and of law, and in turn this can be reflected in complex operative provisions. This makes it almost impossible, and in some respects even undesirable, to attempt to 'classify' judicial decisions as relevant only to a single branch of modern international law.

International law has nothing like the common law rule of the binding force of judicial (or other) precedents, the doctrine of *stare decisis*.[36] As stated in

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1995 on problems arising from a succession of codification conventions on a particular subject, Conclusion 14, 66/II Annuaire IDI 435, 443 (1995).

33 Sh. Rosenne, 'Unilateral Applications to the International Court of Justice: History Revisited', *Liber Amicorum* Bengt Broms *celebrating his 70th Birthday* 447 (Helsinki, Finnish Branch of the International Law Association, 1999).

34 *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Application of the Philippines to Intervene) case, Judgment of 23 October 2001 (para. 47).

35 Above note 27 at xiv.

36 See generally M. Shahabuddeen, *Precedent in the World Court* (Cambridge, Grotius Publications, 1996).

Article 84 of the Hague Convention of 1907, and substantially repeated in Article 59 of the Statute, the decision has no binding force except between the parties and in respect of that particular case.[37] However, in the nature of things, standing tribunals show a well-marked tendency to follow their previous decisions if that is logically possible in the later case, and correspondingly little inclination to depart from previous rulings if that can logically be defended. The ICJ has expressed the doctrinal aspect of this in the following sentence:

> It is true that, in accordance with Article 59, the Court's judgments bind only the parties to and in respect of a particular case. There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases.[38]

This ensures an element of continuity and stability in the case-law. To some extent it reflects the civil law approach of *la jurisprudence constante*.

The absence from international law of any rule of *stare decisis* means that the lawyer should be careful before relying on its ancillary doctrine of the distinction between the *ratio decidendi* and any *obiter dicta*. In one sense, there can be no *obiter dicta* in an international judicial decision. The reason lies in the collective formulation of the decision by all the judges working collegiately. In that process, a word or a sentence will be included because a judge thought it necessary and there was no opposition, or if there was opposition the majority decided to include the passage. In that respect, every word is part of the reasoning. Nevertheless, it appears that occasionally the Court has inserted a passage that may not have been strictly necessary, but which it thought timely to do so.[39] The Rome Statute of the International Criminal Court contains a specific

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37 Repeated with slight difference in the wording in Art. 33 (2) of the Statute of ITLOS. UN Convention on the Law of the Sea 1982, Annex VI, 1183 UNTS 3.

38 *Land and Maritime Boundary between Cameroon and Nigeria* (Preliminary Objections) (hereafter *Cameroon-Nigeria*) case, ICJ Rep. 1998, 275, 292 (para. 28). Other phases in this case are Provisional Measures, 1995, 6, Counter-claims, 1999, 983, Intervention by Equatorial Guinea, ibid. 1029, Merits., Judgment of 10 October 2002. For the application of this principle in relation to facts as established in a different case, in which one of the parties to the later case was involved, see *Border and Transborder Armed Actions* case, ICJ Rep. 1988, 69, 92 (para. 54).

39 Cf. on this the remarks of Judge Lachs that a statement in the *Barcelona Traction* case (above note 19) was not necessary in the judgment, but it was a good opportunity to nail down certain provisions of the law and indicate where States are obliged to act *vis-à-vis* the international community, cited in Shahabuddeen, above note 36 at 159. The inclusion of that passage in that judgment has since been a source of confusion and misunderstanding, demonstrating the undesirability of nailing down something in a catchy

provision reversing the general rule.[40] By Article 21 (2), that Court may apply principles and rules of law as interpreted in its previous decisions. While this may be an innovation for a black letter text, it conforms to the practice of all standing international tribunals.

The term *judicial decisions* does not refer only to decisions of international courts or tribunals. It also envisages arbitral awards including those made in transnational or interstitial cases where one party was not a State, and relevant internal judicial decisions. The ICJ has never cited an internal decision by name (to do so would be invidious and might lead to misunderstanding). But in its case law there are many signs that where appropriate it will study relevant internal jurisprudence, and reference to individual opinions and pleadings will bring out some of the cases brought to its attention. In today's judicial pronouncements of the International Court of Justice, reliance on its own previous decisions is marked, and other international courts and tribunals also tend to do the same.

The statement that judicial decisions are subsidiary means for the determination of the rules of law is not to be taken literally. It reflects the fact that in international relations, and notwithstanding the establishment of standing international courts and tribunals, the judicial settlement of international disputes remains the exception (it is probably the exception in the internal life of States also, since a good attorney will try and keep his client out of court, and a negotiated settlement of a dispute is always preferable to an imposed settlement). Judicial decisions, international and internal, have certainly played an important role in the general development of international law, but not a primary one. Judicial decisions are not an autonomous or self-standing 'source' of international law. The ever growing quantity of judicial decisions and their relative accessibility today has increased their importance for the development of the law, as even a cursory glance at the reports of the International Law Commission will show.

There have been occasions when the law declared by an international tribunal, even the ICJ, has not found general acceptance and the international community has had to find other solutions. Except where there might be great urgency, the codification process as it has developed since 1949 is showing itself to be a useful tool to effect this corrective endeavour, much in the same

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phrase not necessary to the decision itself. That has been set at rest by the ILC in ILC Rep. 2001, Chap. IV, draft articles on responsibility of States for internationally wrongful acts, Art. 1, Commentary para. (4).

40 UN doc. A/CONF.183/9*, UNTS No. 38544.

way that in internal legal systems it is sometimes necessary for the legislature to act if there is widespread dissatisfaction, especially in professional circles, with the law as declared by the highest court. It is no disparagement of the standing or status of any court or tribunal for the legislature to find itself obliged to correct law as declared by that court or tribunal. The existence of machinery to correct judicial statements of what the law is strengthens the court's ability to render justice strictly in accordance with the law as its members see it.

§ 2.07. Resolutions of international intergovernmental organizations

The San Francisco Conference at which the Charter of the United Nations was negotiated refused to grant law-making powers to the new organization. In consequence, very few resolutions of international intergovernmental organizations are technically binding in the sense that they can create general rules of law – the matter depends exclusively on the terms of the constituent instrument of the organization. Nevertheless, if we take the UN General Assembly alone, since its establishment in 1946 it has adopted more than nine thousand resolutions covering virtually every aspect of human interest and activity in the international sphere. Some of these resolutions are the product of long negotiations and careful drafting with which senior legal officers of the organization and of participating governments have been associated. The question of their place in the general thesaurus of international law cannot therefore be disregarded, whatever their formal legal standing under the relevant constituent instrument. The General Assembly acknowledged this in the preamble to resolution 3232 (XXIX), 12 November 1974: '*Recognizing* that the development of international law may be reflected, *inter alia*, by declarations and resolutions of the General Assembly which may to that extent be taken into consideration by the International Court of Justice'[.] The Court has made the following pronouncement on the matter:

> 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.[41]

By the same token, non-adoption of a proposal can sometimes be seen as showing the direction of legal thinking.

In consequence, resolutions and other relevant decisions of intergovernmental organizations are today to be included in the general thesaurus of materials for which the international lawyer must have regard. Their status in the hierarchy of instruments, however, in the sense of the extent to which they might impose legal obligations upon States or other international entities without their consent, depends upon the terms of the constituent instrument of the organization within which a given organ is operating, on the attitude of interested States as expressed on the adoption of the resolution in question, and upon the terms of the resolution itself. The general principle of international law that a State or other international entity cannot be legally bound by an instrument or rule to which it has not given its consent is equally applicable to decisions of international intergovernmental organizations. The principal legal question that arises is whether membership in that organization is sufficient to attract to a member State any legal obligation to conduct itself in accordance with the terms of a given resolution, even if it has not given its consent to it. Only the terms of the constituent instrument can answer that question.

After that question is answered attention goes to the terms of the resolution to see whether they are couched in the language of legal obligation or in that of a recommendation. The ICJ has expressed the guiding rule pithily in the following sentence: 'The language of a resolution . . . should be carefully analysed before a conclusion can be made as to its binding effect'.[42]

It is frequently asserted that textual repetition of resolutions is evidence of the emergence of a rule of international law. This is sometimes seen as the spontaneous production of a rule of customary law through repeated resolutions of a major international organ such as the UN General Assembly. The International Court of Justice has examined this concept in the context of the legality

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41 *Legality of the Threat or Use of Nuclear Weapons* adv. op., ICJ Rep. 1996(I) 226, 254 (para. 70).

42 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (hereafter *Namibia*) adv. op., ICJ Rep.1971, 16, 53 (para. 114). For a recent wide-ranging discussion of this topic, see International Law Association, Report of the Committee on Formation of Customary (General) International Law, *Report of the Sixty-ninth Conference, London*, at 712 (London, ILA, 2000).

of the use of nuclear weapons. It has found that although repeated resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons. It went on to say that the emergence as *lex lata* of a customary rule is hampered by continuing tensions between the nascent *opinio juris* and the still strong adherence to certain practices.[43]

Many names are given to resolutions. The General Assembly sometimes designates a resolution *Charter* or *Declaration*. That is common when the resolution is prepared after careful and at times long negotiations, and sets out broad lines of policy to be consolidated in legal texts. The first, and the most famous of these is the Universal Declaration of Human Rights, resolution 217 A (III), 10 December 1948 (chapter VI § 6.04 below). Other examples are the Declaration of Legal Principles governing the Activities of States in the Exploration and Use of Outer Space, resolution 1962 (XVIII), 13 December 1963, the Declaration of Principles governing the Sea-Bed and the Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction, resolution 2749 (XXV), 17 December 1970, and the Charter of Economic Rights and Duties of States set out in resolution 3281 (XXIX), 12 December 1974. All of these were to lead to comprehensive treaties on human rights, on activities in outer space, and on the whole law of the sea and in the economic sphere. Other resolutions entitled *Declaration* set out general statements of policy of the Organization or contain agreed interpretations for the application of the Charter. The best-known of these is the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, annexed to General Assembly resolution 2625 (XXV), 24 October 1970.[44] As far back as 1962 the UN Secretariat expressed the opinion that a declaration may by custom become recognized

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43 *Nuclear Weapons* adv. op., above note 41, 255 (paras. 71, 72).

44 On this Declaration, adopted as part of the 25th anniversary celebrations of the United Nations, see R. Rosenstock, 'The Declaration of Principles of International Law concerning Friendly Relations: A Survey', 65 AJIL 713 (1971); M. Šahović (ed.), *Principles of International Law concerning Friendly Relations and Cooperation* (Dobbs Ferry NY, Oceana Publications, 1972); G. Arangio-Ruiz, 'The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations', 139 *Recueil des cours* 419 (1974), revised in his *The United Nations Declaration on Friendly Relations and the System of the Sources of International Law* (Alphen aan den Rijn, Sijthoff & Noordhoff, 1979). The drafting of this Declaration took nearly ten years, and many eminent international lawyers worked on it. The ICJ has referred to it several times. See for instance *Nicaragua* (Merits), above note 15, 100 (para. 188); *Nuclear Weapons*, above note 41, 264 (para. 102).

as laying down rules binding on States.[45] As a matter of law the nomenclature is not significant and does not change the formal status of the resolution.

The ICJ in the passage from *Nuclear Weapons* last cited has underlined the need to look to the conditions of the adoption of any resolution. This is important where the resolution is adopted in the General Assembly by consensus or without a vote, and all the reservations and interpretations are expressed in the competent Committee, something frequently overlooked. If a resolution is adopted without a vote, its language will satisfy all points of view and when carefully drafted (as these declarations usually are) will mask major differences. For this reason the precise normative, as opposed to programmatic, character of some declarations remains ambiguous. International courts are showing a tendency to see in this kind of resolution evidence of an emerging rule of law, but require stronger evidence of State practice based on it before concluding that a clear rule of law has come into existence.[46]

In the *Nicaragua* (Merits) case, the ICJ made an important statement on how it views this type of declaration in the process of the formation of a rule of customary law:

> The Court has . . . to be satisfied that there exists in customary international law an *opinio juris* as to the binding character [of a given proposition]. This *opinio juris* may, 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 . . .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.[47]

45 34 ECOSOC OR, Sup. 8 (E/CN.4/L.610, paras. 3–5).

46 The best example of this to date is the *Nuclear Weapons* adv. op. (above note 41).

47 Above note 15, 99 (para. 188). The difficulty with this is that separating the bare rule from its institutional context may reduce the rule to a mere platitude.

§ 2.08. The teachings of publicists

The last element in Article 38 (1) (*d*) of the Statute refers to the teachings of the most highly qualified publicists of the various nations among the 'subsidiary means' for the determination of the rules of law. The writings of publicists – *doctrine* – are not positive law and they do not stand on the same footing as judicial decisions, since they are not the product of direct or indirect action by States and are not made under the authority of States. For that reason alone, their role is subsidiary'

There is no way of establishing who is a most highly qualified publicist of any nation. That is a matter for the skill, knowledge and appreciation of the individual judge and the individual legal adviser. Frequently a doctoral thesis written early in an author's career can be useful, especially for the detailed compilation of facts, documentation and authorities on which most universities insist.

It is rare to find direct citations from writers in international diplomatic correspondence or in collective international decisions. It is different with the opinions of national legal advisers and internal decisions. Citation of writers is free and normal in pleadings and in separate opinions of international judges. Very occasionally, the Court has referred in general terms to 'writers'.[48] There are many reasons for this reticence, apart from the inherent and embarrassing difficulty of saying who is a 'most highly qualified publicist'. Citation of individual writers does not sit well with the collegiate formation of most international judgments. The International Law Commission discussed this when it was preparing its final report on the law of treaties in 1966. It decided not to cite from the teachings of publicists in its final report, the earlier records and the reports of the special rapporteurs being sufficient to show the authorities brought to the Commission's attention during its work on the topic.[49]

In its report of 1950, the ILC also referred to the opinions of legal advisers in its inventory of the evidence of international law. It pointed out that reserve

48 For rare examples of this, see *Nottebohm* (Second Phase) case, ICJ Rep. 1955, 4, 22; *Nuclear Weapons* adv. op. above note 41 259 (para. 85); and notably the *LaGrand* case where the Court noted that an interpretation of its Statute 'has been the subject of intensive controversy in the literature', and had not been settled by the Court's jurisprudence, and that would have been taken into consideration had there been a claim for indemnification. Judgment of 27 June 2001 (paras. 99, 116).

49 YBILC 1966/I/2, 888th meeting, paras. 1–16.

may be needed in assessing the value of such opinions, because the efforts of legal advisers are directed towards the implementation of national policy. In this connection, however, one must distinguish between an opinion which attempts to set forth objectively for the decision-maker what the law is or what could be the legal consequences of proposed action, and an opinion directed towards the implementation and justification of policy measures already adopted, even though not based on the opinion of a legal adviser (as is often the case). Collections of the first type of opinion are becoming more frequent, especially in the United Kingdom which has pioneered works of this character.[50] It is more the second type that has to be treated with reserve, save that where such an opinion, or the law underlying it, is accepted by other States as an adequate statement of the law or is not subject to serious criticism in the literature of the law, it may to that extent enter the general storehouse of materials serving as evidence of the rules of customary international law.

The same goes for the opinions of the legal advisers of international intergovernmental organizations.[51] Here we can identify at least four types of opinion: (1) an opinion on a question of the internal law of the organization; (2) a study on a question of general international law arising in the course of the activities of an organ of the organization; (3) a full study on a topic of international law; and (4) a commentary on a treaty prepared under the auspices of the organization. An opinion of the first kind becomes part of the general practice of the organization, and indeed is now the mainstay of organizational legality.[52] Opinions and studies of the second type are not practice oriented *per se*, and sometime may lack diplomatic sensitivity. They enjoy no special status in the thesaurus of general international law. Sometimes caution is needed in putting these papers to general use, especially when the decision to commission the study or the opinion relates to a controversial issue and reflects political

50 A. McNair, *International Legal Opinions* (Cambridge University Press, 1956); same, *The Law of Treaties* (Oxford, Clarendon Press, 1961). For a unique illustration, see A. Carty and R. Smith, *Sir Gerald Fitzmaurice and the World Crisis: A Legal Adviser in the Foreign Office 1932-1945* (The Hague, Kluwer Law International, 2000).

51 Cf. O. Schachter, *International Law in Theory and Practice, passim* (Dordrecht, Nijhoff, 1991).

52 For a significant instance of the plenary organ not following the opinion of the organization's legal adviser, note the decision of the World Health Assembly in its resolution WHA46.40, 14 May 1993, requesting the advisory opinion in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, (hereafter *Use of Nuclear Weapons*) adopted over the advice of the legal adviser. ICJ Rep. 1996(I), 58. And see the individual opinion of Judge Oda at 91.

alignments in the organ requesting the study. The studies of type 3, often prepared for the ILC or other specialized body, are in a different position. Usually they contain an objective survey of the problem, indicating the principal doctrinal controversies and approaches, and surveying previous international action on the topic. Some of these studies are themselves primary source-material, especially when they delve into the practice of States vis-à-vis an international organization. Since 1963 the *United Nations Juridical Yearbook* (UNJYB) has included a useful section of mostly unpublished legal opinions of both the UN Secretariat and of some other organizations. Many of these deal with questions relating to the internal law and practice of the organization, including the impact on them of general international law.[53]

In the context of the teachings of the most highly qualified publicists, a special place is reserved for the works of scientific organizations devoted to international law, including the ILC (since it is not composed of representatives of Governments[54]), to some extent the United Nations Commission on International Trade Law (UNCITRAL) and the non-governmental organizations devoted to the study of public or private international law, the Institute of International Law and the International Law Association. A principal characteristic of their work is the refreshing spontaneity of the debates, often like a Socratic dialogue, cut and thrust with much give and take. In such proceedings one can see the importance of argument in producing an acceptable statement of what the law is, whether one is working on existing law or making proposals for new law.

§ 2.09. The progressive development and codification of international law

The scattering of so much of the evidence of international law, its relative inaccessibility and its general uncertainty have been powerful forces in the

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53 See also *Cumulative Index of the United Nations Juridical Yearbook*, vol. I, doc. ST/LEG/INDEX/VOL.1 (1998).

54 Cf. on this, S. M. Schwebel, 'The Influence of the International Court of Justice on the Work of the International Law Commission and the Influence of the Commission on the Work of the Court', *Making Better International Law: The International Law Commission at 50. Proceedings of the United Nations Colloquium on Progressive Development and Codification of International Law* 161 (UN, 1998); same 'The Interactive Influence of the International Court of Justice and the International Law Commission', *Liber Amicorum 'In Memoriam' of Judge José María Ruda* 479 (The Hague, Kluwer Law International, 2000). For a striking instance of repeated citation by the ICJ of drafts of the ILC, see the *Gabčíkovo-Nagymaros Project* case, above note 20.

movement for the codification of the law. Its origins, traceable to the latter half of the nineteenth century, were to some extent idealistic and assumed that codification of the law would contribute to world peace and stability. Today a healthy dose of pragmatism and utilitarianism has been added. Since 1945 codification has been a significant factor in reconciling western traditions of international law with the new concepts introduced by Marxist and Communist political and legal philosophy.

As an intellectual matter, codification can trace its origins to the ferment induced by the French and American Revolutions at the end of the eighteenth century. In Europe this led to important movements for the codification of internal law, especially in France, and the unification of national legal systems previously largely made up of different and even contradictory or at least incompatible local customs. First a matter for individual scholars and non-governmental organizations, notably the Institute of International Law and the International Law Association, the movement began to make headway on the inter-governmental level in the Peace Conferences of 1899 and 1907. It was picked up by the League of Nations.

In 1924 the League Assembly decided that the League should contribute to the codification of international law. After preparatory work it convened the Conference on the Codification of International Law at The Hague, in session from 13 March to 12 April 1930 with an agenda of three items: the law of territorial waters, aspects of the law of nationality, and State responsibility for injuries suffered by aliens.[55] The Conference opened amidst high expectations, with delegations from forty-seven countries attending, including an observer delegation from the Union of Soviet Socialist Republics – the new Republic's first participation in a diplomatic conference devoted to the codification of international law.

If measured by its formal output, that Conference was not a success. It produced a report on territorial waters, a draft report on State responsibility, and a few minor Conventions on some peripheral matters of nationality – Conventions which nevertheless are still in force. However, it did bring out

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55 See the reproduction of the relevant documents in Sh. Rosenne (ed.), *League of Nations, Committee of Experts for the Progressive Codification of International Law [1925–1928]*, (Dobbs Ferry NY, Oceana Publications, 1972); *League of Nations, Conference for the Codification of International Law [1930]*, (Dobbs Ferry NY, Oceana Publications, 1975); and see UN, Committee on the Progressive Development of international law and its Codification, *Historical Survey of Development of International Law and its Codification by International Conferences, Memorandum of the Secretariat* (A/AC.10/8, 1947, mimeographed), reproduced in 41 AJIL Sup. at 29 (1947).

the political dimension in the codification of the law, not a matter to be left exclusively in the hands of legal specialists. It also showed that apart from closer association of governments in the preparatory phases, a diplomatic conference should not deal with more than one topic, so that the delegations and the professional secretariat can include appropriate specialists. The oncoming War prevented further action by the League.

The lessons were not lost on the United Nations. The San Francisco Conference included Article 13 in the Charter requiring the General Assembly to initiate studies and make recommendations for, *inter alia*, encouraging the progressive development of international law and its codification. That indicates the political importance of codification and progressive development of the law. To assist it in its task, in 1948 the General Assembly established the International Law Commission and laid out a procedure based on professional recommendations that followed the 1930 Conference.[56] For 'progressive development' of the law, as opposed to 'codification', the General Assembly has established one standing body composed of the representatives of States – the United Nations Commission on International Trade Law (UNCITRAL) – and other *ad hoc* bodies as required.

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56 Statute of the ILC, adopted by A/Res 174 (II), 21 November 1947, and amended in resolutions 1103 (XI), 18 December 1956, 1647 (XVI), 6 November 1961 and 36/39, 18 November 1981. The Commission's records and documents are regularly published in the YBILC. The Commission's annual report to the General Assembly is the principal item on the agenda of the Sixth (Legal) Committee of the General Assembly. On the Commission, see UN, *The Work of the International Law Commission* (5th ed. UN, 1996); *Analytical Guide to the Work of the International Law Commission 1949–1997* (UN 1998, doc. ST/LEG/GUIDE). For a compilation of the Commission's work, see A. Watts, *The International Law Commission 1948–1998* (Oxford University Press, 1999). For an assessment by its members of its work, see *The International Law Commission Fifty Years After: An Evaluation* (UN, 2000). The Commission's work is regularly examined in the professional literature. See also Sh. Rosenne 'The International Law Commission 1949–59', 36 BYIL 104 (1960); Sh. Rosenne, 'Codification of International Law' in I EPIL 632; and 'Codification Revisited after 50 Years', 2 *Max Planck YBUNL* 1 (1998). The Commission's Internet address is www.un.org/law/ilc/index.htm. For a more general conspectus of the work of the United Nations, mostly on the initiative of the General Assembly, in shaping and enhancing the modern international legal order, see American Society of International Law, *The United Nations and International Law* (Ch. C. Joyner, ed. Cambridge University Press, 1997). It is believed that the earliest use of the expression 'progressive development' was by Oppenheim in the first edition of his book. L. Oppenheim, *International Law*, vol. I, Peace, 75 (London, Longmans, Green & Co., 1905).

The two terms codification and progressive development are clarified in Article 15 of the Statute of the ILC:

> [T]he expression "progressive development of international law" is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression "codification of international law" is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.

In that context, codification relates to the *lex lata* and progressive development to the *lex ferenda*. However, if the Statute establishes different procedures for the two processes, since the political requirements for initiating a process will differ, experience has shown that it is not practical to insist on the differentiation, and that a good and complete work of codification on any topic will necessarily include elements of progressive development, extending where needed to correctives which States have found to be desirable in the received law. In addition, the Commission has reported that the distinction could hardly be maintained and as far back as 1956, in its first substantive report on a topic (the law of the sea) it abandoned the attempt to specify which articles fell into one and which into the other category, 'as several do not wholly belong to either'.[57] Time too may change what was originally regarded as progressive development into codified law. The Commission usually refrains from placing a completed work into one or other category. At most it might indicate in its commentaries that a given proposal is advanced *de lege ferenda*. The impossibility of easily classifying a given proposal is one of the reasons why the Commission usually recommends that a diplomatic conference should put the final approval on its projects. That retains the power to create international law in the hands of the States. It is left to a law-applying organ to determine if a provision falls into one category or another, and to draw practical consequences from its decision. The ICJ frequently states that a provision cited in one of its judicial pronouncements is an instance of codification.

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57 ILC Rep.1956, A/3159*, Chap. II, para. 26, YBILC 1956/II 255. The Commission also has stated that in its draft articles on responsibility of States for internationally wrongful acts it sought 'to formulate by way of codification and progressive development, the basic rules' of international law on the topic. ILC Rep. 2001 Chap. IV, para. 77, Introductory section para. (1).

Article 18 of the Commission's Statute requires the Commission to survey the whole field of international law with a view to selecting topics for codification, having in mind existing drafts whether governmental or not. For that purpose in 1949 the Secretary-General furnished the Commission with an important memorandum entitled *Survey of International Law in relation to the Work of Codification of the International Law Commission: preparatory work within the purview of article 18, paragraph 1, of the Statute of the International Law Commission*.[58] That memorandum has formed the basis for the Commission's programme of work throughout the whole fifty years that have elapsed since it was first considered. By 2000 the Commission had virtually completed the programme laid out in it, and started to search after new topics.[59]

The Commission held its first session in 1949. Its working arrangements are designed to ensure a regular interchange between the Commission's independent scientific work and the political input from governments, together with an interchange between governments themselves, in the Sixth Committee of the General Assembly. The major topics that have been codified through the work of the ILC include the law of treaties,[60] the law of State responsibility (see chapter XI below), the law of diplomatic and consular relations,[61] the law

58 UN doc. A/CN.4/1/Rev.1. That memorandum, submitted anonymously, was written by Sir Hersch Lauterpacht and is reproduced in his 1 *International Law* 445 (E. Lauterpacht ed., Cambridge University Press, 1970). And see statement of the Secretary of the ILC, Liang Yuen-li, at the Commission's 535th meeting, 9 May 1960, para. 33, YBILC 1960/I. The Commission has since conducted three further surveys, in 1962 at its 14th session, on the basis of a working paper prepared by the Secretariat, A/CN.4/145, YBILC 1962/II 84, in 1970 at its 22nd session on the basis of a review of the Commission's programme of work and of the topics recommended or suggested for inclusion in the programme, prepared by the Secretariat, A/CN.4/230, ibid. 1970/II 247, and at its 23rd session on the basis of a new Survey of International Law prepared by the Secretariat, A/CN.4/245, ibid. 1971/II 1.

59 ILC Rep. 2000 (A/55/10) Chap. IX/A and Annex.

60 Above note 3.

61 See the Vienna Convention on Diplomatic Relations, 500 UNTS 95; the Vienna Convention on Consular Relations (1963), 596 UNTS 261; the New York Convention on Special Missions (1969), 1400 ibid. 231; the New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973), 1035 ibid. 167; the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (1975) (not yet in force), see UN Conference on the Representation of States in their Relations with International Organizations of a Universal Character, II *Official Records* (A/CONF.67/16). Further in chapter VII § 7.06 below.

of the sea,[62] some aspects of the succession of States,[63] and the law of the non-navigable use of international watercourses.[64] That is a substantial part of general international law. It has removed many minor difficulties in the smooth conduct of international affairs, and opened the way to the solution of outstanding international differences. Major topics now under examination include international liability for injurious consequences arising out of acts not prohibited by international law, the responsibility of international organizations, diplomatic protection, and the unilateral acts of States. This in effect covers most of the core of modern international law. The Commission usually prepares its proposals as draft articles suitable for inclusion in a treaty, in three languages (English, French and Spanish). This is a drafting technique that calls for deep analysis and careful drafting and leads to well-crafted texts. The Commission's proposals must always be read with the Commentaries required by the Statute. They are collegiate pronouncements, although occasionally votes have been needed to reach a decision, when the Commission's members have been sharply divided. Over the years, as the quantity of treaties based on drafts of the ILC has grown, there is an increased interplay between the Court and the Commission. This is marked in judicial pronouncements relating to the law of treaties, but it is not limited to that topic.[65]

On the whole, the ILC concentrates on topics already regulated by customary law. Not being a political organ, it has not been used for the creation of new law such as the law of outer space or the exploitation of the mineral resources of the deep-sea beyond the limits of national jurisdiction. The General Assembly prefers to refer that type of topic, which also comes within the concept of the progressive development of the law, first to an *ad hoc* body with a nucleus of directly interested States, for a feasibility study and if appropriate to an appropriate committee with a defined mandate.

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62 On the first UN Conference on the Law of the Sea (1958), the first codification conference convened by the United Nations, see chapter VIII § 8.01 below.

63 Vienna Convention on Succession of States in respect of Treaties, above note 3; Vienna Convention on Succession of States in respect of State Property, Archives and Debts (1983), not yet in force; see UN Conference on Succession of States in Respect of State Property, Archives and Debts, II *Official Records* (doc. A/CONF.117/14); Nationality of natural persons in relation to the succession of States, Declaration annexed to A/Res/55/153, 12 December 2000.

64 A/Res.51/229, 21 May 1997 and doc. A/51/869 (not yet in force).

65 Occasionally the Court has cited texts that the Commission has adopted on first reading, and before it has received an input from Governments. See above notes 18 and 19 and Schwebel at note 55.

With the virtual completion of the codification of the 'core' elements of international law, the ILC is in a transitory stage. Diplomatic experience shows a marked hesitation in reopening matters that had been concluded earlier, especially as the major codification efforts were consummated in the period of the Cold War. Even the law of the sea, which went through a major renewal process in the period 1967 to 1982 (and in fact it is continuing), did not reopen major aspects based on customary law that were settled in the 1958 Conference. At most it made some minor adjustments in those provisions, and the 1982 Convention incorporates most of the substantive contents of the four Conventions of 1958. What is happening in the law of the sea, however, points to one way in which the written law can be kept up to date, and the application of a codification (or indeed any other continuing treatment) can be carefully monitored. The law of the sea is now an annual item on the agenda of the General Assembly. The basic documentation is provided by wide-ranging reports of the Secretary-General, and this activity has spawned many new developments. There is no reason why other topics should not also be accorded similar treatment, through the ILC.[66] The law of treaties is a dynamic topic which is at the centre of international actions, and could be a useful candidate for this kind of treatment.

§ 2.10. The Sixth Committee of the General Assembly

In the process of the progressive development and codification of international law, the Sixth Committee of the United Nations General Assembly has a special position. It is the arena in which the different legal philosophies confront each other. A Main Committee of the General Assembly, it deals with those items on the agenda of the session of the General Assembly that are allocated to it. It is for the most part fed by reports from the subsidiary organs that it has set up. The Committee assesses their work and gives them if not instructions, then at least directives for the next year. Of those subsidiary organs, the two important standing organs are the ILC and UNCITRAL. The *ad hoc* bodies are dissolved when they have completed their mandate. They are usually composed of States and are frequently employed to conduct preliminary and feasibility studies of a topic and prepare a draft text, whether of a resolution or of some sort of treaty. Today the most important of the *ad hoc* bodies is the Special

66 Something like this has been suggested by Vaughan Lowe in the 50th anniversary colloquium of the ILC, above note 55 129.

Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, first established in 1975. The Sixth Committee also dealt with the reports of the Preparatory Commission of the International Criminal Court. On the other hand, it has nothing to do with the ICJ (unless a special item is placed on the agenda), or the two criminal courts established by the Security Council, ICTY and ICTR, or with the law of the sea.

Being a Main Committee of the General Assembly, the Sixth Committee is a political body, and the general direction of its work is towards the formulation of policy, with special reference to the progressive development and codification of international law. Usually the States' representatives in that Committee are jurists, frequently seconded from the staff of the Legal Adviser of the Foreign Ministries (unless a Permanent Mission has a legal adviser on its staff). The most important item on its agenda is the report of the ILC. The Committee's debate on that report is thematically summarized by the Secretariat and transmitted to the ILC. That summary is particularly useful for the Commission's ongoing work. On the other hand, at times one receives an impression that insufficient attention is paid to that debate, both in the Commission (especially debates preceding a request that the Commission examine a given topic) and in academic circles. The debate is the political counterpart to the professional study of a topic by the ILC. It responds in part to major criticism of the weakness of the 1930 Conference.

Over the years close working arrangements have been developed between the Sixth Committee and the ILC. Many members of the Commission serve as their country's representative in the Committee, although in the Commission they sit as experts and not as national representatives. Special rapporteurs of the Commission frequently attend meetings of the Committee when their subject is under discussion. Conversely, many members of the ILC have been elected because of their service as representatives in the Sixth Committee. Their abilities and their capacities and specializations are known in the Committee, and this knowledge guides States when they come to elect the members of the ILC. In a similar way, the work of a representative on the Sixth Committee may give States an indication of competence to serve on other legal organs of the United Nations, including the ICJ.[67]

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67 The Sixth Committee also performs an important function in strengthening ties between the legal departments of the Foreign Ministries and the Office of Legal Affairs of the UN Secretariat and between themselves. The debate on the report of the ILC is the occasion for annual meetings of Legal Advisers of Foreign Ministries.

The Sixth Committee is not a general legal adviser to the General Assembly and it does not have a monopoly on legal matters. Co-ordination and internal legal advice on legal questions arising in other Committees is a matter for the internal organization of delegations. The First (Political and Security) Committee, for example, has adopted conventions relating to disarmament and outer space. The Second (Economic and Financial) Committee supervises matters relating to the environment, this partly because of the connection between the protection of the environment and development. The Third (Social, Humanitarian, Cultural) Committee is responsible at the level of the General Assembly for human rights matters, and it has been the venue in which most of the human rights conventions have been negotiated. The administrative aspects of the International Court of Justice come within the scope of the Fifth (Administrative and Budgetary) Committee. This is probably to the detriment of the Court since the Fifth Committee is quite properly not concerned with the work of the Court, only that its budget should be as low as possible commensurate with what the Fifth Committee and the powerful Advisory Committee on Administrative and Budgetary Questions (ACABQ), without professional advice, consider adequate. Only when the budgetary and administrative problems of the Court reached a catastrophic low level, in the mid-1990s, was the Sixth Committee asked to examine the matter before the Fifth Committee dealt with it. There is no reason why a delegate in the Sixth Committee should not participate in work of other Committees, if that is the delegation's view. This dispersion of legal work through the whole of the General Assembly demonstrates the all-round nature of today's international law, which cannot be fitted neatly into a single compartment.

General legal advice to the General Assembly and to all the other organs of the United Nations is the function of the Under Secretary-General, Legal Counsel and the Office of Legal Affairs.[68] Although the Sixth Committee is not a legal adviser of the General Assembly, the Secretariat has occasionally sought its approval of something that it was proposing. In particular, the Sixth Committee has kept an eye on the registration and publication of treaties and the UNTS, and on the legal publications of the UN.[69]

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68 For an unusual instance of a legal opinion from the Legal Counsel to the Security Council on the position of a State involved in a controversy, see the letter of the Under Secretary-General of 12 February 2002 (S/2002/161) on Western Sahara. The Under Secretary-General consulted with the State concerned in the preparation of that opinion.

69 *Developments* 405. Annex II of the Rules of Procedure of the General Assembly deals with methods and procedures of the General Assembly for dealing with legal and drafting questions, following A/Res. 684 (VII), 6 November 1952. It has not been followed.

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CHAPTER III

INTERNATIONAL COURTS AND TRIBUNALS

The international community needs peace. The international community needs courts. It needs courts which declare the law.

President G. Guillaume in the United Nations
General Assembly, 30 October 2001.

§ 3.01. Generalities

Having noted the place of judgments and arbitral awards in the thesaurus of international law, it is now necessary to see what type of body can make such judicial statements. One frequently hears that a system of law is incomplete without independent courts to apply that law. The international legal system has its own set of courts and tribunals.[1] In this context, 'court' refers to a corps

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1 The expression 'court or tribunal' is taken from Part XV of the UN Convention on the Law of the Sea of 1982 (1833 UNTS 3), the two terms being used indiscriminately in the statutes of present-day international judicial organs. Most standing international courts and tribunals have a systematic procedure for the publication and dissemination of their cases, including websites. Today, the *International Law Reports* (ILR) perform an essential function in reproducing in English almost every decision of every international court and tribunal, as well as decisions of national courts and tribunals that bear directly on issues of public international law, and decisions of certain treaty-monitoring bodies. Many are also published in ILM. And see J. G. Merrils, *International Dispute Settlement* (3rd ed., Cambridge University Press, 1998); J. Collier & V. Lowe, *The Settlement of Disputes in International Law* (Oxford University Press, 1999); K. Oellers-Frahm & A. Zimmerman, *Dispute Settlement in Public International Law* (2nd ed., Berlin, Springer, 2001); Ph. Sands et al. (eds.), *Manual on International Courts and Tribunals* (London, Butterworths, 1999), produced under the auspices of the Project on International Courts and Tribunals and the Project's website www.pcit-pcti.org. Space does not permit mention of *all* known existing courts and tribunals. In the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (merits) case, the ICJ distinguished between formal arbitration and a binding political decision made by a third party at the request of the States concerned. Judgment of 16 March 2001, para. 114. Such third party action does not come within the scope of this chapter.

of judges, whether a standing body or one created *ad hoc*, which is empowered by its constituent instrument *jus dicere*, to decide disputes or other international questions on the basis of international law, following accepted international judicial procedures based on the equality of the parties, the principle of procedural parity, and the collegiate decision. The decision (judgment or award), usually by majority vote, is final and binding on the parties, who are under the obligation to comply with it. That type of decision is known as *res judicata*. The parties may be two or more States, a State on one side and on the other an international intergovernmental organization, an individual (especially a juridical person) or other entity (including a competent non-governmental organization). On the other hand, as the International Court of Justice (ICJ) has explained, a commission that renders neither arbitral awards nor judgments is neither an arbitral nor a judicial body and cannot be seen as a tribunal.[2] An advisory opinion is a special form of judicial decision, in principle not binding, although its statement of the law is authoritative. Many international courts and tribunals are empowered to give advisory opinions in response to a duly authorized request for one (further in § 3.09 below). States and international organizations may agree in advance to accept an advisory opinion. as binding.

The dilemma of the international courts and tribunals is that recourse to them is never compulsory. Each instance of international litigation requires the consent of all parties. That explains why a systematic order of courts such as is found in the internal organization of States does not exist in the international sphere. There is a range of courts and tribunals, but it is very different from the court system within the States. It is not hierarchical. There are no 'higher' and 'lower' courts, and no standing system of appeal, cassation, case stated, or other recourse from one court to another.[3] Each international court or tribunal is an independent and autonomous entity, performing its tasks according to its constituent instrument. That instrument may be part of another broader treaty, such as the Statute of the International Court of Justice, which is annexed to and is an integral part of the Charter of the United Nations or the Statute of the International Tribunal for the Law of the Sea (ITLOS) which is Annex VI of the Convention on the Law of the Sea read with Part XV (Articles 279 to

2 *Land and Maritime Boundary between Cameroon and Nigeria* (Preliminary Objections) case, ICJ Rep. 1998, 275,. 307 (para. 69).

3 The constituent instrument may provide for an appeal. The Convention on International Civil Aviation of 1944 gives the Council of the ICAO power to settle disputes between member States, with the possibility of appeal to the ICJ. 15 UNTS 295. See *Appeal Relating to the Jurisdiction of the ICAO Council* case, ICJ Rep. 1972, 46.

299) of the Convention; or it may be an independent instrument having the sole purpose of establishing a particular tribunal. It follows that there is no system of *transferring* a case from one international court to another. If a party discontinues a case in a court, that is that. If that party then brings the same case in another court, it is there an entirely new case, with the consequences that follow in the circumstances. Furthermore, international disputes cannot be graded, like eggs, into 'large' and 'small' disputes as a basis for their allocation to different courts or chambers.[4] For a State, every dispute is important. If a court or tribunal has jurisdiction, it must deal with the case, whatever its 'size' or international importance, and whatever the significance of the legal issues that it raises.[5]

The international community is not organized on any theory of the separation of powers, so there is no 'judicial power' alongside an executive and a legislative power such as is common to most States. No standing international machinery exists to ensure compliance with the terms of an international judgment. Article 37 of the Hague Convention of 1907 on the Pacific Settlement of International Disputes provides that recourse to arbitration implies an engagement to submit in good faith to the award.[6] Article 94 of the UN Charter obliges each member of the UN to comply with the decision of the ICJ in any case to which it is a party, with provision for recourse to the Security Council in the event of non-compliance. Article 296 of the Law of the Sea Convention provides that any decision rendered by a court or tribunal having jurisdiction under the Convention shall be final and shall be complied with by all the parties to the dispute. Annex VI, Article 39, on the Seabed Disputes Chamber, provides that the Chamber's decisions 'shall be enforceable in the territories of the States

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4 Cf. in the Talmud, 'A case over one penny is no less important than a case over millions'. *Sanhedrin* folio 8a. Suggestions are heard that to relieve the burden today on the ICJ, some form of screening should be established to decide whether a case should go to a chamber or to the full Court. There is little support for this idea.

5 On the pacific settlement of disputes generally, see the remarkable series commenced by the League of Nations and continued by the UN as follows: League of Nations, *Arbitration and Security: Systematic survey of the arbitration conventions and treaties of mutual security deposited with the League of Nations* (doc. C.34.M.74.1926.V.); 2nd ed. revised and augmented, containing all treaties registered before December 15th, 1927 (doc. C.653.M.216.1927.V.); UN, *Systematic Survey of Treaties for the Pacific Settlement of International Disputes 1928–1948* (1949); *A Survey of Treaty Provisions for the Pacific Settlement of International Disputes 1949–1962* (1966). And see UN, *Handbook on the Peaceful Settlement of Disputes between States*, doc. OLA/COD/2394 (1992).

6 Hague Convention No. I of 1907, 205 CTS 233, Permanent Court of Arbitration. *Basic Documents, Conventions, Rules, Model Clauses and Guidelines* 17 (The Hague, 1998).

Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought'. No other sanction exists. States can include arrangements for compliance in the constituent instrument of the court or tribunal or in their agreement to submit a case to litigation. If non-compliance with the decision becomes a threat to the peace, the normal peace-maintenance machineries, especially those of Chapters VI and VII of the Charter, can be invoked. Non-compliance can also lead to an instance of State responsibility.[7] All are courts of first and last instance, and the decision of an international court or tribunal is final for the parties and without appeal.[8]

In practice, with one or two exceptions (later subjected to appropriate political treatment) States do comply with international decisions if they have agreed to the judicial settlement of a given dispute. Difficulties have arisen in cases of an 'unwilling respondent'. That occurs when proceedings are brought unexpectedly against another State without its real agreement, as a technical matter, the jurisdiction resting on a general compromissory agreement in force between the parties. This is sometimes seen as a procedural abuse although the International Court of Justice has never rejected a case on that ground. States should be familiar with their treaty obligations, including their obligation to accept the jurisdiction of an international court or tribunal for disputes over the interpretation or application of a treaty. *Ignorantia juris non excusat*.

Following from this, there is no automatic process in the international community for changing the law as stated by an international court. The only way to revise the law as stated by a court is by treaty, and that can require time.[9] The codification process is a convenient way of doing this.

Another problem arises when the internal courts of a State that has been a party to litigation are asked to decide a dispute in which the pronouncement of an international court or tribunal is relevant. The principle of the independence of the judiciary makes it difficult if not impossible for a decision of an international court or tribunal to impose an obligation directly on an internal tribunal, unless the national legislation makes provision for that. Thus, in the *Socobel* case in Belgium, the Belgian Tribunal did not give direct effect to the executory part of the decision of the Permanent Court in the *Société Commer-*

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7 Cf. the *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* adv. op., ICJ Rep. 1999, 62. 87 (para. 62).

8 Hague Convention No. I of 1907, Art. 81 (above note 6); Statute of the ICJ, Art. 59; Statute of the ITLOS, Art. 33 (above note 1).

9 An example of this is the dissatisfaction in professional circles at the decision of the PCIJ in the *Lotus* case, Ser. A No.10 (1927). That was finally overcome by Art. 97 of the UN Convention on the Law of the Sea of 1982 (above note 1).

ciale de Belgique case.[10] In the *Immunity from Legal Process* advisory opinion, the International Court was careful not to impinge upon the judicial independence of the Malaysian courts. It indicated the duties of the Government, and stressed that the courts are organs of the State and that their actions could cause an instance of State responsibility. At first it seems that a Malaysian court ruled that the special rapporteur concerned does not have immunity, thus disregarding the advisory opinion. Later, however, the Court ruled that since the Government had agreed to apply the advisory opinion, the Court should recognize the immunity.[11] In Overseas France, the Court of Appeal of Saint Denis, Reunion, has held that it must give effect to a judgment of the ITLOS regarding the prompt release of a vessel since a treaty to which France is a party is part of the law of the land.[12] On the other hand, in the *LaGrand* case, the International Court found that the application of a rule of internal law by the courts of the respondent State had the effect of preventing full effect from being given to a treaty rule binding on that State, and thus constituted a breach of that treaty attributable to that State. However, the choice of means to prevent a recurrence from the point of view of the internal law was left to the respondent.[13]

§ 3.02. Types of courts and tribunals

International courts and tribunals fall into one of two broad classes – standing courts and *ad hoc* tribunals. The two standing judicial organs are the International Court of Justice and the ITLOS. The jurisdiction of the ICJ is universal,

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10 18 ILR 3. And see I *Law and Practice* 221.

11 *Immunity from Legal Process* adv. op. above note 7 at 88 (para. 63). See ECOSOC Res. 1999/64, 30 July 1999 and the subsequent developments recounted in ICJ *Yearbook 1999-2000* at 280, and the judgment of the Kuala Lumpur Court in *Berhad et al.* v. *Cumaraswamy*, Judgment of 7 July 2000 (on file with the author). See also in the Iran–U.S. Claims Tribunal Case A27, *Iran* v. *U.S.A.*, Award of 5 June 1998 (not yet published).

12 Court of Appeal of Saint Denis (Reunion), in the cases of *Sobrido* v. *French State* and *Merce Pesca* v. *French State*, judgments of 21 March 2000 Numbers 266/2000 and 267/2000, ITLOS *Yearbook 2000*, 151, 155, giving effect to the bond set by ITLOS in the *Camouco* case, ITLOS Rep. 2000, 10. The Tribunal d'Instance of Saint Paul gave a similar decision giving effect to the bond set by ITLOS in the *Monte Confurco* case (ITLOS Rep. 2000, 80), in its order of 12 January 2001, Case No. 12-00-000951. ITLOS *Yearbook* 2001, 156.

13 *LaGrand* case, Judgment of 27 June 2001, paras. 90, 125. Similarly, in the *Arrest Warrant of 11 April 2000* case, the Court found that Belgium must, by means of its own choosing, cancel the impugned arrest warrant and so inform the authorities to whom that warrant was circulated. Judgment of 14 February 2003, operative para. 78 (3).

both *ratione personae* and *ratione materiae*. That of the ITLOS, although broad, is limited in both respects by the Law of the Sea Convention. There are four types of *ad hoc* tribunals: one created to settle an existing dispute,[14] one created as part of the settlement of a dispute to determine outstanding claims arising from the incident at the root of the dispute,[15] one created *ad hoc* under a standing agreement for the settlement of any future dispute between the States parties to the treaty,[16] and one created for the settlement of future disputes over the interpretation or application of the treaty itself.[17] The constituent instrument specifies the law to be applied.[18]

The European Court of Justice is the judicial organ of the European Union (Community), a regional organization of economic integration in which the member States have pooled some of their sovereignty for defined matters (see chapter VII § 7.05 below). To some extent this is an international court in so far as the parties have empowered it to decide disputes between States members of the Union. However, its jurisdiction is limited to the States members of the Union, and the law that it applies is the community law of the Union. It also has recourse jurisdiction from the courts of the members of the Union, exercised following the national law, and is in that way part of the legal systems of the member States.[19] It is a court *sui generis*.

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14 An arbitral tribunal to settle a particular dispute is an example of this category (see § 3. 06 below).

15 The Iran-U.S. Claims Tribunal is an example of this category. The dispute between the two countries was settled by the Algiers Declaration of 19 January 1981. The Tribunal settles intergovernmental financial claims and claims of citizens of one country against the other. And see *Iran-U.S. Claims Tribunal Reports* (Cambridge University Press). Another example is the Nuclear Claims Tribunal to settle claims in the Marshall Islands arising out of the nuclear testing programme of the United States in the 1950s, website www.tribunal-mh.org.

16 For example, the Commission established by Chile and the United States under a 1914 Treaty for the Settlement of Disputes that may occur between the two countries, to settle the dispute concerning compensation for the deaths of Letelier and Moffit, under a special agreement of 11 June 1990. On that case (1992), see 88 ILR 727.

17 For an example, see Art. 14 of the Agreement between Israel and the Federal Republic of Germany of 10 September 1952, 162 UNTS 205.

18 On administrative tribunals, see chapter XII note 78 below.

19 Cf. Case No. 26-62, *NV Algemene Transport- en Expeditie Onderneming Van Gend & Loos* v. *Nederlandse Tariefcommissie,* [1963] ECR 1, 12; 2 [1963] *Common Market Law Rep.* 15. There is a certain parallelism between the European Court and the Supreme Court of the United States, which has original jurisdiction to decide disputes between states of the Union. In so acting, it purports to apply international law, but in fact it is applying international law subject to the Constitution of the United States, and to a large extent as interpreted by the United States. Other federal States have also conferred

In resolutions 687 (1991), 3 April 1991, and 692 (1991) 20 May 1991, the Security Council, acting under Chapter VII of the Charter, decided that Iraq is liable under international law 'for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait.' It established the United Nations Compensation Commission to administer a Fund to pay the compensation due. This is a subsidiary organ of the Security Council, and it operates like a national claims commission appointed to distribute the proceeds of a block settlement of an international claim. This Commission, while it works on the basis of the general international law, reacts to claims against the Fund (not against Iraq) submitted through Governments. Individuals do not have direct access to it. It is a special type of international tribunal, to deal with block claims rather than individual claims.[20] The view is sometimes expressed that the determination of the international responsibility of Iraq and its consequences was not a matter for the Security Council and should have been referred to the International Court of Justice. But given the circumstances, including the consensual basis of the Court's jurisdiction and that the compensation was to be paid out of Iraqi assets made available in consequence of Security Council actions under Chapter VII of the Charter, this view is not easy to sustain.

These international courts and tribunals deal for the most part with the international obligations and responsibilities of States. Courts to decide on

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similar jurisdiction on their supreme court, and here too international law is frequently applied. Sometimes this type of case is settled by an international arbitration. Cf. the *Dubai-Sharjah Border Arbitration* (1981) between two units of the United Arab Emirates, the arbitration being conducted under the sponsorship of the Supreme Council of the Federation (91 ILR 543); and the arbitration between Newfoundland/Labrador and Nova Scotia concerning portions of the limits of their offshore areas (conducted with the consent of the federal authorities), first phase, Ottawa, May 2001, second phase, Ottawa, March 2002, available at <http://www.boundary-dispute.ca/>. To some extent the new Central American Court of Justice, the principal judicial organ of the Central American Integration System, has some similarities with the European Court of Justice. On that Court, established by the Convention on the Statutes of the Central American Court of Justice, 10 December 1992, see 34 ILM 921 (1995).

20 Doc. Symbol S/AC.26/ – .109 ILR is devoted entirely to the work of this Commission, and it includes all the relevant documentation. See further, R. B. Lillich, *The United Nations Compensation Commission* (Ardley NY, Transnational Publisher, 1995); N. Wülher, 'Institutional and Procedural Aspects of Mass Claims Settlement Systems: The United Nations Compensation Commission', Permanent Court of Arbitration/Peace Palace Papers, *Institutional and Procedural Aspects of Mass Claims Settlement Systems* 23 (The Hague, Kluwer Law International, 2000).

criminal liability of a State do not exist, partly because the notion of the criminal liability of a State under international law is not part of contemporary international law. On the other hand, courts and tribunals to try individuals accused of grave violations of international law have come into existence, see chapter v §§ 5.07 to 5.09 below.

Not all these courts and tribunals exist to settle international disputes between States. Mixed Claims Commissions, Compensation Commissions and the like are the product of an agreement or other binding instrument that settles the international position of the States and makes consequential arrangements for the disposal of claims arising out of the incident that led to the arrangement in the first place. Those commissions are charged with deciding individual claims against a State. They can also be empowered to decide on the mutual claims of the governments against each other, in which case they act as international tribunals of the first type. Likewise, the international criminal courts do not function as dispute settlement machinery, but have a different purpose altogether, particularly as a contribution to the restoration of peace and legality in international relations.

The existence of standing international tribunals with universal jurisdiction, and particularly the International Court of Justice, may have an important consequence for the settlement of legal disputes. The principle has been enunciated by Sir Gerald Fitzmaurice with regard to a long-standing diplomatic dispute characterized by a series of diplomatic protests. He has contended that if a proposal is made for reference to international adjudication but not accepted by the other party, the refusing party may be taken to have abandoned its claim. This does not confer jurisdiction on an international court or tribunal: that requires consent in the usual way. What it means is that repeated routine protests will not necessarily keep the dispute open if the possibility exists to have the matter referred to an existing international court or tribunal and the claimant State makes no move to have recourse to it.[21]

§ 3.03. Fundamentals of jurisdiction of international courts and tribunals

The fundamental principle governing the jurisdiction of all international courts and tribunals to decide contentious cases between States is that the jurisdiction depends exclusively on the consent of the parties. The basic feature of international judicial procedure is the equality of the parties in appropriate adversarial

21 G. G. Fitzmaurice, I *The Law and Procedure of the International Court of Justice* 158 (Cambridge, Grotius Publications, 1986).

positions, the principle of procedural parity. Jurisdiction is consensual *ad litem*. Even the establishment of courts and tribunals by the Security Council acting under Chapter VII is consensual, since through membership in the United Nations a State has given its consent to Security Council action under the Charter. That is matched by the power of every international tribunal to decide any matter of its own jurisdiction, unless its constituent instrument provides otherwise (the *competence-competence, la compétence de la compétence, Kompetenz-Kompetenz* as this is variously known). This refers to jurisdiction *ratione personae* and *ratione materiae*, and to its scope *ratione temporis*. This requirement of consent goes further. It covers, in principle, how the parties shall seise the court or tribunal of a case, that is whether unilaterally by one party or jointly by both parties, and in some respects the rules of law to be applied. For standing bodies, the basic instrument regulates many of these aspects, at least in a residual form. In this context, the term *party* refers not merely to the parties to the litigation, but parties whose interests are an essential element of the case.[22] Article 36 (6) of the Statute of the International Court of Justice puts this tersely: 'In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.' Similar provisions appear in almost every other constituent instrument of an international court or tribunal. A major consequence of these principles is that contentious international litigation is essentially bilateral and for States not taking part in it, any case is *res inter alios acta*. The basic instruments of the standing courts and tribunals arrange for strictly controlled intervention by third States, something rarely encountered and even more rarely admitted. Whether any form of intervention is to be admitted in proceedings before an *ad hoc* body is entirely a matter for the parties. The force of this is so strong that it can override potential issues of concern to the whole international community that a case can present. The International Court of Justice has recognized this in the passage from the *East Timor* case quoted above at chapter II note 13. This prevents the institution of contentious cases as class actions.

In 1959 the Institute of International Law adopted a resolution in which it declared that recourse to the International Court or another international court or an arbitral tribunal can never be regarded as an unfriendly act towards the

22 The leading cases on the 'essential parties' rule are the *Monetary Gold removed from Rome* and the *Certain Phosphate Lands in Nauru* cases, ICJ Rep., 1954, 19 and 1992, 240; and in arbitration proceedings, the Award of 5 February 2001 in the *Larsen* v. *Hawaiian Kingdom* case, PCA website.

respondent State.[23] The General Assembly has since repeated that thought in the Manila Declaration on the Pacific Settlement of International Disputes annexed to resolution 37/10, 15 November 1982. State practice does not support that idea, and the introduction of the concept of the unwilling respondent shows its unreality. Unilateral proceedings have been instituted without previous notice, accompanied by a request for the indication of provisional measures, in a large number of instances of political tension between the States concerned.[24] At the same time, diplomatic relations between those States have become strained, if not broken.

The decisions of international judicial bodies have to be reasoned. Article 52 of the Hague Convention of 1899 laid this down,[25] and later instruments have repeated it. At the time that was an innovation. Today the right of every member of the bench to attach an individual opinion, whether concurring or dissenting or mixed, goes without saying. It serves as a guarantee that the contentions of the losing party have been considered. That enhances the authority of the decision and makes it easier for the losing party to accept the decision. On the other hand, too extensive a use of the right to append separate and dissenting opinions can fracture the judicial statement and weaken its standing as a statement of the law. Many nineteenth-century arbitral awards were not reasoned. That did not detract from their authority to decide the dispute. Today the decisions of all international courts and tribunals are subject to extensive commentary in professional journals, and that adds to the natural tendency of the judges to produce the most convincing reasoning.

§ 3.04. Provisional measures of protection

An important aspect of the work of international courts and tribunals today concerns requests for provisional measures of protection. These are requests by a party (usually the applicant in the case) for a decision by the court or

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23 48 Annuaire IDI 380 (1959).

24 Instances of this include the *Nicaragua, Border and Transborder Armed Actions, Application of the Genocide Convention, Oil Platforms, Aerial Incident of 3 July 1988,* the *Lockerbie* cases, *Cameroon-Nigeria*, the ten *Use of Force* and the three *Armed Activities on the Territory of the Congo* cases. Only four recent cases introduced by unilateral application have not led to a serious deterioration in the relations between the two States concerned: the *Passage through the Great Belt*, the *Delimitation in the Jan Mayen Area*, the *LaGrand* and the *Avena and other Mexican* Nationals cases. It appears that in the last twenty years the unilateral institution of proceedings is an unfriendly act.

25 187 CTS 410; PCA, op. cit. above note 8, 1.

tribunal seised of the case regarding actions by the adverse party (usually the respondent) to preserve the subject-matter of the dispute pending the final decision. During the last quarter of the century this procedure took on new forms: conceptions of what rights of the applicant are appropriate for judicial protection before the final decision are changing, and this is leading the ICJ in particular into a posture of crisis-management.

In one respect, the mere institution of legal proceedings by one State against another is a form of protection of the rights of the parties. The reason is that their rights and duties are normally established by reference to the situation existing on the day that the proceedings were instituted. Action by one party detrimental to the rights of the other does not affect that legal position. However, internal litigation experience shows that this principle is not always adequate, and that a tribunal may have to deal with the situation created by the respondent's intervening actions that could prejudice the tribunal's ability to render an effective decision on the merits. That is what lies behind the provisions of the constituent instruments of modern international courts and tribunals, empowering them to decide on provisional measures of protection. A State's participation in that instrument is sufficient to supply its consent to that action by the court or tribunal. The exercise of this power depends on the existence of pending proceedings between the parties, to which it is incidental. There is no element in a decision on provisional measures that could be identified as *res judicata*, and all the pronouncements made in connection with it are provisional. The measures too, if directed, are limited in time until varied or terminated or until the final determination of the case, which can also include provisions regarding their consequences.

The establishment of the Permanent Court of International Justice (PCIJ) in 1920 first made it possible to introduce the idea of provisional measures of protection into international practice, although this was controversial at the time and has remained so until 2001.[26] Article 41 of the Statute of that Court, repeated as Article 41 of the Statute of the ICJ, provides:

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26 E. Dumbauld, *Interim Measures of Protection in International Controversies* ('s-Gravenhage, Nijhoff, 1932); J. B. Elkind, *Interim Protection: A Functional Approach*, (The Hague, Martinus Nijhoff, 1981); J. Sztucki, *Interim Measures of Protection in the Hague Court: An Attempt at a Scrutiny* (Deventer, Kluwer Law and Taxation, 1983). L. Collins, 'Provisional and protective Measures in International Litigation', 234 *Recueil des cours* 9 (1992). No such idea appears in the Hague Conventions of 1899 and 1907. However, the new sets of optional rules prepared by the Permanent Court of Arbitration (above note 6) now include appropriate provisions.

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

1. La Cour a le pouvoir d'indiquer, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire.
2. En attendant l'arrêt définitif, l'indication de ces mesures est immédiatement notifiée aux parties et au Conseil de sécurité.

In that provision the English and French texts are not in harmony, and in the English text the words *indicate* and *suggest* are both without clear legal meaning.[27] Given the very general language and that unusual terminology, the law that has developed on the matter is judge-made law. For a long time the ambiguous language of Article 41 and the divergences between the two texts fuelled a sharp controversy between writers on whether an indication of provisional measures by the Court was binding. The Court developed the practice that it could indicate provisional measures if prima facie it had jurisdiction over the merits, a low threshold requiring that the absence of jurisdiction be manifest.[28] For a long time the Court was careful not to take a definite position on this controversy so long as it could avoid doing so. However, in 2001 it subjected the matter to detailed review in the *LaGrand* case. It interpreted Article 41 in light of the object and purpose of the Statute together with the context of Article 41. The context in which that provision has to be seen within the Statute is

27 In the final stages of the drafting of the Statute of the PCIJ, in the English text the words *ought to* replaced *should* in the first paragraph, and *suggested* replaced *indicated* in the second. The purpose of those changes was to improve the concordance of the two versions. See League of Nations, *Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant and the adoption by the Assembly of the Statute of the Permanent Court of International Justice* 114 (Geneva, League of Nations, 1920). The opinions appended to the second Order on provisional measures in the *Application of the Genocide Convention* case illustrate the nature of this controversy. ICJ Rep. 1993, 322.

28 Instances have occurred, notably the *Anglo-Ivanian Oil Co.* case (1951, 1952), in which the Court has established that prima facie jurisdiction, only to find later that it did not have jurisdiction over the merits. On these two related developments, see Sh. Rosenne, 'A Role for the International Court of Justice in Crisis Management?', *State, Sovereignty and International Governance* 195 (G. P. H. Kreijen *et al* eds., Oxford University Press, 2002); 'Provisional Measures and *Prima Facie* Jurisdiction Revisited', 1 *Liber Amicorum Judge Shigeru Oda* 515 (The Hague, Kluwer Law International, 2002).

> [t]o prevent the Court being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined in the final judgment of the Court The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article (para. 102).[29]

With that, the Court has finally settled a controversy that has aggravated international litigation practice since the establishment of the PCIJ.

Although the Security Council is to be notified of any provisional measures indicated under Article 41 of the Statute, there is nothing in the Security Council's Provisional Rules of Procedure (S/96/Rev.7) requiring it to treat this notification in any particular way. On one occasion in which an approach was made to the Security Council for enforcement of provisional measures, not only was the approach not based on Article 41, but the Council itself, during the Cold War, was unable to take any effective measures.[30] On the other hand, in two cases in which the broad tension was already on the agenda of the Security Council, the Council adopted resolutions calling for observance of the relevant orders.[31] This ambivalence can be a source of international tension. The fact that both the International Court of Justice and ITLOS may order provisional measures only in a pending case precludes the use of this procedure for purely precautionary purposes unrelated to a case actually pending.

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29 Judgment of 27 June 2001, paras. 98 to 109. In the operative clause of that judgment the Court found that the respondent had breached the obligations incumbent on it under an order indicating provisional measures (para. 128 (5)). The President of the Court, Judge Guillaume, in his statement at the 56/32nd meeting of the General Assembly on 30 October 2001, explained that the Court anticipated that in future provisional measures will as a result be better executed than when the matter was subject to doubt, and he expressed the hope that the Court's contribution to the maintenance of international peace and security 'will thereby be enhanced'. Statement of the President of the Court from the Court's website, p. 3.

30 See the proceedings in the 559th to 563rd and 565th meetings of the Security Council in 1951 in connection with the *Anglo-Iranian Oil Co.* case. 6 SCOR.

31 S/Res. 461 (1979) in connection with the American hostages in Tehran, and S/Res. 819 (1993) in connection with the situation in the former Yugoslavia. See also the letter of the President of the Security Council of 29 May 1996 in connection with the dispute between Cameroon and Nigeria. Doc. S/1996/391, *Resolutions and Decisions of the Security Council 1996* (doc. S/INF.52).

During the last twenty or so years, requests for provisional measures have gone beyond measures required to protect the rights which the requesting party is claiming. The Court has been cautious when faced with far-reaching claims. For instance, it has strongly asserted that it cannot make an order indicating provisional measures addressed to States or entities not parties to the proceedings, or an order that would 'clarify' action required of third States by virtue of decisions of the Security Council.[32] At the same time, in proper cases the provisional measures procedure can be a factor in maintaining or restoring international peace. There is little doubt that the order in the *Anglo-Iranian Oil Co.* case was a factor in defusing tension. In the same way, the order in the *Nicaragua* case, especially its indication that the mining of Nicaraguan ports should cease, was possibly a factor in reducing that instance of international tension. In other cases, provisional measures orders have been used to remedy frontier incidents and their tensions in pending cases and restore the *status quo*, essential if the judicial proceedings are to continue in an appropriately calm atmosphere, and to ensure the preservation of evidence necessary for the trial on the merits of a case. In such instances the Court has been assisted by, or has itself assisted, parallel activities by the Security Council or by the competent regional organization.

The situation following the dissolution of Socialist Federal Republic of Yugoslavia (SFR) provided significant instances of attempts to invoke Court procedures alongside the Security Council in a grave crisis in which major use of armed force was characteristic. This first occurred in 1993 when Bosnia and Herzegovina brought the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case against Yugoslavia and simultaneously requested provisional measures.[33] Bosnia claimed that the Court should reinterpret SC resolution 713 (1991), 25 September 1991, which had imposed

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32 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Further Provisional Measures) case ICJ Rep. 1993, 325, 344 (para. 40). I have to disclose an interest here, having represented Yugoslavia in that phase of the case. At the Meeting of Experts convened at The Hague in May 1999 in honour of the centenary of the Peace Conference of 1899, under the rubric of the International Court of Justice the Experts drew attention to the need to solve existing problems of requesting interim measures of protection, including due regard for abuse of the system of the compulsory jurisdiction of the Court under Art. 36 (2) of the Statute. Doc. A/54/381, para. 93. Reproduced in F. Kalshoven (ed.), *The Centennial of the First International Peace Conference: Reports and Conclusions* 457 (The Hague, Kluwer Law International, 2000).

33 See previous note.

an arms embargo on all the territories of the former SFR. That the Court refused to do, because had it done this without the consent of the Security Council, it would have immediately thrown itself into direct confrontation with the Security Council with no apparent advantage to anyone. The best known, and probably the most controversial of these cases are the two *Lockerbie* cases brought by Libya against the United Kingdom and the United States. Here the Court accepted that possible action on a request for the indication of provisional measures was trumped by a Security Council resolution under Chapter VII of the Charter. To put this in perspective, however, it should be kept in mind that the real purpose of that request for provisional measures was indeed to forestall Chapter VII action by the Security Council which was already itself seised of the situation. In its judgments on preliminary objections, the Court also kept open the issue whether the relevant Security Council resolutions allowed it to deal with the merits of the cases, while at the same time deciding that they did not affect its jurisdiction to deal with the merits.[34] On occasion a carefully worded refusal by the Court to indicate provisional measures has laid a basis for satisfactory negotiations to settle the dispute, or prevent it from growing more serious.[35]

The ten *Legality of Use of Force* cases brought by Yugoslavia in April 1999 against NATO members are the boldest attempt to involve the Court in crisis management. Yugoslavia requested provisional measures to stop the NATO bombing of Serbia, invoking as a title of jurisdiction the compromissory clause (Article IX) of the Genocide Convention and, where appropriate, declarations accepting the compulsory jurisdiction. Yugoslavia's major difficulty, which it could not overcome, was that there was no jurisdiction as regards the principal respondent, the United States of America (and as it turned out, also as regards Spain). The Court had no choice but to remove those two cases from its list. In the other eight cases, applying the test of prima facie jurisdiction over the merits, the Court found that although it might have jurisdiction, it could not indicate provisional measures (which in the circumstances would have been useless in any event) because it did not find that the circumstances brought to

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34 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*, (Provisional Measures), ICJ Rep. 1992, 3 (U.K.), 114 (U.S.A.), (Preliminary Objections), ibid. 1998, 9, 26 (para. 46) (U.K.); 115, 131 (para. 45) (U.S.A.). And cf. operative paragraphs 2(a) and 3 of each judgment. These cases were discontinued with prejudcie on 10 September 2003.

35 A classic illustration of this is the *Passage through the Great Belt* case, ICJ Rep. 1991, 12.

its notice came within the scope of the Genocide Convention or Yugoslavia's acceptance of the compulsory jurisdiction. However, in all those orders, including those in the cases against Spain and the United States, the Court included three paragraphs in which it gave expression to its views on the legal duties of all the parties in the situation.[36]

Those cases show several things. They indicate that a State is prepared in very special circumstances to invoke Court procedures, especially its power to indicate provisional measures of protection, even if it has only a slender chance of establishing prima facie jurisdiction over the merits. On the other hand, the Court has shown itself careful not to trespass on the authority of the Security Council to deal with a crisis situation involving the use of armed force if to do so would exceed the judicial function in the particular case. At the same time it will not hesitate to act even if the general situation is on the active agenda of the Security Council, provided that it is satisfied that its action comes within the judicial competence in that case. This is emphasized by the last case in this series, the *Armed Activities on the Territory of the Congo (Congo* v. *Uganda*) case, where the Court indicated as provisional measures virtually the same measures as had been ordered by the Security Council under Chapter VII of the Charter a few days earlier in its resolution 1304 (2000), 16 June 2000.[37]

Although the prima facie mainline jurisdiction is a low threshold, the Yugoslavia cases of 1999 demonstrate that even that low threshold has to be reached before the Court will entertain the requests. Of all the cases examined in this context, the prima facie jurisdiction was later upheld in preliminary objection proceedings except in the *Anglo-Iranian Oil Co.* case. That was the only instance in which the Court was to find that it had no jurisdiction over

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36 *Legality of Use of Force* (hereafter *Use of Force*) cases, ICJ Rep. 1999, 124 (Belgium), 259 (Canada), 363 (France), 422 (Germany), 481 (Italy), 542 (Netherlands), 656 (Portugal), 761 (Spain), 826 (United Kingdom), 916 (United States). The Court found that it did not have prima facie jurisdiction required for it to indicate provisional measures in eight of those cases (Belgium, Canada, France, Germany, Italy, Netherlands, Portugal and the United Kingdom), and that it had no jurisdiction at all under the Convention following reservations to Article IX by Spain and the United States. The eight cases are therefore proceeding. The respondents raised preliminary objections to the jurisdiction and to the admissibility. After the change of Government in Yugoslavia, Yugoslavia asked for a stay of proceedings or a 12-month extension of the time-limit. Orders of 14 March 2001 and 29 March 2002 And see chapter XII note 38 below.

37 ICJ Rep. 2000, 111. It appears that the Congo attempted to obtain from the Court measures that the Security Council had not ordered. See the statement of Mr Reichler for Uganda in CR2000/20, 26 June 2000, p. 27; and see the striking opinion of Judge Oda, who doubted if this was a genuine case.

the merits. Even there, however, it formally stated that the order indicating the provisional measures only ceased to be operative upon the delivery of the judgment finding that the Court was without jurisdiction in the case.[38]

§ 3.05. The International Court of Justice

Article 7, paragraph 1, of the Charter establishes the International Court of Justice as one of the principal organs of the United Nations. Article 92 states that the Court 'shall be the principal judicial organ of the United Nations' and shall function in accordance with the Statute which is annexed to the Charter, repeated in Article 1 of the Statute. Article 92 of the Charter (but not Article 1 of the Statute) goes on to say that the Statute is 'based upon the Statute of the PCIJ and forms an integral part of the Charter'. That was a fundamental change in the Court's constitution and status in comparison with those of the PCIJ.[39]

On the basis of Article 14 of the Covenant, the League established the PCIJ in 1920. That Court commenced its activities in 1922. As an international organ, it was technically independent of the League, although its expenses were a charge on the League's budget and the Council and Assembly of the League elected the judges. To become a party to the Statute was entirely separate from the act of obtaining admission to the League. The Court's Statute was largely based on a proposal for a Permanent Court of Arbitral Justice adopted by the Second Hague Peace Conference of 1907.[40] That had never entered into force,

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38 In the *Interhandel* case the Court held that it had prima facie jurisdiction to indicate provisional measures but in the circumstances found that there was no need for it to do so. Later it found that the claim was inadmissible. ICJ Rep. 1957 157, 1959 3.

39 The Court's publications include an annual series of *Reports* (bilingual), the *Pleadings* in each case, a *Yearbook* in separate English and French editions, a *Bibliography* (bilingual) and basic texts under the name of *Acts and Documents* (bilingual) The Court submits an annual report to the United Nations General Assembly, included as a Supplement to the *Official Records* of each session. It is usually presented by the Court's President. The Court's website address is www.icj-cij.org. Written and oral pleadings of current cases are included on that website, and the inclusion of the pleadings in past cases is under examination.

40 For that proposal, see Sh. Rosenne (ed.), *The Peace Conferences of 1899 and 1907 and International Arbitration: Reports and Documents* 169 (The Hague, T.M.C. Asser Press, 2001). The leading treatises on the PCIJ are: Institut für ausländisches öffentliches Recht und Völkerrecht, B. Schenk von Stauffenberg (ed.), *Statut et Règlement de la Cour permanente de Justice internationale: Eléments d'interprétation* (Berlin, Carl Heymans Verlag, 1934); M. O. Hudson, *The Permanent Court of International Justice 1920–1942* (New York, Macmillan, 1943). On the present Court, see *Law and Practice*.

since the Conference could not agree on a method of electing the judges. The establishment of the League, with a small Council dominated by its permanent members, the Great Powers of the time, and an Assembly in which all its members could participate on a footing of equality, made a solution possible for that problem, through simultaneous election by the Council and by the Assembly, requiring an absolute majority in each organ voting concurrently.

The discussions leading to the UN Charter showed general agreement to continue the Court in an appropriate form. More controversial was whether it should be the same or a new Court. The provisions inserted in the Charter (Articles 92 to 96) are the compromise: the Statute of the PCIJ was the basis for the Statute of the present Court which is a new institution under a new name. The main change was in the constitution. Alongside the establishment of the Court as a principal organ of the United Nations was the inclusion of Article 93 providing that all members of the United Nations are *ipso facto* parties to the Statute of the Court, with arrangements for States not members of the United Nations to become parties to the Statute.[41] In the League era, the act of becoming a party to the Statute showed a commitment to the judicial settlement of international disputes. The automatic participation in the Statute of all members of the UN has depreciated that element of commitment. The present Statute also contains provisions – Articles 36 (5) and 37 – designed to confer on the ICJ the contentious jurisdiction of the PCIJ as it stood when that Court went out of existence (technically on 19 April 1946).

The Court consists of fifteen judges elected by an absolute majority in the Security Council and the General Assembly voting simultaneously, from a list of candidates proposed directly or indirectly by the States parties to the Statute. The term of office is nine years, and a judge may be re-elected. At the first election in 1946, lots were drawn to decide which judges would serve for three, six and nine year terms. No two nationals of the same State may be members of the Court at the same time. The qualifications required are high. By Article 2 of the Statute,

> The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

41 There are no States in this category today.

By Article 9 the persons to be elected should individually possess the qualifications required, and in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured. That leads to the distribution of seats on the Court along political lines which today broadly mirror the political composition of the Security Council in terms of the presence of regional groups on the Court. Nevertheless, the growing influence of the group system in the General Assembly is converting the two electoral colleges into organs that frequently have little more to do than endorse decisions reached elsewhere. In the 1999 election, all five retiring Judges were candidates for re-election. All except one were unopposed by other candidates from their group, and were re-elected automatically, neither the Security Council nor the General Assembly having any choice. As for the fifth, the Vice-President of the Court, another candidate from his group competed for election, and was elected.[42]

Only States may be parties in cases before this Court. That has so far been understood as referring to independent States, although there is no reason why semi-independent States with some measure of control over their foreign affairs should not also have limited access to the Court. This is important since that form of autonomy is one of the recognized modes of decolonization. Suggestions are current to broaden the right of access to the contentious jurisdiction to include international intergovernmental organizations, although the proponents appear to have given little thought to the technical aspects of that idea. That suggestion would require amendment of the Statute. It has not attracted adequate political support, and in a series of resolutions the General Assembly has firmly pronounced itself against any proposals requiring amendment of the Charter or of the Statute.[43]

Article 36, paragraph 1, of the Statute affirms the fundamental rule of consensual jurisdiction: the Court's jurisdiction 'comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force'.[44] All that is required is for the Court to be satisfied that in law that consent has or is presumed to have been given. The doctrine of the *forum prorogatum* accepts as valid a

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42 See proceedings in A/54/PV.45 and 54 SCOR S/PV.4059, 3 October 1999.

43 Since the Statute is an integral part of the Charter, it can be amended only by the same procedure as is required for the amendment of the Charter. See A/Res. 47/120 B, 20 September 1993; 52/161, 15 December 1997; 53/105, 8 December 1998.

44 The tautologous expression 'treaties and conventions' is frequently found in older documents and reflects nineteenth century treaty and diplomatic practice. Today the name given to a treaty has no significance in international law.

consent given after the proceedings have been instituted. Article 36, paragraphs 2 to 5, deal with what is loosely called the 'compulsory jurisdiction' – a terminological inexactitude, since it does not displace the fundamental rule of consensual jurisdiction, only reformulates it. Paragraph 2 reads:

> The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
> a. the interpretation of a treaty;
> b. any question of international law;
> c. the existence of any fact which, if established, would constitute a breach of an international obligation;
> d. the nature or extent of the reparation to be made for the breach of an international obligation.

The inclusion of this arrangement in the Statute of the PCIJ aroused high hopes. At its height, forty-two members of the League out of a maximum membership of sixty-three States had accepted that jurisdiction, which was always an important source of business for that Court. At the same time many reservations accompanied those declarations, indicating reluctance on the part of governments to give a blank cheque to the Court. In the United Nations, however, this clause has not produced what many would regard as the desired results. Today, out of a total of 190 parties to the Statute, only sixty-three have declarations in force under that provision.[45] Repeated appeals from the General Assembly for States to accept the compulsory jurisdiction have not been effective.

The Court normally sits with the full complement of available judges. A judge who has previously dealt with the case in some other capacity is disqualified. A judge of the nationality of one of the parties retains his right to sit, the other party being entitled to appoint a judge *ad hoc* for the purposes of that case. Similarly, if neither party has a national among the members of the Court, each may appoint a judge *ad hoc*. This can lead to a bench of seventeen members, an unwieldy number, but manageable for experienced lawyers and diplomats. The classic statement of the function of the judge *ad hoc* was given by E. Lauterpacht in the following passage:

> [I]t cannot be forgotten that the institution of the *ad hoc* judge was created for the purpose of giving a party, not otherwise having upon the Court a judge of its nationality,

45 ICJ Rep., 1 August 2001–31 July 2002, 57 GAOR Sup. 4 (A/57/4) para. 53.

> an opportunity to join in the work of this tribunal. The evidence in this regard of the attitude of those who participated in the drafting of the original Statute of the Permanent Court of International Justice can hardly be contradicted. This has led many to assume that an *ad hoc* judge must be regarded as a representative of the State that appoints him and, therefore, as necessarily pre-committed to the position that that State may adopt. That assumption is, in my opinion, contrary to principle and cannot be accepted. Nevertheless, consistently with the duty of impartiality by which the *ad hoc* judge is bound, there is still something specific that distinguishes his role. He has, I believe, the special obligation to endeavour to ensure that, so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of the collegial consideration and, ultimately, is reflected – though not necessarily accepted – in any separate or dissenting opinion that he may write. It is on that basis, and in awareness that the tragedy underlying the present proceedings imposes on me an especially grave responsibility, that I approach my task.[46]

The Statute also envisages chambers, smaller collectivities of judges, available if the parties so wish. The Chamber of Summary Procedure (Statute, Article 29), composed of five judges elected annually, is, as its name implies, for the purpose of a more rapid disposal of a case than would normally occur. States have shown no inclination to make use of it, and only one case has come before this Chamber since the PCIJ was established.[47] Article 26 of the Statute envisages two other types of chamber. The first is a standing chamber composed of three judges or more for dealing with particular categories of cases. The Statute mentions labour cases and cases relating to transit and communications as examples, but special chambers have not been established for those categories. In 1993 the Court established a seven-member Chamber for Environmental Matters, but that has not yet been invoked. The difficulty, however, is to classify an international dispute which frequently involves many different branches of the law. In addition, the Court may form a chamber for dealing with a particular case, the composition of that chamber being subject to the approval of the parties. Six cases have been brought before *ad hoc* chambers of this type.[48]

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46 *Application of the Genocide Convention* (Further Provisional Measures) case, above note 32, 409. Others with experience as judge *ad hoc* have since endorsed that statement.

47 *Treaty of Neuilly, Article 179, Annex, Paragraph 4*, PCIJ, Ser. A Nos. 3 (1924) and 4 (1925).

48 The following cases have been before this type of chamber: *Gulf of Maine Delimitation* case, ICJ Rep. 1982, 3, 1984, 246; *Frontier Dispute* (Burkina Faso/Mali), ibid. 1985, 6, 1986, 3, 554; *Elettronica Sicula S.p.A. (ELSI)* (the only case of this type formally introduced by unilateral application, by agreement between the parties), ibid. 1987, 3, 1988, 158, 1989, 15; *Land, Island and Maritime Frontier Dispute*, ibid. 1989, 162, 1990, 3, 92, 1992, 351; *Frontier Dispute* (Benin/Niger), Order of 27 November 2002 (pending);

The Statute includes a few provisions on procedure, completed by the Rules of Court made under Article 30 of the Statute and, an innovation of 2001, formal Practice Directions.[49]

§ 3.06. Arbitration. The Permanent Court of Arbitration

Arbitration is the earliest known type of third-party settlement of international disputes.[50] Article 36, paragraph 3, of the UN Charter includes arbitration alongside judicial settlement among the means for the peaceful settlement of disputes to which States should have recourse in appropriate circumstances. Article 95 provides that nothing in the Charter should prevent members of the UN from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.[51] Judicial settlement is usually a matter for the standing courts, and arbitration for *ad hoc* bodies. However, the settlement of disputes between States is not the only function performed by those bodies. Arbitral tribunals can perform whatever tasks the parties confer on them that the arbitrators have accepted, including giving advice.[52] Article 37 of the Hague Convention of 1907 on the Pacific Settlement of International Disputes declares that international arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law.[53] The principal differ-

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Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening), Order of 27 November 2002 (pending).

49 For the Practice Directions, see ICJ Report 1 August 2001-31 July 2002 (doc A/57/10) para. 373, and on the Court's website. The major issue concerning the Court today relates to its power to review the actions of other organs of the United Nations, and particularly the Security Council. See chapter XII § 12.12 below.

50 It was well known in antiquity. Cf. S. Agar, *Interstate Arbitrations in the Greek World, 337–90 BC* (Berkeley, University of California Press, 1996).

51 For an interpretation of this provision, see notes 1 and 2 above. The 'other tribunal' should be a body that renders binding arbitral awards or judgments, not political decisions.

52 Thus, the *Free Zones* arbitration drew up the regulations required to implement the judgment of the Permanent Court in the case of the same name. III RIAA 1455 (27 May 1935). This Tribunal consisted of three eminent neutral Personalities, without any national arbitrators.

53 For a recent interpretation of that provision, see the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Merits) case, 16 March 2001, para. 113. On arbitration generally, see J. L. Simpson and H. Fox, *International Arbitration*: (London, Stevens, 1959); J. Gillis Wetter, *The International Arbitral Process* (Dobbs Ferry, Oceana Publications, 1979); S. Muller and W. Mijs (eds.), *The Flame Rekindled: New Hopes*

ence between arbitration and judicial settlement is that the decision is made by judges chosen by the parties, who can also indicate any special rules that they wish the tribunal to apply. Recourse to arbitration requires agreement by the parties on all the routine administrative, financial and logistical matters that, for the ICJ and ITLOS, are automatically covered by their Statutes. But experience shows that this is a minor inconvenience if the parties to a dispute prefer to have it settled by arbitration and not by one of the standing courts. Publicity and transparency are not essential in international arbitral proceedings, unlike proceedings in the ICJ and in ITLOS. Even the award need not be made public (subject to Article 102 of the Charter on the registration of treaties). The Convention on the Law of the Sea has introduced a new type of compulsory recourse to arbitration through the combination of Article 287 (5) and Annex VII. Here the Convention constitutes the agreement to have recourse to arbitration, and it includes provisions to prevent frustration.

Since 1950, steps have been taken to prevent the frustration of arbitration agreements by including in the treaty provisions for an appointing authority, frequently the UN Secretary-General, the President of the International Court of Justice, or the Secretary-General of the Permanent Court of Arbitration (PCA) or other appropriate international official, should a party fail to appoint the arbitrators that it is required to appoint.

What is it that can induce States to have recourse to arbitration? Situations can arise in which there is difficulty in having recourse to the ICJ precisely because it is an organ of the UN. The Court's interpretation of the integrity of the judicial function as established from the combined Charter and Statute gives it a wide measure of judicial discretion on whether and how it will deal with a case. That can add a degree of unpredictability in an instance of litigation in the International Court, more than responsible decision makers and their legal advisers can accept. An arbitral tribunal does not usually have so wide a discretion. In the nature of things there is always unpredictability in litigation. But there is a major difference between unpredictability based on counsel's under-

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for International Arbitration, (Leiden J. Int'l L. 1994); A. Eyffinger, *The 1899 Hague Peace Conference: The Parliament of Man, the Federation of the World* (The Hague, Kluwer Law International, 1999); Sh. Rosenne (ed.), op. cit. above note 40. The ILC examined arbitral procedure between 1950 and 1958 on the basis of reports by G. Scelle. That led to A/Res. 1262 (XIII), 14 November 1958, adopting the Model Rules on Arbitral Procedure. ILC Rep. 1958, (A/3859*)Chap. II, YBILC 1968/II, 80. And see *Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its fifth session, prepared by the Secretariat*, doc. A/CN.4/92 (UN, 1955). For collections of arbitral awards, above chapter I note 18.

standing of what the law is, with knowledge of the strengths and weaknesses of the case of each side, and unpredictability deriving from fleeting and possibly subjective concepts of judicial discretion held by the majority of the day, and the general political climate then prevailing. It was not by chance that in the discussions on the settlement of disputes in the Third UN Conference on the Law of the Sea, arbitration prevailed as the most desirable form of the residual compulsory dispute settlement procedure, and is the compulsory residual procedure unless otherwise agreed.

Another advantage of international arbitration is its flexibility. The parties' freedom of action goes beyond choosing the arbitrators. The seat of the arbitration may have political implications. The publication of the proceedings and of the award is entirely a matter for the parties. Treaties that have not been registered with the Secretariat under Article 102 of the Charter can be invoked, something impossible in the International Court of Justice because of its quality of an organ of the UN. The parties can decide if they want a reasoned or an unreasoned award. An arbitration agreement can include provisions empowering or even requiring the tribunal, or part of it, to attempt to conciliate the parties at any stage of the proceedings.[54]

The Hague Convention is a useful code for international arbitration proceedings. It is widely followed, with or without modifications, although it is possible to conduct an arbitration without formal Rules of Procedure, having issues decided *ad hoc* as they arise, as occurred in the *Southern Bluefin Tuna* arbitration. Procedure in arbitration is similar to procedure in a standing court, and can be more intimate than proceedings in the Great Hall of Justice in the Peace Palace (the Small Hall is often used for arbitrations). Judges of the International Court of Justice may serve as arbitrators provided that this does not interfere with their priority duties as members of the Court and that at the time of their appointment as arbitrator there is no possibility of recourse to the Court from

54 Cf. the special agreement between Egypt and Israel for the arbitration of a dispute concerning *Boundary Markers in Taba* (1988), XX RIAA 3, 107. Art. IX required a three-member chamber of the Tribunal to explore the possibility of a settlement of the dispute after the submission of the counter memorials. And see paras. 8–11 of the Award, at p. 9. It must not be assumed that in this type of case persons chosen as arbitrators, both national and neutral, are necessarily the best qualified to act as conciliators. On the other hand, there is advantage in linking process of conciliation with an arbitration at a given stage in the arbitration proceedings, after each party has formulated its contentions in writing. For an unreasoned award, rendered at the parties' request, see the *German Secular Property in Israel* (Federal Republic of Germany/Israel) case (1962), XVI RIAA 1. I must disclose an interest, having been counsel for Israel in both those arbitrations.

that arbitration. Many counsel experienced in the International Court take part in arbitration proceedings, both as arbitrators and as counsel.

The Hague Conference of 1899 established the PCA, an institution continued in the 1907 Convention.[55] The PCA is not a standing organ but a panel of potential arbitrators. It has a permanent International Bureau, which can serve as the Registry. Each party to the Convention may choose four persons at the most, of known competence in questions of international law, of the highest moral reputation, and disposed to accept the duties of an arbitrator. These persons are now known as the national groups, and particulars are included in the Bureau's *Annual Report*. Together they constitute a college from which the parties to a dispute can choose the arbitrators. One of the functions of the national groups, where they exist, is to recommend candidates for the International Court of Justice – the system of indirect nomination.[56] This panel system was important during the period up to 1914.[57] Since then it has fallen into disuse, and arbitrators are rarely chosen from these panels. On the other hand, increasing use is being made of the International Bureau for registry services and other logistical assistance, especially when the arbitration takes place at The Hague. What has become more important is the position of the Secretary-General of the PCA as appointing authority in the event that the parties to an arbitration cannot agree on a neutral umpire, or, once removed, as an authority to name the appointing authority, as in the case of the Iran-U.S. Claims Tribunal. Details of this function are included in the *Annual Report*. The widely used UNCITRAL Arbitration Rules provide that the Secretary-General of the PCA shall designate the appointing authority if all else fails. The PCA has adopted a set of procedural guidelines for requesting the designation of an appointing authority by its Secretary-General and other relevant documents.[58]

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55 See PCA, op. cit. above note 6; Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment (2001). The website address is www.pca-cpa.org.

56 Statute of the ICJ, Art. 4 (1). By Art. 36 (4) (a) (ii) of the Rome Statute of the International Criminal Court the national groups of the PCA may perform a similar function as regards candidates for election to the International Criminal Court.

57 *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution; Summaries of Awards, Settlement Agreements and Reports* (P. Hamilton et. al., eds. PCA, The Hague, 2002). See also J. P. A. François, 'La Cour permanente d'Arbitrage, son origine, sa jurisprudence, son avenir', 87 *Recueil des cours*, 457 (1955-I); L. B. Sohn, 'The Function of International Arbitration Today', 108 ibid. 1 (1963-I).

58 PCA, op. cit.above note 6, 261.

In the last quarter of the century the International Bureau, with general encouragement, has been updating its procedures and has produced a series of optional rules for different types of arbitration now required: for arbitrating disputes between two States, for arbitrating disputes between two parties of which one is a State, for arbitration involving international organizations and States, for arbitrations involving international organizations and private parties, optional conciliation rules, optional rules for fact-finding Commissions of Inquiry, optional rules for the settlement of disputes relating to natural resources and/or the environment and sundry other documents.[59] This broad set of documents is a vivid illustration of the wide-ranging types of case that can come before arbitration tribunals. They also reflect the increasing trend towards the decentralization of many State activities and the privatization of State enterprises which nevertheless retain certain qualities deriving from their original status as a State organ. In resolution 48/3, 13 October 1993, the General Assembly granted observer status to the PCA in the General Assembly.

Mention must also be made of the International Centre for the Settlement of Investment Disputes (ICSID) established by the Convention for the Settlement of Investment Disputes between States and Nationals of other States of 18 March 1965.. This Centre has an Administrative Council and a Secretariat, with its seat in the World Bank at Washington D. C. Like the PCA, it consists of lists of arbitrators and conciliators nominated by the parties, and it supplies registry facilities for its arbitration and conciliation panels. With the increasing privatization of economic activities, the ICSID settlement of disputes facility, often requiring considerable expertise, is of growing importance.[60]

§ 3.07. The International Tribunal for the Law of the Sea (ITLOS)

Article 287 (1) of the UN Convention on the Law of the Sea establishes the ITLOS. Part XV (Articles 279 to 299) together with Annex VI set out its

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59 All these are available, in separate English and French editions.

60 575 UNTS 159 And see ICSID, *ICSID Convention, Regulations and Rules* (doc. ICSID/15/Rev.1, 2003); ICSID, *Additional Rules* for the administration of conciliation, arbitration and fact-finding procedures (doc. ICSID/11/Rev.1, 2003); R. Rayfuse (ed.), *ICSID Reports* (Cambridge University Press); and *ICSID Review: Foreign Investment Journal*; A. Broches, 'The Convention on the Settlement of Investment Disputes between States and Foreign Private Firms', 136 *Recueil des cours* 331 (1972-II); I. F. I. Shihata, 'The Multilateral Investment Guarantee Agency (MIGA) and the Legal Treatment of Foreign Investment', 203 ibid. 95 (1987-III). ICSID's website address is www.worldbank.org/icsid.

Statute.[61] The designation of Annex VI as the Statute of the ITLOS can be misleading. The principal rules are in Part XV of the Convention, and Annexes VI, VII and VIII contain additional provisions specific to the ITLOS or to the two types of arbitration envisaged by the Convention. Article 287 is the choice of procedure provision for instances of compulsory judicial settlement required by the Convention. Reflecting the principle of freedom of choice (Charter, Article 33) and the consensual basis of jurisdiction, it allows each party to the Convention to choose its preferred means for the peaceful settlement of disputes relating to the interpretation and application of the Convention. Where there is a difference of choice, competence rests with the means chosen by the respondent, and if none has been chosen, the designated residual method is arbitration under Annex VII. However, part of the compromise embodied in that Convention required compulsory jurisdiction of an appropriate court or tribunal for disputes involving the freedom of navigation. For that purpose, ITLOS has been given a residual compulsory jurisdiction under Articles 290 relating to provisional measures of protection if arbitration is the competent means and no arbitration has been organized when a State requires provisional measures. For this purpose the ITLOS has to be satisfied that the arbitral tribunal when established would prima facie have jurisdiction and that the matter is urgent. The Convention introduces another use for provisional measures, to prevent serious harm to the marine environment pending the final decision. Extending the function of provisional measures to the protection of the marine environment, even within the context of pending legal proceedings, is an innovation and may raise unexpected problems in the future.[62] Under Article

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61 For the Convention, see note 1 above; ITLOS, *Basic Documents* (The Hague, Nijhoff, 1999). Part XV contains provisions applicable to all the dispute settlement procedures envisaged by Art. 287 of the Convention on choice of procedure. On the establishment of ITLOS, see Sh. Rosenne, 'Establishing the International Tribunal for the Law of the Sea', 89 AJIL 806 (1995), 'The International Tribunal for the Law of the Sea and the International Court of Justice: Some Points of Difference', *The Baltic Sea: New Developments in National Policies and International Cooperation*, 200 R. Platzöder and Ph. Verlaan, eds., (The Hague, Nijhoff, 1996) and 'International Tribunal for the Law of the Sea: 1996–97 Survey', 13 *Int'l J. of Marine and Coastal Law* 487 (1998). See also M. Marsit, *Le Tribunal du droit de la mer* (Paris, Pedone, 1999); G. Eiriksson, *The International Tribunal for the Law of the Sea* (The Hague, Nijhoff, 2000). The website addresses are www.itlos.org and www.tiddm.org.

62 Cf. T. Treves, *Le Controversie internazionali: nuove tendenze, nuovi tribunali* 159 (Milan, Giuffré, 1999). In the Convention on Straddling Fish Stocks and Highly Migratory Fish Stocks 1995 (A/CONF.164/37, UNTS No. 37924), Art. 31 (2) envisages provisional measures to prevent damage to the stocks in question. J.-P. Lévy and G.

292 the ITLOS also has a special jurisdiction for the prompt release of vessels and crews if it is alleged that the detaining State has not complied with the provisions of the Convention.[63] In all other instances, the jurisdiction of the Tribunal is consensual *ad litem*, as in the case of the International Court of Justice. Within the Tribunal Article 186 of the Convention and Article 14 of the Statute establish the Seabed Disputes Chamber, examined later. Despite its name and its position in Article 287, ITLOS has no special status in the new régime for the law of the sea, unlike the Seabed Disputes Chamber which has a special status as regards activities in the international seabed area.

The Tribunal consists of twenty-one independent members, elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the law of the sea. They do not serve full time. This large number is explained by the need to accommodate the Seabed Disputes Chamber as an integral part of the Tribunal. In the Tribunal the representation of the principal legal systems of the world and equitable geographical distribution shall be ensured. There are to be no fewer than three members from each geographical group as established by the General Assembly of the United Nations.[64] To be elected, a candidate, proposed by a State party to the Convention, has to receive a majority of two thirds of the States parties at a Meeting of States Parties, the quorum for which is two thirds of the States Parties, provided that the majority includes a majority of the States Parties. The term of service is nine years, staggered as in the ICJ. The first election took place in May 1996, the term of office commencing on 1 October 1996 when the Tribunal came into existence. As in the ICJ, the system of group allocation of seats on the Tribunal together with the rigid system of group voting deprives the electors of almost all real choice. The Meeting of States Parties also conducts the Tribunal's administrative and financial affairs.

The Tribunal's jurisdiction, limited *ratione personae* to States parties to the Convention and *ratione materiae* to disputes relating to the interpretation or application of the Convention or related international agreements (Article

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Schram, *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Selected Documents* 763 (The Hague, Nijhoff, 1996). The Honolulu Convention of 5 September 2000 on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Art. 31) incorporates Part VIII of the 1995 Agreement and that in turn incorporates Part XV of the 1982 Convention. 40 ILM 277 (2001).

63 In 1997, after it had completed its general organization, ITLOS received its first case, a request for prompt release. *M/V Saiga*, 1 *ITLOS Rep.* (1997) 16.

64 On these groups, see chapter XII § 12.06 below.

288 (2)), is based on similar principles to those of the International Court. Like the ICJ, the Tribunal can also work in chambers. It has established two special chambers, one for Fisheries Disputes and one for Marine Environment Disputes. Its Chamber for Summary Procedure can exercise the residuary jurisdiction attributed to the Tribunal as a whole if there is difficulty in reaching a quorum. It can also establish *ad hoc* chambers if the parties to a dispute so desire, and has done so once.[65] The Convention does not confer advisory competence on ITLOS which, however, has attempted to assume it through the Rules of the Tribunal (see § 3.9 below).

The Seabed Disputes Chamber consists of eleven members of the Tribunal selected by a majority of the elected members, the representation of the principal legal systems of the world and equitable geographical distribution being assured.[66] Articles 186 to 191 set out its competence, contentious and advisory. Its contentious jurisdiction is limited to disputes arising out of activities in the international seabed area, and parties to such cases can be entities that are not States, entitled to conduct such activities. It also has a defined advisory competence in connection with the International Seabed Authority (see § 8.07 below). This Chamber too can delegate work to smaller chambers if the parties so desire. In resolution 51/204, 17 December 1996, the General Assembly granted observer status to ITLOS.

§ 3.08. Human Rights Courts

Two regional Human Rights Courts exist today. The European Court of Human Rights and the Inter-American Court of Human Rights,[67] and an African court is on its way. These Courts differ from the courts and tribunals examined earlier in this chapter. The States created them not for the pacific settlement of disputes between those States (although they are available for that purpose as regards

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65 *Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean*, between Chile and the European Community, ITLOS Rep. 2000 148. Proceedings are suspended while negotiations to settle the dispute are in progress.

66 Under Art. 35 (2) of the ITLOS Statute, the Assembly of the International Seabed Authority may adopt recommendations of a general nature relating to such representation and distribution. At its fifth session (1999) the Assembly decided not to make any such recommendation. ISA, Assembly, fifth session, press release SB/5/15, 17 August 1999. The Secretary-General of the Authority stated that to his personal knowledge the Tribunal had taken account of the relevant criteria when selecting members of the Chamber.

67 H. Gros Espiell, 'La Convention américaine et la Convention européenne des droits de l'homme. Analyse comparative', 218 *Recueil des cours* 167 (1989-VI).

disputes arising out of the Conventions), but as mechanism for the protection of the human rights of individuals against their national authorities as set out in the basic instruments. Special arrangements are made to enable aggrieved individuals to bring proceedings against their own Governments. At the same time, however, the fundamental principle of the consensual basis for the jurisdiction of every international court or tribunal is preserved, in the case of individual proceedings through arrangements to which each State has to give its consent. Where relevant, the case law of these courts enters into the general thesaurus of international case law.

(I) The European Court of Human Rights

The European Convention on Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, created the European Court of Human Rights, set up on 21 July 1951. It is established within the framework of the Council of Europe. Between 1952 and 1994 a series of Protocols has completely changed the system of the protection of human rights in Europe.[68] The European Court in its original form operated until 31 October 1998. On 1 November 1998 Protocol No. 11 entered into force and with it the current European Court of Human Rights. This is a new institution under the same name. It has inherited the case law of the former Court and the practice of the former Europan Commission of Human Rights, a screening body abolished by Protocol No. 11.

The Court today consists of a number of judges equal to that of the contracting parties, and membership of the Court is a full-time office (unlike the former Court and the other existing Human Rights Court). Each party may nominate three candidates, one of whom is elected by the Parliamentary Assembly. The plenary Court only sits to elect its President and other officers, to set up chambers and their presidents, to adopt the Rules of Court and to elect the Registrar and deputies. For judicial purposes, the Court sits in committees of three judges, in chambers of seven, and in a Grand Chamber of seventeen judges. These are standing bodies elected by the plenary court for a fixed period

68 213 UNTS 221; id. 262; 1496 ibid. 245; id. 255; id. 265; id. 273; id. 281; ETS 117; ETS 118; ETS 140; ETS 146; and ETS 155. For the consolidated text, see Council of Europe Publishing, *Human Rights today: European Legal Texts* (Strasbourg, 1999). The current version (as amended by Protocol Nol 11 of 11 May 1994) came into force on 1 November 1998. For the Statute of the Council of Europe, see 87 UNTS 103. And see M. Janis *et al*., *European Human Rights Law: Text and Fundamentals* (Oxford University Press, 2000). The Court's website address is www.dhcour.fr. The European Court of Human Rights must be distinguished from the European Court of Justice, an organ of the European Union (Community).

of time. The Court has jurisdiction in certain cases between contracting parties, and also over individual applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by a party of the rights set forth in the Convention or one of its Protocols. The exhaustion of local remedies is required. The application must not be anonymous or deal with a matter that has already been examined by the Court or another procedure of international investigation.

The committees of three judges replace the former Commission as a screening body with some quasi-judicial functions. A committee may, by unanimous vote, declare an individual application inadmissible or strike it out of the list of cases where such a decision can be taken without further examination. That decision is final. If a committee takes no decision, the case goes to a Chamber, which shall decide on the admissibility and the merits of the claim, as well as on the admissibility and the merits of an inter-State claim. In principle, the decision on admissibility should be taken separately unless the Court in exceptional cases should decide otherwise. If a case before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously rendered by the Court, the Chamber may relinquish jurisdiction in favour of the Grand Chamber, unless a party objects (Article 30).

If the application is admitted, the Court shall proceed with the case. However, in the first place it is to try and secure a friendly settlement between the parties on the basis of respect for the human rights as defined in the Convention and the Protocols. Otherwise, the case continues. If the Court finds that there has been a violation of the Convention or the Protocols and if the internal law of the party concerned allows only partial reparation to be made, the Court shall, if necessary afford just satisfaction to the injured party. Within three months of the judgment, any party to the case may, in exceptional cases, request the referral of the case to the Grand Chamber. A panel of five judges of the Grand Chamber decides whether to accept the case, and if so, the Grand Chamber proceeds to a judgment. Judgments of the Grand Chamber are final. A judgment of a Chamber becomes final when the parties declare that they will not request a referral to the Grand Chamber, or three months after the date of the judgment if no request for deferral has been made, or when the panel of the Grand Chamber rejects the request for referral. The parties undertake to abide by the final judgment in any case to which they are parties, and the Committee of Ministers of the Council of Europe is to supervise its execution.

(ii) The Inter-American Court of Human Rights

The American Convention on Human Rights was completed at San José (Costa Rica) on 22 November 1969. The Statute was drawn up by the Court and approved by the General Assembly of the Organization of American States on 31 January 1979.[69] The Court consists of seven judges, nationals of member States of the OAS, nominated and elected by States parties to the Convention. The candidates must possess the qualifications for the highest judicial offices in their own country, be of the highest moral authority with competence in the field of human rights. The quorum is five judges, and the customary practice of judges *ad hoc* is followed. Contentious cases are referred to this Court either by States parties, or by the Inter-American Commission on Human Rights. An injured individual has no direct access to the Court.

(iii) The African Court on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights of 27 June 1982 entered into force on 21 October 1986. It established the African Commission on Human and Peoples' Rights, an organ operating within the framework of the Organization of African Unity. This Commission follows the usual pattern for this type of supervisory and monitoring organ. Individuals can submit communications to the Commission, after exhaustion of local remedies. At a meeting of the Heads of State or Government in Ouagadougou in Burkina Faso on 8–10 June 1988 the Protocol to the African Charter was adopted. That Protocol establishes the African Court on Human and Peoples' Rights within the Organization of African Unity. The Protocol has not yet entered into force.[70]

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69 1144 UNTS 123. And see T. Buergenthal, 'The Inter-American Court of Human Rights', 76 AJIL 231 (1982); Same, 'The Advisory Practice of the Inter-American Court of Human Rights', 79 ibid. 1 (1985); Jo M. Pasqualucci, 'Preliminary Objections before the Inter-American Court of Human Rights: Legitimate Issues and Illegitimate Tactics', 40 *Va. J. Int'l L.* 1 (1999). On the new Rules of the Court of 24 November 2000, see A. A. Cançado Trindade (Rapporteur), *Informe: Bases para un proyecto de protocolo a la Convención Americana sobre Derechos Humanos, para fortalecer su mecanismo de protección* (San José, IACHR, 2001). For those new Rules see 40 ILM 748 (2001). Website: www.corteidh.org.cr.

70 For the Charter, see 21 ILM 58 (1982). The text of the Protocol has been kindly furnished by the African Society of International and Comparative Law. And see G. J. Naldi and K. Magliveras, 'Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights', 16 *Netherlands Quarterly of Human Rights* 431 (1998).

The Court will consist of eleven judges nationals of member States of the OAU elected by the Assembly of the OAU. Its composition should ensure representation in the Court of the main regions of Africa and their principal legal systems, and adequate gender representation. The term of office is six years, and a judge may be re-elected once. Initially it was envisaged that the judges would serve on a part-time basis, and the Assembly has the power to change this arrangement as it deems appropriate. Its jurisdiction extends to all cases and disputes submitted to it concerning the interpretation and application of the African Charter, the Protocol, and any other relevant human rights instrument ratified by the States concerned. Cases may be submitted to the Court by the Commission, any State which has lodged a complaint to the Commission or against which a complaint has been lodged with the Commission, the State party whose citizen is a victim of human rights violation and African intergovernmental organizations. The Court may also entitle relevant non-governmental organizations with observer status before the Commission and individuals to institute proceedings before it. For that, however, a State has to make a declaration accepting this latter competence of the Court. The Protocol will enter into force thirty days after fifteen instruments of ratification or accession have been deposited.

§ 3.9 Advisory opinions

A major innovation of Article 14 of the League Covenant regarding the establishment of the Permanent Court of International Justice was its provision that in addition to competence to hear any dispute of an international character which the parties might submit to it 'The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly' (*Elle [la Cour] donnera aussi des avis consultatifs sur tout différend ou tout point, dont la saisira le Conseil ou l'Assemblée*). The Statute of the PCIJ was the first instrument to arrange for that. The discrepancy between the English and French texts was resolved by the Court which asserted, following the English text, that its power to give advisory opinions was discretionary. Only the Council of the League requested advisory opinions.

The institution of advisory opinions was a controversial innovation. Some think that it is not a function of any court to give advisory opinions, but that view is not universal, and the Permanent Court's advisory competence proved useful. Most of the matters brought before it at the request of the League Council concerned the interpretation or the application of different treaties and other arrangements that followed the First World War. So much was this so

that through its advisory competence the PCIJ became to a large extent identified with the 1919 peace settlement and with the League of Nations. One case was of major political importance at the time, the advisory opinion rendered in 1931 concerning the *Customs Régime between Germany and Austria*.[71] With the establishment of the United Nations and the International Court of Justice as a principal organ, the advisory competence was continued and broadened.

The Permanent Court delivered 26 advisory opinions, several initiated by the International Labour Office and channelled through the League Council. Under its normal procedure, the Council reached its decisions on the basis of unanimity, which, however, would not have counted the positions of the parties if the question related to a pending dispute also before the Council. Under the Charter the General Assembly and the Security Council may request an advisory opinion on any legal question. In addition, the General Assembly may authorize other organs of the United Nations and specialized agencies to request advisory opinions 'on legal questions arising within the scope of their activities' (Charter, Article 96, paragraph 2). Article 65 of the Statute gives the Court discretion whether to give the opinion requested.[72] However, there is one major difference between the advisory procedure of the League and that of the United Nations. In the UN, the former unanimity rule for the adoption of decisions is replaced by a simple or, in the Security Council, a qualified majority (it is an open question whether the veto applies). This has led in the General Assembly requests for advisory opinions being adopted over strong opposition, followed by equally strong opposition to accepting the advisory opinion as guidance for future action.

The main features of an advisory opinion in an international court are that, unless the constituent instrument provides otherwise, only a body composed of States, not a single State or even two or more States acting together, requests the opinion which is given to the requesting body after application of standard judicial techniques, both in the presentation of positions and in the internal deliberations. An advisory opinion is not a *res judicata* and is not binding, and the requesting body is free to take what action it likes on receipt of the opinion. However, that does not prevent States and other international entities from agreeing dehors the Court proceedings to accept the opinion as binding. An

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71 PCIJ, Ser. A/B No. 41 (1931). That incident was a forecast of the *Anschluss* of 1938.

72 Each Court has once declined to give a requested opinion, the PCIJ in the *Eastern Carelia* adv. op., PCIJ, Ser. B No. 5 (1923), and the ICJ in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (hereafter *Use of Nuclear Weapons*) adv. op., ICJ Rep. 1996(I), 66.

advisory opinion need not concern the settlement of a dispute between two or more States, and may be a legal pronouncement for the guidance of the requesting body. The advisory procedure also provides a mechanism for an *erga omnes* statement of the law, which a bilateral contentious case could not easily supply. For legal theory, there is no difference of substance between a judicial decision rendered in a judgment and one rendered as an advisory opinion. The real criterion is whether the judicial pronouncement was made after established judicial procedures allowing for adversarial argument, procedural parity and a collegiate decision. Today the International Court of Justice, the Seabed Disputes Chamber of the ITLOS and the two standing human rights courts may give advisory opinions to bodies authorized to request them.

This demonstrates another major characteristic of advisory opinions. Except when it refers to a dispute actually pending between two or more States, an advisory opinion does not require the *ad litem* consent of any State as a condition for its delivery. Participation in the Charter or a treaty that envisages using the advisory competence of any court or tribunal is sufficient. That is a major breach in the otherwise solid wall of State sovereignty and the consensual basis of jurisdiction that has obstructed the development of international judicial techniques. However, while some States that did not consent to the request have nevertheless accepted an opinion, others have maintained their opposition, and only political means are available to overcome that opposition. A resolution of an organ of the United Nations adopting an advisory opinion, while it may give instructions to the Secretary-General, does not *per se* have a status different from that of any other resolution.

In most cases (but not in the Inter-American Court of Human Rights) only bodies composed of States are authorized to request an advisory opinion. In the United Nations proposals are current – they have even been advanced by Secretaries-General[73] – to empower the Secretary-General on his own initiative

73 A recent example is the recommendation of Secretary-General Kofi Annan in his Report on Prevention of Armed Conflict submitted to the General Assembly and the Security Council, that the General Assembly authorize the Secretary-General and other United Nations organs to take advantage of the advisory competence of the Court, and that other United Nations organs that already enjoy such authorization resort to the Court more frequently for advisory opinions. Doc. A/55/985-S/2001/574, para. 50. Neither the General Assembly in A/Res. 55/281, 1 August 2001, nor the Security Council in S/Res. 1366 (2001), 30 August 2001, referred to this. Another widely canvassed suggestion is that the national supreme courts should be empowered to request advisory opinions on questions of international law. For this controversy, cf. S. Schwebel, 'Preliminary Rulings by the International Court of Justice at the Instance of National Court', *Justice*

to request advisory opinions on questions of international law. There has not been adequate political support for this, and since the Secretary-General as a person is not an organ of the United Nations (as distinct from the Secretariat, of which the Secretary-General is the head), an amendment to the Charter might be needed.

The ITLOS does not have competence under the Law of the Sea Convention to give advisory opinions, and no body established by that Convention is authorized to request advisory opinions from any existing court or tribunal. However, in its Rules ITLOS has included a provision (Rule 138) by which it may give an advisory opinion on a legal question if an international agreement related to the purposes of the Law of the Sea Convention specifically provides for the submission to the Tribunal of a request for such an opinion. On the other hand, Article 159 (10) of the Convention empowers the Seabed Disputes Chamber to give advisory opinions in connection with voting in the Assembly of the International Seabed Authority. Upon a written request sponsored by at least one fourth of the members of the Authority, the Assembly shall request the Chamber for an advisory opinion on the conformity with the Convention of a proposal before the Assembly on any matter; and the Assembly is to defer voting pending receipt of the advisory opinion. This is possibly the first and the most comprehensive system of judicial review of proposed action by a plenary body yet devised. The Chamber also has competence to give advisory opinions at the request of the Assembly or the Council of the Authority on legal questions arising within the scope of their activities. By Article 185, the suspension of exercise of rights and privileges of membership in the International Seabed Authority requires a prior finding by the Chamber that the State concerned 'has grossly and persistently violated the provisions' of Part XI of the Law of the Sea Convention. The Convention does not state how that decision is to be reached, and it does not exclude proceeding by way of advisory opinion provided that the usual judicial procedures are observed.

Article 119, paragraph 2, of the Rome Statute of the International Criminal Court envisages referral to the International Court of Justice of disputes between States parties relating to the interpretation or application of the Statute. In a discussion paper submitted to the Preparatory Commission, the Co-ordinator of a draft relationship agreement between the United Nations and the International Criminal Court proposed (Art. 13) that a recommendation for referral

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in International Law 84 (Cambridge, Grotius Publications, 1994), reproduced from 28 *Va. J. Int'l L.*495 (1988), and Sh. Rosenne, 'Preliminary Rulings by the International Court of Justice at the Instance of National Courts: A Reply', 29 ibid. 401 (1989).

to the Court under Article 119, paragraph 2, of the Rome Statute which involved a request for an advisory opinion should be submitted to the General Assembly, which should decide upon the request in accordance with Article 96 of the Charter. However, that was dropped from the final text adopted by the Assembly of States Parties. By Article 5 (1) (b) (ii) of the Relationship Agreement the Registrar of the ICC shall furnish to the United Nations, with the concurrence of the Court, any information relating to the work of the Court requested by the ICJ in accordance with its Statute; and by Article 7 the ICC may propose items for consideration by the General Assembly or the Security Council.[74]

The European Court of Human Rights, through the Grand Chamber, has limited discretion to render advisory opinions at the request of the Council of Ministers, on legal questions concerning the interpretation of the Convention and the Protocols. But such opinions are not to deal with any question relating to the content or scope of the rights or freedoms defined in the Convention and Protocols or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention, and the Court shall decide whether a request for an advisory opinion is within its competence. No such request has yet been made.

The Inter-American Court possesses an unusual advisory competence, which is discretionary. All member States of the OAS, whether parties to the Convention or not, may request an advisory opinion for the interpretation not only of the Convention but also of other treaties concerning the protection of human rights. This is a major innovation in international practice regarding advisory opinions. There are signs that it may be used to interfere in the judicial settlement of a dispute in other tribunals (see text to note 80 below). In addition, such a State may request an advisory opinion on the compatibility of any of its domestic laws, including proposed amendments to its constitution, with the human rights treaties within the Court's scope. No other international court has so extensive an advisory competence.

The African Court has jurisdiction to provide an advisory opinion at the request of any member State of the OAU, the OAU and any of its organs, or any African organization recognized by the OAU, on any legal matter relating to the Charter or any other relevant human rights instruments, provided that

74 Assembly of States Parties to the Rome Statute of the International Criminal Court., First Session (2002), *Official Records* 243 (doc. ICC-ASP/I/3). This relationship agreement will enter into force after approval by the General Assembly of the United Nations.

the subject-matter of the opinion is not related to a matter being examined by the Commission

§ 3.10. The multiplication of international tribunals

Clearly the international court order is fragile, complex and inadequate for modern needs. Its major weaknesses are the excessive extent of the consensual basis of all the contentious jurisdiction, the limited number of international organs composed of States authorized to request advisory opinions, the lack of any adequate enforcement authority within the international community as it now stands and the absence of any system of controlling possible conflicts of jurisdiction between these different courts and tribunals. It is true that since the PCIJ was set up in 1920 the consensual basis of jurisdiction has, as a formal matter, gone through a process of attrition, to the extent that increasing informality characterizes the manner in which the Court will establish that consent. But if in the final count, the Court is satisfied that there is not even prima facie evidence of consent, it has no choice but to reject the case out of hand.[75]

There is one standing international tribunal with universal jurisdiction – the International Court of Justice. Except for the ITLOS, all the other panels and tribunals created for the settlement of different kinds of dispute or for a single dispute were *ad hoc* arrangements not intended to be permanent, and of limited jurisdiction. The ITLOS has changed this as far as concerns the law of the sea, notwithstanding that its jurisdiction is limited, since part of its jurisdiction could overlap the jurisdiction of the ICJ. Its existence is leading to concern, being expressed with increasing urgency, at the multiplication of international tribunals and at the possibility of the fragmentation of international law and of conflict with decisions of the International Court of Justice.[76] That, however, is only part of the issue. The problem is not so much the possible fragmentation of the law (that has existed ever since the establishment of the PCIJ) but rather where there is overlapping jurisdiction the difficulty of choice for the decision maker, leading to the possibility that no judicial settlement of a dispute could be agreed between the parties. Put that way this is not a new

75 So far, there are only two instances of this for cases already entered in the General List. In the *Use of Force* set of cases, in provisional measures proceedings the Court twice found that it was manifestly without jurisdiction and peremptorily ordered those cases to be removed from the List. The cases against Spain at para. 35 and the U.S.A. at para. 29 (above note 36).

76 Cf. J. I. Charney, 'Is International Law Threatened by Multiple International Tribunals?', 271 *Recueil des cours* 101 (1998).

problem. From the beginnings of the PCIJ the international community has recognized that alongside the standing court, arbitration, in different forms, would exist. Throughout, not only arbitrations have continued, but other quasi-judicial bodies have functioned without any questioning of the position of the International Court.

The risk of fragmentation of international law, while not serious, may be aggravated so long as there is no established authority to determine possible conflicts of jurisdiction or of competence. Probably today the most significant area visited by all international courts and tribunals (and sometimes also by national courts) is the law of treaties, followed closely by the law of international responsibility. Here the work of codification supplies a template serving as a unifying factor common to all international courts and tribunals. Different interpretations and applications are bound to appear, but no more than can be found in any polynomous State such as the United States of America, where there are no less than fifty-one independent legal systems operating within a single set of international boundaries and within the framework of the national constitution.

Although the ICJ is designated as the principal judicial organ of the UN, there is no adumbration of that idea. Despite the absence of binding judicial precedents already noted (above § 2.06), other international courts and tribunals generally follow its reasoning and conclusions where relevant and applicable. Any international court or tribunal that failed to pay due heed to and take proper account of decisions of the International Court of Justice would rapidly lose the confidence of its clientage. No careful and convincing statement of the applied rules of international law today can be made without recourse to its pronouncements. This notwithstanding, both the ICTY, a judicial organ established as a subsidiary organ by the Security Council in a UN framework, and the Inter-American Court of Human Rights as a regional judicial organ of limited jurisdiction, have had cases that can be seen as not paying due heed to that Charter provision.

In the ICTY, the decision causing concern is the judgment of the ICTY Appeals Chamber of 15 July 1999 in *Prosecutor* v. *Thetić*, delivered over a powerful dissent by its President, Judge Shahabuddeen.[77] Part of that judgment

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77 Case IT-94-I-A, 15 July 1999, paras.115 ff, followed by the Trial Chamber in *Prosecutor* v. *Blaškić*, case IT-95-14-T, Judgment of 3 March 2000, para. 97 (122 ILR)1, with a similar declaration by Judge Shahabuddeen. Judge Shahabuddeen was a member of the ICJ from 1988 to 1997. He was not a member of that Court when it heard the *Nicaragua* case. For important criticism of that by the ILC, see para. (5) of its commentary on Art.

deals with the decision of the International Court of Justice in the *Nicaragua* case. The Appeals Chamber found that the International Court of Justice's test of imputability on the basis of 'effective control' of the Contras was 'unconvincing'. That view was based on the very logic of the entire system of international law on State responsibility (para. 116), and in the opinion of the Appeals Chamber the judgment of the ICJ is at variance with judicial and State practice (para. 124). That may or may not be so, but it is surprising that those members of the Appeals Chamber for whom general international law is not their special area of expertise did not accept the powerful separate opinion of their President, Judge Shahabuddeen, who had made an outstanding contribution to the development of international law when he was a member of the International Court of Justice. This lapse has since been to some extent corrected.[78] This is not to say that the ICTY (or any other court or tribunal) must blindly follow a decision of the ICJ if it thinks it to be inapplicable, but more care should have been used to express the reasons why it found the *Nicaragua* case unpersuasive or not relevant for the purposes of the case at hand.

The *Kvočka* case (above note 78) draws attention to another problem. Both the ICJ and ICTY (and now the International Criminal Court) have jurisdiction over cases involving the Genocide Convention of 1948, the International Court on the basis of State responsibility for the interpretation, application or fulfilment of the Convention under Article IX, and the ICTY and ICC for individual criminal responsibility for an act of genocide under its Statute. One can envisage several different types of conflict arising out of this. For instance, the evidence of an individual may be required in the International Court of Justice, but that evidence could incriminate the witness in the other court or tribunal. In such circumstances it is submitted that the human rights of the individual against self-incrimination should have precedence, even if prejudicial to a party's case in the ICJ, with the possible consequence of the Court's inability to settle the dispute. In another respect, both judicial organs may be required to examine and assess the same or similar or related facts. They would be doing so, however, for different purposes, the International Court of Justice to determine the international responsibility of the parties before it, and the ICTY to determine

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8 of its draft articles on the responsibility of States for internationally wrongful acts, ILC Rep. 2001 Chap. IV.

78 Cf. on this in the ICTY Appeals Chamber: *Prosecutor* v. *Delacić*, Judgment of 20 February 2001, Case IT-96-21-A, para. 24; *Prosecutor* v. *Kvočka et al*, 25 May 2001, Case IT-98-30/1-AR72.2 Decision on interlocutory appeal by the accused Zoran Zigić against the decision of Trial Chamber 1 dated 5 December 2000.

the international criminal responsibility of the accused. Given these different purposes, it does not follow that either judicial organ is to be bound by findings of fact or conclusions of law of the other, although no doubt each would accord due respect to the conclusions of the other.[79]

The case in the Inter-American Court of Human Rights is the advisory opinion on *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, much of which addressed the interpretation of Article 36 of the Vienna Convention on Consular Relations of 1963, on issues that were at that date pending in the International Court of Justice in contentious cases.[80] In so far as that distinguished Court exercised its discretion and decided to give the requested opinion on those questions, notwithstanding the cases pending in the International Court, its action is open to criticism, and may possibly not give adequate recognition to the status of the ICJ as the principal judicial organ of the United Nations. A regional court or tribunal of limited jurisdiction, both *ratione personae* and *ratione materiae,* should show the greatest restraint before embarking upon the hazardous and delicate task of interpreting the application of a universal instrument adopted under the auspices of the United Nations, and which itself provides for the jurisdiction of the International Court of Justice. The fact that the advisory opinion was requested by an interested State in the context of a pending contentious case on the same issue in the ICJ is an added reason for caution.

Two cases relate to the law of the sea. They do not concern the position of a dispute settlement organ of the Law of the Sea Convention in relation to the International Court of Justice, but in relation to another dispute settlement organ, one national (applying the same rule of the law of the sea) and the other an international organ with possible jurisdiction different from that of the dispute settlement organ of the Law of the Sea Convention.

The first of these two cases is the decision by ITLOS in its judgment of 7 February 2000 in the *Camouco* case on the prompt release of the vessel when the issue of the bond for that vessel's release was still *sub judice* in the national court of the arresting State. That fishing vessel had been arrested in the exclusive economic zone of French Southern and Antarctic Territories, and brought

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79 Further on this, Sh. Rosenne, 'Antecedents of the Rome Statute of the International Criminal Court Revisited', *International Law across the Spectrum of Conflict: Essays in honour of Professor L. C. Green on the occasion of his Eightieth Birthday* 387, 408 (Newport RI, Naval War College, International Law Studies vol. 75, 2000).

80 Inter-American Court of Human Rights, Series A No. 16, OC-16/99, 1 October 1999. For the Vienna Convention, see 596 UNTS 261.

before the competent court in the island of Reunion. At the time of the proceedings in ITLOS, an appeal was pending in the competent French court over the bond to be supplied for the release of the vessel and crew. In its judgment, the ITLOS overruled French objections based on the litispendence, not itself a matter of difficulty at the present stage. Where one may have, some concern is over its decision to require the posting of a bond at a sum fixed by the Tribunal, notwithstanding that the issue of the amount of the bond was pending in the French court.[81] This is not a question of the exhaustion of local remedies as that term is commonly understood, and as indeed is specifically required by Article 295 of the Law of the Sea Convention. It is more a question of judicial courtesy and propriety, that a tribunal properly seised of a case that is already before another tribunal – whether an international tribunal or a national tribunal of another jurisdiction – ought to refrain from reaching a final decision on the matter which that other court has to decide, until that other court has reached its decision. No international tribunal, not even the ICJ itself, should decide a matter that is *sub judice* in a national court before that national court has itself concluded its judicial procedures, unless the breach of international law is manifest. That is 'judicial courtesy', and with the enormous increase in the number of cases, for instance of treaty interpretation and application, coming before national courts as well as before international courts and tribunals, this is becoming a matter of increasing concern if not of urgency. It is a courtesy that runs in both directions.

The *Southern Bluefin Tuna* cases, in both ITLOS and an arbitral tribunal constituted under Annex VII of the Law of the Sea Convention as the residual compulsory jurisdiction according to Article 287 of the Convention, supplies another illustration of complications arising from the multiplicity not only of courts but also of jurisdictional clauses in different applicable instruments. In that case both ITLOS (for provisional measures under the Law of the Sea Convention) and in an arbitral tribunal for the merits (under a special treaty for the management of that stock) each party invoked a different treaty, each of which has its own dispute settlement provisions not mutually compatible. The applicants instituted arbitration proceedings under Annex VII of the Law of the Sea Convention alleging breaches of the Convention, and immediately

81 As seen (above note 12), the competent French Court gave judgment on appeal in conformity with the judgment of the ITLOS in the *Camouco* case. However, it did so because after France had become a party to the Law of the Sea Convention, the French authorities requested the Court to deliver judgment in accordance with the judgment of ITLOS.

also requested ITLOS to prescribe provisional measures. In the *Southern Bluefish Tuna* (Provisional Measures) cases, ITLOS rejected a challenge to its jurisdiction to prescribe compulsory provisional measures under its residual jurisdiction, on the basis of its interpretation of its Statute.[82] That was not decisive, since ITLOS only needed to establish that the arbitral tribunal to be constituted might prima facie have jurisdiction over the merits, for it to be in a position to prescribe provisional measures. The Arbitral Tribunal, after full written and oral argument, held that it was without jurisdiction to rule on the merits of the case.[83] Following the practice of the ICJ, that Tribunal defined for itself the dispute that was before it and determined which of the two incompatible treaties was applicable. The Tribunal held that it would be 'artificial' to find that there were two distinct disputes (para. 54), and accordingly went on to determine for itself which was the governing Convention in the circumstances of the case.

On the whole, with the possible exception of the ITLOS, the jurisdiction of these different courts and tribunals does not overlap that of the ICJ, or should not if they remain within the framework established in their constituent instrument. The problems have arisen in a routine way in the course of deciding cases properly brought before the tribunals in question. In this situation, the problem for the legal adviser is not one of forum shopping in the pejorative sense, where a civil plaintiff seeks a jury noted for presumed sympathy to its cause. In international relations the problem is more thorny because of the political implications of a decision to submit a dispute to judicial settlement, especially domestic political implications, and the general complexity of an international dispute. The problem may arise and may be acute in those few instances where there is overlapping jurisdiction between two courts and tribunals with different remedies (at present a possibility in connection with law of the sea disputes). This problem however can exist in relation to the ICJ itself, not only when more than one treaty can be invoked, but also where there is a choice between the full Court and one of its chambers, although there the problem is not complicated by incompatible titles of jurisdiction. Many writers and some judges have drawn attention to this problem and have suggested that there is need for an international tribunal with jurisdiction to decide that particular conflict, something like the certiorari writ of the common law. This is probably not

82 Order of 27 August 1999, ITLOS Rep 1999, 280 There were two applicants and the two cases were joined, ibid. at 274. For the second instance of this type of case, see the Order of 3 December 2001 in the *Mox Plant* case, ITLOS Rep. 2001, 95.

83 Award of 4 August 2000, 110 ILR 508. I must disclose an interest as counsel for Japan in the arbitration phase of that case.

urgent now, but it may become urgent. Subject to that principle of avoiding artificiality, as a general rule any possible conflict of jurisdiction with the possibility of incompatible remedies would seem to come within the principle enunciated by the PCIJ in the *Chorzów Factory* (Jurisdiction) case in 1927.[84] That indicates that prima facie the court or tribunal first seised of the dispute will have jurisdiction, unless it finds itself confronted with a clause which it considers sufficiently clear to prevent the possibility of a negative conflict of jurisdiction involving the danger of a denial of justice.

The President of the International Court (Schwebel) first made a delicate allusion to this general problem in his speech in the General Assembly on 26 October 1999. He suggested that 'there might be virtue in enabling other tribunals to request advisory opinions of the International Court of Justice on issues of international law that arise in cases before those tribunals that are of importance to the unity of international law'. The purpose of that suggestion was to 'minimize such possibility as may occur of conflicting interpretations of international law'. In particular he mentioned international tribunals that are organs of the United Nations such as the international tribunals for the prosecution of war crimes. He even thought those international tribunals that are not UN organs might through appropriate machinery be authorized to request advisory opinions. He urged caution in the creation of new universal courts in respect of inter-State disputes.[85] At the time these ideas did not attract much political support, possibly because close inspection might show that the problems calling for solution are more theoretical than real, and that existing general principles such as *lis pendens*, *res judicata*, and possibly even something like *ne bis in idem*, would be adequate to deal with any problem. President Schwebel's successor (Guillaume) has taken the matter further. In his statement before the United Nations General Assembly on 30 October 2001, he concluded with the following sentences:

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84 PCIJ, Ser. A No. 9 (1927) at 30.

85 A/54/PV.39, 3. Earlier in 1999, what was called an expert discussion on peaceful settlement of disputes convened at The Hague in May, 1999, in honour of the centenary of the Peace Conference of 1899. It reached several conclusions regarding the International Court. One of these was that there was need for careful consideration of various aspects of the expansion of the Court's advisory functions, including the possibility of referrals to the Court by other tribunals or by regional organizations. 54 GAOR annexes, a.i. 154 (doc. A/54/381, para. 100); Kalshoven, op. cit. above note 32. Much useful material is reproduced in the CD-ROM disk included with that book.

> Each year, for the last six years, successive Presidents of the Court have drawn attention to these risks which on several occasions have since been realized. I am bound to do so again. The proliferation of international courts may jeopardize the unity of international law and, as a consequence, its role in inter-State relations.
>
> No new international court should be created without first questioning whether the duties which the international legislator intends to confer on it could not better be performed by an existing court. International judges should be aware of the dangers involved in the fragmentation of the law and take efforts to avoid such dangers. However, those measures may not be enough, and the International Court of Justice, the only judicial body vested with universal and general jurisdiction, has a role to play in this area. For the purpose of maintaining the unity of the law, the various existing courts or those yet to be created could, in my opinion, be empowered in certain cases – indeed encouraged – to request advisory opinions from the International Court of Justice through the intermediary of the Security Council or through the General Assembly.[86]

There should be no difficulty in giving effect to that recommendation as a whole should the international community find itself faced with proposals for yet more international courts and tribunals for limited purposes.

86 Statement at the 56/32nd meeting of the General Assembly, taken from the Court's website, at p. 5. Not all the judges share this view. Cf. R. Higgins, 'Respecting Sovereign States and Running a Tight Courtroom', 50 ICLQ 121, 122 (2001).

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CHAPTER IV

THE USE OF FORCE

Qui desiderat pacem, preparet bellum.

Vegetus, *De re militari*, 3, prol.

The Second World War, its atrocities and its scope, through the Charter of the United Nations adopted by the wartime fighting coalition led to three major developments in international law: (1) the formal prohibition on the use of armed force in any manner contrary to the Charter and its replacement by a system of collective security, the topic of this chapter; (2) the renewal and expansion of the former *jus in bello*, now known generally as international humanitarian law designed to regulate the conduct both of States and of individuals in an armed conflict, the topic of chapter V; and (3) the promotion and protection of human rights on a universal scale, addressed in chapter VI. Taken together these three aspects and their place in today's international relations are the major components of the complete change in international law produced in the twentieth century.

§ 4.01. International law and the use of force

The greatest dilemma facing the international lawyer and international law concerns the use of armed force. There is a widespread assumption that the Charter absolutely forbids the use of armed force. That is not the way the Charter puts it, at all events not in that bald form. Article 2 (3) imposes on the members of the UN the obligation to settle their *international* disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. That is followed by Article 2 (4) by which:

> 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.

Those last few words, 'in any manner inconsistent with the Purposes of the United Nations', are the cause of perplexity. International law assumes that the State possesses armed forces (even if they go under the name of 'police' or 'gendarmerie'), and that their normal use does not violate any rule of international law. The language is general enough to allow a pragmatic approach.

The starting point for these provisions is the notion of collective security as enunciated in Article 1 (1) among the Purposes of the United Nations:

> 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[.]

The ICJ has interpreted that provision, together with Article 1 (2), as

> pointing to the goal of international peace and security and friendly relations . . . The primary place ascribed to international peace and security is natural, since the fulfilment of the other purposes will be dependent upon the attainment of that basic condition.[1]

Article 2 (4) is the major provision that in terms prohibits the use of force. It is a conspicuous example of a norm of international law having the character of *jus cogens*.

Leaving aside the looseness of the language of those key passages in the Charter, the first two of which refer only to the international relations of States, armed force has been used by States in their international relations almost without break in many different circumstances since the Charter was adopted in 1945. What is more, it is a fair assumption that the policy decision to use force has often been taken without or against legal advice, the jurists being called in after the event in an effort to justify what has happened or otherwise to engage in damage control. One of the outstanding instances of the early use of armed force in the UN period was the Anglo-French armed intervention in Egypt in 1956 following President Nasser's nationalization of the Suez Canal, although the armed force apparently was not used against the territorial integrity or the political independence of Egypt whatever other purpose those two

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1 *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (hereafter *Certain Expenses)* adv. op., ICJ Rep. 1962, 151, 168.

permanent members of the Security Council had in mind.[2] It is common knowledge that this action was undertaken without proper consultation with their legal advisers. The other three permanent members of the Security Council have also not shrunk from the use of force in their international relations whenever they considered that their interests so required.

The legal situation is further complicated by the fact that two other key provisions of the Charter specifically permit or envisage the use of armed force. One is Article 51, stating what is nevertheless obvious, that nothing in the Charter shall impair the inherent right of individual or collective self-defence, subject to the terms of that Article. The Charter would not have been adopted had that not been included. The second is Article 42, by which the Security Council may itself take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Both those provisions, resting on the statement of principle of Article 2 (4), are discussed more fully in § 4.04 below.

Two major events of the last fifty years have undermined the premiss of those provisions of the Charter. One, and the most significant, is the development of nuclear weapons and other weapons of mass destruction together with vehicles for their delivery (intercontinental ballistic missiles), and what is more destabilizing, because apparently they are not exclusively in the hands of States, the activities of suicide bombers culminating in the murderous and indiscriminate attacks on American cities on 11 September 2001 followed by bioterroristic attacks around the world. To some extent the policy of deterrence through which the two Super-Powers, notwithstanding occasions of brinkmanship, succeeded in maintaining world peace through the stresses and crises of the Cold War.[3] The ICJ has noted that a number of States have adhered to that practice during the greater part of the Cold War and continue to adhere to it.[4]

The second factor, no less significant, is the prevalence of the use of armed force in crisis situations which at first were not *international*, although they came to endanger the maintenance of international peace and security. Encouraged by the progress of decolonization and self-determination, opposition

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2 See G. Marston, 'Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government', 38 ICLQ 773 (1988). There was an almost simultaneous invasion of Hungary by Soviet armed forces, but Arts. 53 and 107 of the Charter may have been applicable, notwithstanding the Peace Treaty of 1947.

3 For the view of the ICJ on the relationship of the policy of deterrence with Art. 2 (4) of the Charter, see the *Legality of the Threat or Use of Nuclear Weapons* adv. op. ICJ Rep. 1996(I) 226, 246 (para. 48).

4 Ibid. at 254 (para. 67).

of the metropolitan Powers gave birth to national liberation movements of uncertain legal status, something more than insurrectionist movements of an earlier period, and often with them the use of indiscriminate terrorism against the metropolitan State and its people, assets and interests around the world to further their political aims (cf. chapter VII § 7.07 below). The States against which movements of this type were operating found themselves compelled to use armed force in self-defence. That, however, was not in their *international* relations, or self-defence against armed attack as that expression is often understood. For those two reasons at least, and leaving aside the impact of the Cold War on the ability of United Nations organs to act, a rigid textual approach to an understanding of the Charter is the better avoided.

Here is the core problem of international law today. There is little point in talking about the 'new' international law in which the individual has a more definite place than before and in which States have voluntarily relinquished or pooled some of the attributes of their national sovereignty in favour of regional organizations of economic integration like the European Union, so long as this core topic remains in its present unsettled and unsettling state. At the same time, taking together the European Union and the factors that led to its development with the evolution of the Council of Europe and its widespread activities among States with shared political and cultural values, one finds a regionalization of the ideal of the non-use of force in one of the areas of the world in which the use of force was the most violent and the most destructive throughout modern history up to 1945. It suggests that taking the Charter as the umbrella, integration of regional economic concerns coupled with overall co-ordination of activities in a region with other shared values (not necessarily coinciding completely with the economic integration) may supply the necessary underpinning for systematic removal of causes that lead to the use of armed force in international relations. There are signs of similar developments taking place, slowly, in other parts of the world, notably on the African continent and in parts of Latin America. It is on account of this central position of the use of force in international law that in this Course I have decided to bring it forward as the first major topic to be treated after the introductory chapters. The inability of the international society to bring under effective control the improper use of force, its failure to indicate what use of armed force is 'proper', cast a shadow over all the other achievements – and they are many – in the progress of international law since the end of the Second World War.

The control of force in international law and international relations follows two separate lines of evolution. One attempts to control the individual use of armed force in a State's international relations, aiming to ban it entirely and

replace that with a centralized control over the use of a State's armed forces in the common interest. The second, originating in a legal context that accepted war as a legitimate instrument of national policy, attempts to regulate the types of weapons that a State might use, as military technology advances. The object here is to minimize as much as possible unnecessary harm to the fighting personnel and even more to the non-combatant, leading to the regime of international humanitarian law. Those two lines of development are coming together with the rapid evolution of weapons of mass destruction, and notably nuclear, chemical and biological weapons. There is a major difference between these two trends. The second, dealing with the permissible types of weapons and other aspects of reducing the sufferings caused by war, has a built-in synallagmatic feature, in the notion that self-interest would ensure mutual observance of the agreed rules. That is missing from the rules designed to ban the improper use of armed force. To enforce that requires a proper international response which today can only be organized through a competent international organization, whether universal or regional, working under accepted national leadership. If that fails, States have no alternative but to take the matter into their own hands.

Running through this history is the persistent attempt to balance the legitimate requirements of national defence and security with the equally legitimate requirements of the enlightened world which abhors the indiscriminate use of force and seeks to place it beyond the pale not only of the law but of normal international relations.

The first stage in tempering the rigours of the use of force goes back to an early age. We can find traces of this type of humanitarian legal regulation in the Bible,[5] in the teachings of the Church Fathers, and in comparable works of other religions and other cultures. Today they find formal expression in the Geneva Conventions of 1949 and the Additional Protocols of 1977 (see chapter V below). Although peripheral to the central problem, the history of this humanitarian law illustrates an important facet of the central problem of law and force, namely the place of the individual human being and an assumption that one can make a clear and rational distinction between the combatant and the non-combatant, and between the military and the nonmilitary objective. The experiences of modern warfare, whether total World Wars such as the twentieth century has witnessed, or small localized wars, internal conflicts and even of relatively low-intensity insurrectionist movements, cast doubt on the validity

5 Cf. P. Weil, 'Le judaïsme et le développement du droit international', 151 *Recueil des cours* 253 (1976-III); Sh. Rosenne, 'Sovereignty within the Law – Jewish Law', *An International Law Miscellany* 549 (Dordrecht, Martinus Nijhoff, 1993).

and the viability of that assumption.[6] If that is so as regards what is a segment of the problem, it follows that the problem itself is coloured by the same characteristic. For many smaller peoples and countries, loss of a war may mean the loss of national independence, or at least a fundamental change of the national destiny into new directions imposed by the victor. The natural unwillingness of peoples forcibly to submit to such changes makes the problem of the legal regulation of the use of force so delicate and so difficult, and which makes it so impossible to separate its legal form from its social content.

The topic concerns the dynamics of human intercommunication and international relations. It is *relatively* simple to draw up a document such as the UN Charter and refer to respect for the territorial integrity or political independence of any State. The generality of the language is a convenient way of expressing the different understandings of what is meant. Such a text assumes that the concepts of 'territorial integrity' and 'political independence' are self-explanatory and inherently static and immutable. It may be true that law generally prefers stability to unregulated change. But given that international relations are not static, the consecration of stability in the words of a text may become an empty platitude, as the evolution of the League of Nations showed. A complicated variety of factors for change converge. That does not mean that no reconciliation between law and force is possible. International experience since 1945, especially in Europe, is showing faintly that ways can be found to reconcile the two.

Intellectual and informed pacifism, not the emotional, ideological and dogmatic pacifist movements, has in the last century and a half looked in two directions as it approaches the creation of an international order to contain built-in elements enabling it to cope with this aspect of the inherent dynamism of international relations. One is to find acceptable international machineries and instrumentalities as an alternative to war to facilitate the necessary changes in the status quo, the problem of peaceful change. That would require at least a dilution of the absolute sovereignty of States. The second is the attempt to regulate the use of force itself, through a mixture of political machinery and legal controls, crisis management in modern jargon – two systems that are not

6 For an early assumption that the distinction between combatant and noncombatant in the law of war merits reconsideration, see H. Parks, 'Making Law of War Treaties: Lessons from Submarine Warfare Regulation', *International Law across the Spectrum of Conflict: Essays in honour of Professor L. C. Green on the Occasion of his Eightieth Birthday* 339, 381, fn. 115, referring to a previously unpublished lecture delivered in 1938 by Professor P. S. Wild in the Naval War College (Rhode Island, Naval War College International Law Studies vol. 75, 2000).

antithetical but complementary. Experience shows that for this second to succeed, a minimum of an agreed political consensus between the States that have the power, universal and regional, is the prime requisite. Without that, the best laid plans will go awry.

If each of these approaches must be treated separately as a matter of systematic presentation, in fact and in intellectual conception they are inseparable. For this reason alone it is impossible to accept the approach of the ICJ regarding the significance of reporting to the Security Council when a State exercises its inherent right of self-defence following Article 51 of the Charter. For what the Court has done is to call for the observance of a procedural requirement intended to generate action for collective defence after a State has exercised its right of self-defence while ignoring that the Charter provisions for collective security under the direction of the Security Council have never come into effective existence. In that way the substance of the norm has become detached from the institutional provisions to which it is linked. If the institutional machinery is ineffective or non-existent, something else must replace it. Caution is needed whenever any form of separation of norms from their institutional context is being considered.[7]

In their modern guise, each approach grew from a single intellectual endeavour, the reaction of a small group of farsighted statesmen, parliamentarians, jurists and officers of the armed forces. In 1870 they saw the two major European powers tearing themselves to pieces in a short but devastating war, and the two leading English-speaking powers, on the verge of war pulling back and settling their difference through third-party arbitration. The Franco-Prussian War (1870–1871) and the *Alabama* arbitration (1872) coincided. Arbitration had also been widely employed to resolve disputes on the American continent. The birth of the profession of international law, too, can be placed at that date.

The approach to the regulation of peaceful change started with the idea that, apart from the secondary and in a way technical aspects of improving the formulation of international law through its codification (above chapter II § 2.09), new internationalized institutions more representative and more open than Big Power control of events through secret and elitist diplomacy would be required and empowered to substitute their collective decision for the individual wills of the sovereign States. Apparently following what was thought to be the

7 For a closer examination of this, see Sh. Rosenne, *Breach of Treaty* 106 (Cambridge, Grotius Publications, 1985).

lesson of the organic social development that led to the modern nation-state, a way was sought to centralize in the international society the control of force, much in the same way that within each State private forces are not allowed and all controlled force is within the competence of the authorities. Parallel to this comes the creation of new or improved international machineries for peaceful change (or dispute prevention) and dispute settlement (crisis management). Those machineries are of two kinds, fact-finding institutions to lay the basis for the political decisions, and regulatory mechanisms, particularly procedures for conciliation and mediation and, even more far-reaching, for arbitration and judicial settlement, where the binding decision is made by third parties. Leaving aside technicalities, the underlying approach is the same: the parties in dispute must lay their cards on the table, clarify their aims, and leave it to third parties to help them to reach a reconciliation, whether by persuasion or by producing a binding settlement of the matter.

Experience establishes that the substance of these common features of the internal organization of States cannot easily be transferred to the international level. If, within States, the police and if necessary the armed forces under centralized control exist to enforce the law, to preserve public order and to prevent breaches of the peace, this system is liable to break down in situations of deep social conflict such as a particularly grave labour dispute or a particularly serious crisis in race relations, or a strong localized demand for autonomy or even secession. In those fields (and there are others), legal and traditional governmental processes, whatever their immediate efficiency, can rarely come to grips with the root causes of the tensions. Resort has to be had to other mechanisms outside the formal procedures. The failure of the regular processes to provide acceptable solutions in turn feeds attitudes of contempt and frustration towards the law enforcement authorities and even towards the law and the law-making process itself. Those kinds of internal tensions are close to the kind of international tensions that endanger peace. Their common feature is that they require an accepted even if enforced political solution to be effective.

The Achilles' heel of those machineries remains the requirement of the consent of the States concerned before they can be used. Article 33 of the Charter preserves the freedom of choice of the parties for the settlement of their international disputes, a freedom which goes a long way to deprive that provision of much of its usefulness. The obstacle is the transcendent impact of national sovereignty and the sovereign equality of all States (which in political terms is little more than a fiction, as seen in chapter VII § 7.01 below). Regular legal processes do not easily accommodate internal dissensions based on class or ethnic or religious or other distinctive attributes, as is exemplified by the

desegregation of schools processes in the United States of America. The break up of States commonly perceived as solid and coherent notwithstanding internal ethnic and religious differences – the dissolution of the Soviet Union, of the former Socialist Federal Republic of Yugoslavia and of Czechoslovakia are three recent examples and the bitter internal divisions and conflicts in some of the new independent States of Africa– shows the unreality of a peace-keeping system based on an assumption that the territorial integrity and political independence of States are immutable.

The second intellectual approach turns more directly to the problem of force itself. It was once thought that reduction of national armaments (always a heavy burden on national economies) would go far in answering the problem. The two Hague Conferences of 1899 and 1907 were initially conceived in suchlike terms, and in that they failed. Disarmament was not effective before the First World War, nor between the two World Wars, possibly because it took the symptom for the cause. The 1919 Peace Treaties imposed heavy disarmament obligations on the defeated States, which however found ways to circumvent them so that within 20 years they had created the strongest military power in Europe. The victors assumed no reciprocal disarmament. The international debate on disarmament, concentrating largely at that time on the power relationships of the world's principal navies, did not touch the roots of the suspicions and fears which made the massive armament of nations so commonplace. No serious change has taken place in the United Nations, although attention has focused more on bringing under some form of agreed international supervision the new weapons of mass destruction, and above all nuclear weapons and instruments of chemical and biological warfare and the vehicles for their delivery. This has always been on the assumption that their control would rest exclusively in the hands of States. Here the policy of deterrence, or the balance of fear, has done as much to maintain universal peace since 1945 as anything else. Should these instruments come within the control of non-State entities, the whole existing legal order will be inadequate to deal with the situation.

With this, the international community has been groping towards a form of organization that will supply appropriate political machineries to deal with situations of tension and maintain international peace and security. The United Nations today epitomizes that effort. Viewed externally, the United Nations appears as a sophisticated and multifaceted administrative machinery. Yet in substance it is not very different from the more discreet form of diplomacy under Great Power leadership prevalent in earlier times. The underlying theory – and here is the explanation for the 'veto' power in the Security Council – is that the Great Powers, in fact and not merely in theory, bear the major

responsibility for the maintenance of international peace and security, and for its restoration when violence and other serious violations of the international order threaten international peace and stability. This theory works well enough when those Powers can regulate relations between themselves. It has never worked well if there is great tension between them, as was the case throughout the whole period of the Cold War, from 1946 to the mid-1990s, and still not dissipated although taking new forms.

The proposition of the renunciation of the use of armed force as an instrument of national policy is the premiss of the modern systems of international political organization, both universal as in the United Nations and regional as in the different regional bodies now encountered.[8] Nevertheless, the proposition will hardly stand up to critical analysis, and the superficial attraction of its slogan-like language blinds the unwary to that unreality. In a UN context, its application depends too much on interpretation and unless the interpretation is agreed, that is at best controversial and at worst a decoy for a naked political power struggle. This is reflected in the gap between the statement of legal principles in the Charter and practice.

§ 4.02. The historic rule

It is no accident that Grotius' classic work, *De jure belli ac pacis*, places war before peace. It is no accident that today's classic, Oppenheim's *International Law* (whatever edition), is divided into two books, the first on peace and the second on war, reversing Grotius' order. Classic international law as it developed in the Westphalian system accepted war and the violent use of force as permitted conditions of international relations, regulated by international law. That is not the approach of international law today. Throughout history, different religions and different schools of philosophy and of jurisprudence have wrestled with the problem of war, its legitimacy and its morality.[9] Many and diverse theories

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8 For example, the Organization of American States, the League of Arab States, the Organization of African Unity, the Conference on Security and Co-operation in Europe. For the status of these within the United Nations framework, see Chapter VIII (Arts. 52–54) of the Charter and appropriate decisions of the Security Council.

9 For a survey, see Th. M. Franck, 'Fairness in the International Legal and Institutional System: General Course on Public International Law', 240 *Recueil des cours* at 222 (1993-III). In this context, 'morality' is closely related to a person's conscience and unlike law, there is no universally accepted underlying 'morality' or any institution comparable to the ICJ to declare and enforce it. Cf. T. Nardin, *Law, Morality and the Relations of States* 305 (Princeton University Press, 1983).

and concepts have evolved over the distinction between just and unjust wars, between permitted and prohibited wars, between wars for a religious duty and those that are not so sanctified, on the different rights and duties of the States and of individuals in either type of war. But this distinction was never formulated in accepted legal terms. One thing, however, is common virtually to all approaches: to use force in self-defence is a natural right recognized under any legal, religious or philosophical approach.

Against that background, third party regulation of grave international disputes, and particularly arbitration and judicial settlement leading to a binding decision based on law, could be presented as an alternative to war. The nineteenth century pacifist movements, appreciating this, supported the movement to develop the potentialities of international arbitration as an alternative to war. But they were not strong enough to persuade governments to outlaw war and make recourse to arbitration compulsory. The 1899 and 1907 Conferences firmly retained the consensual basis of all international arbitration. Nevertheless, the first major attempt to limit the right to go to war achieved success at the turn of the century. That was in the second Hague Convention of 1907, respecting the Limitation on the Employment of Force for the Recovery of Contract Debts, giving force to the Drago Doctrine that a public debt cannot give rise to a right of armed intervention.[10] Its immediate cause was the Pacific Blockade of Venezuela in 1902 by combined naval forces of Germany, Great Britain and Italy to obtain payment of indemnities due to their subjects who had suffered losses in a civil war in Venezuela.[11]

The Covenant of the League of Nations (1919) was a start in controlling the use of force and the right to go to war.[12] It did not prohibit recourse to war, but tried to control it. It provided that any war, or threat of war, whether immediately affecting any of the members of the League or not, was a matter

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10 205 CTS 250. The text was negotiated in the First Commission of the 1907 Conference. For the Commission's report on that Convention, see J. B. Scott (ed.), *The Reports to the Hague Conferences of 1899 and 1907* 489 (Oxford, Clarendon Press, 1917); same, I *The Proceedings of the Hague Peace Conferences*, translation of the official texts, *The Conference of 1907*, 330, 547, 751 (New York, Oxford University Press, 1920).

11 By Art. 1, the parties agreed not to have recourse to armed force for the recovery of contract debts, except where the respondent State refused to submit the matter to arbitration. The claims were later settled by arbitration. *The Venezuelan Preferential Case* (1904), IX RIAA 99.

12 For text, see P. J G. Kapteyn *et al* eds., *International Organization and Interpretation: Annotated Basic Documents and Descriptive History of International Organizations and Arrangements* (2nd completely revised ed., The Hague, Nijhoff, from 1981), vol. 1A, p. I.A.1.b.

of concern to the League which should take any action that it deemed wise and effectual to safeguard the peace of the nations. The members of the League agreed that if a dispute should arise between them likely to lead to a rupture, they would submit the matter either to arbitration or to judicial settlement or to inquiry by the League Council, 'and they agree not to resort to war until three months after the award by the arbitrators or judicial decision, or the report by the Council' (Article 12). Article 16 provided that should any member of the League resort to war in disregard of its obligations under the Covenant, it should *ipso facto* be deemed to have committed an act of war against all other members of the League. For their part, they agreed to subject that State to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether or not a member of the League. Provision was also made for the imposition of military and nonmilitary sanctions against an offending State. The United States did not ratify the 1919 Peace Treaties and never became a member of the League, which in its first decade did not enjoy unreserved backing of its principal members, France and Great Britain. The Soviet Union, temporarily weakened by the First World War and the civil war that followed it, became a member in 1934. Between 1933 and 1937 Germany, Italy and Japan withdrew from it (as did many other mainly Latin American States). The League was too weak to prevent the general deterioration of the international situation in the 1930s leading into the Second World War and the collapse of the League.

Nevertheless, in 1928, in the heyday of the League, the famous Briand-Kellogg Pact (the Pact of Paris), officially named General Treaty for the Renunciation of War as an Instrument of National Policy, was signed on 27 August 1928 and entered into force on 25 July 1929.[13] Its main provision was the solemn declaration of its Parties 'in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another'. They further agreed that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin which may arise among them shall never be sought except by pacific means. That was the first attempt to

13 94 LNTS 57. This Pact is named after its principal architects, the Foreign Minister of France and the American Secretary of State. It was heavily riddled by reservations that deprived it of much value. For a contemporary assessment in terms of *Realpolitik*, cf. J. Brierly, 'The General Act of Geneva, 1928', 11 BYIL 112 (1930).

outlaw recourse to war as an instrument of national policy. If it was ineffective in light of the general weakness of the League of Nations and the international situation before 1939, its full impact on the development of this central aspect of international law only started to come to the fore after 1945.[14]

§ 4.03. The Charter of the United Nations

Following the Second World War the UN replaced the League.[15] The approach of the Charter is quite different. The concept of collective security with armed forces made available to the Security Council and the general prohibition on the use of force as expressed in Article 2 (4) replace the League's approach based on a controlled application of the right to resort to war. However, the wartime fighting alliance that had negotiated the Charter was quickly replaced by the tensions and suspicions of the Cold War, and that has conditioned the evolution of the law and practice regarding the use of force since 1945. The central provisions of the Charter embodying this approach have been distorted. While the prohibitions on the use of force have remained, those on collective security have never been implemented as originally conceived. Force is force, whoever is exercising it. The legal issue becomes whether the use of force was justified in the circumstances, and whether that use of force was reasonable and proportionate.[16] Because of this, the UN does not have an exclusive position when it comes to international crisis management. States, acting individually or collectively, can have a role in that, and there are circumstances in which the use of force is permitted.

The Charter balances the prohibition on the use of armed force by important provisions regarding collective action to maintain international peace and

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14 The International Military Tribunal for the Trial of German Major War Criminals (the Nuremberg Tribunal) found that Germany had violated the Pact in all the cases of aggressive war charged in the indictment (p. 443). The Tribunal examined the legal effect of the Pact and held that the solemn renunciation of war as an instrument of national policy necessarily involved the proposition that such a war was illegal in international law and that those who planned and waged such a war were committing a crime in so doing (p. 445). *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22 (London, HMSO, 1950).

15 See in general chapter. XII below. For the UN Charter, see Kapteyn, above note 12

16 Cf. the *Red Crusader* conciliation (1962), 35 ILR 485, 499. The doctrine of proportionality has its origin in the *Caroline* incident of 1837 and its recognition of the 'right of self-defence'. For a re-examination, before the Charter, see R. Y. Jennings, 'The Caroline and McLeod Cases', 32 AJIL 82 (1938).

security and to deal with threats and acts of aggression (Articles 40 to 51). To give backing to those provisions, and in particular to Article 51 on self-defence, the Charter contains detailed arrangements for members to make available to the Security Council on its call armed forces and other facilities, to be supervised by the Military Staff Committee (MSC). The MSC consists of the Chiefs of Staff or their representatives of the permanent members of the Security Council. Those institutional provisions have remained a dead letter since the MSC ceased operating in 1948, although, established by Article 47 of the Charter, it technically remains in existence and holds regular meetings at which no business is transacted. That has knocked away one of the important institutional linchpins of the Charter system of collective security, namely the expectation of prompt and effective action by the Security Council. This is reflected in Charter language by the transitional security arrangement of Article 106, by which the five permanent members shall consult with one another and, as occasion requires, with other members of the UN with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security, but that too has remained a dead letter. This deprives Article 51 of an essential element. This has been aggravated by unseemly protracted procedural delays and wrangling before the Security Council has taken an item on its agenda and adopted any measures.[17] When the ICJ referred to 'the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51, when its survival is at stake',[18] one must ask whether it had noted the inability of the Security Council to act in many cases. Who, apart from the organs of the State itself, is to determine whether the very survival of the State is at stake?

The key provisions of the Charter regarding the use of force are in Chapter V (the Security Council, Articles 23–32),[19] Chapter VI (Pacific Settlement of Disputes, Articles 33–38), Chapter VII (Action with respect to threats to the

17 I refer from personal experience to the proceedings in the 1341st to 1345th meetings of the Security Council between 24 May and 3 June 1967, preceding the Six Days War of June 1967. See on this R. Lapidoth, 'The Security Council in the May 1967 Crisis: A Study in Frustration', 4 *IsLR* 3 (1969). Similar delay was experienced in 1999 in connection with the situation in East Timor, before the Security Council adopted resolution 1269 (1999), 15 September 1999.

18 *Nuclear Weapons* adv. op. above note 3, 263 (para. 96). Careful reading of this passage in its context would indicate that the use of force in what is called 'anticipatory self-defence' is compatible with the Charter. Note, in this connection, the rejection by the General Assembly of proposals to determine that Israel had been the aggressor in the Six Days War of 1967. GAOR, 5th Special Session, Plenary, S/PV.1548 (4 July 1967).

19 On the Security Council, see chapter XII § 12.07 below.

peace, breaches of the peace and acts of aggression, Articles 39–51) and Chapter VIII (Regional Arrangements, Articles 52–54). Those provisions only relate to international disputes the continuation of which is likely to endanger international peace and security.[20] Resolutions adopted under Chapter VI are usually addressed to the parties concerned, whether States or not. Those adopted under Chapter VII are also addressed to the total membership of the UN and beyond. When the Council acts under Chapter VII, the domestic jurisdiction principle of Article 2 (7) of the Charter becomes inoperable. That is the provision which prevents the United Nations from intervening in matters which are essentially within the domestic jurisdiction of any State or requiring members of the United Nations to submit such matters to settlement under the Charter. 'This principle shall not prejudice the application of enforcement measures under Chapter VII'.

Yet there is an element of self-deception in those Charter provisions. In the last resort, political considerations determine whether the Security Council will take any action or not, and what type of action it will take, how the decision will be enforced, and those decisions are subject to the veto of the permanent members. The decisions of the Security Council are political decisions. There is no basis in the Charter for regarding them as quasi judicial decisions, whatever that is intended to expresss. That means, in the long run, that the real decision is taken by the States with the power and the willingness to act in the circumstances, the permanent members of the Security Council. They have to be evaluated by their contribution to the maintenance or restoration of international peace and security, not in terms of legalistic casuistry. To appreciate this one only has to compare, even superficially, events in Kosovo with events in East Timor, occurring in close succession during 1999. In that kind of context, there is little relevance in questions of whether the Security Council was acting in conformity with the Charter or not, or whether there should be any possibility of judicial review of its actions. Such review could realistically only take place after the event, and if, in a case of a continuing action, the judicial review should be against what the Security Council had

20 This notwithstanding, it cannot be said that every dispute or situation that has come before the Council was one likely to endanger international peace and security. A conspicuous example of a dispute which did not have that character is the dispute between Argentina and Israel over the abduction of the war criminal Adolf Eichmann; S/Res. 138 (1960), 23 June 1960. We can regret that more use has not been made of the Council to settle that kind of dispute. There is here a major difference between the Security Council and the Council of the League of Nations. To overcome this difficulty, Art. 65 of the Vienna Conventions on the Law of Treaties uses the expression 'the means indicated in Article 33 of the Charter'.

decided, very serious and delicate issues would arise (see chapter XII § 12.12 below).

This primary responsibility is not exclusive and the General Assembly at least is also to be concerned with international peace and security. However, the General Assembly cannot authorize the use of armed force in coercive measures under Chapter VII.[21] Nor do its decisions carry any obligations similar to those imposed by Articles 25 and 48 regarding decisions of the Security Council, or come within the scope of Article 103.

§ 4.04. The permitted use of force

The principal provision of the Charter that in its own language *permits* the use of force is Article 51 on self-defence. That too is an ambiguous article, rendered more debatable by differences between its English and French versions:

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 the 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.

Aucune disposition de la présente Charte ne porte atteint au droit naturel de légitime défense, individuelle ou collective, dans le cas où un Membre des Nations Unies est l'objet d'une agression armée, jusqu'à ce que le Conseil de sécurité ait pris les mesures nécessaires pour maintenir la paix et sécurité internationales. Les mesures prises par des Membres dans l'exercice de ce droit de légitime défense sont immédiatement portées à la connaissance du Conseil de sécurité et n'affectent en rien le pouvoir et le devoir qu'a le Conseil, en vertu de la présente Charte, d'agir à tout moment de la manière qu'il juge nécessaire pour maintenir ou rétablir la paix et la sécurité internationales.

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21 *Certain Expenses* adv. op. above note 1, 163. The General Assembly had adopted this position in 1950 in the Uniting for Peace resolution, 377 (V), 3 November 1950. One of the preambles of that resolution states that the failure of the Security Council to discharge its responsibilities on behalf of all the member States does not relieve the member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security.

The keywords here are 'inherent right', 'self-defence' and 'armed attack' or 'natural right' and 'armed aggression' to go by a possible reading of the French text. They are undefined, which means that the State claiming to be acting in self-defence makes its own determination in light of all the circumstances. There is no authority that can challenge that determination. In an important statement the International Court of Justice has said that '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'.[22]

The ICJ has given two interpretations of Article 51, in the *Nicaragua* (Merits) case and in the *Nuclear Weapons* advisory opinion. In *Nicaragua* it explained the significance of Article 51 and the relation of customary international law with it:

> The Court . . . finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it. Moreover, a definition of "armed attack" which, if found to exist, authorizes the exercise of the "inherent right" of self-defence, is not provided in the Charter and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which "subsumes and supervenes" customary international law. It rather demonstrates that in the field in question . . . customary international law continues to exist alongside treaty law. The areas covered by the two sources of law do not overlap exactly, and the rules do not have the same content.[23]

Elsewhere the Court explained that '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 an actual armed attack conducted by regular forces or its substantial involvement in that. At the same time the Court did not regard assistance to armed bands as constituting armed attack, although it could be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States (para. 195). On the aspect of

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22 *Military and Paramilitary Activities in and against Nicaragua* (Merits) case, ICJ Rep. 1986 14, 103 (para. 195 ff.).

23 Ibid. at 94 (para. 176).

collective self-defence, the Court declared that the requirement of a request by the State which is the victim of an alleged attack is additional to the requirement that such a State should have declared itself to have been attacked (para. 199).

In *Nuclear Weapons* the Court said:

> The entitlement to resort to self-defence under Article 51 is subject to certain constraints. Some of these constraints are inherent in the very concept of self-defence. Other requirements are specified in Article 51.
>
> The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. [After referring to the cited passage from paragraph 176 of the *Nicaragua* judgment, the Court continued] . . . This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed. . . . [A]t the same time, a use of force that is proportionate under the law of self-defence 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.[24]

Neither of those pronouncements, themselves not fully consistent, makes any attempt to explain 'proportionate', nor who is to determine it. Both stress the requirement of reporting to the Security Council as stated in Article 51. In *Nicaragua*, the Court indicated that the absence of a report may be one of the factors indicating whether a State in question was itself convinced that it was acting in self-defence (para. 200). In *Nuclear Weapons*, the Court recalled the requirement of immediate reporting to the Security Council. Both those pronouncements overlook the disuse of the collective security provisions of the Charter which the reporting would trigger and the difficulties in having an item adopted onto the agenda of the Security Council. In practice, reporting to the Security Council is sporadic, no doubt because during the period of the Cold War, and in the absence of the enforcement machinery envisaged in Articles 45 to 47 of the Charter with which Chapter VII enforcement action is intimately connected, little value was seen in this direct reporting, especially as the Security Council would in most cases be seised of the matter at least on the initiative of the Secretary-General.

The second provision of the Charter that envisages the use of force, also in Chapter VII, is Article 42. The difference is that Article 51 permits the State concerned to initiate the use of force, while Article 42 permits the Security Council, if it considers that measures not involving the use of armed force under Article 41 would be inadequate or have proved to be inadequate, to take such

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24 Above note 3, 244 (paras. 40–42).

action by air, sea or land forces as may be adequate to maintain or restore international peace and security or to authorize such action. The Charter gives as examples such actions as demonstrations, blockade, and other operations by air, sea, or land forces of members of the United Nations.

The words 'maintain or restore' international peace and security in Article 42 suggest that the Security Council may act before the crisis breaks or after, either anticipatory before force is used, or retrospectively during or after the event. This has given rise to a widespread impression that the use of force by a State or a coalition of States against another State, not against that State's territorial integrity or political independence but to prevent grave violations of the Charter which are a threat to international peace and security or to restore international peace and security, requires authorization from the Security Council in advance. This is open to discussion, however, given the ambiguous language of the Charter and the fact that well known and announced policies of a State and its actions in furtherance of that policy may legitimately be understood as constituting at least a threat to the maintenance of international peace and security, if not actually endangering it. There is also a grey area arising out of the expression 'the Purposes of the United Nations' in Article 2 (4). Article 1 sets out the Purposes of the United Nations (with an upper case *P*). The question is whether, if the Security Council has shown itself unable or unwilling to act in the absence of the required majority, a State or a group of States acting collectively may use force not against the territorial integrity or political independence of the State concerned, but to prevent or remove a threat to the maintenance of international peace and security. The Secretary-General of the United Nations, Mr Kofi Annan, has recognized that the rejection by the Yugoslav authorities of a political settlement for Kosovo had made the NATO action against Yugoslavia 'necessary'.[25]

Both Articles 42 and 51 are given to many, and not always reconcilable, interpretations. Since the Security Council became more active in the maintenance of international peace and security, differences of opinion on whether the situation comes under one or other of them have not stood in the way of agreed

25 'The Effectiveness of the International Rule of Law in Maintaining International Peace and Security', Speech of Mr Kofi Annan, Secretary-General of the United Nations, on 19 May 1999 at the Peace Palace sessions of the celebration of the Centennial of the First International Peace Conference of 1899, UN Press Release SG/SM/6997, 19 May 1999. Also available on CD-ROM annexed to F. Kalshoven (ed.), *The Centennial of the First International Peace Conference; Reports and Documents* (The Hague, Kluwer Law International, 2000).

action by or in its name. To overcome the difficulties, the current practice is to use the all-embracing phrase that the Security Council is 'acting under Chapter VII of the Charter', Chapter VII including Article 39 and Articles 42 and 51, and extending the obligations of Articles 25 and 48 on all members of the UN to accept and carry out the decisions of the Security Council, with the consequences of Article 103.

Over the years, the General Assembly has adopted many resolutions and declarations confirming the Charter obligations against the use of force (above chapter II § 2.07). The best known of these is the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[26] It contains a long section on the 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, or in any other manner inconsistent with the purposes of the United Nations. While most of this Declaration is cast in negative terms stating what States should refrain from doing, it concludes with the statement that nothing in the Declaration shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter 'concerning crises in which the use of force is lawful'. There is no authoritative explanation of what that phrase means. The ICJ has indicated that it is necessary to distinguish the gravest form of the use of force (an armed attack) from other less grave forms, and that in determining the legal rules applicable to the latter forms, it can draw on the formulations contained in the Declaration.[27] The Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, annexed to General Assembly resolution 42/22, 18 November 1987, is another of these. In Part II, paragraph 19, it requires States to take effective measures to prevent the danger of armed conflicts and to enhance global stability, a sentence which contains no mention of the Charter or of any United Nations organ. That type of instrument may purport to elucidate or even add 'clarifications' to the Charter. At the same time they all contain an express statement to the effect that nothing in them affects the overriding quality of the Charter itself. But nothing has been done to bring about any institutional replacement of the lost provisions of Articles 43 to 50 of the Charter.

The International Court of Justice has no direct powers in relation to the use of force. If it has jurisdiction, it can state whether in the circumstances the

26 On that Declaration, above chapter II note 44.

27 The *Nicaragua* (Merits) case, above note 22, 101 (para. 191).

use of force was legitimate or not. If necessary it can, while a case is in progress, indicate provisional measures of protection and indeed has done so, to deal with an outbreak of violence connected with the dispute before it.[28] Those orders are communicated to the Security Council, which if need be can act under its general powers for the maintenance of international peace and security. Towards the end of the 1990s States began to show interest in the possibilities offered by the Court to the processes of the maintenance of international peace and security and even the restoration of peace after a breach, and to its possibilities regarding the use of force in possible violation of the Charter (above chapter III § 3.04 . Possible peace-keeping decisions by the Court could not be carried further since they involved at least one permanent member of the Security Council or its interests, and its right of veto prevented direct action by the Security Council in support of the Court's decisions. In its orders in the *Use of Force* cases the Court recalled that when such disputes give rise to a threat to the peace, breach of the peace or acts of aggression, the Security Council 'has special responsibilities under Chapter VII of the Charter'. The Court did not comment on the position where the Security Council has not exercised its responsibilities.[29] To some extent a judgment of Solomon, those orders nonetheless confirm that while military operations are in progress, the Security Council is the proper organ to deal with the situation.

As seen, the ICJ has also given some interpretation of the meaning of these provisions of the Charter. It recognizes that the rule prohibiting force (a rather free paraphrase of the Charter provision) allows for exceptions. One of these is the exception constituted by the right of individual or collective self-defence, itself a matter of customary international law. There also appeared to be general agreement on the nature of the acts which can be treated as constituting armed attacks. This includes 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 an actual armed attack conducted by regular forces, or that State's substantial involvement in those activities, and terrorist attacks not attributed to another State. The Court saw no reason to deny that in customary law the prohibition of armed attacks may apply to the sending

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28 The outstanding examples are the orders indicating provisional measures of protection in the *Frontier Dispute* case, ICJ Rep. 1986 554 and in the *Land and Maritime Boundary between Cameroon and Nigeria (*Preliminary Objections) case, ICJ Rep. 1998 275, 292 (para. 28).

29 *Legality of Use of Force* cases (above chapter III note 36), ICJ Rep. 1999, case against Belgium, 131, 140 (paras. 16-19 and 48-50) and equivalent passages in the other Orders.

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 it did not believe that the concept of armed attack included assistance to rebels in the form of the provision of weapons or logistical or other support. That kind of assistance may be regarded as a threat or use of force or amount to intervention in the internal or external affairs of other States. There is no question that terrorist attacks conducted from beyond the State's borders give it the full right to use armed force in its self-defence. Article 21 of the ILC's draft articles on the international responsibility of States for internationally wrongful acts (see chapter XI below) provides that the wrongfulness of an act of State is precluded if the act constitutes a lawful measure of self-defence in conformity with the Charter.

Defensive action by a unit or organ of the State outside the State, such as a warship on the high seas, a military base or installation in a foreign country with that country's consent or an embassy or a consulate, believing itself to be under attack or under threat of attack, is widely believed to constitute an attack on the State giving rise to the right of self-defence. The self-defence of the warship or of the embassy or consulate or other installation is also an inherent and natural right, unaffected by the Charter, justifying the use of armed force. It is significant that the ICAO Council, while expressing regret that weapons were used against a civilian aircraft, did not condemn the action of an American warship which, believing itself to be under threat of attack, opened fire on an Iranian civil aircraft, killing all its occupants. In fact the Iranian recourse to the Court was in the form of an appeal from that decision of the ICAO Council.[30]

§ 4.05. The meaning of 'force'

The Charter prohibition is on the use of 'force' not a word with any accepted legal meaning. That was deliberate. In the deteriorating international situation before the Second World War, many expressions had been used to avoid the word 'war', partly in an attempt to overcome the renunciation of war as an instrument of national policy embodied in the Briand-Kellogg Pact of 1928 (above § 4.02) and partly to avoid the imposition by third States of neutrality

30 Resolution of the ICAO Council adopted at the 126th session, 20th meeting, 17 March 1988. This incident was brought before the Court in the *Aerial Incident of 3 July 1988* case, discontinued in ICJ Rep. 1996(I), 9. And see II Pleadings 632.

legislation. For example, the Japanese invasion of China was known as the 'China Incident'. German expansion into neighbouring countries was given a series of designations. With Austria it was *Anschluss* (a word with many meanings, including 'union', 'accession' but also 'annexation'). Czechoslovakia came under a 'Protectorate'. The Italian invasion of Ethiopia was anything but 'war'. To overcome spuriosities of that kind, the authors of the Charter deliberately chose the non-committal word *force*. From the structure of the Charter and from the negotiations that led to it, it is clear that what they had in mind was the kind of abuse of armed force that had characterized international diplomacy in the first half of the century.

The Charter is not consistent in its language. In the sixth paragraph of the Preamble and in Articles 41 and 46 it uses the expression 'armed force'. In Article 2 (4) and in Article 44 it uses the unqualified word 'force'. This has led to the question whether it is limited to armed force (which on the whole is easily identifiable), or whether, for the purposes of constructing a modern international order, the concept is now broader and extends to such intangible and at times indirect elements as psychological, economic and political pressures. If there is a strong reaction today, and rightly so, against the 'gunboat diplomacy' of the nineteenth century, there is equally strong reaction against the 'gin-bottle diplomacy'; for the great colonial empires now disintegrated are said to have been established by a sinful combination of those two methods of coercion together with military force. This issue arose in connection with the codification of the law of treaties.

Consistent with its view that the invalidity of a treaty procured by the illegal threat or use of force is *lex lata* in today's international law, the ILC included draft Article 49 to the effect that a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of the Charter of the United Nations.[31] At the first Vienna Conference (1968–1969) this gave rise to difficulties. After long negotiations, the Conference adopted what is now Article 52 of each of the Conventions on the Law of Treaties, in a slightly modified form. In addition it included in the Final Act of the 1969 Conference a Declaration on the prohibition of military, political or economic coercion in the conclusion of treaties. In that Declaration the Conference, desiring to ensure that in the future no such pressures will be exerted in any form by any State in connection with the conclusion of a treaty, solemnly condemned the threat

31 ILC Rep. 1966 (A/6309/Rev.1) Part II, Chap. II Art. 49, YBILC 1966/II, 169, 249. For the Vienna Conventions, see 1155 UNTS 331.

or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent. This is limited to the law of treaties, as *lex desiderata*.

One must assume that the feasibility and other studies that a Government will commission before it decides on a treaty action will calculate the advantages and the disadvantages likely to follow from the proposed action, and those calculations should estimate the reactions of other States. Fears were expressed at the Vienna Conference that a provision along those lines would lead to instability in international treaty relations, at the heart of all international relations today. Those fears have proved groundless. There is no known instance of a State attempting to escape from treaty relations on the ground that the treaty had been procured by coercion.[32] The General Assembly has broadened the scope of that Declaration. In its Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations annexed to resolution 42/22, 18 November 1987, paragraph I.8 declares that no State may use or encourage the use of economic, political or other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.

However, accepted notions of military, political or economic pressures are not the only form of force or coercion encountered today. There is the force of universal public opinion, shifting and now largely moulded instantaneously and manipulated by nonstop worldwide telecasts (sometimes inaccurate and later retracted, sometimes tendentious) and the Internet. These are brought into diplomatic tergiversations, and especially into public debates in organs like the General Assembly and the Security Council. This is being backed by something more insidious. Most of the countries of the world taken singly are militarily and economically weak and dependent on outside powers. If the matter is approached simply as one of head-counting in international conferences, including UN organs, in which all States take part on a footing of formal equality, there is little doubt that the majority would prefer the broadest interpretation of 'force' as covering all forms of pressure which one State can bear upon

32 When faced with a contention that a treaty had been procured by force, the ICJ adopted a very strict criterion: 'It is . . . clear that a court cannot consider an accusation of this serious nature on the basis of a vague general charge unfortified by evidence in support'. *Fisheries Jurisdiction* (Jurisdiction of the Court) cases, ICJ Rep. 1974, 3, 14 (para. 24) and 49, 59 (para. 24).

another. In practical terms that is obviously unreal, just as in ordinary human relations pressures can be used quite legitimately until the fine dividing line of the illegal area of undue influence is reached. This question is noted in connection with the law of treaties. Here we are concerned with the use of armed force on land, on sea or in the air. That is what the Charter has in mind when it refers to the use of force against the territorial integrity or political independence of any State. That is the real pressure of which the threat or use is a violation of the Charter.

§ 4.06. Weapons of mass destruction: nuclear and biological weapons

Since the Charter was adopted in June 1945, problems caused by nuclear weapons and nuclear energy generally have dominated international relations. The terrorist attacks on the United States in September 2001 have introduced a new threat – fully fuelled civil aircraft hijacked by suicidal terrorists and in that way converted into humanly guided flying bombs of destructive power far exceeding anything used in the Second World War. Two factors have influenced the evolution of international law in this context. One is the increasing 'efficiency' and destructiveness of modern weapons, including their expanding 'collateral damage' – a monstrous term indicating loss of life of, or injury to civilians or other protected persons (under the Geneva Conventions), all innocent bystanders, and damage to or the destruction of the natural environment or objects that are not in themselves military objectives.[33] The second is, in organized industrialized States, the State's ability in time of war to control all its human resources, male and female. Both have encouraged the outlawing of war, and both have blurred the distinction between 'combatant' and 'non-combatant' and between military and non-military objectives, on which much of the law relating to the use of force, together with modern international humanitarian law, rests (further in chapter V).

An early attempt to restrict the use of indiscriminate weapons is the Declaration respecting the use of projectiles diffusing asphyxiating gases adopted at

33 International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (L. Doswald-Beck, ed. Cambridge, Grotius Publications, 1995). This is the most authoritative statement of the law on this aspect. See also the symposium in Tel Aviv University in 27 IsYBHR (1997).

the 1899 Peace Conference.[34] The use of poison gas during the First World War led to the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacterial Methods of Warfare of 17 June 1925.[35] This treaty is still in force and has been carried further in the Convention of 10 April 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons, and on their Destruction[36] and the Convention of 3 September 1992 on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction.[37] To these should be added the Oslo Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction of 18 September 1997.[38] These and other weapons of mass and indiscriminate destruction in modern ballistic carriers can be no less destructive than nuclear weapons.

Yet it is the shock produced by the nuclear attacks on Japanese cities in 1945 coupled with later disasters in civilian nuclear plants that more than anything else has aroused public concern over the use of weapons of mass destruction, particularly nuclear weapons. This concern has led to the establishment in 1956 of the International Atomic Energy Agency, dealing with the peacetime uses of atomic energy, and to a series of international treaties relating both to the military and to the civilian use of nuclear energy. The principal treaties on nuclear weapons, both products of the Cold War, are the Treaty of 4 August 1963 banning nuclear weapon tests in the atmosphere, in outer space and under water,[39] the treaty of 1 July 1968 on the non-proliferation of nuclear weapons,[40] and the Comprehensive Nuclear Test-Ban Treaty of 10 September

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34 187 CTS 453.

35 94 LNTS 65. This had been preceded by a treaty of 6 February 1922 regarding the use of submarines and gases in warfare, but that treaty never entered into force. For text see 16 AJIL Sup. 57 (1922).

36 1015 UNTS 163.

37 1934 UNTS 45. This Convention established the Organization for Prohibition of Chemical Weapons (OPCW), with its seat at The Hague. Internet address: www.opcw.org.

38 2056 UNTS 211, in force from 1 March 1999.

39 480 UNTS 43.

40 729 UNTS 161. In S/Res. 825 (1993), 11 May 1993, the Security Council called upon the Democratic People's Republic of Korea (North Korea) to reconsider its intention to withdraw from this Treaty – an indication of the importance that the Security Council attaches to it. On 11 June, North Korea decided to suspend that withdrawal. Statement by the President of the Security Council, S/PRST/1994/2, 31 March 1994. And see S/Res. 984 (1995), 11 April 1995, stating clearly that any aggression with the use of nuclear weapons would endanger international peace and security, noted by the ICJ in its *Nuclear Weapons* adv. above note 3 *passim*. Similarly in S/Res. 1172 (1998), 6 June 1998.

1996 (not yet in force).[41] Other instruments are under negotiation. In addition, nuclear free zones have been established in different regions of the world.

In 1994 the General Assembly, responding above all to pressure from Non-governmental Organizations, requested an advisory opinion of the ICJ on the question: 'Is the threat or use of nuclear weapons in any circumstances permitted under international law?'. In its reply, the Court was unanimous in finding that there is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons. By eleven votes to three it found that there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such. It was unanimously of opinion that a threat or use of force by means of nuclear weapons is contrary to Article 2 (4) of the Charter and that failure to meet all the requirements of Article 51 is unlawful; and that 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. By the casting vote of the President (Judge Bedjaoui), the Court being equally divided, it found that it followed 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 facts at its disposal, the Court could not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake. The Court ended this inconclusive opinion by recalling that 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.[42]

In its opinion, the Court wisely recognized that 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

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41 A/Res.50/245, 10 September 1996.

42 *Nuclear Weapons* adv. op. above note 3, 266 (para. 105 (2)). President Bedjaoui explained his position in a carefully worded declaration at 268. Each one of the fifteen judges who sat in this case appended an individual opinion, a grave fracturing of the law. Since the Court did not answer the question put, there are some who think that it would have done better had it declined to give any opinion.

to the legal status of weapons as deadly as nuclear weapons. It was consequently important to put an end to that state of affairs: 'the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result' (para. 98).

§ 4.07. The definition of aggression

The prohibition on the use of force and acknowledgment of the inherent right of self-defence are directly linked to the concept of aggression, and one of the purposes for the extensive powers of the Security Council under Chapter VII of the Charter is to enable it to take effective action against acts of aggression. In consequence, the question of the definition of aggression, which has been under international discussion since the late 1920s, has assumed prominence in the United Nations.[43] In fact it is older, and was concerned with treaties of guarantee and of non-aggression. In terms of the discipline of the law, the need for a definition of aggression is now said by its proponents to arise from the role of the Security Council in dealing with acts of aggression under Chapter VII of the Charter. It is contended that a definition of aggression would assist the Security Council in its work, though this suggestion is undoubtedly tendentious. But every definition has its hazards – *omnis definitio periculosa est*. There is no definition that cannot be circumvented. All this refers to a definition of aggression for the purpose of general international law and the application of specific treaties, especially today the UN Charter. The introduction by the Rome Statute of the International Criminal Court (ICC) of the concept of individual international criminal responsibility for aggression without a definition of the term for inclusion in the Statute of the ICC has left that matter for future development.[44] This will raise difficult problems of co-ordination between

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43 For a useful collection of materials on this topic, see B. Ferencz, *Defining International Aggression* (Dobbs Ferry NY, Oceana Publications, 1985). In its well-known dictum in the *Barcelona Traction* (Second Phase) case, the ICJ included the outlawing of acts of aggression in its list of obligations *erga omnes*. *Barcelona Traction, Light and Power Company, Ltd* (New Application; 1962) (Second Phase), ICJ Rep. 1970 3, 32 (para. 34). It is not clear whether that observation is intended to mean that the obligation is addressed *erga omnes* or is owed *erga omnes*.

44 Art. 5 of the Rome Statute of the International Criminal Court includes aggression among the crimes over which that Court has jurisdiction. The Rome Conference referred the definition of that crime and related matters to the Preparatory Commission which, however, was unable to complete the work. The Assembly of States Parties accordingly established a special working group to continue the work. Assembly of States Parties to the Rome Conference on the International Criminal Court, first session (2002), *Official*

State responsibility on the one hand, and individual criminal responsibility on the other.

Traditionally, aggression has been considered in terms of armed attack by one State against another. The term is not applied to situations of internal conflict or civil war. The international reaction to the events in the United States on 11 September 2001 suggests that terrorist armed attack also counts as aggression. There is no difficulty over the obvious and blatant cases of the threat or use of armed force for direct aggression against another State. It is easy to observe and to list them. The difficulty arises over the more dangerous and insidious forms of indirect aggression deliberately carried out in a way that enables the Government to deny responsibility for the action. Techniques of this kind were common in Europe preceding the Second World War, and they have been used since, especially in forms of internal unrest and armed attack on the established authorities. The appearance of a word like 'volunteers' signals a possible instance of indirect aggression. This phenomenon also illustrates in a practical way the problem of a 'preventive war' and anticipatory self-defence, and the risks to the stability of the legal order that are created if one thinks of defining aggression in exclusively enumerative terms. Such a definition could be appropriate for the identifiable instances of direct aggression. It is inappropriate if one takes a broader view of the international regulation of the use of force.

Examination of the resolutions of the Security Council since its inception discloses that it has referred to acts of aggression in connection with violations of the peace that occurred during the decolonization process on the African continent, and especially regarding actions of the former Governments of South Africa and of Rhodesia.[45] It has never directly condemned a State as aggressor even in circumstances in which the parliamentary situation in the Council could have favoured the use of the term. The nearest it reached was in resolution 419 (1977), 24 November 1977, in which it strongly condemned the act of armed aggression perpetrated against Benin on a given date.

There are at least three explanations for this. One is the absence of agreement among the permanent members of the Security Council, the principal factor that has prevented the creation of peace-maintenance machinery as envisaged in the Charter. The second is the need to ensure the required majority of nine

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Records (ICC-ASP/I/3) 328 (Res. ICC-ASP/I/Res.1).

45 These governments were in effect 'outlawed' by the international community. For examples, see the following resolutions: 387 (1976), 405 (1977), 419 (1977), 424 (1978), 445 (1979), 447 (1979), 496 (1981), 546 (1984), 580 (1985), 587 (1986).

favourable votes. The third is a matter of diplomatic technique. If the primary object is the restoration of peace and of legality and the adjustment of the situation that has given rise to the tension, pejorative assertions that one party or the other was 'guilty' of 'aggression' will not be helpful. The Security Council has been pragmatic. It is more concerned with bringing violence to an end and with preventing its spread than with formal findings that a State has committed aggression. It prefers condemning a State for breaches of the peace rather than for acts of aggression. To this we may add that the Security Council has not felt that it could legislate a new situation into existence. It has left that to the parties to settle by negotiation, at most indicating its view as to the main lines of an acceptable settlement.[46]

In the same line of thought, internationally controlled and internationally composed military or quasi-military (police) peace-keeping and observer missions have been created *ad hoc* and have undertaken peace-keeping action under the flag of the United Nations.[47] During the Cold War these forces did not operate under the compulsory powers of the Security Council but with its approval and by agreement with the States concerned. The Charter does not foresee this, but the International Court of Justice has upheld it in the *Certain Expenses* advisory opinion.[48] In the long run this is probably a more satisfactory approach towards intractable problems and one closer to international realities and to good diplomatic practice. More recently, however, with the lessening of general international tensions following the end of the Cold War, the Security Council has made increasing use of its powers under Chapter VII of the Charter, and adopted decisions binding on the whole of the United Nations (if necessary) for the establishment and the operational functions of these forces. In the late 1990s, in the Kosovo and East Timor crises there is a sharp distinction between actions for the suppression of acts of violence or

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46 An outstanding example of this is S/Res. 242 (1967), 22 November 1967, outlining principles for a just and lasting peace in the Middle East. Israel's Treaties of Peace with Egypt (1138 UNTS 59) and with Jordan (UNTS # 35325) both recite that resolution in their preambles. Likewise the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1997, doc. A/51/889–S/1997/357.

47 UN, Department of Public Information, *The Blue Helmets – A Review of United Nations Peacekeeping.* (2nd ed., Sales No. E.90.I.18, 1990). For a quick survey, see UN Information Notes, *United Nations Peace-keeping* (United Nations, 1995). See also R. Higgins, *United Nations Peacekeeping; Documents and Commentary* (London, Oxford University Press, 1969–1981); R. C. R. Siegmann, *Basic Documents on United Nations Peacekeeping Forces* (2nd ed. The Hague, Nijhoff, 1989). More on peace-keeping in chapter XII § 12.0**8** below.

48 Above note 1.

other violations endangering international peace and security on the one hand, and the restoration or re-creation of civil administration and internal law and order in the affected area, on the other. That too is being undertaken by United Nations organs, although it is not a function specifically envisaged in the Charter.

Notwithstanding this practice of the Security Council, the General Assembly has concerned itself with a definition of aggression. In the Friendly Relations Declaration in resolution 2625 (XXV), 24 October 1970, it proclaimed that a war of aggression constituted a crime against the peace, for which there is responsibility under international law. In resolution 3314 (XXIX), 14 December 1974, it approved a long definition of aggression which it thought would contribute to the strengthening of international peace and security. The General Assembly recommended that the Security Council should, as appropriate, take account of that definition as guidance in determining, in accordance with the Charter, the existence of an act of aggression. The resolution was adopted without a vote, indicating that its deliberate ambiguities are a cover for irreconcilable differences of approach and of understanding of the meaning of the Charter. The resolution was duly brought to the notice of the Security Council, which has not had occasion to use it. Charles De Visscher has well stated the position:

> Aggression, in the present state of international relations, is not a concept that can be enclosed in any legal definition whatsoever; the finding that it has occurred in any concrete case involves political and military judgments and a subjective weighing of motives that make this in each instance a strictly individual matter.[49]

The definition adopted by the General Assembly refers to aggression when committed by States. For that reason, notwithstanding contrary opinions, it is not appropriate for inclusion in an instrument referring to international criminal

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49 Ch. De Visscher, *Theory and Reality in International Law* 303 (trans. L. Corbett, Princeton University Press, 1968). For devastating criticism of that definition of aggression of the General Assembly, see J. Stone, *Conflict through Consensus* (Baltimore, Johns Hopkins University Press, 1977). See also S. M. Schwebel, 'Aggression, Intervention, and Self-Defense in Modern International Law', 136 *Recueil des cours* 411 (1972-II), reproduced in his *Justice in International Law* 530 (Cambridge, Grotius Publications, 1994); B. Broms, 'The Definition of Aggression', 154 *Recueil des cours* 299 (1977-I). The Secretary-General duly communicated the resolution to the Security Council on 31 January 1975 (S/11613, mimeographed).

responsibility of individuals.[50] Likewise, it does not cover the new form of aggression by terrorist movements, nor acts of aggression committed by other entities.

§ 4.08. The problem of intervention

A common technique to conceal the use of force against a foreign State is that of intervention at the request of the responsible authorities of the invaded State. Agreed intervention is nothing new, being a traditional way for a strong State to impose its will on a weaker State or to prevent the emergence in a weaker State of elements hostile to its own policies. Today that type of intervention would not be in conformity with Charter prohibition on the threat or use of force. To overcome that, and for more general reasons, the procedure of 'invitation' has been evolved. By this, a government invites an outside power to send in its armed forces to protect it. Sometimes this happens when internal turmoil threatens the internal regime without necessarily leading to a change in the general orientation of the country's foreign policy. At others the internal turmoil may be produced or accompanied by external elements aiming at changing the country's external orientation. In the first type of case, where the status quo is not threatened, this form of intervention, while not to be commended, may not always be open to serious reproach, provided that the invitation is real, that it leaves the government in command of the situation, is not excessive, and is terminated as soon as possible. The other type of case will have serious international implications. Here the fact that the intervention is in response to a formal invitation may be of purely nominal significance. The intervention becomes a disguised form of aggression.

Nevertheless, limited armed intervention cannot be excluded if its purpose is a humanitarian one, and is a form of necessary self-help. Following the rescue by Israel armed forces of the passengers and crew of an Air France airliner hijacked by Palestinian elements to Entebbe, Uganda, in 1976, the Organization of African Unity requested the Security Council to consider the 'aggression against Uganda by Israel'. On behalf of its African members, a draft resolution was presented condemning Israel's 'flagrant violation of Uganda's sovereignty and territorial integrity' (S/12139). After the debate, the sponsors withdrew that resolution. That debate can be seen as endorsing O'Connell's view, cited by the representative of Israel, to the effect that Article 2 (4) should not be inter-

50 Above note 44.

preted as to prohibit a use of force which is limited in intention and effect to protecting a State's own integrity and its nationals' vital interests, when the machinery envisaged by the United Nations is ineffective in the situation.[51]

The two Charter allowances for the use of force together with the grey area mentioned earlier reflect a situation that existed in 1945, with the *de facto* division of Europe and of East Asia into two hostile camps, and without any consideration being given to the possibility that unforeseen factors may impair the stability of the territorial integrity of States as established after the Second World War. It is precisely in that respect that in the last decade of the twentieth century this hypothesis has crumbled. The decolonization process in Africa took place in relative ease in its original form of separation from the metropolitan country. But as time went on, the artificiality of the colonial boundaries together with the UN proclaimed right of self-determination led to serious internal disturbances and secessionist movements in different African States. These led to armed intervention and came to constitute a threat to international peace and security, requiring Security Council action. This development also produced a serious clash of legal principles, between the principle of self-determination and the principles of *uti possidetis* and territorial integrity as the territorial basis for the new independent States of Africa (further in chapter VII § 7.02 below). Later, a similar situation developed in the new Southern States of the Confederation of Independent States, including Armenia, Georgia, Tajikistan and others. Uncertainties regarding the law applicable to internal armed conflicts and serious violations of humanitarian law and human rights (sometimes indistinguishable) called for intervention by outside powers and UN action.

The dissolution of two federal States, the USSR and the Socialist Federal Republic of Yugoslavia (SFRY), had similar features. Those two instances have called for massive intervention in forms that the Charter does not foresee – armed humanitarian intervention to prevent excessive violations of international humanitarian law, political intervention with the same object, the provision of large-scale aid to victims of violations of humanitarian law, and to establish temporary and transitional civil authority to mention the main aspects. In autonomous regions of the Russian Federation (Chechnya, for example) the central authorities of the Russian Federation took the matter in hand. In the former Yugoslavia, where the individual republics all proclaimed their independ-

51 Security Council, S/PV.1939 to S/PV.1943 and relevant documents, 31 SCOR Sup. for July, August and September 1976; O.P. O'Connell, *International Law* 304 (2nd ed. London, Stevens, 1970; L. C. Green, 'Rescue at Entebbe – Legal Aspect', 6 *IsYBHR* 312 (1976). For more on aircraft hijacking, see chapter IX § 9.03 below.

ence of Serbia and Montenegro, the risk of extension of armed conflict was serious enough that the Security Council had to arrange for outside armed forces to enter the area. So long as the Cold War virtually forestalled serious action by the Security Council except perhaps in the most serious cases, or where the interests of the two major power blocs coincided, little could be done, and attention was focused on maintaining the status quo and preventing the spread of violence. With the end of the Cold War, things started to look different, and the Security Council began taking more decisive action under Chapter VII of the Charter. In resolution 1247 (1999), 18 June 1999, the Security Council gave *ex post facto* endorsement to the military actions (bombing from the air) undertaken by NATO since 24 March 1999 in a form of humanitarian intervention for the protection of the population of the province of Kosovo. The legality of this type of intervention and its scale is and will remain a matter of controversy. However, as the Secretary-General of the United Nations said in his speech mentioned earlier, there 'are times when the use of force may be legitimate in the pursuit of peace'.[52]

§ 4.09. Force and decolonization

The Declaration on the Granting of Independence to Colonial Countries and Peoples, the decolonization resolution of the General Assembly, resolution 1514 (XV), 14 December 1960, declared that the subjection of peoples to alien subjugation and exploitation constituted a denial of fundamental human rights, was contrary to the Charter, and was an impediment to the promotion of world peace and co-operation. Ten years later, in resolution 2621 (XXV), 12 October 1970, the General Assembly reaffirmed the inherent right of colonial peoples to struggle by all necessary means at their disposal against colonial Powers which suppressed their aspiration for freedom and independence. This received fuller treatment in the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, annexed to resolution 42/22, 18 November 1987. That Declaration ends with the statement that nothing in the 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, particularly peoples under colonial and racist regimes or other forms of alien domination, nor the right of such peoples to struggle to that end and to seek and receive support.

52 Above note 25.

That would appear to weaken the compelling power of the Charter prohibition on the threat or use of force in decolonization struggles, with corresponding weakening of the same power as regards counter-measures available to the opposing party. That effect may not accord fully with the Charter principle which, as has been seen, is sometimes regarded as an example of a *jus cogens* principle.

Article 1 (4) of Additional Protocol I to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977,[53] on the other hand, may contradict this. By that, the Protocol applies in situations 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 and the Friendly Relations Declaration. This holds national liberation movements engaged in armed struggle to the same standards as States, and not to the slightly lower standards of Protocol II applicable to dissident movements which are not national liberation movements.[54] This distinction is maintained in the detailed lists of war crimes in Article 8 of the Rome Statute of the ICC. Closely related to decolonization is the presence of national liberation movements that have acquired a recognized standing in international organizations (see chapter VII § 7.07 below).

§ 4.10. The response to terrorism

Although terrorism is as old as recorded history (the excuse for the mobilizations that led to the First World War in 1914 was a political assassination in Sarajevo), the first modern incident of *international* or transborder terrorism is commonly placed at the assassination of King Alexander of Yugoslavia in Marseilles on 9 October 1934 by member of a Croatian separatist movement.

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53 1125 UNTS 3. Further in chapter V note 59 below. On the adherence of national liberation movements to the Geneva Conventions, see ibid. And see the resolution of the Institute of International Law on the application of international law, in particular humanitarian law, in armed conflicts in which non State entities are parties of 25 August 1999, 68/II Annuaire IDI 387 (1999). Inability to be a party to a treaty between States does not exempt the movements from observing the requirements of international humanitarian law, or affect the rights of the States concerned when faced with abuses of the international humanitarian law, especially if it requests ICRC or other similar interventions on its behalf. But it introduces legal asymmetry into the problem.

54 1125 UNTS. 609. That Protocol makes the general rules of international humanitarian law applicable to non-international armed conflicts.

That act was directed against a single prominent political personality, and it led the League of Nations to adopt the Convention for the prevention and punishment of terrorism of 16 November 1937.[55]

Terrorism as we now see it is quite different. It began appearing in the 1960s. Its outstanding characteristics are its extreme violence, its indiscriminate, inhumane and perfidious use of armed force from across the national borders (frequently with illegal weapons such as nail-filled bombs or empoisoned or explosive letters sent through the mail) by non-State entities against innocent and unsuspecting target victims, often without warning, in utter disregard of any of the legal precepts relating to the use of armed force. It is based on elements of surprise in time and in place. Those who perform terrorist acts do not distinguish themselves from their victims under attack, nor do they carry their weapons openly, thereby both violating fundamental principles of international law and forfeiting any protection of the Geneva Conventions to which they might otherwise be entitled, following Article 44 (3) of Additional Protocol I of 1977. Terrorism in this sense has become a major factor of modern international affairs, culminating in the mass attacks on New York and on Washington D.C., with heavy loss of life, on 11 September 2001. Although said to be undertaken to further political aims such as 'liberation', international law sees no relevance in terrorist motives and puts all the emphasis on the illegality of the acts.

This notwithstanding, political considerations impeded attempts to take international action against transborder terrorism, as important groups in the UN saw the asserted motives behind these actions as political and connected either with the decolonization process or with other political situations. The Friendly Relations Declaration laid down the principle that no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State.[56] That has not had much effect. Terrorist acts increased in their severity, unpredictability and everywhereness: hijacking of civil airliners or their destruction while in flight, with heavy loss of life and regardless of nationality, violent attacks on civilian airports, bombing

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55 League of Nations doc. C.94.M.47.1938.V, reproduced in B. Ferencz, *An International Criminal Court: A Step toward World Peace*. vol. I, 193 (Dobbs Ferry NY, Oceana Publications, 1980). That Convention never entered into force, probably on account of the outbreak of war in 1939.

56 On that Declaration, see above chapter II note 44. And see *International Instruments related to the Prevention and Suppression of Terrorism*, prepared by the Codification Division of the Office of Legal Affairs (United Nations, 2001).

of discotheques in Berlin and Tel Aviv, of crowded pizzerias in Jerusalem, of civilian housing blocks in Moscow, violent attacks on embassies and consulates of different countries in different continents as far apart as Nairobi and Buenos Aires, indiscriminate bombings in Haifa, Belfast, London and throughout Spain, violent attack on the Parliament Building in New Delhi, and lately the sending through the mails of poisonous and hazardous substances potentially life-threatening not only to recipients of the mail, but to others who might come into contact with it during its transmission (bioterrorism), to mention but a few acts of terrorism. These have been dubbed 'asymmetrical threats' and 'asymmetrical responses from terrorist organizations', terminology intended to designate the new type of warfare that these activities have engendered.[57] 'Asymmetrical' – because of the complete absence of correspondence, equivalence and parallelism between the perpetrators and the victims.

Acts of terrorism and those who engage in them are completely outside the law. The acts are certainly criminal in the State in which they were committed and to some extent have been dealt with in criminal law terms by treaties laying down the application of the doctrine of *aut dedere aut judicare* – either extradite the accused or put the person on trial. In its earliest form this response was directed at the protection of civil aircraft against terrorist attacks, aircraft and airfields being particularly vulnerable (see chapter IX § 9.03 below). While that has been relatively successful in those politically destabilizing instances of terrorism such as the hijacking of civil aircraft or merchant ships, the tensions of the Cold War, and the support given by its protagonists to one side or the other in the political tensions that enabled that kind of terrorism to flourish, for a long time prevented any concerted international action to enable the international community, and individual States, to take necessary defensive actions to protect themselves against mass terrorism.

The increasing intensity, spread and frequency of terrorist acts compelled both the General Assembly and the Security Council to take more decisive action. The General Assembly, in its Declaration on Measures to eliminate international terrorism (resolution 49/60, 9 December 1994), declared that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political,

57 William Safire in the *International Herald Tribune*, Tel Aviv ed., 22 October 2001 p. 6.

philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them. In resolution 51/210, 17 December 1996, it decided to elaborate a comprehensive convention on international terrorism, but progress on that has been slow and in resolution 56/88, 12 December 2001, it tried to accelerate this work. In 1997 it adopted the International Convention for the Suppression of Terrorist Bombings,[58] and in 1999 the International Convention for the Suppression of the Financing of Terrorism.[59]

The Security Council has addressed the problem in stronger terms. In resolution 1269 (1999), 19 October 1999, it reaffirmed that the suppression of acts of international terrorism, including those in which States are involved, is an essential contribution to the maintenance of international peace and security. It unequivocally condemned all acts, methods and practices of terrorism as criminal and unjustifiable regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, in particular those which could threaten international peace and security. It called on States to co-operate in the suppression of terrorism and in criminal proceedings against persons accused of terrorist acts. In a presidential statement of 6 December 2000 (S/PRST/38) it expressed its deep concern at the increase, in many regions of the world, of acts of terrorism in all its forms and manifestations, and reiterated its previous condemnation.

The outrages of 11 September 2001 led the Security Council to a more stringent response. After condemnations of those acts by the General Assembly in resolution 56/1, 12 September 2001 and by the Security Council in resolution 1368 (2001) of the same date, the Security Council examined the problem in depth. It recognized the 'inherent right of individual or collective self-defence in accordance with the Charter'. That is confirmation that the Charter does not displace the right to resort to armed force in self-defence in circumstances not contemplated by the Charter. This has been carried further in later resolutions. On 28 September 2001 it adopted resolution 1373 (2001), now acting under Chapter VII of the Charter. It recognized that such acts constitute a threat to international peace and security and the need to combat by all means, in accordance with the Charter, threats to international peace and security caused by terrorist acts. At the same time it reaffirmed the inherent right of individual or collective self-defence as recognized in the Charter. The resolution concentrated on the duties of States in connection with the financing of terrorism, the freezing of assets of persons who commit or attempt to commit terrorist acts

58 Annexed to A/Res. 52/164, 15 November 1997; UNTS No. 37517.
59 Annexed to A/Res. 54/109, 9 December 1999; UNTS No. 38349.

or facilitate or participate in the commission of terrorist acts and the like, and their freedom of movement. It also decided that all States shall refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing of members of terrorist groups and eliminating the supply of weapons to terrorists; to deny a safe haven to those who finance, plan, support or commit terrorist acts, or provide safe havens; to ensure that such persons are brought to justice and to ensure that such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts; to assist each other in criminal investigations and proceedings; and to prevent the movement of terrorists or terrorist groups by effective border controls and through measures for preventing counterfeiting or fraudulent use of identity papers and travel documents. In paragraph 4 of the resolution the Security Council noted with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms trafficking and illegal movement of nuclear, chemical, biological and other potentially deadly materials. It declared that acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations. Following the practice that it has developed when sanctions have been imposed, the Security Council established a Counter-Terrorism Committee to monitor the implementation of the resolution and called upon all States to report within ninety days on the steps taken to implement the resolution. The resolution concluded by expressing the determination of the Security Council to take all necessary steps to ensure full implementation of the resolution and to remain seised of the matter. It was adopted at the 4385th meeting of the Security Council which lasted three minutes, indicating that the text had been carefully negotiated beforehand. It provided authorization for the use of armed force by the American-led coalition in Afghanistan.

On 12 November the Security Council adopted a third resolution on the topic – resolution 1377 (2001), a declaration on the global effort to combat terrorism. It declared that acts of terrorism constitute one of the most serious threats to international peace and security and a challenge to all States and to all of humanity. It called on all States to take urgent steps to implement fully the earlier resolutions

These strong resolutions place heavy emphasis on acts of terrorism, not on the motives of their perpetrators or their legal status. Binding on all States, they are the first international effort to get to grips with the major factors that enable

international terrorism to flourish and become a recognized danger to international peace and security. It is notable that in none of those resolutions did the Security Council, while acting under Chapter VII, refer to Article 51. Their recognition that a State the victim of indiscriminate terrorism may exercise its inherent right of self-defence is an important application of the Charter.

The Rome Conference on the ICC (chapter V § 5.07 below) recognized that terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community. Nothing is said about this directly in the Rome Statute of the ICC, but the Conference recommended (Final Act, Annex I, resolution F) that in due course terrorism should be included in the list of crimes within the Court's jurisdiction. This confirms that today the international community accepts national jurisdiction as the accepted means for dealing with international terrorism and its perpetrators. If the crime should later be brought within the jurisdiction of the ICC, the principle of complementarity, fundamental in the Rome Statute, would still give priority to the competent national jurisdiction.

§ 4.11. Neutrality in the Charter regime

At one time it was widely assumed that one consequence of the Charter is that the existence of a formal state of war between States is not consistent with the law of the Charter. Nevertheless, experience, notably the war between Iran and Iraq (1980-1988), has shown that this is not absolute. Notwithstanding Hague Convention No. III of 1907 relative to the opening of hostilities,[60] there has been no formal declaration of war since 1945 although there have been armistice agreements and treaties of peace, notably those of Israel with Egypt and with Jordan. In S/Res. 95 (1951), 1 September 1951, the Security Council found that a party to an armistice agreement concluded under the auspices of the United Nations cannot reasonably assert that it is actively a belligerent or

60 205 CTS 263. And see N. Feinberg, 'The Legality of a "State of War" after the Cessation of Hostilities under the Charter of the United Nations and the Covenant of the League of Nations', *Studies in International Law* 74 (Jerusalem, Magnes Press, 1979). This is the position in international law. National law may require a formal declaration that a state of war exists, frequently replaced today by a declaration of a state of emergency. See on this E. Lauterpacht, 'The Legal Irrelevance of the "State of War"', 62 Proceedings of the American Society of International Law., 58 (1969); J. Crawford, *Second Report on State Responsibility* (A/CN.4/498/Add.2) para. 297 (1999). For a contrary view, see Y. Dinstein, *War, Aggression and Self-Defence* 167 (3rd ed., Cambridge University Press, 2001).

requires to exercise the right of visit, search and seizure for any legitimate purpose of self-defence. However, when hostilities were in progress (in the Iraq-Iran War), the Council affirmed the right of free navigation and commerce in international waters, and called upon 'the belligerents to cease immediately all hostilities in the regions of the Gulf, including all sea-lanes, navigable waterways, harbour works, terminals, offshore installations and all ports with direct or indirect access to the sea.'[61]

For a long time there was little practical interest in the effect of these provisions of the Charter on the concept or rules of neutrality. One reason is certainly to be found in the fact that most cases involving the use of force brought before the Security Council were 'incidents' or were decolonization cases, and not international wars in any accepted sense. Others were situations of internal unrest constituting a threat to international peace, or disintegration of political entities, not situations in which neutrality would assume much prominence. In fact, the first situation fully recognized by the Security Council as war (without using that word) was the Iraq-Iran War of 1980–1988, especially in connection with the reflagging of neutral vessels to ensure the supply of crude oil to the outside world.[62] Later the Iraqi invasion of Kuwait was also treated as war.

Widely overlooked is Israel's War of Independence (1947–1949). This commenced as an internal matter of Palestine then under British mandate on 30 November 1947 and counted either as civil unrest or as civil war, in the exceptional circumstances of the winding down of the Mandate for Palestine. On 15 May 1948, with the termination of the Mandate and Israel's Declaration of Independence, the limitrophe Arab States with small contingents from others, invaded the territory of former Palestine, informing the Security Council of their action, and the War of Independence then became an international armed conflict. There were no declarations of war or of neutrality. One reason is that such declarations would have implied recognition of Israel by the State making the declaration, a matter of political difficulty at that time. Hostilities ended with the conclusion of a series of General Armistice Agreements under the auspices of the Security Council. Yet some aspects of the accepted rules of neutrality as they stood at the end of the Second World War were applied. Egypt

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61 S/Res. 540 (1983), 31 October 1983; 552 (1984), 1 June 1984.

62 See on this A. de Guttry and N. Ronzitti, *The Iran-Iraq War (1980–1988) and the Law of Naval Warfare* (Cambridge, Grotius Publications, 1993); G. K. Walker, *The Tanker War, 1980–88: Law and Policy* (U.S. Naval War College, International Law Studies Volume 74, Newport RI 2000).

established a Prize Council that condemned as contraband several neutral cargos addressed to Jewish interests in Palestine, releasing others addressed to Arab interests. Some of the cargoes had even been detained a couple of weeks before the termination of the Mandate, in anticipation of what would occur on that event. So far as is known, no protests were made to Egypt on that account.[63] Israel, on the other hand, took the view that the Charter prohibited war as a condition of international law. In 1948 the United States protested at attempts by Egypt and Syria to impose a blockade on Israel's coast, and the idea was dropped.[64]

Aspects of neutrality in light of the Charter have been examined by the Institute of International Law, the International Institute of Humanitarian Law and the International Law Association. The Institute of International Law, in a resolution of 1975 on conditions of the application of rules other than humanitarian rules of armed conflict to hostilities in which the UN Forces may be engaged, included a provision (article 4), to the effect that whenever UN Forces are engaged in hostilities, members of the UN may not take advantage of the general rules of neutrality to evade obligations laid upon them in pursuance of a decision of the Security Council acting in accordance with the Charter, nor may depart from the rules of neutrality for the benefit of a party opposing the UN Forces. In another resolution of 1985 on the effects of armed conflicts on treaties it included a provision (article 10) that the resolution does not prejudge rights and duties arising from neutrality.[65] The International Institute of Humanitarian Law has adopted a comprehensive restatement of the rules of international law applicable to armed conflict at sea, and in the nature of

63 Decisions of the Alexandria Prize Council are reported in 16 and 17 ILR. On that Council, see A. Safouat Pasha, 'Le Conseil des Prises égyptien: Organisation, compétence et procédure', 6 *Revue égyptienne de droit international* 24 (1950) (fuller in the Arabic section, at p. 1); A. M. Abdul Fatah, 'La jurisprudence égyptienne en matière de prises', 38 ibid. 119 (1982). The confiscation of goods before the termination of the Mandate was undertaken according to Egyptian legislation dating to 1946. See E. Vitta, 'The Boycott of "Zionist Goods" by the Arab League', *The Jewish Yearbook of International Law* 1948, 253 (Jerusalem, Rubin Mass, 1949).

64 Sh. Rosenne, 'Israel and the First United Nations Conference on the Law of the Sea (1958): The Strait of Tiran', *An International Law Miscellany* 723, 724 (Dordrecht, Nijhoff, 1993); same,. 'The United Nations and Israel's War of Independence', id. at 629; and *Israel's Armistice Agreements with the Arab States* (Tel Aviv, ILA Israel Branch/Bloomstein's Bookstores, 1951). For the General Armistice Agreements, see 42 UNTS 251, 287, 303 and 327.

65 For those resolutions, see 56 Annuaire IDI 541 (1975); ibid. 61/II, 279 (1985).

things this has to deal comprehensively with neutrality in maritime hostilities.[66] The International Law Association has produced the Helsinki Principles on the Law of Maritime Neutrality.[67] Common to both these is the prescription that in cases where the Security Council has taken binding action, a third State cannot invoke the rules of neutrality as justification for not following injunctions of the Security Council.[68]

The International Court of Justice has found that international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the UN Charter) to all international armed conflicts, whatever type of weapon may be used.[69] This open-ended statement does little to indicate what the 'principle of neutrality' implies today.

66 The *San Remo Manual,* above note 33.

67 ILA, *Report of the Sixty-eighth Conference, Taipeh, 1998* at 496.

68 San Remo rules, Part I, section III, on armed conflicts in which the Security Council has taken action; Helsinki principles, No. 1.2.

69 *Nuclear Weapons* adv. op. above note 3, 261 (para. 89).

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CHAPTER V

INTERNATIONAL HUMANITARIAN LAW

I am tired and sick of war. Its glory is all moonshine. It is only those who have neither fired a shot nor heard the shrieks and groans of the wounded who cry aloud for blood, more vengeance, more desolation. War is hell.

General Sherman, from an address before a military academy in 1879, published in the *National Tribune*, Washington, 26 November 1914.

§ 5.01. Religious and philosophical background

Going hand in hand with the efforts to control if not completely to prohibit the threat or use of armed force in international relations, and sometimes in the same conference, since the middle of the nineteenth century the international community has been trying to reduce the human sufferings caused by war. This has led to the development of the *jus in bello*, the law applicable in warfare or armed conflict, today also known as international humanitarian law. Like the attempts to control the use of force, efforts to hold in check unrestrained acts of violence and exceptionally cruel weapons in armed conflict have an origin in religious and philosophical approaches to the problem of war. Chapter XX:10 of the Book of Deuteronomy is an illustration, and we find similar precepts in the heritage of other religions and cultural systems.[1]

In Christendom attempts to reduce the cruelties of war were largely the product of religious discussions about the distinction between just and unjust war, inherited from Roman (Stoic) philosophers – *bellum justum* and *bellum*

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1 Cf. A. Rechid, 'L'Islam et de droit des gens', 60 *Recueil des cours* 371 (1937-II); M. Hamidullah, *Muslim Conduct of State* 195 (Lahore, Ashraf, 1945); M. Khadduri, *War and Peace in the Law of Islam* (Baltimore, Johns Hopkins, 1955); S. Mahmassani, 'The Principles of International Law in the Light of Islamic Doctrine', 117 *Recueil des cours* 201 (1966-I); N. Singh, 'Armed Conflicts and Humanitarian Law of Ancient India'; *Studies and Essays on International Humanitarian Law and Red Cross Principles in honour of Jean Pictet* 531 (Geneva/The Hague, ICRC/Nijhoff, 1984).

injustum. So long as war was waged in forms of knightly combat, chivalry and knightly codes of honour supplied to knights and their subordinates elements of control of acceptable behaviour in battle. The early writers on international law, particularly Gentili (1552–1608)[2] and Grotius (1583–1647),[3] did not accept the view that in time of war all laws are silenced – *inter arma silent leges*. They both called for rules of international law to prevent excesses in the conduct of hostilities, the *jus in bello*. Their admonitions, however, had little practical effect, as the horrors of the Thirty Years War (1618–1648) brought out.

In the latter half of the nineteenth century, when the military consequences of the industrial revolution were beginning to produce increasing advances in military technology and ever more destructive weapons and armaments, almost simultaneously Florence Nightingale was campaigning for improved military medical services, Henry Dunant published his *Un souvenir de Solférino* after the Battles of Balaklava in the Crimean War (1854) and of Solferino in the Franco-Austrian War of 1859,[4] and the American President Lincoln issued the famous *Instructions for the Government of Armies of the United States in the Field*, the *Lieber Code*.[5] Those are the start of today's international humanitarian law.

Unlike the law regarding the use of force, with its two trends, international humanitarian law developed always on a single theme through the Geneva Conventions, the protection of the victims of war, particularly hors de combat members of the armed forces of both sides, and today enemy civilian population coming under the control of the other party to the conflict. Its enforcement, especially as regards members of the armed forces, until recently has been based on mutual self-interest. Breach of a rule of humanitarian law was frequently met by retaliation in the form of breach of the same rule, a tit for tat. Article 60 (6) of the Vienna Convention on the Law of Treaties of 1969 now prohibits

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2 *De jure belli libri III*, particularly in Book II dealing with the *jus in bello*, English translation by J. C. Rolfe 131–286 (Carnegie Classics of International Law, Oxford, Clarendon Press, 1933).

3 *De jure belli ac pacis libri III*, *Prolegomena*, paras. 25 ff. English translation by F. Kelsey 18 (Carnegie Classics of International Law, Oxford, Clarendon Press, 1925).

4 H. Dunant, *Un Souvenir de Solférino* (Geneva, Fick, 1862, reprinted Institut Henry-Dunant, 1980).

5 Promulgated as General Order No. 100, 24 April 1863. Many of the documents cited in this chapter are reproduced in English in D. Schindler & J. Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 3 (3rd ed. Dordrecht/Geneva, Nijhoff/Henry Dunant Institute, 1988) and in A. Roberts & R. Guelff, *Documents on the Laws of War* (3rd ed. Oxford University Press, 2000).

any form of reprisals against persons protected by treaties of a humanitarian character in the event of breach of a treaty.[6] The efficacy of that provision has not been tested in practice. Against this, there has been a growing movement throughout the twentieth century to establish international machineries for the enforcement of international humanitarian law and the development of a new and parallel branch of the law, international criminal law. The process culminated in 1998 with the adoption of the Rome Statute of the International Criminal Court for the prosecution of individuals charged with violations of the rules of humanitarian law in a more general sense (see § 5.09 below).

§ 5.02. The Geneva Conferences and Conventions, 1863 to 1945

The Geneva Conventions are the anchor for the rules of international humanitarian law.

In September 1863 five prominent citizens of Geneva constituted themselves as the Geneva Committee for the Assistance of Wounded Soldiers. They convened a preparatory conference of Government representatives to examine a draft code designed to give practical effect to Dunant's ideas. Seventeen entities attended. The Conference adopted a resolution for the establishment in each country of a committee to work for the assistance of wounded whenever the military medical services are found to be inadequate. That was the founding conference of what is now known as the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies, together the International Red Cross and Red Crescent Movement.[7] Their initiative led the Swiss Government to convene the Geneva Diplomatic Confer-

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6 1155 UNTS 331. In parallel to this, Art. 50 (1) (c) of the draft articles on the responsibility of States for internationally wrongful acts, on obligations not affected by countermeasures, lays down that countermeasures shall not affect obligations of a humanitarian character prohibiting reprisals. For those draft articles, see ILC Rep. 2001, (A/56/10) chapter IV.

7 *Compte rendu de la Conférence internationale réunie à Genève . . . pour étudier les moyens de pourvoir à l'insuffisance du service sanitaire dans les armées en campagne* (2nd ed., Geneva, ICRC, 1904). For the history of the Red Cross, see P. Boissier, *Histoire du Comité international de la Croix-Rouge: de Solférino à Tsoushima* and A. Durand, *Histoire du Comité international de la Croix-Rouge: de Sarajévo à Hiroshima* (Geneva, Institut Henry-Dunant, 1978); R. Perruchoud, *Les Résolutions des conférences internationales de la Croix-Rouge* (Geneva, Institut Henry-Dunant, 1979); F. Bugnion, *Le Comité international de la Croix-Rouge et la protection des victimes de guerre* (Geneva, ICRC, 1994). And see the *Handbook of the International Red Cross and Red Crescent Movement* (13th ed. Geneva, ICRC, 1994).

ence of 1864, thus starting the tradition of the Geneva Conferences and what came to be called the Geneva Law. That Conference adopted the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864 – the first Geneva Convention.[8] It laid down several principles that have remained as the guiding principles of the International Red Cross and of humanitarian law. They include respect for what was then called the 'neutrality' – meaning impartiality – of ambulances and military hospitals, non-discrimination in the treatment of wounded or sick, and the distinctive emblem for hospitals, ambulances and medical personnel. That emblem was to bear a red cross on a white background.[9] Another diplomatic conference in 1868 adopted Additional Articles to clarify some provisions of the 1864 Convention and to extend its application to naval forces, but it never entered into force.[10] Later the first Hague Peace Conference of 1899 adopted the Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864.[11]

The Franco-Prussian War of 1870–1871 provided the first real test of the Geneva Convention. While the German side met its obligations under the Convention, the French authorities were unprepared for it. That gave rise to many incidents and misunderstandings and charges of violations of the Convention.[12] The next major test was the Russo-Turkish War of 1877–1878, the first occasion on which one side used the Red Crescent. These and other wars of the period pointed to the need for improvements in the Geneva Convention.

There was no provision in the 1864 Convention to control its application, and no provision for enforcement or for sanctions in cases of its violation. The experience of the Franco-Prussian War brought this out, and led the President of the ICRC, Gustave Moynier, to propose standing international machinery

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8 129 CTS 361.

9 There is controversy over the emblem. See Sh. Rosenne, 'The Red Cross, Red Crescent, Red Lion and Sun and the Red Shield of David', 5 *IsYBHR* 9 (1975); F. Bugnion, *The Emblems of the Red Cross: A Brief History* (Geneva, ICRC, 1977) and *Towards a Comprehensive Solution to the Question of the Emblem* (Geneva, ICRC, 2000). The difficulties are not limited to the Red Shield of David (Magen David Adom) used by Israel. Additional Protocol III, awaiting adoption, embodies a partial solution to this vexed problem.

10 138 CTS 189. Although never in force, it was applied in the Franco-Prussian War of 1870–1871 and in the Spanish-American War of 1898.

11 Hague Convention No. III of 1899, 187 CTS 443.

12 See Boissier, above note 7, 317.

to remedy this.[13] But Moynier's proposal was ahead of its time, and since then the ICRC has concentrated on having provisions for national penal sanctions for violations of the conventions included in the law of each State party to the Convention. Only recently, in connection with the establishment of an international criminal court with jurisdiction over war crimes, has the ICRC changed its position; however, as will be seen, the principle of complementarity characteristic of the Rome Statute of the ICC acknowledges that the primary responsibility for enforcement of the rules of international humanitarian law rests with the national authorities.

Following the series of wars that brought the nineteenth century to its end and ushered in the twentieth, including the Spanish-American War of 1898, the Boer War of 1899–1902 and the Russo-Japanese War of 1904–1905, the Swiss Government convened the second Geneva Conference in 1906, a year in which war-clouds were gathering ahead. That Conference adopted a new Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.[14] Its principal innovations were its provisions for the protection of the emblem against abuse by private persons, and the requirement that national legislation be adequate to repress in time of war individual acts of robbery and ill-treatment of the sick and wounded of the armies. It also required governments to take necessary steps to ensure that their troops were acquainted with the provisions of the Convention. The Geneva Convention was still limited to the protection of the sick and wounded of armies in the field. The protection of other victims of war, and notably prisoners of war and the civilian population of occupied enemy territory, were matters for the Hague Conventions. The law was firmly based on a distinction between combatants and non-combatants, and aimed to ensure that collateral damage to non-combatants and nonmilitary objectives would be kept to the minimum. This produced a dichotomy between the law of The Hague, addressed primarily to States and for breach of which States would incur international responsibility, and the law

13 Circular of 28 January 1872, reproduced in *Bulletin international des Sociétés de secours aux militaires blessés publié par le Comité international de la Croix Rouge* No. 11, 121 (1872). For the contemporary reactions, see G. Rolin-Jacquemyns, 'Note sur le projet de M. Moynier, relatif à l'établissement d'une institution judiciaire internationale, protectrice de la Convention [de Genève]', 4 *Revue de droit international et de législation comparée* 325 (1872). On this initiative, see Ch. Keith Hall, 'The First Proposal for a Permanent International Criminal Court', 38 *International Review of the Red Cross* 57 (1998).

14 202 CTS 277, in force from 9 August 1907. And see *Actes de la Conférence de révision, réunie à Genève du 11 juin au 6 juillet 1906*.

of Geneva, addressed primarily to individuals and their behaviour, violations of which were to be punishable under national law, without prejudicing any State responsibility for breach of the Convention attributable to the State.

Section I, Chapter II (Articles 4 to 20), of the Regulations annexed to Hague Convention No. I of 1899 with respect to the laws and customs of war on land included the first modern attempt to regulate the condition of prisoners of war. The Regulations were revised in Convention IV of the 1907 Conference, technically still in force although most of their provisions have been superceded by later Geneva Conventions.[15] The same instruments also sought to alleviate the condition of civilians, especially in occupied enemy territory. That too has been superceded mostly by Geneva Convention No. IV of 1949 (note 55 below). The Conventions were conceived in a context that accepted war as a recognized condition of international relations, with a tidy beginning signified by a formal declaration of war and a tidy end signified by armistice followed by a peace treaty (which could regulate new frontiers between the belligerents). The concept of world wars with full mobilization of all of a nation's extended human resources and all of its assets – total war and armed conflict ending without formal peace arrangements – was yet to come.

Unlike the Geneva Conventions, the Hague Conventions contain the *Si omnes* clause, to the effect that the instrument's provisions did not apply except between the contracting parties and then only if all the belligerents were parties to the Convention. That left the legal situation obscure (if not inexistent), especially during the First World War. After the Second World War both the International Military Tribunal for the Trial of Major German War Criminals (the Nuremberg Tribunal) and the International Military Tribunal for the Far East (the Tokyo Tribunal) faced this problem. They both took the view that by 1939 the rules laid down in the Convention were recognized by all civilised nations and were regarded as declaratory of the laws and customs of war.[16] This clause was abandoned in the Geneva Conventions of 1949 and no longer is part of modern international law.

The preamble to the Hague Convention also contains the Martens Clause, reading:

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15 187 CTS 429; 205 CTS 277.

16 See J. H. W. Verzijl, IX *International Law in Historical Perspective* 386 (Sijthoff & Noordhoff, Alphen aan den Rijn, 1978). This was upheld by the ICJ in the *Legality of the Threat or Use of Nuclear Weapons* adv. op. ICJ Rep. 1996(I) 226, 258 (para. 80).

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[17]

This has been reworded in Article 1 (2) of Additional Protocol I of 1977 (note 58 below):

> In cases not covered by that 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 the public conscience.

To that has to be added Article 2 (b) of Additional Protocol I giving the meaning of rules of international law applicable in armed conflict: 'The rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable in armed conflict'. Open-ended perhaps, but deliberately so. For it has a continuing function. It enables the law to keep abreast of technological developments. It circumvents any possible problems arising out of the intertemporal law. This is brought out by a pronouncement of the International Court of Justice:

> [T]he Court points to the Martens Clause, whose continuing existence and applicability are not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons.[18]

For the First World War (1914-1918) the Geneva Convention governed the protection of the sick and wounded in the field, and the Hague Convention regulated the status of prisoners of war. The ICRC, however, did commence activities for the protection of prisoners of war. There was no comprehensive legal protection for the civilian inhabitants of enemy territory occupied by the armed forces of the other side, beyond some rudimentary provisions in the Hague Convention. During the War there were many charges and counter-

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17 For an account of the origin of that clause, see F. V. Poustogarov, *Au service de la paix; F. de Martens et les conférences internationales de la Paix de 1899 et 1907* 175 (University of Geneva, 1999). And see A. Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?', 11 EJIL 187 (2000).

18 *Nuclear Weapons* adv. op. above note 16, 260 (para. 87).

charges of violations of the Conventions, and the Treaty of Versailles contained provisions for the trial and punishment of persons accused of those violations. A few such trials did take place, but their outcome was unsatisfactory.[19] Military technology had advanced considerably during the War. The emergence of air power brought in a new dimension, and required a new look at the fundamental elements of humanitarian law. The Hague Rules of Air Warfare of 1922 were the first official attempt to draw up a code of aerial warfare.[20]

The Swiss Government convened the next Red Cross Conference in 1929, after preparatory work by the ICRC and governments. That too was at a difficult moment of history, just before the Wall Street crash of 1929 and at a time of rising nationalism, exasperation and disillusion with the 1919 peace settlement in Europe. Experience during the War had brought out the need for more effective protection for prisoners of war, including a clearer definition of the ICRC's role. Governments agreed that the ICRC should assume that function. Alongside revision of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field,[21] the Conference adopted the Convention relative to the Treatment of Prisoners of War.[22] The Final Act of the Conference includes a recommendation for an exhaustive study regarding the condition and protection of civilians of enemy nationality in the territory of a belligerent or in enemy territory occupied by a belligerent. However, it was not possible to complete that work before the outbreak of the Second World War in 1939.

Of the major belligerents in that War (1939–1945), all were parties to the Conventions regarding the sick and wounded. Finland, Japan and the USSR were not parties to the Prisoners of War Convention. That explains – but does not justify – the disgraceful treatment of prisoners of war in Japanese hands, the mutual maltreatment of German and Russian prisoners of war in each other's hands, and their slow repatriation after the end of hostilities.[23] The ICRC was

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19 J. W. Garner, *International Law in the World War* (London, Longmans, Green & Co, 1920); Verzijl, above note 16, 382; and § 5.03 below.

20 General Report of the Commission of Jurists to consider and report upon the revision of the rules of air warfare, British Parliamentary Papers, Misc. No. 14 (1924), Cmd. 2201.

21 118 LNTS 303. For authoritative commentary on that Convention, see P. Des Gouttes, *La Convention de Genève du 27 juillet 1929* (Geneva, ICRC, 1930).

22 .118 LNTS 343.

23 Cf. A/Res.427 (V), 14 December 1950, on measures for the peaceful solution of the problem of prisoners of war; Progress report on the work of the *ad hoc* Commission on Prisoners of War (doc. A/2482 and Corr.1) (1953); A/Res. 741 (VIII), 7 December 1953. That Commission continued reporting until 1957, and ceased working in 1960.

virtually powerless in those cases. The Second World War was also marked by excessive abuses by the German occupying forces in both Eastern and Western Europe, including the Holocaust of six million Jews and millions of others, and similar abuses by Japanese forces occupying China, Manchuria, Korea, the Philippines, and the European possessions in East Asia. Here too, the ICRC found itself virtually powerless.[24] The massive use of air power brought out the artificiality of the distinction between combatant and non-combatant, and between military and non-military objectives. Experience notwithstanding, international law tends to maintain that distinction to the present day.

§ 5.03. The immediate aftermath of the War: the war crimes trials

Those excesses led to a chain of major legal developments. Those included on the one hand the adoption of several new international instruments and the complete revision of the Geneva Conventions, and on the other the long (but incomplete) series of trials of German and Japanese war criminals in the Nuremberg and Tokyo Tribunals. The international trials and punishments of war criminals, sometimes also carried out by the military courts of the occupying forces in Germany, became necessary because of the absence of any real sanction in the Geneva Conventions of 1929 coupled with the complete breakdown of the State in Germany after that country's unconditional surrender. The law was clear, and the trials did no violence to the basic principles of *nulla poena sine lege* and *nullum crimen sine lege* or of the non-retroactivity of criminal legislation. Lacking was established machinery to ensure that a fair trial would determine whether individual senior civil and military government officials in a policy making position and individual members of the armed forces in time of war had observed those rules. That was to lead to the adoption in 1998 of the Rome Statute of the ICC.

As the extent of the atrocities in occupied Europe became known, on 13 January 1942 the Governments of the occupied countries in Europe concluded

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For details, see the annual *Yearbook of the United Nations*, published by the UN Department of Public Information. For the unsuccessful attempts of the ICRC to improve the lot of prisoners of war in Eastern Europe and East Asia, see F. Bugnion, op. cit. above note 7, 212, 218.

24 In response to criticisms that the ICRC could have done more to prevent excesses against the civilian populations in occupied territories in Europe, the ICRC opened its archives to a prominent Swiss historian. See J.-C. Favez, *Une mission impossible? Le CICR, les déportations et les camps de concentration nazis* (Lausanne, Payot, 1988).

in London the declaration condemning German terror and demanding retribution, referring to the 1907 Convention on warfare on land. This was followed on 30 October/1 November 1943 by the Moscow declaration on German atrocities. In that declaration, the three major Allied Powers fighting in Europe, the Soviet Union, the United Kingdom and the United States of America, published a warning that German war criminals would in due course be sent for trial to the countries in which they had committed their crimes. The declaration was without prejudice to the case of the major criminals, whose offences had no particular geographical localization and who would be punished by the joint decision of the Governments of the Allies.[25] Here was the starting point of the major law applying and law making activities that occupied both the wartime coalition under the name of the United Nations and the new organization established at San Francisco in 1945, also named the United Nations.[26]

Those declarations were warnings and reminders that the *jus in bello* existed and that the Allies required its observance. The first major instrument for the implementation of these warnings and the implementation of that policy was the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, with the annexed Charter of the International Military Tribunal, concluded at London on 8 August 1945 (the London Charter).[27] The Charter delineated three crimes: crimes against peace (essentially planning a war of aggression or a war in violation of international treaties[28]), war crimes

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25 For the London declaration, see 144 BFSP 1072; for the Moscow declaration, see 9 *Dep't State Bull.* 310 (1943); see also *The Charter and Judgment of the Nuremberg Tribunal: History and Analysis*, Memorandum submitted by the Secretary-General (doc. A/CN.4/5) 87 (UN, 1949). For retrospective endorsement, see A/Res.3 (I), 13 February 1946. That resolution called on States that were not members of the United Nations to take all necessary measures for the apprehension of war criminals in their territories 'with a view to their immediate removal to the countries in which the crimes were committed, for the purpose of trial and punishment according to the laws of those countries'.

26 Established by the Declaration by the United Nations of 1 January 1942, 204 LNTS 381. For the distinction between this wartime fighting coalition, and the organization established at the San Francisco Conference of 1945, see chapter XII note 2 below.

27 82 UNTS 279. And see *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945* (Washington, Dep't of State Publication 3080, 1949); Memorandum of the Secretary-General, above note 25, 89. For the proceedings of that Tribunal see above chapter IV note 14.

28 This had appeared in Art. 227 of the Treaty of Versailles of 1919, regarding the trial of the Kaiser, rendered inoperative following the refusal of Holland to surrender him. Given those precedents and the explanations in the Nuremberg judgment of how the Tribunal saw crimes against peace in the circumstances before it, it is difficult to

(violations of the laws or customs of war), and what were named crimes against humanity,[29] various crimes committed against any civilian population, and whether or not in violation of the domestic law of the country where perpetrated. This latter was particularly significant. At the time it did not signify a degree of heinousness. Its function was to open the way to prosecution of government officials of all grades and ranks, civilian and military, responsible for perpetrating comparable criminal acts on their own nationals, even if those acts were authorized by their national law. The London Charter also included a provision (Article 7) to the effect that the official position of defendants, whether as Heads of State or responsible officials in Government Departments, should not be considered as freeing them from responsibility or mitigating punishments – a provision now finding its way into national courts.

The Tribunal was composed of one judge each from France, the Soviet Union, the United Kingdom and the United States of America. The Prosecution too was composed of teams headed by representatives of those four countries, each of which was free to include any other persons and representatives as it liked. The Tribunal has been criticized on account of its composition as imposing victors' justice. However, given the conditions in Europe during the War and at its end, it is difficult to see what any other court whatever its composition could have decided.

The judgment of the Nuremberg Tribunal and the trials that followed it have had a profound influence on the development of international humanitarian law.[30] For the first time courts, composed of experienced officers, examined wartime conduct of other military and civilian officers in light of established rules and principles of both general international law and the formal *jus in bello* as it existed at the time. In resolution 95 (I), 11 December 1946, the General Assembly affirmed the principles of international law recognized by the London

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appreciate the reluctance of the Rome Conference to including a definition of aggression in the Statute.

29 For earlier use of the term .crime against humanity. see W. A. Schabas, *Genocide in International Law: The Crime of Crimes* 17 (Cambridge University Press, 2000).

30 Those trials by military courts were conducted under Control Council Law No. 10: *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Nuremberg October 1946–April 1949* (15 vols., Washington DC, Government Printing Office, 1949–1953); *United Nations War Crimes Commission: Law Reports of Trials of War Criminals* (14 vols., London, HMSO for the UN War Crimes Commission, 1947–1949). There is a tendency to belittle the subsequent trials on the ground that the courts were not manned by professional civilian judges. This criticism overlooks that in most military codes, military offences are judged by courts-martial composed of military personnel, with jurists and non-jurists in their composition.

Charter and by the judgment, and set in motion the procedure that in 1996 led to the adoption by the ILC of the Code of Crimes against the Peace and Security of Mankind.[31] The Nuremberg Trial was followed by a similar trial of the wartime leaders of Imperial Japan.[32]

§ 5.04. The Genocide Convention (1948) and the international humanitarian law

The second major instrument of this period is the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly on 9 December 1948.[33] This is a treaty of worldwide application. Genocide is defined (Article II) as any of the following acts committed with intent to

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31 ILC Rep. 1996 (A/51/10*) Chap. II, YBILC 1996/II/2. In 1950 the ILC adopted a formulation of the Nuremberg principles which, at the request of the General Assembly, the Commission took into account in formulating that Code of Crimes. ILC Rep. 1950 (A/1316) Part III YBILC 1950/II 364, 374; A/Res.488 (V), 12 December 1950. That was the first attempt to formulate a black letter text regarding individual criminal responsibility, as something distinct from State responsibility, for violations of international humanitarian law.

32 Special Proclamation relative to the Establishment of an International Military Tribunal for the Far East, with Charter, issued by the Supreme Commander for the Allied Powers, 19 January 1946, 4 Bevans 20. For the proceedings, see R. J. Pritchard and S. M. Zaide (eds.), *The Tokyo War Crimes Trial* (22 vols., 1981). For the judgment, see R. V. A. Röling and C. F. Rüter, *The Tokyo Judgment*, (3 vols., 1977–1981), and R. Pal, *International Military Tribunal for the Far East, Dissentient Opinion* (Calcutta, Sanyal, 1953).

33 78 UNTS 277. This Convention was inspired by R. Lemkin, *Axis Rule in Occupied Europe* (Washington, Carnegie Endowment for International Peace, 1944); same, 'Genocide as a Crime under International Law', 41 AJIL 145 (1947). The Convention had been preceded by A/Res.95 (I), affirming that genocide is a crime under international law which the civilized world condemns and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or other grounds – are punishable. See further P. N. Drost, *The Crime of State: Penal Protection for Fundamental Freedoms of Persons and Peoples*, Book II, Genocide (Leyden, A. W. Sythoff, 1959); N. Robinson, *The Genocide Convention: A Commentary* (New York, Institute of Jewish Affairs, 1960); N. Ruhashyankiko, special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, doc. E/CN.4/Sub.2/416 (1978); B. Whitaker, *Report on the Question of the Prevention and Punishment of the Crime of Genocide*, doc. E/CN.4/Sub.2/1985/6 (1985); M. Shaw, 'Genocide and International Law', *International Law at a Time of Perplexity* 797 (Y. Dinstein and M. Tabory, eds. Dordrecht, Nijhoff, 1989); W. A. Schabas, op. cit. above note 29.

destroy, in whole or in part, a national, ethical, racial or religious group as such: (*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; (*e*) forcibly transferring children of the group to another group. That is the principal crime. The ancillary crimes of conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide are also punishable (Article III).

The Convention goes on to provide that persons committing genocide should be punished whether they are constitutionally responsible rulers, public officials or private individuals (Article IV).[34] Article V requires its parties to enact necessary legislation to give effect to its provisions and, in particular, to provide effective penalties for persons guilty of genocide or the ancillary crimes, but it is believed that not all countries have done this (except where a duly ratified treaty becomes part of the law of the land).[35] The Convention contains no enforcement provision. However, by Article VI, persons charged with genocide or any of its ancillary crimes shall be tried by a competent tribunal of the State in the territory of which the act was committed 'or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'. This anticipates some form of international criminal procedure for the trial of individuals accused of acts that the Convention criminalizes.[36] Article IX also gives the International Court of Justice

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34 The first instance of a constitutionally responsible ruler being punished for genocide is the case of *Prosecutor* v. *Kambanda*, Case No. ICTR 97-23-S, Judgement and sentence of 4 December 1998. Kambanda was acting Prime Minister of an interim government of Rwanda. He pleaded guilty and co-operated with the Prosecution. He was sentenced to life imprisonment on one count of genocide, three counts of ancillary crimes of genocide and two counts of crimes against humanity. See also in the same Tribunal, *Prosecutor* v. *Serushago*, Case No. ICTR 98-39-S, sentence of 5 February 1999. Following a plea bargain, he was sentenced to 15 years imprisonment on charges of genocide and crimes against humanity. The first instance of a conviction after a plea of not guilty was *Prosecutor* v. *Akayesu*, Case ICTR-96-4-A, Appeal Chamber Judgement of 1 June 2001. On ICTR see note 75 below. For the first conviction in ICTY on a charge of genocide, see *Prosecutor* v. *Krstić*, Judgement of 2 August 2001, Case No. IT-98-33-T.

35 For a survey of this, see Schabas, op. cit. note 29 346.

36 In A/Res.260 B (III), 9 December 1948, adopted with the Convention, the General Assembly set in motion the work for the establishment of an international criminal jurisdiction. That ended with the adoption of the Rome Statute of the ICC on 17 June 1998. The Genocide Convention does not countenance the idea of universal jurisdiction over this crime. Schabas, loc. cit. 354.

jurisdiction over disputes between the contracting parties relating to the interpretation, application or fulfilment of the Convention, including those relating to the responsibility of the State for genocide or any of the other ancillary acts enumerated in the Convention.[37] That competence is limited to disputes between the States parties to the Convention. One major consequence of the Genocide Convention is that the principle of individual criminal responsibility under international law alongside the international responsibility of States has become firmly embodied within the international legal system. That responsibility is distinct from State responsibility, although there is clearly an interaction between the two types of responsibility.[38] It is the first international treaty with provisions regarding international responsibility for its breach by States parties and individual responsibility for violations regardless of whether the violation is attributable to a State.

Several cases concerning this Convention have come before the ICJ. In the *Reservations to the Convention on the Prevention and Punishment of Genocide* advisory opinion it made a seminal explanation of the character of the Convention:

> The origins of the Convention show that it was the intention of the General Assembly and the parties to condemn and punish genocide as a 'crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of humankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 95 (I) of the General Assembly, December 11th, 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention). The Genocide Convention was therefore intended to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States.
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> The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since

37 The ICJ has interpreted the last phrase of that provision as not excluding any form of State responsibility. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Preliminary Objections) (Bosnia Herzegovina *v.* Yugoslavia [Serbia & Montenegro] case, ICJ Rep. 1996(I) 595, 616 (para. 32).

38 See ILC Rep. 2001 (A/56/10) chapter IV, Draft articles on the responsibility of States for internationally wrongful acts, Art. 58, Commentary.

> its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.[39]

In a well-known passage in its judgment in the second phase of the *Barcelona Traction* case, the Court mentioned specifically genocide in its list of what are frequently today known as *erga omnes* obligations of international law.[40] This *erga omnes* character of the Convention does not affect bilateral litigation between States parties based on Article IX.[41]

Since then, the situation in Yugoslavia has led to no less than 12 cases being brought in the ICJ alleging breaches of the Genocide Convention. The first of these was the case brought by Bosnia-Herzegovina against Yugoslavia in 1993. It has to be noted with regret that the 1993 orders indicating provisional measures, to be observed by both parties, were not directly effective at the time. It was not until the Dayton Agreement of December 1995 that relative peace was restored to that part of the former Yugoslavia.[42] In 1999 Yugoslavia brought ten cases against members of NATO in connection with the bombing of Yugoslavia that commenced on 24 March 1998, invoking the Genocide Convention as a title of jurisdiction.[43] On 2 July 1999 Croatia introduced proceedings against Yugoslavia alleging breaches of the Convention.[44]

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39 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* adv. op. ICJ Rep. 1951, 15, 23. Repeated in whole or in part in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Provisional Measures) case, ICJ Rep. 1993, 3, 23 (para. 49); and (Preliminary Objections) above note 37, 611 (para. 22).

40 *Barcelona Traction, Light and Power Company, Ltd* (New Application: 1962) (Second Phase) case, ICJ Rep. 1970, 3, 32 (para. 34).

41 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Counter-claims) case, ICJ Rep. 1997, 243, 258 (para. 35).

42 For the Dayton Agreement see 50 SCOR Sup. for October, November and December 1995 (A/50/790–S/1995/999).

43 *Legality of Use of Force* (Provisional Measures) cases, ICJ Rep. 1999, 124, and see above chapter III note 36.

44 ICJ Rep. 1999, 1015.

On 10 December 1948, the day following the adoption of the Genocide Convention, the General Assembly adopted resolution 217 A (III), the Universal Declaration of Human Rights, the third major instrument of this period (chapter VI § 6.04 below). Although it was adopted through a different Main Committee, it also reflects the horrors of the Second World War by a passage in its preamble recalling that disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind. In time it has become merged, at least in its general principles, with the international humanitarian law discussed here.[45]

These developments during the five years that followed from the end of the Second World War have received powerful judicial backing from the ICJ. In the *Corfu Channel* case it referred to one of the Hague Conventions as embodying 'elementary considerations of humanity, even more exacting in peace than in war'.[46] As the Court has said, many rules of humanitarian law applicable in armed conflict are so fundamental for the respect of the human person and elementary considerations of humanity, that the Hague and Geneva Conventions have enjoyed a broad accession. Further, those fundamental rules are to be observed by all States, whether or not they have ratified the conventions that contain them, because they are 'intransgressible principles of international customary law'.[47] Dealing more specifically with nuclear weapons, the Court

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45 As far back as A/Res.2444 (XXIII), 19 December 1968, the General Assembly called for respect for human rights in armed conflicts. And cf. A. Bos, 'Some Reflexions on the Relationship between International Humanitarian Law and Human Rights in the Light of the Adoption of the Rome Statute of the International Criminal Court', *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* 71 (UN, Office of Legal Affairs, 1999). On the possible interrelationship between the Geneva Conventions and human rights law in an internal conflict, cf. the Judgments of the Inter-American Court of Human Rights in the *Las Palmeras* and *Bámaca Velásquez* cases (2000), Ser. C. No. 67 (paras. 25, 34) and No. 70 (para. 203).

46 *Corfu Channel* (Merits) case, ICJ Rep. 1949, 4, 33; repeated in *Military and Paramilitary Activities in and against Nicaragua* (Merits) case, ICJ Rep. 1986, 14, 112 (para. 215); *Use of Nuclear Weapons* adv. op. above note 16, 257 (para. 79). The ITLOS has likewise stated that considerations of humanity must apply in the law of the sea as they do in other areas of international law. *The Saiga No. 2* case, ITLOS Rep. 1999, 10, 62 (para. 155).

47 *Nuclear Weapons* adv. op. above note 16, 257 (para. 79). The Court described humanitarian law as including the Geneva Conventions of 1949, the Hague Convention No. IV of 1907, the Genocide Convention of 1948 and the 1945 London Charter. That list omits direct mention of the Additional Protocols of 1977. The list was proposed by the Secretary-General in his report leading to the establishment of the ICTY (see § 5.09

recognized that they were invented after most of the principles and rules of humanitarian law applicable in armed conflict had come into existence, and that there is a qualitative as well as a quantitative difference between nuclear weapons and all conventional weapons. Nevertheless, the Court continued:

> 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.[48]

In the cases brought by Yugoslavia against members of NATO in 1999, the Court, although it rejected the requests for the indication of provisional measures, twice emphasized that all parties appearing before it must act in conformity with their obligations under the United Nations Charter and 'other rules of international law, including humanitarian law', and that whether or not they have accepted the jurisdiction of the Court, they remain in any event 'responsible for acts attributable to them that violate international law, including humanitarian law.'[49]

Equally striking and emphatic is the pronouncement of the ICTY Appeals Chamber on the nature and application of international humanitarian law:

> This body of law is not grounded on formalistic postulates. It is not based on the notion that only those who have the formal status of State organs, i.e., are members of the armed forces of a State, are duty bound to refrain from engaging in violations of humanitarian law as well as – if they are in a position of authority – to prevent or punish the commission of such crimes. Rather, it is a realistic body of law, grounded on the notion of effectiveness and inspired by the aim of deterring deviation from its standards to the maximum extent possible. It follows, amongst other things, that humanitarian law holds accountable not only those having formal positions of authority but also those who wield *de facto* power as well as those who exercise control over perpetrators of serious violations of international humanitarian law.[50]

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below).

48 Ibid. 259 (para. 86).

49 Above note 43, 132, 140 (paras. 19, 48) (Belgium) and equivalent passages in the other Orders.

50 *Prosecutor* v. *Tadić,* Judgement, 15 July 1999, Case No. IT-94-1-A (para. 96).

§ 5.05. The Geneva Conferences and Conventions, 1949 to 2000

International humanitarian law had accordingly started undergoing a structural reformation when the Diplomatic Conference for the revision of the Geneva Conventions convened in 1949. That made it possible for the ICRC and Governments to consider incorporating more clearly defined provisions regarding criminal responsibility for breaches of the instruments to be adopted than had been possible in the previous conferences, and in co-ordinating the humanitarian law with the emerging law of human rights. The ICRC appreciated this. At one stage of its preparations for the 1949 Conference it envisaged a provision regarding grave breaches to be included in all the instruments to be adopted at the Conference. According to that suggestion, grave breaches were to be punished as crimes against the law of nations by the tribunals of any of the parties 'or by any international tribunal'. However, that was not pursued.[51]

The Conference of 1949 adopted four new Conventions, replacing those of 1929 and, to a large extent, the Regulations annexed to the Fourth Hague Convention of 1907, as follows:

- I. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;[52]
- II. Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;[53]
- III. Geneva Convention relative to the Treatment of Prisoners of War;[54] and

51 ICRC, *Revised and New Draft Conventions for the Protection of War Victims: Remarks and Proposals submitted by the International Committee of the Red Cross*, Art. 40 (1949). H.-P. Gasser to the author, 16 November 1998. At the Rome Conference the ICRC changed its position and strongly supported the establishment of the ICC. See the statements of the President at the fourth plenary meeting and of the Legal Counsel at the ninth plenary meeting, docs. A/CONF.183/SR.4 (para. 68) and SR/9 (para. 113).

52 75 UNTS 31. For the authoritative commentary see *The Geneva Conventions of 12 August 1949, Commentary under the general editorship of J. S. Pictet* (Geneva, ICRC, 4 vols., 1952, 1960, 1960, 1958). And see J. S. Pictet, 'La Croix-Rouge et les Conventions de Genève', 76 *Recueil des cours* 1 (1950-I); Sh. Rosenne, 'Participation in the Geneva Conventions (1864–1949) and the Additional Protocols of 1977', *Studies and Essays on Humanitarian Law and Red Cross Principles in honour of Jean Pictet* 803 (Geneva/The Hague, ICRC/Nijhoff, 1984).

53 75 UNTS 85.

54 Ibid. 135.

– IV. Geneva Convention relative to the Protection of Civilian Persons in Time of War.[55]

One aspect of these instruments is that the general provisions placed at the beginning of each Convention, the provisions on the repression of breaches, and the final provisions are common to all four Conventions, as is explained in the Final Act of the Conference.[56] The first three Conventions incorporate requirements found necessary from the experience of the Second World War and from technological advances. The Fourth Convention is new, although preparatory work was commenced following the Conference of 1929 (above § 5.02). Like the others, it also is largely based on experience gained during the Second World War. Taken together, those Conventions contain a series of major innovations. There are clearer definitions of what violations are crimes engaging individual responsibility, it still being the duty of a State party to provide effective penal sanctions for persons committing breaches or ordering them to be committed and to ensure that the perpetrators are brought before its own courts or those of another party, and clearer definitions of grave breaches of the Conventions. Each Convention contains a provision saying what are to be considered as grave breaches, dependent on its subject-matter. Each party is required to enact necessary legislation to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches as defined.[57] Another innovation, hesitant at first, is the extension of some principles of the Geneva law to conflicts not of an international character, a distinction which is gradually becoming blurred. The monitoring powers of the ICRC are more closely defined. The Conventions also envisage an enquiry procedure concerning any alleged violation of the Convention, but there is no known instance of this procedure having been followed. On the other hand, the full integration of the Geneva law with the Charter prohibition on the use of force and with the new conceptions of human rights was incomplete.

The distinction between international armed conflicts and non-international armed conflicts is embodied in a combination of common Articles 2 and 3. By common Article 2, besides the provisions that shall be implemented in peacetime, 'the present Convention shall apply to all cases of declared war or of any other armed conflict that may arise between two or more of the High Con-

55 Ibid. 287.

56 Ibid. 5. The 11 resolutions annexed to that Final Act are reproduced in volume I of the *Commentary* cited above note 52, 431.

57 Convention I, Art. 49; Convention II, Art. 50; Convention III, Art. 131; Convention IV, Art. 146.

tracting Parties, even if the state of war is not recognized by one of them'. Common Article 3 indicates provisions to be applied in armed conflict not of an international character. This distinction is carried further, and clarified, in the Additional Protocols of 1977.[58] In Additional Protocol I 'international armed conflict' is extended to armed conflicts in which peoples are fighting against colonial domination as seen above chapter IV § 4.09.[59] Additional Protocol II relates specifically to the protection of victims of non-international armed conflicts. The Protocol applies to all armed conflicts which are not covered by Article 1 of Additional Protocol I and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. It does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, not being armed conflicts. (Article 1 (2)).[60]

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58 Protocol additional to the Geneva Conventions of August 12, 1949, and relating to the protection of victims of armed conflicts (Protocol I), 1125 UNTS 3, 1226 UNTS 208; Protocol additional to the Geneva Conventions of August 12, 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), 1125 UNTS 609, 1126 UNTS 208. And see *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Y. Sandoz et al. eds., Geneva, ICRC/Nijhoff, 1987); M. Bothe *et al., New Rules for Victims of Armed Conflicts* (The Hague, Nijhoff, 1982); D. Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press, 2000).

59 See also chapter IV note 53 above. That was highly controversial and was one of the few provisions adopted at the Diplomatic Conference by a vote, and not by consensus. The final vote in plenary was 87-1-11. VI *Official Records* 40 (CDDH/SR.36, para. 58). Its presence in the Protocol is one of the reasons why some States have not ratified the Protocol, even if otherwise accepting it. By Art. 96, the authority representing a people engaged against a party to the Protocol in an armed conflict of a type referred to in that provision may undertake to apply the Conventions and the Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. So far as is known, no national liberation movement has made any such declaration. On 21 June 1989 the Palestine Liberation Organization sent a communication to the depositary concerning Palestine's participation in the Conventions and Additional Protocols. The Swiss Government as depositary communicated this to the States parties and at the same time stated that it was not in a position to settle the question whether the communication should be considered an instrument of accession within the meaning of the relevant provisions of the Conventions and Protocols. Doc. A/55/173, Annex, note a.

60 That exception is picked up in Arts. 8 (2) (d) and 8 (2) (f) of the Rome Statute of the ICC on the definition of war crimes within the jurisdiction of that Court. That Statute

The distinction between the two types of armed conflict relates principally to the extent and nature of the protection vouchsafed by the Conventions. It has become important in the ICTY, which dismissed a Prosecution pre-trial motion to take judicial notice of the international character of the conflict in Bosnia-Herzegovina. The Trial Chamber explained that as regards the controversial issue of the nature of the conflict, involving an interpretation of facts, both parties should be able to present arguments and evidence on them.[61] The question has also arisen in the ICTR.[62]

The 1949 Conference took place at a time when there was little experience of the new international order established by the United Nations, and when wartime passions were still running high. As experience accumulated and technology advanced, it became apparent that further updating would be required. In the early 1970s the United Nations General Assembly had on its agenda an item concerning human rights in armed conflicts. It adopted a series of resolutions culminating in resolution 3102 (XXVIII), 12 November 1973, in which it welcomed the convocation by the Swiss Government of the new Diplomatic Conference. The significance of that resolution is that it acknowledged a close connection of the United Nations with the ICRC in both the formulation of international humanitarian law and its application. After several years of preparatory work including consultations with Governments, the Conference held its first session in 1974, and continued until 1977. It completed its work with the adoption of the two Additional Protocols (above note 58). The representatives of the Secretary-General were present as observers and submitted regular reports to the General Assembly.

The most important aspects of the 1977 instruments, apart from general updating, include a clearer formulation of the distinction between international and non-international armed conflicts, a clearer reformulation of the functions of the ICRC and other humanitarian organizations, further designations of grave

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continues that nothing in paras. 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means. That follows Art. 3 of Additional Protocol II.

61 *Prosecutor* v. *Simić* et al., Decision of 25 March 1999. Case IT-95-9-PT. For an analysis by the ICRC of the two types of armed conflict, see the ICRC papers submitted to the Preparatory Commission of the ICC in docs. PCNICC/1999/WGEC/INF.2, Annex I (international armed conflict) at p. 9, Annex II (non-international armed conflict) at p. 69 and Annex III at p. 121 + Adds. 1–4 (1999).

62 *Prosecutor* v. *Kanyabashi* (ICTR-96-15-T), Decision on Defence Motion on jurisdiction, 3 July 1997, para. 23,.

breaches, and clarification that grave beaches are war crimes (Protocol I, Article 85 (5)), together with the possibility of establishing international fact-finding commissions to investigate allegations of grave breaches. At the same time, it remains a matter for the individual States to ensure that their legislation permitted the trial and punishment of persons accused of grave breaches.

Article 90 of Additional Protocol I sets out the provisions for the new International Humanitarian Fact–finding Commission.[63] It consists of 15 members of high moral standing and acknowledged impartiality, elected at a meeting of the contracting parties after at least two of them have accepted the Commission's competence. That competence is based on a system close to the optional clause of the Statute of the International Court of Justice. A party may declare that it recognizes the Commission's competence *ipso facto* and without special agreement in relation to any other contracting party accepting the same obligation, to enquire into allegations as authorized by that article. The Commission has competence to enquire into any facts alleged to be a grave breach or other serious violation of the Conventions or Additional Protocol I, and to facilitate, through its good offices, 'the restoration of an attitude of respect for the Conventions and this Protocol'. It is to work through Chambers consisting of five of its members, not nationals of any of the parties to the conflict, together with two members *ad hoc*, one appointed by either side, also not nationals of any party to the conflict. The Commission reports the Chamber's findings to the parties with such recommendations as it may deem appropriate. It shall not report its findings publicly, unless the parties to the conflict have so requested. The depositary (the Swiss Government) is to provide administrative facilities. To the end of 2000, some 60 States had accepted the competence of the Commission. However, since its establishment, it has not been invoked. Its structure appears to be more suited to the investigation of an allegation of a single breach of the Conventions or the Additional Protocol, not for more widespread situations in which the breaches are endemic. It seems that in complicated situations, such as that in former Yugoslavia, the United Nations and States prefer to work through *ad hoc* bodies working under a specific directive.

This period also saw an extension of the matters now accepted as coming within the scope of humanitarian law. These include the following instruments:

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63 On this Commission, see L. Condorelli, .La C.I.H.E.F.: Un outil obsolète ou un moyen de mise en œuvre du droit international humanitaire?, 83 *Revue internationale de la Croix-Rouge* 393 (2001).

- The Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict;[64]
- The Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 26 November 1968;[65]
- The Convention on Prohibitions or Restrictions on the Use of certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, 10 October 1980 and its Protocols;[66]
- The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984;[67] and
- The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000.[68]

The International Committee of the Red Cross is the accepted guardian of the integrity of the principal Geneva Conventions. It is an entity incorporated under Swiss law with headquarters in Geneva. It consists of a maximum of 25 Swiss citizens. Article 4 (*c*) of its Statutes includes in its role 'to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law'. In resolution 45/6, 16 October 1990, the General Assembly invited the ICRC to take part in its sessions and work in the capacity of an observer. In doing that, the General Assembly acknowledged its special role in international humanitarian relations. Since then, the ICRC has participated actively in all relevant actions in the General Assembly and related bodies such as the Rome Conference on the ICC. Its contribution to the evolution of the ICC is particularly noteworthy. The International Red Cross, composed of all recognized National Red Cross and Red Crescent Societies, is technically a non-governmental organization. Its supreme deliberative body is the International Conference of Red Cross and Red Crescent Societies, composed of delegations of duly recog-

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64 249 UNTS 240, and Protocol at p. 358. For the Second Protocol of 26 March 1999, see 38 ILM 769 (1999). This is not yet in force.

65 754 UNTS 73. This is embodied in Art. 29 of the Rome Statute of the ICC.

66 1342 UNTS 137. Also Additional Protocol on Blinding Laser Weapons (Protocol IV) of 13 October 1995, 1342 UNTS 137, and Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and other Devices as amended on 3 May 1996 (Protocol II), ibid. 168.

67 1465 UNTS 85.

68 A/54/Res/263, 25 May 2000. This brings the UN Convention on the Rights of the Child of 1989 (1577 UNTS 3) into line with Art. 26 of the Rome Statute of the ICC. In force from 18 January 2002.

nized national societies, delegations of States party to the Geneva Conventions and delegations of the ICRC.[69]

§ 5.06. The principles of humanitarian law

It is not only the governing black letter texts that use broad language as background to their detailed rules. In the *Nicaragua* (Merits) case, the International Court of Justice made repeated reference to what it termed the 'fundamental principles of humanitarian law', which it then proceeded to apply in the circumstances. In the *Nuclear Weapons* advisory opinion, the Court included an analysis of the principles and rules of humanitarian law, and in its orders on provisional measures in the *Use of Force* cases, it referred to 'humanitarian law' *tout court*. It is necessary to look at these more closely.

In the *Nuclear Weapons* advisory opinion the Court stated:

> The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and non-civilian targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants; it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.[70]

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69 For particulars see the current edition of the *International Red Cross Handbook*, and F. Bugnion, *Le Comité International de la Croix-Rouge et la protection des victimes de la guerre*, above note 8. On the application of the Geneva Conventions to UN forces operating under Security Council decisions and the possible accession of intergovernmental organizations to the Conventions, see the Memorandum of the Under-Secretary-General for Special Political Affairs in UNJYB 1972, 153. The Secretariat's attitude at that time was negative. This changed with the promulgation in 1999 of the Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law. Doc. ST/SGB/1999/13 (1999); 38 ILM 1656 (1999). See on this D. Shraga, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-related Damage', 94 AJIL 406 (2000).

70 Above note 31, 257 (paras. 78, 79). The fallacy of the way in which the first principle is set out is that it assumes that *weapons* are capable of distinguishing between one target and another. But weapons are inert. They might be able to detect and distinguish a building. They cannot distinguish who or what is in it, whether it is a .civilian. target or not.

This makes it necessary to examine further what those fundamental principles are.

Relevant indications are found in the introductory parts of each of the four Conventions of 1949. Thus, regarding the wounded and sick, Convention I, Article 12, establishes that members of the armed forces and certain other persons who are wounded or sick shall be respected and protected at all times. The Convention refers in particular to wounded and sick members of the opposing armed forces on land. Convention II applies the same principles to members of the armed forces at sea who are wounded, sick or shipwrecked. In an important innovation introduced in 1949, it also apples to members of the merchant marine and the crews of civil aircraft of the opposing party (Article 13). Those two Conventions go on to regulate the details of medical establishments and their use of the protective emblem, ambulances, and hospital ships and aircraft ambulances, and lay down the rules for the identification and protection of medical personnel. Convention III addresses the issues of prisoners of war, that is members of the opposing armed forces, land, sea and air, who fall into the power of the enemy. Convention IV relates to the protection civilian persons in time of war (now armed conflict), and attempts to remedy serious omissions from the *jus in bello* that became evident to all during the Second World War. It is a complicated instrument setting out provisions for the general protection of populations against certain consequences of war, and is intended to alleviate the sufferings caused by war (Article 13). In principle it applies to persons who, at a given moment and in any manner whatsoever, find themselves in case of conflict or occupation in the hands of a party to the conflict or occupying power of which they are not nationals. Each Convention provides that no protected person may in any circumstance renounce in part or entirely the rights secured to him or her by the Convention and by any other special agreements should there be such.

Theoretically, the ongoing supervisory role in connection with the application of these Conventions is to be performed by a protecting power, but should none be designated, the ICRC may be invited to undertake these functions. In practice, while the protecting power, if designated, replaces the normal diplomatic channel when diplomatic relations between the States in conflict have been broken, all matters connected with the application of the Conventions (but not other aspects of humanitarian law) are undertaken by the ICRC, with the consent of the party or parties concerned. For its part, the ICRC is jealous in the protection of its neutrality and impartiality, is strict in its interpretation of its powers, functions and privileges, and shows a capacity for adaptability in unforeseen circumstances always within the letter of its interpretation of the Convention in question.

The Geneva Conventions in general, and the Fourth Convention in particular, have given rise to a problem from which political elements are not absent. The Conventions are treaties concluded between States, and they express the mutually agreed adjustment of the relations between States and their organs (the armed forces) or their populations (civilian personnel) in the circumstances contemplated by each Convention. The question that this has posed is whether the relations of States are to have priority in the interpretation and application of the Conventions, or whether the protection of the individual protected person comes first. In the nature of things, the ICRC puts its weight on the side of the protected person. The question does not permit of an easy answer. There is certainly an element of inter-State mutual adjustment throughout the Conventions, and that has to be set beside the element of individual protection.[71] The balance lies in a careful appreciation of the circumstances in which the interpretation and the application of a given provision are required.

The dilemma of the humanitarian law at the beginning of the twenty-first century is its apparent remoteness from the fields of armed conflict, that is its distance from the realities of modern asymmetrical armed conflict. It was conceived in the days of standing armies, disciplined and directed by a responsible government or other identifiable authority. But the way the use of armed force has developed since 1945 is different. While one side might possess those traditional characteristics, it is rarely true of the other side, and often neither side possesses them. In that situation, the formal rules of the Geneva Conven-

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71 This controversy has exercised Israel in connection with the territories held after the Six Day War (1967). The difference between Israel and the ICRC concerned the applicability of the Fourth Convention. In an exchange of notes of 24 May and 16 June 1968 a pragmatic solution was reached enabling the ICRC to perform its functions in those territories. For that exchange of notes, see 'The Middle East: Activities of the International Committee of the Red Cross June 1967–June 1970', 10 *International Review of the Red Cross*, at 426 (1970). During Israel's War of Independence the ICRC investigated the possibility of establishing, with the agreement of all parties, security zones in Jerusalem on the basis of what were then draft proposals before the 1949 Conference. See 'The International Committee of the Red Cross in Palestine (December 1947 to May 1, 1948)', *International Review of the Red Cross,* Supplement, May 1948, 81 at 89 (1948); reissued (with modifications) as *The International Committee of the Red Cross in Palestine* at 5 (Geneva, ICRC, July 1948). For the view of the official Jewish representatives of that time, the Jewish Agency for Palestine, see *Political and Diplomatic Documents December 1947–May 1948*, doc. 466/*Companion Volume* 29 (Jerusalem, Israel State Archives/Central Zionist Archives, 1979). And see the *Commentary* above note 52, vol. IV at 123. For the position of the ICRC after 1967, see H.-P. Gasser, 'The Geneva Conventions and the Autonomous Territories in the Middle East', 26 *Security Dialogue* 173 (Oslo, 1995).

tions and related instruments lose much of their relevance. We can go further. Article 82 of Additional Protocol No. I of 1977 (above note 58) requires the parties to ensure that legal advisers are available where necessary to advise military commanders at the appropriate level on the application of the Geneva Convention and on the appropriate instruction to be given to the armed forces. That sounds laudable enough, but is it realistic? What is meant by a military commander? What is meant by the appropriate level? What is the appropriate instruction? Is the legal adviser to override the commander? What battle experience is required of these legal advisers? Is a high ranking field commander ordered to attack a given objective – for instance a church spire suspected of being used as a look-out post – to seek legal advice before carrying out the order? Is an aircrew member of whatever rank, perhaps a unit commander, ordered to attack a given objective with a specific weapon to seek legal advice as to possible collateral damage before embarking on the mission? Is a naval commander of a modern warship with orders to attack and sink an object at sea to ascertain first through a legal adviser (who may or may not be at sea but be stationed on a land base) that the object is a legitimate military objective? And what about the commander's duty to protect the lives of all persons under his/her command? Piracy is widespread in some parts of the world, and in other areas terrorists, acknowledging no rules of humanitarian law, are known to use the sea in furtherance of their militant aims. Terrorism directed at unsuspecting civilian objectives (in violation of basic tenets of humanitarian law) has introduced a new dimension into the concept of modern armed conflict. Is it perfidious for special units to feign to be in the service of a humanitarian agency when acting to rescue civilian victims of a terrorist act such as a hijacked vehicle? Do the Geneva Conventions, by now massive documents with even more massive commentaries, measure up to current requirements? And to go a step further, many responsible military cultures require military personnel to be judged by military personnel, officers of equivalent or higher rank. Are courts manned exclusively by civilian judges, elected in a political body, fully competent to judge military offences? That is the challenge that has to be faced. That is the challenge set before the international criminal tribunals and their protagonists. Are they properly equipped for this?

§ 5.07. International Criminal Courts created by the Security Council

Recent instances of armed conflict, both international and non-international, have thrown a great strain on international humanitarian law and its enforcement. Serious breaches of humanitarian law have occurred. National courts have dealt

with some of these. Notable instances are the Kafr Kassem case in Israel[72] and the trial of Lt. Calley in connection with the My Lai Incident in Vietnam.[73] However, it was above all a series of atrocities committed in the violent armed conflicts that erupted in the Balkans following the dissolution of the Socialist Federal Republic of Yugoslavia starting in Slovenia at the end of 1990 followed by equally horrendous acts of genocide in the civil war in Rwanda that prompted the Security Council to establish two *ad hoc* tribunals to try and punish persons accused of grave violations of applicable humanitarian law. Responding to mounting public opinion, in 1993 the Security Council established 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 (ICTY).[74] That was followed in 1994 when the Security Council established the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 (ICTR), similar to the ICTY.[75] A single Appeals Chamber serves both Tribunals.

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72 Cf. the Kafr Kassem incident, Central District Military Court, *Chief Military Prosecutor* v. *Melinki and others*, 13 *Pesakim Mehoziim* (District Court Rep.) 90 (1958-59), and on appeal in the Military Court of Appeal, cited in the *Eichmann* case, 36 ILR 1 at 257. And see Y. Dinstein, *The Defence of 'Superior Orders' in International Law* (Leyden, A.W. Sijthoff, 1965), *passim*; and the citation in N. Krejzer, 'A Plea for the Defence of Superior Order', 8 IsYBHR 78, 101 (1978). In the words of the District Court cited by Krejzer: 'a soldier must be able to recognize when an ostensibly valid order from a superior officer is so flagrantly immoral as to be manifestly unlawful'.

73 See in the U.S. Court of Military Appeals, *United States* v. *Calley*, in *Digest of United States Practice in International Law 1973*, 505 (A. W. Rovine, ed. Washington, State Department Publication 8756, 1974); *Investigation of the My Lai Incident: Report of the Armed Services Investigating Subcommittee of the Committee on Armed Services, House of Representatives, 91st Congress, 2nd session, under authority of H. Res. 105, 15 July 1970* (Washington D.C., Government Printing Office, 1970). And see 1972 *Proceedings* of the American Society of International Law 183.

74 See ICTY, Basic Documents/Documents de base 2001. Hereafter *Basic Documents*. The Security Council amended the Statute in S/Res. 1329 (2000), 30 November 2000, 1411 (2002), 17 May 2002 and S/Res. 1431 (2002), 14 August 2002. Other ICTY publications include a *Yearbook* (since 1994), and *Judicial Reports/Recueils judiciaires*, commencing with the period 1994 -1995 (published for the United Nations by Kluwer Law International). The Tribunal's website is www.un.org/icty.

75 S/Res. 955 (1994), 8 November 1994. The Security Council amended the Statute in S/Res. 1329 (2000), 30 November 2000, 1411 (2002), 17 May 3003 and S/Res.1431 (2002) 14 August 2002. For the Tribunal's judicial reports, see UN, International Criminal

There have been repeated calls by the Security Council for strict adherence to the principles of international humanitarian law, but enforcement has been difficult, and in conditions of civil war and anarchy, with the virtual breakdown of the State system, the international law itself is not clear and may not always be applicable. Resolution 808 (1993), 12 February 1993, was the first concrete step for enforcing international humanitarian law. Here the Security Council determined that the continuing reports of widespread violations of international humanitarian law within the territory of the former Yugoslavia, including in particular the practice of 'ethnic cleansing', was a situation that constituted a threat to international peace and security. It expressed its determination to put an end to such crimes and to take effective measures to bring to justice the persons responsible for them. In the circumstances, as others had recommended, the establishment of an international tribunal would enable this aim to be achieved and would contribute to the restoration and maintenance of peace. It therefore decided to establish such a tribunal and requested the Secretary-General to submit proposals within 60 days.

On the basis of the Secretary-General's report with the draft statute annexed, the Security Council adopted the Statute unchanged in resolution 827 (1993), at its 3217th meeting on 25 May 1993.[76] In so doing the Security Council stressed that it was acting under Chapter VII of the Charter. It decided that all States were to co-operate fully with ICTY and that consequently they were to take any measures necessary under their domestic law to implement the provisions of the resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute. That provision requires States to co-operate with the Tribunal in the investigation and prosecution of persons accused of committing

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Tribunal for Rwanda, *Basic Documents and Case Law, 1995-2000* (CD-ROM Sales No. E/F.01.III.W.1 (2001); Centre of International Law, Université libre de Bruxelles, *International Criminal Tribunal for Rwanda: Reports of Orders, Decisions and Judgments* (Brussels, Bruylant, 2000, continuing). Its website is www.un/org/ictr. In resolution 1503 (2003), 29 August 2003 the Security Council decided to appoint a separate prosecutor for ICTR.

76 Doc. S/25704, *Basic Documents* 155 (resolution), 161 (report) and 1 (Statute). In preparing the report, the Secretary-General took into account proposals received from member States and from other bodies, as well as the text prepared by the 1953 UN Committee on International Criminal Jurisdiction. 9 GAOR Sup. 12 (A/2645). At that meeting members of the Security Council made statements indicating how they understood different parts of the Statute. Those statements are part of the *travaux préparatoires* of the Statute.

serious violations of international humanitarian law, and to comply without delay with any request for assistance or an order issued by a Trial Chamber.

The Tribunal has power 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 (Article 1). By Article 2 it has power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 1949, namely a series of acts against persons or property protected under the provisions of the relevant Geneva Convention. Eight specific acts are mentioned in this context. By Article 3 it may prosecute persons violating the law or customs of war. Five specific acts are mentioned, but the violations are not limited to them. Article 4 deals with genocide, in a definition following Articles II and III of the Genocide Convention. Article 5 deals with crimes against humanity. It is the first black letter text since the London Charter of 1945 to set out those crimes.[77]

> The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
> (a) murder [*assassinat*];
> (b) extermination;
> (c) enslavement;
> (d) deportation;
> (e) imprisonment;
> (f) torture;
> (g) rape;[78]
> (h) persecutions on political, racial and religious grounds;
> (i) other inhumane acts.

Article 7 lays down the principle of individual criminal responsibility of any person regardless of his or her official position. It excludes the defence of superior orders, but a superior order may be considered in mitigation of punishment. Article 8 delineates the Tribunal's temporal and territorial jurisdiction.

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77 Israel adopted the following definition of crime against humanity in the Nazi and Nazi Collaborators (Punishment) Law, 5710 – 1950: .'"crime against humanity" means any of the following acts: murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds'. 4 *Laws of the State of Israel: Authorized translation from the Hebrew* 154 (1950).

78 For the first finding of guilty of rape, see the case of *Prosecutor* v. *Kunarac, Kovač and Vuković*, the *Foca* case. IT-96-23-T, IT-96-23/I-T, Judgement of 22 February 2001.

The jurisdiction extends to the territory of the former Socialist Federal Republic of Yugoslavia including its land surface, airspace and territorial waters, over a period beginning on 1 January 1991. There is no terminal date: the Security Council will set that. The Statute is based on the principle of concurrent jurisdiction. ICTY and national courts have concurrent jurisdiction to prosecute, but ICTY shall have primacy over national courts. At any stage of the procedure, it may formally request national courts to defer to its competence.[79] By Article 20, the accused is entitled to a fair and public hearing.

The Tribunal is organized in trial chambers and an appeals chamber, a prosecutor, and a registry. It is composed of 14 independent judges, persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the chambers due account is to be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law (Article 13). A notable omission from these qualifications is experience at a high level of responsibility of military law – an omission that is carried through to the new ICC. The judges are elected by the General Assembly from a list submitted by the Security Council. They serve for a term of four years and are eligible for re-election. For the first election the Security Council submitted a list of 23 candidates (resolution 857 (1993), 20 August 1993), thus giving the General Assembly more choice than it now usually has for the election of the judges of the International Court of Justice. In resolution 1329 (2000), 5 December 2000, the Security Council established a pool of 27 *ad litem* judges to enable the Tribunal to expedite the conclusion of work at the earliest possible date. That resolution also invited the Secretary-General to submit a report containing an assessment and proposals regarding the date ending ICTY's temporal jurisdiction.

The legality of the establishment of the Tribunal was challenged in the first case to come before it, the *Tadić* case. Both the Trial Chamber and the Appeals Chamber dismissed the challenge. A major question was what article of Chapter VII of the Charter serves as a basis for the establishment of a tribunal. The Appeals Chamber found that its establishment 'falls squarely within the powers

79 For an example of deferral, see *Prosecutor* v *Tadić* , ICTY, *Judicial Rep*, 1994–1995(II) at 1177. For the position in the ICTR, see Art. 8 of its Statute. The European Court of Human Rights has declared inadmissible an application under the European Convention of a person indicted on charges of crimes against humanity and war crimes, and surrendered to ICTY by order of the domestic courts. *Natelitić* v. *Croatia*, (No. 51891/99), Decision of 4 May 2000.

of the Security Council under Article 41'.[80] While as a matter of law this decision is not open to serious criticism, the question that arises is whether the Appeals Chamber should not better have found a way to refer this aspect to the Security Council for an advisory opinion from the International Court of Justice, on the basis of the principle *nemo judex in causa sua*. The Appeals Chamber would obviously have been in very great difficulty had it reached any other conclusion on this delicate issue of the legality of its establishment.

The internal situation in Rwanda grew into a civil war early in 1994 and the hostilities were not limited to the territory of Rwanda. In resolution 918 (1994), 17 May 1994, the Security Council determined that the situation constituted a threat to peace and security in the region and commenced action under Chapter VII of the Charter. There were widespread reports of serious violations of humanitarian law and of acts of genocide. In resolution 966 (1994), 8 November 1994, the Security Council, acting under Chapter VII, decided to establish the ICTR. To that end, it adopted a Statute, modelled on that of ICTY. The ICTR has jurisdiction over persons accused of genocide, crimes against humanity and violations of Article 3 common of the Geneva Conventions [of 1949] and of Additional Protocol II [of 1997]. Its structure is the same as that of ICTY. It is now composed of eleven judges, having the same qualifications as those of ICTY, elected in the same way as those of ICTY, together with a pool of *ad litem* judges. Its seat is at Arusha, Tanzania (resolution 977 (1995), 22 February 1995).

Although both these Tribunals were established by the Security Council, the Security Council has not shown much interest in their work. In June 2000, it held a brief discussion on the Tribunals in the presence of the Prosecutor, who addressed the Council and answered questions.[81] Each Tribunal has to submit an annual report to the Security Council and the General Assembly, and each budget is determined by the General Assembly in the usual way. In 1993, on the recommendation of the Advisory Committee on Administrative and Budgetary Questions (ACABQ), the General Assembly requested the Secretary-General to conduct a full review of the two Tribunals with a view to evaluating their effective operation and functioning. This is not the time or place for a

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80 *Prosecutor* v. *Tadić*, Trial Chamber II, Decision on the Defence Motion on Jurisdiction (1995), ICTY, *Judicial Reps.* cited, 27; Appeals Chamber, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (1995), ibid. 353; followed in *Prosecutor* v. *Slobodan Milošević*, Decision on preliminary motions, Case IT-99-37-PT, 8 November 2001.

81 55 SCOR S/PV.4150, 2 June 2000. This was followed by a further discussion at the 4161st meeting, 20 June 2000.

full account of the report of that Expert Group.[82] One paragraph, however, warrants notice. Although limited to the work of those two *ad hoc* Tribunals, much of what that Expert Group wrote will have to be taken to heart in setting up the new ICC. That report draws attention to the difficulties caused to ICTY in particular, and less to ICTR, by the excessive detail of the lists of crimes in the two Statutes.

> Indictment problems begin with the way in which the offences are defined. While offences are broadly four in number in ICTY, and three in ICTR, they are defined in a way that makes them capable of being committed in numerous ways. No less than eight individual types of actions/conduct separately amount to a grave breach of the Geneva Conventions. In ICTR also, eight separate types of actions are considered serious violations of Article 3 common to the Geneva Conventions of 1949 for the protection of war victims and of Additional Protocol II. The offence of violation of the laws or customs of war, which is specific to ICTY, is not fully defined; rather, five types of acts/conduct are indicated as non-exclusive examples. The rest are to be found in customary international law.[83]

In this context, the question has arisen whether a crime against humanity is more serious than a war crime, warranting a heavier sentence. The ICTY Appeals Chamber has answered that question in the negative:

> [T]he Appeals Chamber takes the view that there is in law no distinction between the seriousness of a crime against humanity and that of a war crime. The Appeals Chamber finds no basis for such a distinction in the Statute or Rules of the international Tribunal [ICTY] construed in accordance with customary international law; the authorized penalties are the same, the level in any particular case being fixed by reference to the

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82 Identical letters dated 17 November 1999 from the Secretary-General to the President of the General Assembly and the Chairman of the ACABQ, 54 GAOR, annexes, a.i. 142 and 143, doc. A/54/634, and the observations of ICTY and ICTR in doc. A/54/850. These have been consolidated in a single document for the Security Council, doc. S/2000/597. The composition of this Expert Group is significant: a former president of the United Nations Administrative Tribunal, a Judge of the Cámera nacional de Casación Penal of Argentina, a former Attorney General, Minister of Justice and serving Justice of the Supreme Court of Gambia, a former public prosecutor and Judge of the Supreme Court of India, and a former Under Secretary-General for Administration and Management of the United Nations, a combination of administration and management experience and of the administration of criminal justice at the highest levels of national responsibility. For proposals by ICTY to improve its performance, see doc. A/55/382–S/2000/865, leading to the amendment of 30 November 2000. For similar proposals by ICTR, see doc. A/56/265–S/2001/764.

83 A/54/634–S/2000/597, Annex I, para. 161.

> circumstances of the case. The position is similar under the Statute of the International Criminal Court [see § 5.09], Article 8 (1) of the Statute, in the opinion of the Appeals Chamber, not importing a difference.[84]

The Registry also attracted the Group's attention. The Registry is responsible for the non judicial aspects of the administration and servicing of the Court (Article 17). The Registrar's duties are spelled out in the Tribunal's Rules of Procedure and Evidence.[85] One of the Registrar's duties is to set up a Victims and Witnesses Unit within the Registry. This Unit shall provide protective measures for witnesses and victims, in particular in cases of rape and sexual assault.[86] Commenting on this, the Experts wrote:

> In both Tribunals, the Registry has a triple function. First, it directly assists Chambers in their judicial work. Secondly, it performs a number of court-related functions which, in national practice, are usually entrusted to separate government departments. Thirdly, it provides general administrative services.[87]

There are indications throughout the Group's report of conflicting interests, especially between the different sections of the Registry, and to some extent between the Registry and the Office of the Prosecutor.

Neither Tribunal can be said to have played a significant role in the major international actions for the restoration or the maintenance of peace and security in their respective regions. They are both slow and their procedure is complex. It is equally open to question, notwithstanding their important contribution to the development of international criminal law, whether the few sentences of guilty passed by them with long terms of imprisonment have had a deterrent effect, whether directly in the territories concerned or in any broader context of either conflict or other situations of armed conflict in which the Security Council has had to call for a stricter application of international humanitarian

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84 *Prosecutor* v *Tadić* , Judgement in sentencing appeals, 26 January 2000, Case No IT-94-1-A and IT-94-1-A*bis*, para. 69.

85 *Basic Documents 1988*, 29.

86 For the view that this is misnaming the section, to the extent that it implies responsibilities with respect to victims other than witnesses, see para. 187 of the report, above note 83.

87 Ibid. para. 174.

law. Their case-law is impressive, and at times confusing. It is, however, too early yet to undertake a thorough evaluation of their work.[88]

§ 5.08. The International Criminal Court: the Rome Statute

The movement to establish a standing international criminal court grew in the inter-War period. The first international criminal courts to try individuals for serious breaches of the international laws of war and related matters (the *jus in bello*) were established after the Second World War, the Nuremberg and Tokyo tribunals.[89] In the 1950s the United Nations examined the possibility of establishing a permanent international criminal court, but in the conditions of the Cold War there was little progress. At that time the establishment of an international criminal court was linked to two other projects that were in the hands of the ILC: the definition of aggression, and the preparation of a draft code of offences against the peace and security of mankind.

The General Assembly completed its definition of aggression in resolution 3314 (XXIX), 14 December 1974 (above chapter IV § 4.07), a definition widely regarded as inadequate. It addressed aggression by States, not individual responsibility for acts leading to aggression. The ILC made slow progress on the topic renamed draft Code of Crimes against the Peace and Security of Mankind, and the establishment of an international criminal court became part of that topic. The changed international situation in the 1990s made it feasible for the General Assembly to resume work on the establishment of an international criminal court. In resolution 44/39, 4 December 1989, dealing with drug trafficking, adopted on the recommendation of the Sixth Committee, it requested the ILC to prepare a draft. That was probably a mistake. Preparing a draft Statute for an international criminal court is neither codification nor progressive development of international law. The qualifications required for that task – familiarity with different systems of criminal law and its administration, familiarity with military law and practice with special reference to problems of the chain of command and its working under battle conditions, familiarity with inter-

88 For an attempt to assess the role of these tribunals in the maintenance of peace, see L. Arbour (former Chief Prosecutor), 'War Crimes Courts are a Powerful Force for Peace and Liberty', *International Herald Tribune* (Tel Aviv ed.), 5 April 2001 at 8.

89 Above notes 27 and 32. And see Sh. Rosenne, 'Antecedents of the Rome Statute of the International Criminal Court Revisited', *International Law across the Spectrum of Armed Conflict: Essays in Honour of Professor L.C. Green on the Occasion of his Eightieth Birthday*, 387 (Rhode Island, Naval War College International Law Studies, vol. 75, 2000).

national law in general and with international humanitarian law in particular, and with human rights law in theory and in practice – are beyond the qualifications required of members of the ILC. The Commission completed its draft in 1994.[90] After further preparatory work, the General Assembly decided to convene a diplomatic conference in 1998, which adopted the Rome Statute of the International Criminal Court.[91] The Statute is in the form of an international

90 ILC Rep. 1994, (A/49/10*) Chap. II B, para. 91, YBILC 1994/II/2 T 26. The final structure of the Rome Statute differs from the original proposal of the ILC. That was structured as follows: Part I (Arts. 1 to 4), the establishment of the Court; Part 2 (Arts. 5 to 19), Composition and administration of the Court; Part 3 (Arts. 20 to 24), Jurisdiction of the Court; Part 4 (Arts. 25 to 31), Investigation and prosecution; Part 5 (Arts. 32 to 47), the Trial; Part 6 (Arts. 48 to 50), Appeal and review; Part 7 (Arts. 51 to 57), International co-operation and judicial assistance; Part 8 (Arts. 58 to 60), Enforcement; Annex, Crimes pursuant to [designated] treaties. That proposal did not contain final clauses. Appendix I discussed possible clauses of a treaty to accompany the draft statute.

91 UNTS No. 38504. The original text (doc A/CONF/138/9) contained so many errors, both typographical and of substance (lack of concordance, especially between the English and French texts), that a new version had to be prepared for the use of the Preparatory Commission (doc. PCNICC/1999/ INF/3). Corrections have been circulated to that. In August 2000 a corrected certified authentic text was circulated to Governments, but more corrigenda have been issued since. For a contemporary account of the drafting of the Rome Statute by persons who took part in the Rome Conference, see R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague, Kluwer Law International, under the auspices of UNITAR, 1999). And see Sh. Rosenne, 'The Jurisdiction of the International Criminal Court', 2 *Yearbook of International Humanitarian Law* 119 (1999). For my views on the inadequate organization of the Conference leading to flaws in the Rome Statute, see Sh. Rosenne, 'Poor Drafting and Imperfect Organization: Flaws to Overcome in the Rome Statute', 41 *Va. J.Int'l L.*. 164 (2000). The Statute entered into force on 1 July 2002, a date that is significant for the Court's jurisdiction *ratione temporis*. By Art. 124, a State on becoming a party to the Statute may declare that for a period of seven years after the entry into force of the Statute for that State it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Art. 8 [war crimes] when the crime is alleged to have been committed by is nationals or in its territory. Such a declaration may be withdrawn at any time. The election of the judges took place between 4 and 7 February 2003 at the resumed first session of the Assembly of States Parties, and the Court was formally inaugurated on 11 March 2003. The Prosecutor was elected on 21 April 2003. It appointed its Registrar on 24 June 2003, and established its Secretariat. In A/Res. 56/85, 12 December 2001, the General Assembly authorized the Secretary-General to take the necessary action for the first meeting of the Assembly of States Parties during the summer or early fall of 2002. And see the Secretariat's note concerning the Secretary-General's responsibilities under that resolution, doc. A/C.6/56/L.25, 16 November 2001.

treaty that comes within the scope of the Vienna Convention on the Law of Treaties.[92]

As is customary, the Statute commences with a preamble, setting out the general objects and purpose of the Rome Conference in adopting the instrument. The preamble is important for the interpretation of the instrument, following Article 31 (2) of the Vienna Convention. Its tenth paragraph is a substantive provision, which is picked up in the body of the Statute. It enunciates the rule of complementarity, a central feature of this Statute. *Emphasizing* that the International Criminal Court established under this Convention shall be [*est*] complementary to national criminal jurisdictions'. Complementarity was a major political question throughout the negotiation of the Statute. The tenth paragraph of the preamble is given substantive content both through the English word *shall*, a word of obligation in legal drafting,[93] and explicitly in Article 1 on the establishment of the Court and in Article 17 on issues of admissibility. The expression 'national criminal jurisdictions' presumably extends to any form of national jurisdiction that is competent to try and punish an offender for the particular act(s) for which he or she could be indicted before the ICC, including for this purpose courts martial and military courts acting under a national code of military justice. This insistence on complementarity renders it difficult to accept unilateral assertions by States of universal jurisdiction that a State can exercise over these crimes, unless treaty so provides.

Part 1 (Articles 1 to 4) deals with the establishment of the Court. Article 1 establishes the Court as a permanent institution with power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in the Statute, 'and [it] shall be complementary to national criminal jurisdictions'. This general functional jurisdiction is universal in scope. This is immediately a source of ambiguity. The question that it sets is whether the general definitions contained in the Statute are sufficient as an indication of the most serious crimes of international concern, or whether some expression of international concern, whether general or specific, is to be required for an individual prosecution. This question does not arise for the ICTY or ICTR, as the Security Council has given a general directive to those two bodies.

Part 2 (Articles 5 to 21) formulates the jurisdiction, admissibility and the applicable law. Article 5 is the principal provision setting out the crimes that are within the Court's jurisdiction *ratione materiae*. It specifies four crimes

92 1155 UNTS 331.

93 Cf. the explanation given by Sir Humphrey Waldock, special rapporteur on the law of treaties, at the 872nd meeting of the ILC. YBILC 1966/I.

– genocide, crimes against humanity, war crimes and the crime of aggression. Articles 6, 7 and 8 follow that bare statement. They define more closely 'for the purpose of this Statute' the meaning of genocide, crimes against humanity and war crimes.

In Article 6 the definition of genocide only follows Article II of the Genocide Convention for the principal crime. The ancillary crimes, which the Genocide Convention places in Article III, appear here in Article 25 (3) (e), a general article on individual criminal responsibility. This change of position of the ancillary crimes of genocide distorts the original Genocide Convention. Article 7 on crimes against humanity enumerates ten separate acts together with an eleventh in very general *ejusdem generis* terms, 'other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health'. The act must have been committed as part of a widespread or systematic attack 'directed against any civilian population, with knowledge of the attack'. That requirement of knowledge of the attack is new and may limit the *mens rea* required for a conviction of this crime. The element of 'systematic attack' should be enough. Article 7 includes several treaty-crimes without referring to the original treaties: enslavement (taken from the London Charter where it referred to the forced labour practices of occupying powers in the Second World War, not slavery, as used in the treaties) and the crime of apartheid are two examples.

Article 8 on war crimes is a controversial provision of this Part of the Statute. For the purposes of the Statute, the acts must have been committed as part of a plan or policy or as part of a large-scale commission of such crimes. That again is relevant for the *mens rea*. The article goes on to specify war crimes in terms that do not always follow the language of the Geneva Conventions or the Additional Protocols.[94] It further distinguishes between serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law (Article 8 (2) (b)), and armed conflicts not of an international character (Article 8 (2) (c) and (e)). It further distinguishes armed conflicts not of an international character from situations of internal disturbances and tensions, such as riot, isolated and sporadic acts of violence or other acts of a similar nature (paragraph (d)). Serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international

94 For an analysis see the ICRC papers above note 61 with PCNICC/INF.1 (1999).

law, other than violations of Article 3 common to the 1949 Geneva Conventions do not extend to

> situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

With all that, Article 8 (3) states that nothing in paragraphs 2 (c) and (d) 'shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means'. One might think that the application of this type of exclusion requires a political decision, not one that a court of law can easily take or assess.

The crimes set out in Articles 6, 7 and 8 are further individualized by what the Statute calls .Elements of Crimes, to be adopted by a two-thirds majority of the members of the Assembly of States Parties.[95] Article 9 states that the elements of crimes 'shall assist the Court in the interpretation and application of Articles 6, 7 and 8'. Article 21 (1) (a) requires the Court to apply .'(a) in the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence'. There is an inconsistency between those two provisions, Article 9 being exhortatory and Article 21 mandatory.

There is no definition for the purposes of this Statute of the crime of aggression or of its elements as a matter of individual criminal responsibility. By the Final Act of the Conference, the Preparatory Commission (PrepCom) was to prepare proposals for a provision on aggression including the definition and the Elements of Crimes and the conditions under which the Court shall exercise its jurisdiction with regard to this crime. PrepCom was to submit its proposals to the Assembly of States Parties at a Review Conference 'with a view to arriving at an acceptable provision on the crime of aggression for inclusion in this Statute'.[96] This means that the Statute anticipates its own amendment some

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95 For the Elements of Crimes as adopted by the Assembly of States Parties, see Assembly of States Parties to the Rome Convention on the International Criminal Court, first session (2002), *Official Records* (ICC-ASP/I/3) 105. It appears that the United States delegation was largely instrumental in having the elements of crimes included in the Statute, and later, in the PrepCom, in their formulation. M. A. Newton, 'The International Criminal Court: The Way it is & the Way Ahead', 41 Va. J. Int'l L. 204 (2000).

96 Doc. A/CONF.183/10*, 17 July 1998, Annex I, resolution F, para. 7. The PrepCom was unable to complete the work, and the Assembly of States Parties decided to establish

time after its entry into force. That is an unusual provision, and it might cause difficulties if the proposed definition of aggression raises constitutional problems for any of the States parties at the time.[97]

Against the sensitivity to internal disorders of Article 8, Article 17, the main provision for complementarity, goes under the title of issues of admissibility. According to Article 17 (3), the Court shall determine that a case is inadmissible, *inter alia* where the State is investigating or prosecuting the case, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution. Article 17 (5) goes on to prescribe that to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 10 places the Statute within the framework of general international law. It provides that nothing in Part 2 'shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute'. Article 11 has the title 'jurisdiction ratione temporis'. The Court has jurisdiction 'only with respect to crimes committed after the entry into force of this Statute'. By paragraph 2, for a State that becomes a party to the Statute after its entry into force, the Court may exercise jurisdiction only with respect to crimes committed after the entry into force of the Statute for that State, unless the State has previously made a declaration by which it has, although not a party to the Statute, accepted the jurisdiction with respect to the crime in question. It follows that the Court may not exercise jurisdiction in respect of a crime where the relevant State was not a party to the Statute at the relevant date and has not taken other steps to accept the exercise of jurisdiction with respect to that crime.

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a special working group, open to all States entitled to become party to the Rome Convention, for the purpose of elaborating proposals for a provision on aggression in accordance with the relevant provisions of the Statute. Assembly of States Parties to the Rome Convention of the International Criminal Court, first session (2002), *Official Records* 328 (Res. ICC-ASP/I/Res.1).

97 In several countries constitutional difficulties have already been raised. See for instance the decision of the French Conseil constitutionnel of 22 January 1999 No. 98-408 DC to the effect that ratification of the Rome Statute would require revision of the French Constitution. http://www.conseil-constitutionnel fr/decision/98/98408/index htm. English translation in II *Yearbook of International Humanitarian Law* 493 (1999). After the constitution was amended, France signed the Statute and later ratified it with no less than seven .Interpretative Declarations., some of which have the appearance of reservations.

There are striking omissions from the crimes over which the ICC has jurisdiction. Apart from the crime of aggression, the Rome Conference also had in mind drug trafficking and terrorism, but was unable to come to any agreement on their definition. In resolution E annexed to the Final Act, it recognized that 'terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community'. It also recognized that 'international trafficking of illicit drugs is a very serious crime, sometimes destabilizing the political and social and economic order in States'. It affirmed that the Rome Statute allowed for its expansion in the future, and recommended that a Review Conference pursuant to Article 111 consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court. There is a certain irony in this as regards drug crimes since, as seen, the resumption of work for the establishment of an international criminal court was the result of a resolution dealing with drug trafficking. Another outstanding omission is piracy, notwithstanding the traditional recognition of the pirate as *hostis humani generis*, and this at a time when piracy is becoming prevalent in several parts of the world, and has been defined adequately for individual responsibility in the UN Convention on the Law of the Sea of 1982.[98] In fact, all the crimes over which the new ICC will have jurisdiction are crimes that can only take place within a political context of international or internal instability involving the use of armed force, and are violations that come within the scope of international humanitarian law. Without questioning the need for a court with jurisdiction to deal with those offences committed in such circumstances, the Statute overlooks that individuals can commit other violations of international law, and not all instances of individual responsibility for grave crimes under international law arise from violations of international humanitarian law. The Statute does not deal with other major international crimes not easily localized or pinpointed *ratione temporis*.

Part 3 (Articles 22 to 33) sets out the general principles of criminal law (meaning *international criminal law*). Here Article 25 (1) on individual criminal responsibility, gives the Court jurisdiction only over natural persons. That excludes juridical persons from the scope of the Court's jurisdiction, but not the individuals composing the juridical person. By Article 26, the Court has no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of the crime (above note 68). States parties are required

98 See Arts. 101 to 106, 1833 UNTS 3.

to take all feasible measures to ensure that persons who have not attained that age do not take a direct part in hostilities. Article 27 is entitled 'Irrelevance of official capacity'. Official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under the Statute. That is a provision that can cause constitutional difficulties for some countries, since some of the personalities and officials to whom it refers enjoy immunity in their own country. Likewise Article 28 deals with the criminal responsibility of commanders and other superiors.

Part 4 (Articles 34 to 52) treats the composition and administration of the Court. By Article 34 the Court is composed of the following organs: the Presidency (Article 38), an Appeals Chamber, Trial Chambers, and a Pre-Trial Chamber (Article 39), the Office of the Prosecutor (Article 42), and the Registry (Article 43).

Dealing with the qualifications of the judges of the Court, Article 36 (3), of the Statute requires the judges are to be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices. In addition they shall have established competence in criminal law and procedure, and the necessary relevant experience in criminal proceedings, whether as judge, prosecutor, advocate or in other similar capacity, or they may have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court. The candidates must have excellent knowledge of and be fluent in at least one of the working languages of the Court (English and French). The complicated system for the election of the judges set out in Article 36 is designed to ensure the proper balance of the two disciplines, criminal law and procedure, and relevant areas of international law – international humanitarian law and the law of human rights – among the judges. A notable omission from these requirements both for judges and for other officials of the Court is knowledge of and experience in military law and practice.

By Article 42 (3), the Prosecutor and Deputies shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution and trial of criminal cases and must be fluent in at least one of the working languages of the Court. The Statute contains no requirements for other counsel appearing before the Court. Article 55 (2) allows a person under investigation to have legal assistance of that person's choosing or to have legal assistance assigned to him or her. Rule 22 (1) of the Rules of Procedure

and Evidence provides that counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings.[99]

The inclusion of the Office of the Prosecutor as an organ of the Court is a questionable feature of the Statute. Experience shows that it can produce intolerable tension between an approach to international criminal jurisdiction based on *Fiat justitia, et pereat mundus* and an approach based on the Psalmist's ideal of *Seek peace and pursue it,*[100] between a criminal trial at all costs, and consideration of the political and diplomatic consequences of a particular prosecution at a particular time, in relation to the restoration of international peace.[101]

The subject of Part 5 (Articles 53 to 61) is investigation and prosecution. The trial comes within the scope of Part 6 (Articles 62 to 76). Trials *in absentia* are excluded. Article 63 (1) requires that the accused be present during the trial. Part 7 (articles 77 to 80) addresses penalties. The maximum penalty is imprisonment for 30 years but a term of life imprisonment may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person (Article 77). The Court cannot impose capital punishment. Appeal and revision of the sentence are governed by Part 8 (Articles 81 to 85). International co-operation and judicial assistance are the matter of Part 9 (Articles 86 to 102). This relates to the duties of States parties, but by Article 87 (5) the Court may invite any State not a party to the Statute to provide assistance under Part 9 based on an *ad hoc* arrangement, an agreement, or on any other basis. That paragraph goes on to empower the Court to inform the Assembly of States Parties or, where necessary the Security Council, of failure by a non-party State to co-operate with requests made pursuant to the agreements made. This provision represents a marked extension of the scope of operation of an international treaty, which for non-parties is *res inter alios acta*. It is therefore a potential source of difficulties. Article 82 on the surrender of persons to the Court with its reference to the national law of the requested persons, may also raise constitutional difficulties in countries where the constitution prohibits the extradition of nationals. Although there may be a technical

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99 Assembly of States Parties to the Rome Statute of the International Criminal Court, first session (2002), *Official Records* (ICC-ASP/I/3) 10.

100 Psalms, XXXIV:15.

101 For my detailed criticism of this part of the Statute, see my article on the drafting of the Statute above note 91, 174.

distinction between surrender and extradition, in substance there is not much difference between them. The enforcement of the Court's judgments and related matters is the substance of Part 10 (Articles 103 to 111).

Part 11, consisting of Article 112 only, establishes the Assembly of States Parties. That is the competent political organ for the non-judicial aspects of the Court's affairs. It elects the judges and the prosecutor, and determines how the expenses of the Court are to be met. Amendments to the Statute are to be adopted either by the Assembly or by a Review Conference. Part 12 (Articles 113 to 117) addresses the financing of the Court. The Court is to be separately funded by the States parties, with funds provided by the UN (subject to approval by the General Assembly), in particular in relation to the expenses incurred due to referrals by the Security Council. The final clauses (Articles 119 to 128) form Part 13.

On the international level (leaving aside issues for the internal judicial systems), the existence of a permanent international criminal court may lead to two sets of problems, each concerning the position of an individual likely to be the accused in international criminal proceedings.

The first derives from the principle of complementarity as it appears in the Rome Statute. As mentioned, the definition of war crimes in Article 8 sometimes differs from the definitions of the Geneva Conventions and the Additional Protocols. Some of those variations may be slight, but they are variations, and a criminal statute should be construed strictly. The principle of complementarity means that a person can be subject simultaneously to two separate legal regimes, the Geneva regime as enacted in that person's national legislation (as is required by the Geneva Conventions) and the Statute regime. No doubt the *ne bis in idem* rule set out in Article 20 of the Statute will go some way to protect that individual from double jeopardy. Nevertheless, the question might arise whether that is sufficient.

The second matter is of a different order. Some of the crimes enumerated in the Rome Statute have their basis in a treaty containing a compromissory clause conferring jurisdiction on the International Court of Justice or other standing organ over any dispute concerning the interpretation or application of that treaty. In litigation between two States coming within the scope of such a compromissory clause, a suspected or an accused individual may be called to give evidence, and that evidence might be incriminating. However, no person can be obliged to give self-incriminating evidence in any court. Some way will have to be found to enable the two sets of proceedings to continue without prejudice either to the rights of the two litigating States under general inter-

national law, or to the rights of the individual entitled to protection against self-incrimination.

Article 10 provides that nothing in Part II of the Rome Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than that Statute. That leads to another problem, of the relationship between individual responsibility as determined by the ICC (or any other similar court or tribunal) applying international criminal law, itself a component element of international law in general, and the law of international responsibility. The Draft Code of Crimes against the Peace and Security of Mankind (above note 31) addresses that problem. Article 4 lays down that the fact that the Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law (further above § 5.04). Article 25 (4) of the Rome Statute similarly provides that no provision in the Statute relating to individual criminal responsibility shall affect the responsibility of States under international law. Parallel to this, draft Article 58 of the ILC's draft articles on the responsibility of States for internationally wrongful acts provides that those articles are without prejudice to any question of the individual responsibility under international law of any person acting in the capacity of an organ or agent of a State.[102]

§ 5.09. The specialities of international criminal law

The Expert Group that investigated the workings of ICTY and ICTR drew attention to specific aspects of the developing international criminal law, something that also appears through the case law of the two Tribunals. International criminal law is fast developing into a highly specialized branch of the law. The substantive law is mostly derived from international treaties against a background of customary international law, including the law of treaties. The Genocide Convention, the 1949 Geneva Conventions and the 1977 Additional Protocols are the main elements, and a given act may well fall under more than one of those instruments, and indeed under more than one of the crimes listed in Article 5. The Rome Statute and its related documents will constitute the principal source of enforcement procedure against individuals, enforcement in relation to States remaining a political matter.

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102 See ILC Rep. 2001 (A/56/10) Chap. IV.

The international criminal procedure is a blend of common law and civil law criminal procedures, having perhaps a leaning towards the common law adversarial procedure – with the heavy burden of proof that it imposes on the prosecution and a somewhat passive role for the judge. The Expert Group reported:

> Another area of complexity . . . stems from the structure of the Statutes and the Rules of Procedure and Evidence, combining as they do characteristics of the common law adversarial system and the civil law inquisitorial system of dealing with criminal proceedings . . . there is a growing consensus among the judges that as the Tribunals develop and mature as international organs, they will have to move in the direction of drawing upon and incorporating into their own jurisprudence the most helpful aspects of the two systems. But this is a slow process . . . largely because the legal culture and background of the judges who come from one system tends [sic] to make them cautious about quickly or uncritically accepting features of the other system. The Statutes are largely, though not entirely, reflective of the common law adversarial system, and the future evolution of the Tribunals' procedural jurisprudence, while necessarily complying with their Statutes, is apt to adopt aspects of the civil law model. Some civil law models can doubtless deal with criminal law cases more expeditiously than the common law adversarial system . . . It may be noted that a gradual convergence of important dimensions in both systems seems to be occurring through procedural reform efforts in national criminal law.[103]

The Trial Chamber was emphatic about this in the *Čelebići* case:

> The Tribunal's Statute and Rules consist of a fusion and synthesis of two dominant legal traditions, these being the common law system, which has influenced the English-speaking countries, and the civil law system, which is characteristic of continental Europe and most countries which depend on the Code system. It has thus become necessary, and not merely expedient, for the interpretation of their provisions, to have regard to the different approaches of these legal traditions. It is conceded that a particular legal system's approach to statutory interpretation is shaped essentially by the particular history and traditions of that jurisdiction. However, since the essence of interpretation is to discover the true purpose and intent of the statute in question, invariably, the search of the judge interpreting a provision under whichever system, is necessarily the same.[104]

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103 Above note 83. This idea has been expressed forcefully by President Cassese in para. 5 of his Separate and Dissenting Opinion in the ICTY Appeals Chamber in *Prosecutor* v. *Erdemović*. Case IT-96-22-A, 7 October 1997.

104 *Prosecutor* v. *Delalić et al*, Case IT-96-21-T, Judgement of 16 November 1998, para. 159.

Those statements are true and pointed. This rapprochement of the two legal systems has practical consequences for the field of adjudication itself and for those who are practising international criminal law.

More fundamentally, it is not clear from the practice that is developing in the existing Tribunals what the proper function of an international prosecutor is. Conceptions of a prosecutor's task vary from the extreme of getting at the facts and laying them before the judge, to obtaining a conviction at all costs. Even more fundamentally, who is to be prosecuted?[105] The connection of the investigation to the prosecution blurs the distinction between the function of establishing facts sufficient to warrant a prosecution, and the objective determination that the investigation shows a prima facie case to be brought before the judge. In ICTY we can see an evolution in this respect. Looking at its annual reports to the General Assembly, ICTY at first seems to have concentrated more on the investigative side of its activities. It is now beginning to assert more its prosecutorial duties, sometimes even aggressively. The gnawing question remains, whether the two functions can be combined. This question relates to the whole issue of a fair trial. To what extent do the requirements of a fair trial extend to the investigative process? Is there such a thing as a fair investigation? What is the function of the judge, to act as a kind of umpire and not interfere in the conduct of the case as in the common law adversarial system with the burden of proof on the prosecution, or to be an active participant for instance in the examination of witnesses as in the civil law inquisitorial system?. And again, after the trial is completed should the prosecution as such have any say in the enforcement of the judicial decision, for instance the conditions of imprisonment, and more important, whether the convicted person should earn any element of reprieve? Should matters like that not better be left to the sentencing procedure?

There is another fundamental problem arising out of this. That relates to the very concept of a fair trial, which Article 64 (2) and other provisions of the Statute require. Here there are conceptual differences between the two prevalent legal systems. One aspect relates to the right of a suspected person to have the assistance of counsel before the decision to issue an indictment,

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105 This question has to be asked in view of the report of Amnesty International entitled *Collateral Damage or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, of June 2000 and the Prosecutor's report on the NATO bombing campaign with its conclusion that there was no deliberate targeting of civilians or unlawful military targets by NATO during the campaign. ICTY Press Release PS/P.I.S./510-e, 13 June 2000.

whether and when a *Miranda* type of caution is required. From exchanges with defence counsel in ICTY, I have an impression that this is a serious feature, and one that requires careful handling, especially in light of the detailed statement of the rights of the accused set out in Article 67. The problem is not only the rights of the accused, but also the rights of a suspected person before any act of accusation is made.[106]

In this context, the Expert Group has reported difficulties over the provision of defence counsel, and it found the provisions of the Statutes of ICTY and ICTR inadequate. Mere admission to the practice of the law is no assurance that an attorney is qualified with respect to trial or appellate work or criminal law, much less international criminal law. Similarly, a law professorship does not automatically carry with it knowledge or experience with respect to matters germane to criminal trials or appeals. Indeed, given the admixture of common-law and civil-law criminal procedures characteristic of international criminal law and procedure, it seemed to the Expert Group that there are only two areas in the world where counsel adequately familiar with both systems can be found – Quebec and Cameroon.[107] The finalized text of the Rules of Procedure and Evidence (Rule 22) is an improvement (above note 99).

106 Three judgements of the Appeal Chamber of ICTR have addressed questions of fair trial: *Kambanda* v. *Prosecutor*, Case ICTR-97-23-A, 19 October 2000; *Prosecutor* v. *Akayesu*, Case ICTR-96-4-A, 1 June 2001; *Prosecutor* v. *Kayishema and Ruzindana*, Case ICTR-95-1-A. 1 June 2001. They have not extended to the issue of investigation.

107 Report cited above note 82, para. 210. There are more than those two areas.

CHAPTER VI

HUMAN RIGHTS

He who wishes to change men must change the conditions under which they live.
Th. Herzl, *Tagebücher* (7), 6 August 1899.

§ 6.01. The concept

Alongside the development of international humanitarian law hastened by the excesses of the conduct of the Second World War, abuse of national, racial and religious minorities in Europe in the period between the Wars, widely seen as one of the factors that contributed to the general international tension that led into the War, hastened the development of human rights law. Abuses of that kind endangered international peace and security. The Allied war aims as expressed in the Atlantic Charter of 1941 and generalized in the Washington Declaration of 1942 included 'to defend life, liberty and religious freedom and to preserve human rights'.[1] That emphasized the direct link between the maintenance of international peace and security, international humanitarian law, and the international definition and protection of human rights. That created the triad that has transformed the substance of international law from what it was at the beginning of the twentieth century, which deliberately refused to interfere in any way in the internal affairs of States whatever their form of government. The substance of the international law of today, still groping towards its proper equilibrium, now gives to the individual human being a recognized place beside the State, with rights and duties that the international community of States undertakes to protect and to develop. That is the law. But the fact remains that its application throughout the world is uneven and in some places totally missing, and international efforts to protect those rights are frequently distorted through overpoliticization of the responsible organs. The reader of this chapter

1 204 LNTS 381.

is cautioned that much of the law described here is not yet universally observed, and some of the concepts are not universally accepted.

The international law of human rights, like humanitarian law, is also a law between States and made by States. It addresses the rights and duties of States regarding the rights and duties of the individual in all situations, with permitted derogations in times of national emergency. Its distinguishing mark is that the international formulations of those rights and standards can only be fully implemented through their firm introduction into national law and administration. The rights that it sets out are not matched by clearly stated duties. The most is in Article 29 of the Universal Declaration of Human Rights. By that, everyone has duties to the community in which alone the free and full development of his or her personality is possible. In the exercise of the rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. Finally, the rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Notwithstanding the laicity of modern international law, there is little room for doubt that the origins of the concept that basic rights of the human being are to be recognized and protected by the law are to be found in the religious elements of pre-Grotian international law, even if the circle of persons entitled to that protection may have been limited. The Biblical statement that God created man in His own image (Gen. I:27) is a seed for the idea of the equality of all human beings regardless of race, colour, creed, gender, caste or other differential, although it is an equality that must acknowledge differences, for instance between the sexes. Similar concepts are found in the holy books and classic literature of other cultures and religions, and in the Roman and particularly the Stoic philosophers. That idea was picked up by the Church Fathers. Probably the first European attempt to set out a doctrine was Vitoria's *De Indis et de jure belli relectiones*, published posthumously in 1537, discussing the rights of the original inhabitants of the American territories conquered by Spain.[2]

In a sense, this religious background for international recognition of human rights receives support from the Peace of Westphalia of 1648, with its guarantees

2 *De Indis et de jure belli relectiones; De Indis recenter inventis relectio prior* 115. English translation by J. P. Bate (Carnegie Classics of International Law, Oxford University Press, 1917).

for freedom to practice religion – meaning at the time different forms of Christianity.[3] In a similar vein, the Congress of Vienna (1815) adopted several provisions regarding religious equality – again having in mind the different forms of Christianity – in regions transferred from one political entity to another.[4] It went further and in Article XVI of the Federative Constitution of Germany of 8 June 1815 made provision for the civil rights of Jews, the earliest instance of a provision regarding rights of a non-Christian minority in Europe.[5] The religious pluralism now common in many countries obscures the fundamental, almost dogmatic, consideration that provisions such as those meant at the time. Both those instruments (and others with similar provisions) were peace treaties after wars in which the religious factor had been prominent. The Peace of Westphalia followed the Thirty Years War largely between the Catholic and Protestant Powers of Europe. The Congress of Vienna followed the Napoleonic Wars one of the features of which was the rallying cry of *Liberté, Egalité, Fraternité* symbolized by the destruction by French troops of the Jewish ghettos in cities which they captured, in the spirit of the French Revolution.

In secular terms, three domestic instruments are commonly seen in democratic societies on the Western model as the roots of national conceptions of the basic rights of Man, and have found their way into international law and practice. Those instruments are: (1) the Bill of Rights adopted by the English Parliament in 1688 after the Civil War and the interregnum of Oliver Cromwell; (2) the Declaration of the Rights of Man and Citizen adopted by the French National Assembly in 1789; and (3) the first ten amendments to the Constitution of the United States of America, adopted and ratified almost simultaneously in 1791, also known as the Bill of Rights. There are many similarities between these three documents. Each was a product of middle-class revolutionary activity against the excessive power of the monarchs and the aristocracy and the authoritarianism of the Church, and reflects the ideals that had inspired that revolutionary activity. Each has had an influence outside its country of origin. Today they are widely regarded as embodying the core concept of western democracy, with its emphasis on the formal political and legal equality of all persons, and the

3 Above chapter I note 2.

4 64 CTS 453. See as an example Art. LXXVII regarding the uniting of the Bishopric of Basle and the City and territory of Bienne to the Canton of Berne as part of the Helvetic Confederation.

5 Act establishing the German Confederation, 64 CTS 443, forming Annex IX to the Final Act (General Treaty) of the Congress of Vienna of 9 June 1815 (previous note).

transparency of the political and judicial systems. These were not yet transformed into rules of general international law.

From the middle of the nineteenth century what emerged as Marxist political and legal thought, and later as adopted by the Soviet Union, developed a different concept of human rights based on the class struggle leading to a classless society. That approach was based on the obligations owed by the individual to the classless State especially in the social and economic spheres, and the corresponding obligations of the State, with little regard for formal equality and transparency in the Western sense. Andrei Vyshinsky gave a frank expression of that approach in the General Assembly when it adopted the Universal Declaration of Human Rights in 1948. His statement then has been summarized as follows:

> "Human rights," he said, "could not be conceived outside the State; the very concept of right and law was connected with that of the State." If such rights were not protected and implemented by the State, they would become a "mere abstraction, an empty illusion, easily created but just as easily dispelled"(p. 924). He pointed out that many delegations had stated that in Soviet Union the individual had been "subordinated to the state, making of the individual some sort of cog in the all-powerful State on the lines of Hobbes's *Leviathan"* (p. 928). These delegations had forgotten "that the contradiction between the State and the individual was a phenomenon which had occurred in history when society had been divided into rival classes," the ruling one which had oppressed those being ruled (p.929). In that case, and therefore in most of history, there had indeed been a conflict between the individual and the state which sought to oppress that individual. But, he went on to argue, "circumstances were wholly different in a society in which there were no rival classes . . . for in such a society there could not be any contradiction between the government and the individual, since the government was in fact the collective individual"(p. 929). Historically speaking, the problem of the state and the individual had been solved in the Soviet Union, "where the State and the individual were in harmony with each other, [and] their interests coincided" (p. 929).[6]

Throughout, the United Nations has faced the task of finding middle ground between these two opposing approaches. In addition, the application of some of the human rights proclaimed in the Universal Declaration has to be accom-

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6 J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* 21 (Philadelphia, University of Pennsylvania Press, 1999). For the original, see 3 GAOR Plenary at p. 923. Probably the last authoritative statement of the Communist position on human rights is that contained in the 1985 edition of the Soviet Diplomatic Dictionary, « Права человека », II Диплочатический словарь 409 (Moscow, Nauka, 1985).

modated to the requirements of religious law.[7] It often seems that insufficient attention is paid to this religious element in human rights instruments, as is evidenced by the many reservations on religious grounds that are made by non-Christian States when becoming parties to those treaties.

After the Congress of Vienna, the Treaty of Berlin of 1878 is at the root of modern treaty law providing for the protection of minorities, the forerunner of the current international protection of human rights.[8] That Treaty, between the major European Powers of the time, among other matters finalized the independence of Romania from Ottoman rule and required the granting of civil rights to recognized minorities, especially the Jews of that country. In the international law of that period we find a general proposition that to qualify for recognition by the Great Powers, a new State must guarantee religious liberty and civil rights to all inhabitants and prohibit discrimination on ground of creed or religious belief.[9] Being treaties, the obligations arising out of them ran only between the parties to those treaties. Concepts such as obligations owing to the international community as a whole, whether organized or not, and even less obligations *erga omnes*, were unknown at that stage. Consequently, the protection of minorities under that system was a political matter, the individual members of a protected minority, or even a representative organ of that minority, having little if any say in it.

§ 6.02. The Minorities Treaties of 1919

Prominent in President Wilson's Fourteen Points setting out terms for ending the First World War was the principle of self-determination.[10] Against that background, the 1919 Peace Conference, where the political map of Europe

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7 The delegation of Saudi Arabia explained its abstention in the final vote on the Universal Declaration that in parts it could not be reconciled with fundamental tenets of Islam. Morsink, above note 6, 25.

8 153 CTS 171. And cf. *The Modalities accompanying the recognition of Serbia and Romania by the Powers represented at the Congress of Berlin*, *British Parliamentary Papers*. vol. LXXXIII (1878) 391; J. C. Bluntschli, *Roumania and the Legal Status of the Jews in Roumania: An Exposition of Public Law* (London, Anglo-Jewish Association, 1879). And see B. Röben, Exkurs: Die rechtliche Gleichstellung der rumänischen Juden, *Johann Caspar Bluntschli, Francis Lieber und das moderne Völkerrecht 1861-1881* 177 (Baden-Baden, Nomos, 2003).

9 Examples of this are found in G. Schwarzenberger, *The Frontiers of International Law* 137 (London, Stevens & Sons, 1962).

10 *Papers relating to the Foreign Relations of the United States,* 1918, Sup.1 vol. 1, 12, 13 (Washington, State Department Publication 465, 1933).

was redrawn, could not avoid the question of the protection of minorities. The establishment of the League of Nations as part of the peace settlement supplied a new approach. At first, unsuccessful attempts were made to include in the Covenant of the League of Nations provisions for protection against religious persecution and intolerance.[11] This was conceived as an undertaking by new States seeking admission to the League. It was replaced by a system of Minorities Treaties based on a conception of protecting the rights of individuals through the groups to which they belonged, a system of group rights, and setting out the rights and duties of national and religious minorities. Provisions of this kind were made in respect of new States created by the Versailles system, and also were included in some (but not all) of the 1919 Peace Treaties and the League of Nations established a formal system for their supervision. New or renewed States with which no peace treaties were made were required to accept minorities obligations through a unilateral declaration made before the Council of the League and registered as a legal undertaking under Article 18 of the Covenant. The Minorities Treaties were limited to Europe. The system was still treaty-based and the obligations ran between the parties to each treaty, although there was a technical difference where the obligations were expressed in a unilateral undertaking with the League of Nations as the other partner. The League of Nations supplied a monitoring system giving the League Council authority over the operation of the minorities clauses, and the Permanent Court of International Justice was called in to advise on legal questions that arose. The system was unbalanced. It did not apply to all minorities everywhere or even to all minorities in Europe, for which the system had been conceived, and with the later exception of Iraq, was limited to the European States involved in the War.[12] Nevertheless, placing the protection of protection under League guarantee with compulsory jurisdiction of the PCIJ parallel to its advisory competence was a step forward.[13] Yet there was no attempt to secure universal-

11 Cf. David Hunter Miller, *The Drafting of the Covenant*, vol. I at 91 and later in vol. II at 105 (New York/London, Putnam, 1928); N. Feinberg, *La question des minorités à la Conférence de la Paix de 1919–1920 et l'action juive en faveur de la protection internationale des minorités* (Paris, Rousseau, 1929).

12 Technically, on the dissolution of the Ottoman Empire Iraq was placed under League of Nations Mandate (Class A), with Great Britain as mandatory, its terms being embodied in a treaty of 10 October 1922. In 1931 Iraq became independent and was admitted into the League of Nations. On that occasion it made a minorities declaration, in the customary terms of the time.

13 See League of Nations, *Protection of Linguistic, Racial and Religious Minorities by the League of Nations: Provisions contained in the various International Instruments*

ity, or to ensure minimum standards in the European overseas possessions, although some States were required to make a formal undertaking to abolish slavery as a condition for admission into the League.[14]

Assessment of the Minorities System varies.[15] However, in the negotiations leading to the establishment of the UN in 1945 there was no enthusiasm for reviving it under UN auspices. One reason for that was certainly the one-sided choice of States to be bound by minorities undertakings in the League system. Some of the most notorious excesses against minorities during the inter-War period had been committed by European States that were exempted from the minorities system.

In 1950 the UN Secretariat published a *Study of the Legal Validity of the Undertakings concerning Minorities*.[16] It reached the conclusion that because of changed circumstances, the treaties were no longer in force. One might have thought that so serious a matter should have been referred to a more authoritative body such as the International Court of Justice for an advisory opinion, or at least to an advisory committee of jurists. Be that as it may, no attempt has been made to revert to that system. Minority protection, so far as it exists, is carried on today in the broader frame of the promotion and protection of human rights. The failure of the international community to insist on proper respect

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at present in force, doc. C.L.110.1927; *List of Conventions with indication of the relevant Articles conferring Powers on the Organs of the League of Nations*, doc. C.100.M.100. 1945.V. And see N. Feinberg, *La juridiction de la Cour permanente de Justice dans le système de la protection internationale des minorités* (Paris, Rousseau, 1931); N. Feinberg, 'La juridiction de la Cour permanente de Justice internationale en matière de mandats et de minorités', 59 *Recueil des cours* 587 (1937-I); J. Stone, *International Guarantees of Minority Rights: Procedure of the Council of the League of Nations in Theory and Practice* (Oxford University Press/London, Humphrey Milford, 1932); Sh. Rosenne, 'The Protection of Certain Jewish Interests in the Statute of the Permanent Court of International Justice', 3 *IsYBHR* 197 (1973) and *An International Law Miscellany* 577 (Dordrecht, Martinus Nijhoff, 1993).

14 F. P. Walters, *A History of the League of Nations* 258 (London, Oxford University Press, reprint 1960).

15 Cf. J. Robinson (ed.), *Were the Minorities Treaties a Failure?* (New York, Institute of Jewish Affairs, 1943); P. de Azcárate, *League of Nations and National Minorities*, (Washington, Carnegie Endowment for International Peace, 1945). Robinson had been active on behalf of Jewish minorities in Eastern Europe; de Azcárate was Director, Minorities Questions section of the League of Nations Secretariat.

16 Doc. E/CN.4/367 + Corr.1 + Add.1. On this *Study*, see. N. Feinberg, 'The Legal Validity of the Undertakings concerning Minorities and the *Clausula Rebus sic Stantibus*', *Studies in International Law* 17 (Jerusalem, Magnes Press, 1979); Sh. Rosenne, '*Rebus sic Stantibus* and the Minorities Treaties: An Afterword', 12 *IsYBHR* 330 (1982).

for minority rights on a universal level is a cause of international tension and is one of the perplexities of modern international law.[17]

§ 6.03. Human Rights in the Charter of the United Nations

In place of formal legal protection of racial, religious and linguistic minorities as group rights, attention became focused on the promotion and protection of human rights as a universal matter of individual rights, neglecting rights that an individual might require by virtue of belonging to a group. This system was to be applied to all States. The term 'human rights' first appeared in a modern international document in the Washington Declaration by the United Nations of 1 January 1942, the Allied war aims (above note 1). That was followed in more detail in the Dumbarton Oaks Proposals for a General International Organization, negotiated by the Big Four – China, the USSR, the United Kingdom and the United States of America – as the basis for the establishment of the new post-War international organization.[18] Chapter IX (Arrangements for International Economic and Social Co-operation), Section A (Purpose and Relationships) contained a proposal that the new organization should 'promote respect for human rights and fundamental freedoms'.

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17 In 1993 Bosnia invoked the 1919 Minorities Treaty between the Principal Allied Powers and what was then the Kingdom of the Serbs, Croats and Slovenes as an additional basis of jurisdiction in its dispute before the ICJ with Yugoslavia. The Court did not find it necessary to decide whether the cited articles were in force, since it found that the treaty in question imposed obligations on that Kingdom to protect minorities within its own territory. Accordingly, if Yugoslavia, as the successor State, were bound by that Convention, its obligations would appear to be limited to the 'present territory of Yugoslavia'. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case (Further Provisional Measures), ICJ Rep. 1993 at 340 (para. 30); (Preliminary Objections), ICJ Rep. 1996 at 619 (para. 68). This enabled the Court to avoid taking a position on the question whether the treaty was still in force. For that Treaty, signed at St. Germain-en-Laye, see 226 CTS 182. Nevertheless, the Council of Europe has found it necessary to introduce a system of protection for linguistic and national minorities under the control of the Council of Ministers. See the European Charter for Regional or Minority Languages of 5 November 1992 (ETS/148) and the Framework Convention for the Protection of National Minorities of 1 February 1995 (ETS/157).

18 The Dumbarton Oaks proposal was the basic document for the San Francisco Conference, at which the present United Nations was established. United Nations Conference on International Organization (UNCIO), *Documents*, vol. 3, at 19. Human rights were to be the responsibility of the General Assembly, and under its control, of the Economic and Social Council (ECOSOC).

Several references to human rights appear in the Charter. The second paragraph of the Preamble contains a reaffirmation of 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'. Article 1 (3), on the Purposes of the UN, includes encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion. By Article 13 (1b), the General Assembly is to initiate studies and make recommendations *inter alia* for the purpose of assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. Article 53, on international economic and social co-operation requires the UN to promote universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. By Article 60, this is under the authority of the General Assembly, and is exercised through the ECOSOC. By Article 62, that Council may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all. By Article 68, ECOSOC is to set up a series of functional commissions, one of which is for the promotion of human rights – that is the Commission on Human Rights (CHR).[19] Furthermore, Article 71 empowers it to make suitable arrangements for consultation with non-governmental organizations (NGOs) which are concerned with matters within it competence. That is the only provision in the Charter to mention the NGOs, which are particularly active in all matters concerning human rights. The Charter mentions human rights more frequently than the maintenance of international peace and security, the primary purpose of the organization. Small wonder that the UN Preparatory Commission recommended that the ECOSOC should at its first session establish the CHR. Its functions would include the formulation of an international bill of rights, formulation of recommendations for an international declaration or convention on such matters as civil liberties, status of women, freedom of information, protection of minorities, prevention of discrimination on grounds of race, sex, language or religion and any other matters within the field of human rights considered likely to impair the general welfare or friendly relations among nations.[20]

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19 There is a vast literature on the Commission on Human Rights; cf. P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (Oxford, Clarendon Press, 1999). The UN publishes an annual *Yearbook on Human Rights*.

20 Preparatory Commission Rep. (doc. PC/20), Chap. III, sect. 4, paras. 14–17 (1946).

The ECOSOC quickly got down to work. In resolution 5 (I), 15 February 1946, it established the CHR as the chief policy making body of the UN in the field of human rights. It is today composed of 53 representatives of States elected by ECOSOC. Being composed of representatives of States it is a political, not an expert, organ, and even less a judicial or quasi-judicial body. Its pronouncements are political statements. The Commission undertakes the preparation of studies, usually through special rapporteurs, makes recommendations, prepares drafts of human rights instruments, and resolutions for ECOSOC (to which it reports) and for the General Assembly. It is also empowered to investigate allegations of violations of human rights, and it handles communications relating to violations – a task which enhances the Commission's political character.

At its first session in 1946 the Commission established the Sub-Commission on Prevention of Discrimination and Protection of Minorities. In 1999 the Sub-Commission's name was changed to Sub-Commission on the Promotion and Protection of Human Rights. That symbolizes the complete integration of minority protection with the universal protection of human rights, as was immediately recognized by the General Assembly. In resolution 54/162, 17 December 1999, the General Assembly reaffirmed the obligation of States to ensure that persons belonging to minorities may exercise fully and effectively all human rights and fundamental freedoms without any discrimination and in full equality before the law. In the UN, the ECOSOC is the principal organ with primary responsibility for controlling the ramified system that now exists for the promotion and protection of human rights, and where necessary makes recommendations to the General Assembly. The Security Council takes action where abuse of minorities constitutes a threat to the maintenance of international peace and security. Accordingly, the United Nations has not dealt with minorities as a specific item. Unlike the Secretariat of the League of Nations, the UN Secretariat does not include a unit that specializes in minority problems as something distinct from human rights in general. Yet minority problems continue to beset the nation-States and the international community, not only in Europe but in the other continents as well.

The following instruments are the core of modern human rights law (apart from the instruments relating to international humanitarian law) fathered by the Charter.[21] They were adopted by the General Assembly after preparatory

21 Cf. the useful compilation by the Centre for Human Rights, Geneva, *Human Rights: A Compilation of International Instruments*, vol. I (2 Parts), Universal Instruments, vol. II, Regional Instruments, doc. ST/HR/1/Rev.6/2002.

work in the CHR or other competent functional commission or organ of ECOSOC:

- The Universal Declaration on Human Rights of 1948 (see § 6.04 below);
- The International Convention for the Elimination of All Forms of Racial Discrimination of 7 March 1966,[22]
- The International Covenant on Economic, Social and Cultural Rights of 16 December 1966 (see § 6.05 below[23]);
- The International Covenant on Civil and Political Rights of 16 December 1966 with its Optional Protocol (see § 6.05 below[24]);
- The International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973,[25]
- The Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 with its Optional Protocol of 6 October 1999,[26]
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishments of 10 December 1984,[27]
- The International Convention against Apartheid in Sports of 10 December 1985,[28]
- The Convention on the Rights of the Child of 20 November 1989, as amended in 1995, with two Protocols adopted in 2000,[29]

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22 660 UNTS 155, in force from 4 January 1969.

23 993 UNTS 3, in force from 3 January 1976.

24 999 UNTS 171 and 1057 ibid. 407 (rectification of Spanish text), in force from 23 March 1976. For the Optional Protocol, see 999 ibid. 302. A second optional protocol aiming at the abolition of the death penalty was adopted in A/Res. 44/128, 15 December 1989, and entered into force on 11 July 1991. UNTS No. 14668.

25 1015 UNTS 243, in force from 18 July 1976.

26 1249 UNTS 13, in force from 3 September 1981; Optional Protocol, UNTS No. 20378, in force from 22 December 2000.

27 1465 UNTS 85, in force from 26 June 1987. For amendments to this Convention, endorsed by GA Res. 47/111, 16 December 1992 but not yet in force, see doc. CAT [Committee against Torture]/SP/1992/L.1.

28 1500 UNTS 161, in force from 3 April 1988.

29 1577 UNTS 3, in force from 2 September 1990. For amendments to this Convention, endorsed by A/Res. 50/155, 21 December 1995, but not yet in force, see doc. CRC [Committee on the Rights of the Child]/SP/1995/L.1/Rev.1. In Res. 54/263, 25 May 2000, the General Assembly adopted two Protocols to this Convention. Protocol I on the Involvement of Children in Armed Conflict, in force from 13 February 2002, and Protocol II on the Sale of Children, Child Pornography and Child Prostitution, in force from 18 January 2002. Art. 38 of the Convention on the participation of children in hostilities forms part of international humanitarian law, above chapter V note 68.

– The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 18 December 1990.[30]

Participation in these instruments is a voluntary act of each State. Most of them today have more than one hundred States parties, and many are inclined to see norms of *jus cogens* in their substantive provisions, although State practice probably does not go so far. In addition, apart from the different supervisory organs that these instruments have established (§ 6.06 below), important NGOs have assumed continuous supervisory and monitoring roles in all parts of the world, frequently through local branches working in complete independence of governments. Of all the activities of the UN, those relating to human rights are today the most transparent. No State is exempt from the sharp eye of one or other of these official or non-official supervisory organizations or organs.

In addition to these formal instruments of positive international law, the General Assembly has adopted many programmatic declarations relating to different aspects of human rights. These frequently presage the adoption of a formal instrument, whether a new Convention or a Protocol to one of the existing core instruments. In 1993, after the Cold War had come to an end, the General Assembly convened the World Conference on Human Rights, which adopted the Vienna Declaration and Programme of Action, endorsed by the General Assembly in resolution 48/121, 20 December 1993.[31] This has set the general programme of action for all UN associated bodies in the field of human rights. At the same time in its reference in Article 5 to the 'significance of national and regional particularities and various historical, cultural and religious backgrounds' it gives hesitant acknowledgment to the sectorial elements existing in the world today.

§ 6.04. The Universal Declaration of Human Rights

The CHR quickly got down to work and in the summer of 1948 completed its proposed Bill of Human Rights. That consisted of a Declaration, to be followed by a Covenant and implementation procedures. After close examination in the Third Committee, on 10 December 1948 the General Assembly adopted and

30 A/Res. 45/158, 18 December 1990.

31 *World Conference on Human Rights, Vienna, 14–25 June 1993*, Rep. doc. A/CONF.157/24; UN, *World Conference on Human Rights: The Vienna Declaration and Programme of Action, June 1993*, DPI/1394-39399, 199.

proclaimed the Universal Declaration of Human Rights.[32] It adopted the Declaration by a vote of forty-eight in favour with no negative votes and eight abstentions, for reasons that have been explained, by the USSR and its then allies, the Ukrainian and Byelorussian SSRs, Poland, Czechoslovakia, Yugoslavia, together with South Africa with its *apartheid* regime and Saudi Arabia related to basic tenets of Islam.[33] That remarkable vote indicates that the language of the Declaration was acceptable to different religious, philosophical, spiritual, political and secular trends prevalent in the UN in 1948. Nevertheless, the compromises embodied in it concealed the very fundamental differences of approach to the basic question of what are the human rights requiring promotion and protection, and how best is that secured. These differences of approach have found major expression in reservations that have been made in respect of many of the human rights conventions, and in objections to those reservations. Indeed, it was only by allowing reservations and by including some matters in optional protocols that it has been possible to conclude those instruments, something often overlooked.[34]

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32 A/Res.217 A (III), 10 December 1948. Since then, 10 December is recognized annually as *Human Rights Day*. The principal architects of the Universal Declaration were René Cassin (France), Charles Malik (Lebanon) and Mrs Eleanor Roosevelt (U.S.A.), together with J. Humphrey of the Secretariat. See R. Cassin, 'La Déclaration universelle et la mise en oeuvre des droits de l'homme', 79 *Recueil des cours* 241 (1951-II); Ch. Malik, 'Human Rights in the United Nations', *International Journal*, 1951, 275; E. Roosevelt, 'The Promise of Human Rights', *Foreign Affairs*, April 1948, 470; J. Morsink, above note 6. There was also a major input from individuals and from NGOs. Cf. H. Lauterpacht, *International Law and Human Rights* (London, Stevens, 1950), a revised version of a memorandum prepared for the American Jewish Committee, published as *An International Bill of the Rights of Man* (New York, Columbia University Press, 1945). For an early presentation of a declaration of the rights of man, see the resolution of the Institute of International Law in 35/II Annuaire IDI 298 (1929), English translation in 35 AJIL 663 (1941).

33 Cf. M. Ritter, 'Universal Rights Talk/A Plurality of Voices: a Philosophical-Theological Hearing', M. W. Janis and C. Evans (eds.), *Religion and International Law* 417 (The Hague, Nijhoff, 1999).

34 Reservations to human rights treaties have caused many difficulties in both Human Rights Courts and in the controlling organs such as the Human Rights Committee, and they have shown a tendency to assert their right to pronounce on the validity of reservations notwithstanding that in the Conventions on the Law of Treaties (above chapter II note 3), the admissibility of a reservation is always left to the parties to the treaty. For examples, in the European Court of Human Rights see *Belilos* v. *Switzerland* (1988), Eur. CHR, Ser. A No. 132; in the Inter-American Court of Human Rights see the adv. ops. on *Effects of Reservations on the Entry into Force of the Inter-American Convention on Human Rights (Arts. 74, 75)* (1982) and *Restrictions to the Death Penalty (Arts. 4*

The Declaration commences with a preamble announcing that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. In that Proclamation the General Assembly went on and referred to the Declaration as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping the Declaration constantly in mind, should strive by teaching and education to promote respect for those rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance both among the peoples of member States themselves and among the peoples of territories under their jurisdiction. The emphasis is on 'common standard of achievement', and that passage clearly recognizes that much remained to be done to ensure respect for human rights as required by the Charter. The Declaration is a bold forward-looking programme for the future in a very sensitive area of international relations. Even if today respect for human rights worldwide is uneven, what has been achieved in this sphere on the basis of the Declaration is one of the most creditable achievements of the UN in the first half-century of its existence.

The preamble is followed by thirty articles setting out in axiomatic and very generalized language what at the time were regarded as the basic human rights recognized as protected through the Charter and UN machinery. The Declaration was clearly a statement of principle and of intent, and was to be followed by a binding Covenant. It has provided motive force for the great decolonization movements of the 1960s, and many of its principles have acquired a recognized place as rules of international law. It is also finding its way into internal law of States. As has been said, it constitutes evidence of the interpretation and application of the relevant Charter provisions.[35] Most of them have since been restated in treaty form. Notable about the Declaration is that it nowhere uses the word *State* or any synonym. It refers to an individual's duties 'to the community in which alone the free and full development of his personality is possible' but it does not even hint at that community or what are those duties. In short, it avoids legal terms of art, and does not balance the different rights

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(2) and 4 (4) of the American Convention on Human Rights) (1983), Ser. A No. 2 (OC-2/82) and Ser. A No. 3 (OC-3/83); and in the Human Rights Committee, see its General Comment No. 24 of 2 November 1994, 50 GAOR Sup. 40 (A/50/40), vol. I, reproduced in 107 ILR 64. Further in chapter XI § 11.05 below.

35 Judge Tanaka, Dissenting Opinion in the *South West Africa* (Second Phase) cases, ICJ Rep. 1966, 6, 293.

that it proclaims with any indication of who is to enforce those rights or how an individual can enforce them.

This Declaration has probably had more direct influence on the development of legal thinking, both international and national, than any other single instrument adopted by the UN or under its auspices. It has also been given some interpretation and application by the International Court of Justice. Concerning the American hostages held in Teheran, the Court said that wrongfully to deprive human beings of their freedom and to subject them to physical constraint is in itself manifestly incompatible with the principles of the Charter 'as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights'.[36] After its work for the maintenance of international peace and security, primarily the responsibility of the Security Council, human rights and the many-sided organs dealing with human rights has become the most significant of the many activities undertaken by the UN or under its auspices. Yet we must not ignore that this has been accompanied with serious politicization of the management of the system. Often broader and largely irrelevant political considerations have placed obstacles in the way of objective treatment of a given situation. Condemnations of States for violations of human rights too often take the place of slow and less publicized efforts to remedy the situation. This is marked in the work of the HRC and the treatment of its recommendations by the ECOSOC and the General Assembly acting through the Third Committee.

With all that, the most important of human rights is missing from the Universal Declaration and from later instruments. That is the right of all people

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36 *United States Diplomatic and Consular Staff in Tehran* case, ICJ Rep. 1980, 3, 42 (para. 91). On the other hand, the Court has shown caution and is not prepared to accept that every treaty right accorded to individuals comes within the category of a human right. Thus, in the circumstances it found it unnecessary to consider a contention that a provision in the Consular Relations Convention of 1963 requiring notification to the consul of the arrest of a person of foreign nationality was a human right. The *LaGrand* case, Judgment of 27 June 2001 (para. 78). For that Convention, see 596 UNTS 261. The law distinguishes between human rights properly so called, and other individual rights. The Universal Declaration has also been incorporated in several national constitutions and in some important treaties and agreements. Among those may be mentioned the Fundamental Agreement between the Holy See and Israel of 30 December 1993 and the Basic Agreement between the Holy See and the Palestine Liberation Organization of 15 February 2000. For those instruments see (1) 1775 UNTS 175 and 86 *Acta Apostolicae Sedis* 716 (1994) and (2) 92 *Acta Apostolicae Sedis* 853 (2000).

to live in peace and security.[37] Not until 1984 did the General Assembly partly act to repair this omission. In resolution 39/11, 12 November 1984, it approved a Declaration on the Right of Peoples to Peace. The General Assembly was convinced that life without war serves as the primary international prerequisite to material well-being, development and progress of countries, and for the full implementation of the rights and fundamental human freedoms proclaimed by the United Nations. In its substantive provisions it did little more than reiterate the Charter doctrines of the renunciation of the use of force in international relations. This may be a platitude. Nevertheless, it is proper that the right of all to peace and security should be recognized, and one day become a binding and applied precept of international law, and a norm of *jus cogens*.

The vast and ever-widening compass of human rights is bringing out that human rights are not like traditional rights in national legal systems. In the treaties they are frequently promulgated in axiomatic terms, addressed to the world at large, *erga omnes*. They do not indicate who the beneficiaries are, and by whom the rights are owed. In the form in which they are usually couched, they are rights without a direct remedy, unless the State concerned has consented to supply one. They are frequently so widely drawn as to be indeterminate. But they *are* rights. Like the Universal Declaration which spawned them, they set out standards to be attained, and to oppressed peoples, and to individuals feeling a real injustice, offer hope for relief. Their full implementation requires their complete incorporation into the different systems of national law. The international community is gradually – for some too slowly – moving in towards greater concretization of human rights, their protection, their realization in practice, and, at least where they coincide with rules of humanitarian law (from which they ought not to be separated), installing procedures for the apprehension and punishment of individuals who deliberately violate human rights of others for whatever purpose. I have little doubt that the twenty-first century will see far-reaching changes in all these respects.

On the 50th anniversary of the Universal Declaration, the General Assembly without a vote adopted resolution 53/168, 10 December 1998. The General Assembly solemnly declared its commitment to the fulfilment of the Universal Declaration as a common standard of achievement for all peoples and all nations and as a source of inspiration for the further promotion and protection of all

37 The great medieval Jewish commentator on the Bible Rashi – Rabbi Shelomo (Salomon) ben Isaac, 1040–1105, commenting on the verse 'And I will give peace in the land' (Leviticus XXVI:6). wrote that placed in the scale of values, peace outweighs all else: השלום שקול כנגד הכל.

human rights and fundamental freedoms – political, economic, social, civil and cultural – including the right to development. This resolution also recognized the existence of obstacles to be overcome in the field of human rights.

§ 6.05. The Covenants of 1966

After the adoption of the Universal Declaration, the CHR continued work on the second part of the proposed Bill of Human Rights. To accommodate the different approaches, the Commission prepared two draft Covenants. After lengthy negotiations in the Third Committee, on 16 December 1966 the General Assembly adopted resolution 2200 A (XXI) and opened for signature the International Covenant on Economic, Social and Cultural Rights[38] and the International Covenant on Civil and Political Rights together with an Optional Protocol concerning the treatment of communications from individuals.[39] The Covenants do not stand alone. A year earlier the General Assembly had adopted the International Convention on the Elimination of all forms of Racial Discrimination, opened for signature in 1966.[40]

The preamble to the first of those Covenants recognizes that in accordance with the Universal Declaration, the ideal of free human beings enjoying freedom from fear and want (words taken from the Atlantic Charter of 14 August 1941) can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights as well as his civil and political rights. It also realizes that the individual, having duties to other individuals and to the community to which he or she belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in that Convenant. The main provisions of this Covenant deal with different aspects of the right to work, meaning the right of everyone to the opportunity to gain a living by work freely chosen or accepted. It protects the right to form trade unions and join the trade union of choice and the right to strike, in conformity with the laws of the particular country. It recognises the right of everyone to social security, including social insurance. The Covenant also deals with the right to a decent standard of living, to the highest attainable standard of physical and mental health, and to education including free and compulsory primary education. On the other

38 993 UNTS 3. A/Res. 2200 A (XXI) also requested the Secretary-General to submit reports on the status of ratifications of the Covenants and the Optional Protocol, and such reports have been submitted annually since 1967.

39 999 UNTS 1, 1057 ibid. 407.

40 666 UNTS 155.

hand, it does not indicate how these measures are to be financed. That is to be read alongside the very detailed set of labour conventions that have been adopted over the years by the International Labour Organization.

With regard to enforcement, the Covenant envisages a system of reporting to the ECOSOC, and the reports 'may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant'. ECOSOC may decide to transmit the reports to the CHR. This keeps the enforcement provisions on the political level. This Covenant is the only major instrument in this series that does not set up its own body to control compliance.

The Covenant on Civil and Political Rights is the more detailed of the two. It enters into specifics of many of the rights formulated in general terms in the Universal Declaration. It deals with the civil standing under the law of all persons. It has provisions concerning the application of the criminal law, embodying the principles of *nullum crimen sine lege* and *nulla poena sine lege*, these being subject to either national or international law. The Covenant has an important part devoted to control of compliance through the Human Rights Committee (§ 6.07 below), an independent treaty organ of experts reporting annually to the General Assembly through the ECOSOC.

The first Optional Protocol, concluded simultaneously with the Covenant, enables a State Party to recognize the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant. The second Optional Protocol concluded in 1989 provides for the abolition of the death penalty by its parties except in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.[41]

The Covenant has once been relevant in proceedings in the International Court of Justice. In the *Nuclear Weapons* advisory opinion, some States argued that the use of nuclear weapons would violate the right to life laid down in the Covenant. The Court made the following comment:

> The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what

41 In line with this, neither the two *ad hoc* criminal tribunals established by the Security Council for the former Yugoslavia and for Rwanda, nor the International Criminal Court established by the Rome Statute of 1998, are empowered to impose the death penalty.

> is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[42]

That is an important judicial illustration of the interlocking of international humanitarian law and the international protection of human rights.

This process has been carried further in the case law of the international criminal tribunals. Thus, the report of the Secretary-General which formed the basis for the Statute of the ICTY regarded it as axiomatic that the ICTY would observe internationally recognized standards regarding the rights of the accused at all stages of its proceedings, and indicated that such internationally recognized standards are, in particular, contained in Article 14 of the Covenant.[43] It has accordingly been subject to various interpretations by the Tribunal.

In *Prosecutor* v. *Tadić* (Defence Motion on Jurisdiction), Trial Chamber II analysed Article 14 to confirm that the ICTY was 'established by law', in the words of the Covenant. It also rejected a defence argument that removal of the case from the German Courts denied the defence the opportunity to have recourse to the Human Rights Committee under Optional Protocol I.[44] In another decision in the same case, the Trial Chamber stressed that in drafting the Statute and the Rules, every attempt was made to comply with internationally recognized standards of fundamental human rights, on the basis of the Covenant.[45] Elsewhere it discussed the *ne bis in idem* rule, also embodied in Article 14 of the Covenant, but here it found that the principle was only binding on ICTY to the extent that it appeared in the Statute and in the form that it appears there.[46] Several of these issues were examined further by the Appeals Cham-

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42 *Legality of the Threat or Use of Nuclear Weapons* adv. op., ICJ Rep. 1996(I) 226, 240 (para. 25)

43 Doc. S/25704, above chapter v note 76.

44 ICTY, *Judicial Rep.* 1994–1995, 63, 89 (para. 34), 93 (para. 39).

45 *Prosecutor* v. *Tadić* (Preventive measures for the protection of witnesses), ibid. 123, 147 (para. 25); the same decision also discussed the power of derogation under Article 4 of the Covenant, ibid. at 173/622 (para. 61); *Prosecutor* v. *Slobodan Milošević*, case IR-99-37-PT, 8 November 2001.

46 *Prosecutor* v. *Tadić* (*Non bis in idem* principle), ibid. 263, 269 (para. 9) and 277 (para. 17).

ber.[47] In the first place, it found that the possibility of appellate proceedings was in conformity with Article 14 (4) of the Covenant. It examined the requirement that the tribunal be 'established by law' as laid down in that Article (paras. 41 ff.), and rejected the argument that 'fair trial' means trial by the accused's national courts in accordance with the national law (para. 61 ff.).

Other provisions of the Covenant have been invoked. For instance, Article 10 has been relevant to the treatment of prisoners.[48] The Tribunal relied on Article 9 to determine the meaning of 'arrest'.[49] It cited the Convention in support of its finding that the prohibition of torture laid down in international humanitarian law with regard to situations of armed conflict is reinforced by the body of international treaty rules on human rights. Those rules ban torture both in armed conflict and in time of peace.[50] In the same case it found that rape or other serious sexual offences, although not specifically prohibited in any international human rights instrument, are implicitly prohibited by the provisions safeguarding the physical integrity of the person that are contained in all the relevant international treaties, including Article 7 of the Covenant.[51] The Appeals Chamber has also given a long explanation of the meaning of 'fair trial', incorporated in the Statute of the Tribunal from the Covenant.[52] In another case the Trial Chamber gave an important interpretation of Article 15 (2) of the Covenant. That is the provision which incorporates in treaty form the basic principle of *nullum crimen sine lege*. Paragraph 2 lays down that nothing in Article 15 shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.[53] In the same case it referred to article 5 of the Covenant regarding charges of torture (para. 452), including relevant decisions of the Human Rights Committee (para. 461). In a discussion of Article 7 of the Covenant, it examined the prohibition of torture or other cruel, inhuman or degrading treatment (para.

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47 *Prosecutor* v. *Tadić* (Decision on Defence motion for interlocutory appeal on jurisdiction), ibid. 353.

48 *Prosecutor* v. *Erdemović* (Sentencing) (para. 74), Case No. IT-96-22-108 ILR 180.

49 *Prosecutor* v. *Dokmanović* (Motion for release) (para. 28); 111 ILR 459.

50 *Prosecutor* v. *Furundzia* (Judgement) Case No. IT-95-17/1-T (1998), (para. 143).

51 Ibid. (para. 170). More in *Prosecutor* v. *Aleksovski* (Judgement) 1999 (para. 54) Case IT-95–14/1-T.

52 *Prosecutor* v. *Tadić* (Judgement), (1999) (paras. 43 ff.) Case IT-94-1-A. More above chapter v note 106. And see in the European Court of Human Rights, *Natelicić* v. *Croatia*, (No. 51891/99), Decision of 4 May 2000.

53 *Prosecutor* v. *Delalić* (the *Čelibići* case) (Judgement), 1998 (para. 313) Case IT-96-21-T.

539). In a similar way, the two regional Human Rights Courts have made frequent use of the Covenant and of other human rights instruments adopted by the United Nations (above chapter III § 3.09). On another occasion the Appeals Chamber of ICTR agreed with a finding of the Human Rights Committee concerning the application of the International Covenant on Political and Civil Rights.

§ 6.06. Treaty controlling bodies.

None of these human rights instruments contain provisions for the settlement of disputes between States arising out of their interpretation or application. The obligations of States under these treaties are not merely synallagmatic obligations of the traditional kind. They are also obligations *erga omnes* within the general concept formulated by the International Court of Justice in the following passage from the *Barcelona Traction* case:

> In particular, an essential distinction should be drawn between obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the sphere of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection: they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law …; others are conferred by international instruments of a universal or quasi universal character.[54]

For this reason the General Assembly appears as the ultimate arbiter of any differences that might come into existence, not between two or more States

54 *Barcelona Traction, Light and Power Company Ltd.* (New Application:1962) (Second Phase) case ICJ Rep. 1970, 3, 32 (para. 33). On the origin of that statement, see above chapter II note 39. Arts. 40 and 41 of the ILC's draft articles on the responsibility of States for internationally wrongful acts address serious beaches of essential obligations under peremptory norms of general international law, and Art. 48 deals with the invocation of responsibility by a State other than an injured State, referring to what are frequently called '*erga omnes* obligations'. ILC Rep. 2001, Chap. IV, Art. 50, on obligations not affected by countermeasures provides that countermeasures shall not affect obligations for the protection of fundamental human rights. And see on this paras. (6) and (7) of the Commentary on that draft article.

parties but between a State and the body controlling the compliance. Consequently, all these treaties contain elaborate provisions for control and supervision of compliance, and each is set up in a manner appropriate to the theme of the instrument. These controls are all political. The pattern was set in the Convention on the Elimination of Racial Discrimination, and was heavily influenced by the tensions and positions of the principal antagonists of the Cold War. That at the time excluded any formal role for the International Court of Justice as machinery for dispute settlement.[55] These bodies do not have monitoring functions in the sense of real time observation and action. Their role is more one of control and supervision on the basis of reports furnished by the States themselves at regular intervals (a procedure that States do not follow strictly) and, where individual complaints are accepted, on the basis of the admissible complaints submitted by individuals claiming violation of their rights, also after the event to which the complaint relates. Monitoring in the sense of real time observation is for the most part undertaken by the NGOs active in the field of human rights. Those NGOs are either international, or national branches, and the national branches are frequently identified with a political trend in their country, not always objective.

The Convention on the Elimination of Racial Discrimination (Article 8) establishes the Committee on the Elimination of Racial Discrimination (CERD), consisting of 18 experts of high moral standing and acknowledged impartiality elected by the States parties from among their nationals. These persons serve part time in their personal capacity for a term of four years, and the States parties are responsible for their expenses.[56] The term of office of one third

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55 As far back as 1950, when the CHR thought it desirable that the proposed committee should be able to obtain advisory opinions from the Court, the Secretary-General submitted a negative and discouraging report, and the matter was dropped. See Report of the Commission on Human Rights, 5 ECOSOC *Official Records,* Sup. 5 (E/1681) para. 45 (1950) and for the report of the Secretary-General, see doc. E/1732 (1950). For the report of ECOSOC to the General Assembly, see 5 GAOR Sup. 3 (A/1345) para. 205.

56 In an opinion of 15 September 1969 the Office of Legal Affairs concluded that the members of this Committee are experts on mission for the United Nations within the meaning of sections 22, 23 and 26 of the Convention on the Privileges and Immunities of the United Nations. UNJYB 1969, 207. This has been upheld by the ICJ in the *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* adv. op., ICJ Rep. 1999, 62, 83 (para. 45). In a later opinion of 17 August 1976 the Office explained that while the Committee is not a subsidiary organ of the General Assembly, it falls into the special category of 'treaty organs of the United Nations' and can be considered as an organ of the United Nations. UNJYB 1976, 200.

of the members expires every second year, and apparently there are no agreed incompatibilities regarding the general activities of the members, some of whom have been senior civil servants of their countries. The States parties have to submit to the Secretary-General at fixed intervals, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures that they have adopted and which give effect to the Convention. The Committee reports annually to the General Assembly. It may make suggestions and general recommendations based on its examination of the reports and information received from the States parties (Article 9). The status of a General Assembly resolution adopted on the basis of these reports and recommendations is no different from that of any other resolution of the General Assembly. Addressed to States, it is a recommendation. For the Secretary-General it may contain an instruction.

If one State party considers that another is not giving effect to the provisions of the Convention, it may bring the matter to the attention of the Committee. If the matter is not adjusted to the satisfaction of both parties, either State may refer the matter again to the Committee which shall deal with it 'after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law' (Article 11).[57] The Convention then goes on to provide for the appointment of an *ad hoc* Conciliation Commission (Article 12) which is to report its findings to the Committee's Chairman. The parties have the option of accepting or not the recommendations of the Conciliation Commission (Article 13). That is the normal outcome of a process of international conciliation. By Article 14, a State party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by a State party of any of the rights set forth in the Convention. The Convention establishes the procedure for dealing with this type of communication (Article 14), which is amplified in the Rules of Procedure of CERD. By Article 16, the provisions of the Convention regarding the settlement of disputes or complaints are without prejudice to other procedures for the settlement of disputes or complaints in the field of discrimination laid down in the constituent instruments of, or conventions adopted by, the United Nations and

57 The ILC is examining the exhaustion of local remedies rule in the context of diplomatic protection. On the rule in this context, cf. A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: its Rationale in the International Protection of Human Rights* (Cambridge University Press, 1983).

its specialized agencies, and shall not prevent States parties from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

The treaty body under the UN Covenant on Civil and Political Rights of 1966, the Human Rights Committee (HRC), is similar. The HRC is not to be confused with the Commission on Human Rights (CHR), from which it is distinguished by its sharper concentration on the application of the text of the Convention. It consists of 18 members, nationals of States parties to the Convention, persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience. The members serve in their personal capacity, and are required to give a solemn undertaking to discharge his or her duties impartially and conscientiously. States parties may nominate not more than two persons who shall be nationals of the nominating State, and the term of office is four years. Its normal function is to study reports required from the States parties. Article 41 empowers it under certain conditions to receive and consider communications to the effect that a State party claims that another State party is not fulfilling its obligations under the Covenant. The Committee can only deal with a matter after all available local remedies have been invoked and exhausted in accordance with international law. In addition, by an Optional Protocol a State that is party to the Covenant may recognize the Committee's competence to receive and consider communications from individuals subject to that State's jurisdiction, and who claim to be victims of a violation by that State of any of the rights set forth in the Convention. Here too, exhaustion of all available local remedies is a precondition. The Committee submits an annual report to the General Assembly through ECOSOC.

Other similar bodies include the Committee on the Elimination of Discrimination against Women (CEDAW), the Committee on the Rights of the Child (CRC), and the Committee against Torture (CAT). The volume of their work is considerable, and their reports are major items on the agenda of the Third Committee of the General Assembly, frequently after examination in ECOSOC. Despite the similarities in their basic instruments, there are differences of substance and of procedure between them. The question is frequently asked whether this multiplicity of organs with similar but not identical functions and procedures is conducive to the promotion and implementation of human rights on a universal scale.[58] Individual complaints, only permissible where a State

58 This aspect is discussed in depth in Ph. Alston and J. Crawford, eds. *The Future of Human Rights Monitoring* (Cambridge University Press, 2000).

has specifically agreed (and subject to the exhaustion of local remedies rule), are handled roughly in a similar way.

Although the Committees may adopt some of the outward signs of judicial procedures, such as separate and dissenting opinions, or self-recusation of a member for cause, the procedure cannot be regarded as judicial. Their members need not be jurists. There is a loosely organized written procedure in the form of exchanges of documents, but no hearings, no direct confrontation of the complainant with the authorities of the State concerned. The procedure is not properly adversarial or inquisitorial as in a court. Nothing is known of their method of deliberation, or how their conclusions are prepared.[59] Little is known of the implementation of individual decisions of these Committees.[60] Since they do not render final and binding decisions, they cannot be considered as courts. The decisions are nevertheless widely regarded as on a par with international cases and in that respect where relevant they come within the general thesaurus of international law. The general observations of these Committees, usually on the interpretation or application of the Convention under which they function, are important elements in clarifying the application of the law.[61]

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59 The question of voting is significant. In judicial bodies, voting is normally in inverse order of seniority of the members present and voting, abstention not being permitted. In other organs, the voting is by show of hands or by roll call, affirmative, negative, abstention. In these Committees, while every effort is to be made to reach a conclusion by consensus, voting follows the system usual in other deliberative bodies of the United Nations and abstentions are not included in the calculation of the majority. Rule 50 of the Rules of Procedure of CERD (CERD/C/35/Rev.3). The Rules of Procedure and other relevant material can be found on website www.unhcr.org.

60 For a critical assessment of the monitoring system of the human rights instruments, see the First Report of the Committee on International Human Rights Law and Practice (prepared by A. F. Bayefsky), International Law Association, *Report of the Seventy-seventh Conference* 336 (Helsinki, 1996).

61 On the exclusion of the ICJ from a role in the Covenants, see note 56 above. The view that these bodies are not organs of the UN has since been abandoned. There is no reason why treaty bodies composed of States established under treaties adopted within or under the auspices of the UN should not be empowered to request advisory opinions of the principal judicial organ of the UN, the ICJ. The CHR has once directly requested an adv. op. on a question concerning the privileges and immunities of one of its special rapporteurs. Its Sub-Commission on Prevention of Discrimination and Protection of Minorities has also once wished to obtain the Court's advice on a similar question. On each occasion it was necessary to recommend that ECOSOC adopt an appropriate resolution, and the Court's opinion was formally addressed to ECOSOC. That procedure is cumbersome and unsatisfactory, especially if the opinion is required as a matter of urgency.

In addition to these formal monitoring bodies, the CHR and its parallel body established by ECOSOC, the Commission on the Status of Women, have established other procedures for thematic or sectorial matters. The most important of these is the appointment of a special rapporteur with defined terms of reference for a given topic or in relation to a defined situation in a named country.[62] This is frequently the prelude to more substantive action, possibly the conclusion of a treaty on that matter.

In 1993 the General Assembly created the post of United Nations High Commissioner for Human Rights (UNHCHR) as the principal United Nations official with responsibility for United Nations human rights activities under the direction and authority of the Secretary-General (resolution 48/141, 20 December 1993).[63] The High Commissioner, to be appointed by the Secretary-General and approved by the General Assembly, is to be a person of high moral standing and personal integrity with expertise, including in the field of human rights, and the general knowledge and understanding of diverse cultures necessary for impartial, objective, non-selective performance of the duties of High Commissioner. The High Commissioner has the rank of Under-Secretary-General and serves for a term of four years, with the possibility of re-election once. The terms of reference are broad, and include crisis management, prevention and early warning of impending gross violations of human rights, assistance to States going through a transitional process, the promotion of substantive human rights, and the much needed co-ordination and rationalization of the human rights programmes. This has brought the administration of human rights directly into the centre of crisis management and control and may result in over politicization of what is at best a delicate operation. These broad terms of reference reflect the changed characteristics of international crises which are today frequently internal disturbances of a kind likely to endanger international peace and security, in which violations of human rights are endemic.

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62 On the status of a special rapporteur of the CHR, see the case in note 57 above; and regarding a rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, see *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (Mazilu) adv. op. ICJ Rep. 1989, 177.

63 The website address is www/unhchr.ch/. The High Commissioner stands at the head of the UN Centre for Human Rights, now an autonomous entity within the United Nations, headquartered at Geneva. The Centre operates a 24-hour 'hot line' at the disposal of victims of human rights violations, and that allows it to react rapidly to human rights emergencies.

§ 6.07. Regional human rights systems

The broad and universalist language of the Universal Declaration, hardly modified in the different Covenants and other instruments for the transformation of the individual rights and freedoms into treaty law and hence into national legal systems, has been found inadequate to protect the observance of human rights in different parts of the world or not fully compatible with the social and cultural environment of a region. This has led to a partial regionalisation of human rights law in three areas, within the scope of the activities of the Council of Europe and later of the Organization for Security and Co-operation in Europe, the Organization of American States, and the Organization of African Unity respectively. Those regional arrangements adapt the general principles of the Universal Declaration to the cultural and societal requirements shared by the States of the region. Common to all three systems is the requirement of the exhaustion of local remedies before the regional remedies may be approached.

Among the international courts are two standing regional courts dealing with human rights, and a third in process of formation (above chapter III § 3.09) The human rights courts differ from the other standing courts in two respects: (1) their jurisdiction is not universal *ratione personae*; (2) they are each regional and their jurisdiction deals with violations of human rights as set out in the appropriate regional treaty. The reach of their decisions does not extend outside the region for which they have been established. Besides those two Courts, the different Covenants and Conventions on human rights adopted by the United Nations and by regional organizations have set up several treaty monitoring bodies with power to examine individual complaints of violations and to act as screening bodies for individual applications to a Human Rights court.

The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 is the first of these.[64] The Convention is open to the members of the Council of Europe. The numerical increase in those members on the one hand, and the growth in the caseload of the original Commission and Court of Human Rights led to the amalgamation of those two bodies into the new European Court of Human Rights.

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64 Above chapter III § 3.09 and note 68. The enforcement provisions were completely revised by Protocol No. 11 of 11 May 1994 (while preserving the precedents of the former European Commission on Human Rights and the European Court of Human Rights, leaving the original provisions a matter of historic interest only). The substantive provisions of the Convention were retained

The preamble to the Convention, after mentioning the Universal Declaration, announces the aim of the Council of Europe as the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realization of human rights and fundamental freedoms. It goes on to proclaim the members' profound belief in those fundamental freedoms 'which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend'. It expresses their resolve, 'as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law', to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration. This preamble embodies the credo of Western democratic principles. In addition to the Court, the Council of Ministers also has functions in regard to the enforcement of the Convention.

The Conference on Security and Co-operation in Europe included in the Helsinki Final Act of 1 August 1975 section VI on respect for human rights and fundamental freedoms, including freedom of thought, conscience, religion or belief.[65] This included a passage to the effect that in the field of human rights and fundamental freedoms, the participating States would act in conformity with the purposes and principles of the UN Charter and with the Universal Declaration and would fulfil their obligations as set forth in the international declarations and agreements in this field, including *inter alia,* the International Covenants on Human Rights by which they might be bound.

The American Convention on Human Rights (the Pact of San José) was concluded on 22 November 1969.[66] Unlike the European and the African instruments, the American Convention makes no reference to regional tradition. It follows the original European Convention in establishing as organs with respect to the fulfilment of the commitments of the States parties the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. After setting out in detail the civil and political rights and the personal responsibilities of each person, the Convention turns to means of

65 For that Final Act, one of the most important political documents of the Cold War period, see 14 ILM 1292 (1975), and chapter XI § 11.01 below.

66 Above chapter III note 69. It had been preceded by the American Declaration of the Rights and Duties of Man, adopted at the ninth International Conference of American States at Bogotá on 2 May 1948 (before the adoption of the Universal Declaration). 43 AJIL Sup. 133 (1948)

protection through the different competent organs. The Commission has the main function of promoting respect for and defence of human rights. Any person or group of persons, or any non-governmental entity legally recognized in one or more of the member States, may lodge petitions with the Commission containing denunciations or complaints of violation of the Convention by a State party. A State party may also recognize the competence of the Commission to receive and examine communications in which a State party alleges violations by another State party. Admission by the Commission of a petition or communication is subject to several requirements. Local remedies must have been exhausted in accordance with the generally recognized principles of international law. The subject of the petition or communication must not be pending in another international proceeding for settlement, and individual petitions must not be anonymous. The first function of the Commission, after due examination of the document, is to try and effect a friendly settlement. Different reporting requirements are laid down for the different circumstances that may arise. The Commission has power to submit a case to the Inter-American Court, and is required to appear in all cases before the Court. The Commission has to make an annual report to the General Assembly of the Organization of American States.

The African Charter on Human and Peoples' Rights of 16 June 1981 (the Banjul Charter) is a reaffirmation of an earlier pledge by the African States members of the Organization of African Unity to promote international co-operation having due regard for the Charter and the Universal Declaration.[67] It also takes into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights. The preamble further recognizes that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone. Combining the Western and the Communist approach with African traditions, the preamble recalls that it is essential to pay a particular attention to the right to development, and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality, and that satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights. The Charter sets out in greater detail the rights and the duties of the

67 Above chapter III note 70 and the UN. publication cited above in note 23, vol. II at 330; OAU doc. CAB/LEG/67/3/Rev.5 (1981); in force from 21 October 1986. And see R. Gittleman, 'African Charter on Human and Peoples' Rights; a Legal Analysis', 22 *Va. J Int'l L.* 667 (1982).

individual in a form adapted to the African situation. The duties of the individual are based on the premise that every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community (Article 27).

Part II of the Charter deals with measures of safeguard. It establishes the African Commission on Human and Peoples' Rights. This consists of 11 members chosen from African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights, 'particular consideration being given to persons having legal experience'. These persons, who serve in their personal capacity, are elected by the Assembly of Heads of State and Government. They serve for a six-year period and may be re-elected. The Commission's functions are to promote human and peoples' rights, to ensure the protection of human and peoples' rights under conditions laid down in the Charter, to interpret all the provisions of the Charter at the request of a State party, an institution of the OAU or an African organization recognized by the OAU, and to perform any other tasks that may be entrusted to it by the Assembly of Heads of State and Government. It may deal with communications from States, and as in the case of the other human rights bodies, only after the exhaustion of all local remedies. If it is not successful in reaching an amicable solution it reports to the States concerned and to the Assembly of Heads of State and Government.

There is interest in the applicable principles for the Commission. It is to draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments, from the UN Charter and the Charter of the OAU, the Universal Declaration of Human Rights, other instruments adopted by the UN and by African countries, and from the various instruments adopted within the specialized agencies (Article 60). It shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions laying down rules expressly recognized by Member States of the OAU, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African States as well as legal precedents and doctrine (Article 61).

§ 6.08. The human genome: cloning

More than any other branch of human activity, matters relating to the human genome[68] impinge directly on religious and spiritual sensibilities not only of the world's religions and spiritual beliefs, but also on the conscience of many persons regardless of their religious orientation. There are also important economic interests involved, together with the requirements of legitimate medical research. It is here that the secularization of international law comes into direct conflict with its religious background, especially in the sphere of human rights.

Unimaginable advances in all branches of science, including biology and medicine (leading to modern biomedicine), towards the end of the century produced a capability of cloning animals, and later of human beings. That led the 29th session of the General Conference of UNESCO to adopt on 11 November 1997 the Universal Declaration on the Human Genome.[69] Recalling *inter alia,* the Universal Declaration and the Covenants as well as the Genocide Convention and other relevant instruments, the preamble recognizes that research on the human genome and the resulting applications have opened up vast prospects for progress in improving the health of individuals and of humankind as a whole. At the same time it emphasized that such research should fully respect human dignity freedom and human rights as well as the prohibition of all forms of discrimination based on genetic characteristics. Probably its most important provision is in Article 11. By that, practices which are contrary to human dignity, such as reproductive cloning of human beings, shall not be permitted. States and competent international organizations were invited to cooperate in identifying such practices and in taking, at national or international level, the measures necessary to ensure that the principles set out in that Declaration are respected. An accompanying resolution on the implementation

68 *Genome* – A biological term meaning a haploid set of chromosomes; the sum total of the genes in such a set; *cloning* – 'To propagate or reproduce (an identical individual) from a given original; to replicate (an existing individual)'. *Oxford English Dictionary*, CD-ROM ed. s.v. 'Genome', 'clone' (verb). And see S. D. Murphy, 'Biotechnology and International Law', 42 *Harvard Int'l L. J.* 47 (2001).

69 UNESCO, *Records of the General Conference, Twenty-ninth Session* (1997), Vol. I, 41, 29 C/Res. 16. That was followed by 30 C Res. 23, adopted by the General Conference on 16 November 1999, on the implementation of the Guidelines. Endorsed by the UN General Assembly in Res. 53/152, 9 December 1998. UNESCO has established two organs to deal with this: the International Bioethics Committee (IBC) and the Intergovernmental Bioethics Committee (IGBO). UNESCO publishes their proceedings.

of that Declaration urged the members of UNESCO to take appropriate steps, including where necessary the introduction of appropriate legislation.

This declaration had been preceded by the European Convention for the Protection of Human Rights and Dignity with regard to the Application of Biology and Medicine, the Convention on Human Rights and Biomedicine, concluded at Oviedo on 4 April 1997.[70] Chapter IV (Articles 11 to 14) deals specifically with the human genome. More significant is the Charter of Fundamental Rights of the European Union, adopted at Nice on 7 December 2000, although the question of its enforcement has been deferred.[71] From the point of departure enunciated in Article 1, that human dignity is inviolable and must be respected and protected, Article 3 of this instrument reads:

> Right to the integrity of the person
>
> 1. Everyone has the right to respect for his or her physical and mental integrity.
> 2. In the fields of medicine and biology, the following must be respected in particular:
> – the free and informed consent of the person concerned, according to the procedures laid down by law,
> – the prohibition of eugenic practices, in particular those aiming at the selection of persons,
> – the prohibition on making the human body and its parts as such a source of financial gain,
> – the prohibition of the reproductive cloning of human beings.

The Organization of American States is also concerned. It has confided the initial examination of the issues to the Inter-American Judicial Committee. The Committee has presented a draft legislative guide on medical assisted fertility, and in 2001 the Assembly of the OAS requested it to study further all human rights and biomedicine-related aspects with a view to presenting a report on the status of international law governing the matter.[72]

The CHR in resolution 2001/71, 25 April 2001, signified its awareness that the rapid development of the life sciences opens up tremendous prospects for the improvement of the health of individuals and mankind as a whole, but also

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70 Council of Europe, ETS/164, in force from 1 December 1999; and the Additional Protocol for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning of Human Beings, Paris, 12 January 1998, ETS/166.

71 *Official Journal of the European Communities*, 2000, No. 364, p. 1.

72 Res. AG/RES 1772 (XXXI-O/01), 5 June 2001. For the draft legislative guide, see doc. OEA/Ser.Q, CJI/doc. 33/00, 18 August 2000 and CJI/RES 18.

that certain practices may pose dangers to the integrity and dignity of the individual, and sought to ensure that scientific progress benefits individuals and develops in a manner respectful of fundamental human rights. It also invited Governments to consider establishing independent multidisciplinary and pluralist committees of ethics to assess, notably with UNESCO's Bioethics Committee, the ethical, social and human questions raised by the biomedical research undergone by human beings and, in particular, research relating to the human genome and its applications. Following that, on the initiative of France and Germany the General Assembly took on its agenda the question of an international convention against the reproductive cloning of human beings and allocated it to the Sixth Committee. In resolution 56/93, 12 December 2001, the General Assembly decided to establish an *ad hoc* committee open to all States members of the UN or of the specialized agencies. Its purpose is to study the elaboration of an international convention banning the reproductive cloning of human beings, once agreement is reached on a negotiating mandate, a cautious approach to a delicate problem. The resolution recited awareness of the need for a multidisciplinary approach, and instructed the *ad hoc* committee to open with an exchange of information and technical assessments with the participation of experts on genetics and bioethics. However, during the 57th session (2002) no agreement was reached and it was decided to reconvene the working group during the 58th session of the General Assembly.[73]

§ 6.09. The dilemma of enforcement

The existence of this vast quantity of regulation of human rights, much of it today based on treaties and much of it also probably now widely regarded as rules of customary international law, plays havoc with the domestic jurisdiction provision of the Charter, Article 2 (7) (see chapter XII § 12.02 below). It is not a matter for contention that for States party to any treaty, the matters governed by that treaty are no longer within the domestic jurisdiction of those States. The International Court of Justice has stated that the interpretation of the terms of a treaty could not be considered as a question essentially within the domestic jurisdiction of a State: it is a question of international law which by its very nature lies within the competence of the International Court of Justice.[74]

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73 See the report of the Sixth Committee, doc. A/57/569.

74 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* adv. op., ICJ Rep. 1950, 65, 70. This is an application to the Charter of the doctrine enunciated by the Permanent Court in relation to the Covenant of the League of Nations in the

The Universal Declaration does not contain any provision for derogation, although one may be implied from Article 51 of the Charter, on the inherent right of self-defence. Article 4 of the Covenant on Political and Civil Rights provides that in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, a State party may take measures derogating from their obligations under the Covenant to the extent required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. The article goes on to indicate provisions of the Covenant from which no derogation may be made. A State availing itself of that right of derogation is immediately to inform the other States parties through the Secretary General, and likewise is to inform them when it terminates the derogation. Even the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, allows reservations regarding the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime. It is not by any means clear what is the intention of the word 'wartime' under the régime of the Charter, and there is no reason why it should not extend to situations of self-protection against indiscriminate terrorism.[75] On the other hand, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 contains in Article 2 an absolute prohibition on derogation whatsoever,

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Nationality Decrees in Tunis and Morocco adv. op., PCIJ, Ser. B No. 4 (1923) at 24: 'The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question: it depends upon the development of international relations'.

75 See Human Rights Committee, *Derogations from provisions of the Covenant during a state of emergency*, General Comment No. 29, 24 July 2001, reproduced in the Committee's Report for 2001 (doc. A/56/40, vol. I, Annex VI). For the view of the ILC on derogation see its Report 2001, Chap. IV, responsibility of States for internationally wrongful acts, Art. 21 on self-defence, commentary, para. (3). The Inter-American Court of Human Rights has had several requests for an adv. op. and several contentious cases concerning the derogation provisions of the Pact of San José. See adv. ops. on *Habeas Corpus in Emergency Situations (Arts. 27 (2), 25 (1) and 7 (6) of the Inter-American Convention on Human Rights), Judicial Guarantees in States of Emergency (Arts. 27 (2), 25, and 8 of the American Convention on Human Rights)*, and *Reports of the Inter-American Commission on Human Rights (Art. 51 of the American Convention on Human Rights)*, Series A, Nos. 8 (1987), 9 (1987) and 15 (1997) and the judgments in *El Amparo Reparations (Art. 63 (1) of the American Convention on Human Rights)*, *Ivcher Bronstein* and *Constitutional Court*, Series C, Nos. 28 (1996), 54 (1999) and 55 (1999). This is a substantial jurisprudence on the matter.

whether a state of war or a threat of war, internal political instability or any other public emergency exists. The existence of this right of derogation coupled with insistence on the maintenance of other obligations under international law means that even where there is derogation from human rights law, the obligations of the international humanitarian law, more relaxed in favour of the obligations that it imposes on the 'belligerent' powers, remains in full force and effect.

Similar provisions are found in two of the current regional human rights systems, where they can be controlled by the regional human rights court. Article 27 of the American Convention on Human Rights provides that in time of war, public danger, or other emergency that threatens the independence or security of a State party, it may take measures derogating from its obligations under the Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on grounds of race, colour, sex, language, religion or social origin. It also prohibits derogation from certain of its provisions and requires notice to be given to the other States parties. Article 15 of the European Convention on Human Rights likewise provides for a power of derogation in time of war or other public emergency threatening the life of the nation, to the extent strictly required by the exigencies of the situation and provided that the measures taken are not inconsistent with the State's other obligations under international law (while preserving the precedents of the former European Commission on Human Rights and the European Court of Human Rights).

The major dilemma encountered throughout the discussions on human rights in the United Nations turns on one issue, namely: What are the 'rights' requiring promotion and protection, and what is the role of a political organization such as the United Nations in that effort? There is little room for doubt that the statesmen who produced the wartime documents, when the western democracies were engaged in a life-and-death struggle against the forces of dictatorship, were inspired by the Anglo-American common law heritage of individual rights guaranteed by law. However, it is clear from the debates leading to the Universal Declaration of Human Rights in 1948 that not all the fifty members of the United Nations who adopted it shared that conception. Today when the United Nations has 190 members world-wide, other ideas of the relationship between the individual and the State are claiming equal status. The Marxist approach continues to enjoy a wide following notwithstanding the collapse of the strict communist regimes in Eastern Europe. And there are other vibrant cultural systems calling for recognition. It is foolish to ignore the strong religious trends

in the non-Christian world with different conceptions of the place of the individual in the organized society and the responsibility of the rulers for the welfare of their peoples. It was obvious from the start that if the United Nations was to make any real headway in promoting and protecting the rights of individual men and women of the national societies, whatever their state of development, it would not be enough to have the principles of the Universal Declaration formally embodied in the precepts of international law alongside the rules of national law. That has to be accompanied by a political will on the part of all Governments, regardless of political hue, to ensure the enforcement of those precepts on the national level in accordance with national standards and processes. That in turn calls for an extensive programme of education, not limited to qualification for the legal profession. But that has not occurred. The Constitution of UNESCO proclaims among the functions of that organization 'to further universal respect for justice, for the rule of law and for human rights and fundamental freedoms which are affirmed for the peoples of the world'. This notwithstanding, the gap between the fine language in which the rights are enshrined in legal texts and discrimination on grounds of race, religion, colour, sex, of other distinguishing feature is too wide to be ignored. The promotion of human rights is noteworthy among the achievements of the United Nations. Their protection, however, fall far behind. As the Secretary-General, Mr Kofi Annan said in an address to the Commission on Human Rights: 'gross violations of human rights must not be allowed to stand'.[76]

76 Statement at the CHR on 24 April 2003, Press Release SG/SM/8675 - HR/CN/1043, 24 April 2003.

CHAPTER VII

INTERNATIONAL PERSONALITY

§ 7.01. The State: sovereignty and independence

The term *international personality* is widely used to signal the capacity of an entity to act on the international plane. The ICJ sanctioned its use in the *Reparation for Injuries suffered in the Service of the United Nations* advisory opinion, with that meaning.[1] The independent sovereign State today possesses the fullest international capacity. Other entities with recognized international capacity include semi-independent States, international intergovernmental organizations, national liberation movements, and to some extent individuals (natural and juridical persons) and non-governmental organizations (NGOs) composed of groups of individuals. Implicit in recognition of an entity's international personality is its capacity to conclude agreements governed by international law (treaties) and to be a respondent in an international claim under the law of international responsibility. If an entity does not have that capacity, it does not possess international personality. An entity capable of possessing rights and bearing duties under international law is an actor of international law and it can maintain its rights by whatever appropriate international means are open to it.[2]

The independent State is the core unit of today's international law. It has full capacity to perform all acts under international law and to bear international responsibility for all internationally wrongful acts that are attributable to it and in that quality are violations of international law. The independent State is the

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1 ICJ Rep. 1949, 174, *passim*.

2 For example, the ICJ is only open to 'States', up to now always interpreted as meaning independent States. The ITLOS is more restrictive, being in principle open only to States parties to the UN Convention on the Law of the Sea 1982. That, through Art. 305, includes some semi-independent States and regional organizations of economic integration entitled to become parties to the Convention in accordance with Annex IX. 1833 UNTS 3.

principal actor, around which all the remainder revolves. It is the only repository of full international sovereignty. It is also the primary creator of rules of general international law and the primary object and addressee of those rules. Yet there is no formal universal definition of *State* for this or any other purpose. The Montevideo Convention on Rights and Duties of States of 26 December 1933, adopted by the seventh international conference of American States (forerunner of the Organization of American States), sets out what has become a widely accepted working description of what is meant by *State*.[3] By that text, a State as a person of international law should posses the following characteristics: (*a*) a permanent population; (*b*) a defined territory; (*c*) a government; and (*d*) capacity to enter into relations with other States. In 1949 the ILC, in its report on the draft declaration on rights and duties of States, concluded that no useful purpose would be served by an effort to define the term *State*. In the draft, it used the word *State* 'in the sense commonly accepted in international practice'. Likewise, it did not think that it was required to set forth the qualifications to be possessed by a community in order that it may become a State.[4] Yet it is possible to set out the principal characteristics of a State for the purposes of international law, as was done in the Montevideo Convention of 1933 and later by the ILC. For example, in 2001 the ILC pointed out that the State is a 'real organized entity, a legal person with full authority to act under international law', and that the 'State is treated as a unity, consistent with its recognition as a single legal person in international law'.[5]

From the point of view of international law, there are two principal types of State – the unitary State and the federal State. The unitary State is a single political unit within the international borders having a central national government – France, for example. The federal State is a State composed of several territorial units each with its own set of powers and functions and extent of autonomy, united with a central federal government representing it internationally – the United States of America or Switzerland for example. While the applica-

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3 165 LNTS 19.

4 ILC Rep. 1949 (A/925) para. 49, YBILC 1949, 277, 289. Later, drawing conclusions from an analysis of internal cases prepared by the Secretariat, the Commission gave the following 'indicators of a State: defined territory, permanent population, being under the control of its own government, and having capacity to engage in formal relations with other States and to implement the obligations that normally accompany formal participation in the international community'. ILC Rep. 1999 (A/54/10 + Corr. 1, 2) Annex para. 19.

5 ILC Rep. 2001 (A/56/10) chapter IV, draft articles on responsibility of States for internationally wrongful acts, Art. 2, Commentary, paras. (5), (6).

tion of international law to and in a unitary State does not cause difficulties of principle, it is otherwise with federal States, especially as there are many different types of federation, and many diverse features of the powers of the units of a federal State. This issue has caused difficulties in treaty drafting in connection with what was called the 'federal clause',[6] and later in connection with the codification of the law of treaties and of State responsibility. The prevailing view is that the central government is internationally responsible for any action of a unit of a federal State that is a breach of the international obligations of the State. The ICJ has formally stated that the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be. The same principle has been incorporated in the ILC's draft articles on the responsibility of States for internationally wrongful acts.[7]

Both types of State may have, within their boundaries, more than one legal system, what might be termed 'a polynomous State', for example the United Kingdom. The same principle would apply in those States. The different legal systems may be territorial, or sectorial. In the former Ottoman Empire different systems of law applied to different persons within the framework of the *millet* system – religious law (Muslim, Christian and Jewish) which the secular legislature cannot touch, applicable to the members of the different recognized religious communities, and the national law of foreigners coming within the framework of the capitulations. To some extent this sectorial system has survived in many of the Near Eastern successor States of that Empire, although the capitulations were all suspended or abolished after the First World War and no distinction is now made on the basis of nationality except where treaties in force so provide.

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6 For an early account of this, see Sh. Rosenne, 'United Nations Treaty Practice', 86 *Recueil des cours* 275, 374 (1954-II).

7 *LaGrand* (Provisional Measures) case, ICJ Rep. 1999, 9 at 16 (para. 28); draft articles on Responsibility of States for internationally wrongful acts ILC Rep. 2001 chapter IV, Art. 2, Commentary para. (6) (above note 5). In the *LaGrand* (Provisional Measures) case, the Court required the Government of the United States to transmit the Order to the Governor of the State of Arizona, where the impugned action took place. The Court held that the Governor was under the obligation to act in conformity with the international obligations of the United States. That may be going too far, since how the Government of a federal State acts on an order from the ICJ is an internal matter, and it is not for an international court to deal with that aspect. But for an explanation of this, see R. Higgins, 'The Concept of "The State": Variable Geometry and Dualist Perceptions', *The International Legal System in Quest of Equity and Universality, Liber Amicorum Abi Saab* 547, 556 (The Hague, Kluwer Law International, 2001).

For practical purposes the dominant criterion of statehood today is membership in the UN or participation in the Statute of the International Court, together with the Holy See/Vatican City.[8] Semi-independent States (§ 7.03 below) have not been admitted into the UN under Article 4 of the Charter, although in 1945 some founder members of the UN (as of the League of Nations in 1919) were not fully independent States.[9]

Both sovereignty and independence, whether taken together or separately, are elusive topics. They are given to much philosophical and practical controversy, and are incapable of acceptable legal definition. What is more, they arouse deep and passionately held feelings in the citizenry, making political settlement of territorial disputes difficult. As a distinguished Dutch Foreign Minister wrote as far back as 1953 in this Academy: 'the notion of sovereignty continues to be a dominating element in our heart and mind; we are strongly affected by it, and it is part of nearly everybody's being. To ignore this fact would be silly'.[10] As for independence, one of the provisions of the ILC's draft declaration on the rights and duties of States declared that every State has the right to independence, and hence to exercise freely, without dictation by any other State, all its legal powers, including the choice of its own form of government.[11]

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8 The Lateran Treaty of 11 February 1929 between the Holy See and Italy, 21 *Acta Apostolicae Sedis* 275 (1929); *Gazetta Ufficiale del Regno d'Italia, Prima Parte* No. 170 (Straordinario), 5 June 1929, 2501. This treaty was not registered with the Secretariat of the League of Nations under Art. 18 of the Covenant. For an English version, see 23 AJIL Sup. 187 (1929). The Vatican City/Holy See is a member of several specialized agencies. In purely secular aspects, the formal representation is by the Vatican City. That includes membership in the ITU and the UPU. Among the treaties to which the Holy See is party are the Vienna Conventions on Diplomatic Relations 1961, the Vienna Convention on the Law of Treaties 1969, and the Statute of the International Criminal Court.

9 In 1945, at the San Francisco Conference the Byelorussian SSR and the Ukrainian SSR, as well as the Commonwealth of the Philippines, were not fully independent States. Doubts are also sometimes heard that India too (before its partition) was not a fully independent State at that time, but that is open to question. Belarus and Ukraine were not required to apply for admission into the UN on the dissolution of the Soviet Union but retained their position as original members.

10 E. N. van Kleffens, 'Sovereignty in International Law', 82 *Recueil des cours* 1, 130 (1953-I). Sovereignty can be shared or pooled, for instance in a condominium such as Andorra. Sovereignty is to be distinguished from sovereign rights, the name given to the functional rights and jurisdiction of a coastal State over the living and mineral sources of its exclusive economic zone and continental shelf (chapter VIII §§ 8.04, 8.05 below).

11 Above note 4. That text is annexed to A/Res. 375 (IV), 6 December 1949. No further action has been taken. It reflects legal thinking of the period. It may no longer do justice

A major manifestation of the independence of a State is its ability to conduct its own foreign relations, and in that process to conclude international treaties governed by international law with other entities of international law, including other States, international organizations, and any other recognized entity,[12] and to become a member of an international intergovernmental organization (subject to the organization's constituent instrument). Those are the attributes that make the independent State the primary actor in international life and the originator of the rules and practices of international law and custom.

The principle of non-interference in the internal affairs of another State is fundamental in international law. Article 41 of the Vienna Convention on Diplomatic Relations of 1961 and Article 55 of the Vienna Convention on Consular Relations of 1963 give expression to that principle. Those provisions lay down that diplomatic and consular personnel have a duty not to interfere in the internal affairs of the receiving State. This applies equally to the Head of a State when on an official visit to another State.[13] The General Assembly has adopted several resolutions on the topic. Significant among these is the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States annexed to General Assembly resolution 36/103, 9 December 1981. That Declaration embodies statements of both the rights of States and their duties. Part I proclaims the main attributes of the principle in terms of its meaning. Part II deals with the duties of States in terms of the different forms of intervention in the internal affairs of another State. Part III is concerned with mixed rights and duties. Paragraph (*c*) of that Part sets out the right and duty of States to observe, promote and defend all human rights and fundamental freedoms within their own national territories and to work for the elimination of massive and flagrant violations of the rights of nations and peoples, and, in particular, for the elimination of apartheid and all forms of racism and racial discrimination. At the same time, nothing in the Declaration is to prejudice in

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to present-day thinking, which is inclined to attach importance to a democratic form of government, a loose conception with many meanings.

12 Cf. the 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331. Art. 6: 'Every State possesses capacity to conclude treaties'. In the 1986 Convention the corresponding provision reads: 'The capacity of an international organization to conclude treaties is governed by the rules of the organization'.

13 Cf. the incident involving General de Gaulle, as President of France, when on an official visit to Canada in 1967. See I *Oppenheim's International Law* 1035 (9th ed. by R. Jennings and A. Watts, London, Longman, 1992). For the Conventions of 1961 and 1963, see 500 UNTS 95 and 596 UNTS 261.

any manner the provisions of the Charter or action taken by the Security Council under its Chapters VI and VII.

The State has complete jurisdiction, civil and criminal, over all persons, natural and juridical, within its territory, subject in the case of foreigners and stateless persons to any applicable treaty provisions. It may also have jurisdiction over its nationals, including juridical persons, when they are outside its territory or are operating outside its territory. For instance, the State's jurisdiction will extend to all aircraft, ships and satellites registered with it and to all persons on them wherever those vehicles may be, although if in or over the territory of another State or its territorial sea, that jurisdiction would be concurrent with the jurisdiction of that other State (subject to any relevant treaty). Its jurisdiction over its nationals in a foreign State is concurrent with the jurisdiction of that State, and may not be enforceable so long as the person in question is in that or any other foreign State. A State has no jurisdiction over foreigners not within its territory, save where treaty so provides (universal jurisdiction). The grant of nationality by a State is a matter within that State's exclusive jurisdiction, again subject to any treaty obligations. The only general exception to the exercise of jurisdiction over a foreigner within its territory is a foreigner entitled to diplomatic, consular or other recognized privileges and immunities. That jurisdictional immunity is not a license to disregard the laws of the receiving State, and infraction can lead to the person concerned being required to leave the country. Likewise, the State has complete jurisdiction over all actions that take place within its territory, again subject to the recognized privileges and immunities and to treaty obligations and, for private law transactions, subject to the *lex fori* rules governing the conflict of laws.

§ 7.02. A State's territory

A State's territory consists of all the land within its frontiers, together with a belt of sea adjacent to its coast known as the territorial sea, and the airspace above its land territory and territorial sea. The delimitation of the territorial sea is a matter for the law of the sea (chapter VIII below). The outer limit of the territorial sea is the State's maritime frontier. Article 29 of the Conventions on the Law of Treaties provides that unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party 'in respect of its entire territory'. In that context, 'entire territory' includes the adjoining sea up to the outer limit of the territorial sea, and not beyond that. The superjacent airspace comes within the scope of the law of the air (chapter IX below). That sovereignty also extends into the soil and subsoil of the territory,

usque ad coelum, usque ad inferos, but not to the outer space beyond its airspace (chapter IX § 9.04 below), and its cyberspace is in the present state of technology beyond its control (§ 9.05 below). This sovereignty is exclusive and no other State is entitled to intrude into it without its consent. It extends to all the natural resources within the national frontiers. Full sovereignty has to be distinguished from sovereign rights over natural resources beyond the State's frontiers, a feature of the law of the sea and the accompanying functional jurisdiction.[14]

The State's territory including appurtenant airspace is limited by its frontiers, today mostly resting on a treaty, on judicial or arbitral decisions or on long usage and acquiescence of the neighbouring States. The codified law of treaties contains provisions designed to maintain the stability of frontiers. Article 62 of the Vienna Conventions on the Law of Treaties, on fundamental change of circumstances, provides that a fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty if the treaty establishes a boundary. Article 11 of the Vienna Convention on Succession of States in Respect of Treaties of 1978, on boundary regimes, provides that a succession of States does not as such affect a boundary established by a treaty or obligations and rights established by a treaty and relating to the regime of a boundary. Article 12 goes on to deal with the effect of a succession of states on other territorial regimes more generally.[15] A State's international frontiers have to be distinguished from internal administrative dividing lines of provinces or other internal divisions. The independence of the former Spanish colonies of Latin America led to the practice of taking the former Spanish colonial administrative lines as the international frontiers of the new States formerly Spanish possessions, as between them. This practice went under the name of the doctrine of *uti possidetis*. The application of that doctrine, of which there are several variants, was not easy, largely due to the carelessness of the colonial maps and descriptions of the lines. As the International Court of Justice has explained:

> While it was from the outset accepted that the new international boundaries should be determined by the application of the principle generally accepted in Spanish America

14 The ICJ has used the term 'functional jurisdiction' in this context, in the *Maritime Delimitation and Territorial Questions between Qatar and-Bahrain* (Merits) case, 16 March 2001, para. 170.

15 For those Conventions, see above chapter II note 3. For judicial interpretation of this provision, see the *Gabčíkovo-Nagymaros Project* case, ICJ Rep. 1997, 7, 72 (para. 123).

> of the *uti possidetis juris*, whereby the boundaries were to follow the colonial administrative boundaries, the problem . . . was to determine where those boundaries actually lay.[16]

The doctrine has been adopted by the Organization of African Unity for the decolonized States of Africa, but with reference both to the internal administrative lines and to the international frontiers of the former imperial powers, with similar difficulties. A Chamber of the International Court of Justice considered the application of the doctrine there in light of African questioning of some aspects of inherited international law and its preference for the principle of self-determination:

> At first sight this principle [*uti possidetis*] 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 consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of the self-determination of peoples.[17]

The State may react to unlawful violations of its sovereignty by whatever means are appropriate, including proportionate use of force, in exercise of its inherent right of self-defence (above chapter IV § 4.04). A less serious violation of sovereignty entitles the injured State to satisfaction under the general rules regarding remedies for internationally unlawful acts. This can include a resolution of the Security Council acknowledging that a violation of sovereignty has occurred and requiring appropriate reparation,[18] or a declaration by an inter-

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16 *Land, Island and Maritime Frontier Dispute*, ICJ Rep. 1992, 351, 380 (para. 28).

17 *Frontier Dispute (Burkina Faso/Mali)* case, ICJ Rep. 1986, 554, 565 (para. 20). The *uti possidetis* principle was also adopted by the Badinter Commission in its Opinion No. 3 (1992) in connection with the break up of the Socialist Federal Republic of Yugoslavia, although this is controversial. 92 ILR 170.

18 S/Res. 138 (1960), 23 June 1960, accepting Argentina's complaint that the transfer of Adolf Eichmann to Israel constituted a violation of its sovereignty, and requesting Israel to make appropriate reparation in accordance with the Charter and the rules of international law. The two States later accepted that resolution as the basis for closing the incident. For the text of the joint communiqué closing the incident, with its reference to that resolution, see State of Israel, 14 *Documents on the Foreign Policy of Israel 1960* 835 (Jerusalem, Israel State Archives, 1997). Questions relating to the issue of the

national court or tribunal to similar effect.[19] For a State to use force to rescue its citizens or persons under its protection from manifest danger is not intervention and is not an act that is prohibited by international law. The classic example of this is the rescue by Israel armed forces of Israeli passengers of a foreign aircraft hijacked to a third State which made no attempt to secure their release. The Security Council rejected attempts by the State concerned, in the Entebbe incident, to condemn that action.[20] The use of a nation's armed forces to protect its embassies and consulates and other official premises (including military bases) abroad is likewise not intervention in the sense here used or an improper use of armed force. This use of a State's armed forces usually requires the agreement of the host State.

§ 7.03. Recognition

The question of recognition of States and Governments once occupied a prominent place in international law. Recognition of a State comprises recognition of its government at the time of recognition. There is major controversy over the nature and function of recognition between those who see it as constitutive of a new State or of a Government that did not come to power strictly according to the national constitution, and those for whom it is merely declaratory of that fact. There was also a subtle distinction between recognition *de jure* and recognition *de facto*, although that distinction is becoming less common than it was fifty years ago. These today have largely lost their international legal importance, being replaced by a politically charged and legally complex issue of the validity or acceptance of the credentials of a delegation to the General Assembly of the UN.[21]

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exercise of State powers in a foreign county without that country's consent are currently before the ICJ in the *Certain Criminal Proceedings in France* case (pending). Order on provisional measures of 17 June 2003.

19 For an example, see the *Corfu Channel* (Merits) case, ICJ Rep. 1949, 4 at 35, 36.

20 On that incident, see above chapter IV note 51.

21 In 1949 the ILC decided to include recognition of States and Governments in its provisional list of topics selected for codification. There was no enthusiasm for this topic which has been dropped from the Commission's programme of work. For a later survey of the topic, see *Survey of International Law: Working paper prepared by the Secretary-General*, YBILC 1971, II/2 (A/CN.4/245, paras. 55 ff.). See on this the letter of the Secretary-General to the Security Council of 9 March 1950, transmitting a memorandum on the legal aspects of representation in the UN, 5 SCOR Sup. for January, February and March 1950 (S/1466). The thrust of that memorandum was that the linkage of the question of representation in the UN with recognition was 'unfortunate'. That view,

Recognition is a matter of political more than legal significance when there is controversy over the declaration of independence of a new State, as was the case of Israel in 1948. It is a unilateral act of the recognizing State, although it may be the outcome of negotiations. Agreement to an entity's admission into the UN, whether expressed by a vote or by acceptance in a consensus is a form of recognition of the State and its government by those favouring its admission. Today admission into the UN is in practice the final step on the international plane for the establishment of a new State, except in those rare instances when the new State does not wish to become a member of the UN. Admission does not necessarily imply recognition of the State's frontiers at that time if they are not fully determined or are a matter of controversy.[22] Acceptance by the General Assembly of a delegation's credentials, acceptance by the Security Council of a representative in the capacity by which he or she is identified,[23] or acceptance by the competent authorities of a State of the accreditation of an individual such as an ambassador, means recognition of the accrediting authority.

In resolution 396 (V), 14 December 1950, the General Assembly recommended that whenever more than one authority claims to be the government entitled to represent a member State in the UN and the question becomes a subject of controversy, it should be considered in the light of the Purposes and Principles of the UN. It continued that whenever any such question arises, it should be considered by the General Assembly and that the attitude adopted by the General Assembly should be taken into account in other organs of the UN and the specialized agencies. At the same time the resolution declared that the attitude adopted by the General Assembly should not itself affect the direct relations of individual member States with the State concerned. That emphasizes the political aspect of the issue. At the same time, the possibility that this gives

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however, has been criticized and is not widely adopted. This is without prejudice to the position in the internal law of a State. The internal law may require some formal act of the Government regarding its recognition of a new entity or a new government. And see B. R. Roth, *Governmental Illegitimacy in International Law* (Oxford University Press, 1999). In a Note to Correspondents of 10 February 1972, the Secretariat explained that A/Res./ 2758 (XXVI), 25 October 1971, constituted recognition of the Government of the People's Republic of China for General Assembly purposes, and left bilateral relations untouched. UNJYB 1972 at 154.

22 Cf. the speech of the representative of the United States, Dr Ph. Jessup, at the 383rd meeting of the Security Council on 2 December 1948. 3 SCOR No. 128 (S/PV.383), 9. That speech is widely regarded as the *locus classicus* on conditions of statehood today.

23 For an example of recognition by the Security Council, cf. Sh. Rosenne, 'Recognition of Israel by the Security Council', 13 *IsYBHR* 295 (1983).

to a State to oppose the admission and thereby indicate that it does not recognize the candidate for membership preserves the inherently political character of the act of recognition. The two aspects were frequently confused, especially in the long discussions on the representation of China in the United Nations. The outstanding instance of this action by the General Assembly was its decision in 1974 to reject the credentials of the delegation of South Africa.[24] In that case, the decision led to the absence of a delegation from South Africa from the Conference on the Law of the Sea, notwithstanding that country's important sea coasts and interests in the sea, to the possible disadvantage of the new South Africa and Namibia. Premature recognition by a State of an entity which does not meet the requirements of statehood may give rise to an instance of State responsibility.

Non-recognition is another matter. There are two types of non-recognition, one where the non-recognition *ab initio* reflects national policy, and the other where it is required by virtue of a decision of a competent international body such as the Security Council. That body has employed non-recognition to indicate disapproval of an action or the policies of a Government. For example, in resolution 216 (1965), 12 November 1965, the Security Council decided to call upon all States not to recognize the 'illegal racist minority régime in Southern Rhodesia'. In resolution 217 (1965), 20 November, it went further and called upon all States not to recognize this 'illegal authority' and not to entertain any diplomatic or other relations with it. That was a prelude to other resolutions incorporating the same decision. In resolution 283 (1970), 29 July 1970, it requested all States to refrain from any relations – diplomatic, consular or otherwise – with South Africa 'implying recognition of the authority of the Government of South Africa with regard to the Territory of Namibia and its people'. Regarding this, in its advisory opinion of 21 June 1971, the International Court of Justice explained in detail what was the obligation of the member States in their dealings with South Africa so as not to imply any recognition of the authority of South Africa in Namibia.[25] In resolution 402

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24 The process began with A/Res. 2636 (XXV), 13 November 1970, and ended with A/Res. 3206 (XXIX), 30 September 1974, finally rejecting the credentials of the delegation of South Africa. That was interpreted as disentitling South Africa to continue to take part in the work of the General Assembly but without prejudice to its general status as a member of the UN. On this, see Roth, op. cit. above note 21, 247; and Y. Blum, *Eroding the United Nations Charter* 43 (Dordrecht, Nijhoff, 1993).

25 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 9(1970)* adv. op., ICJ Rep. 1971 16. Art. 41 (2) of the draft articles on responsibility of States for inter-

(1976), 22 December 1976, the Security Council endorsed an earlier resolution of the General Assembly (resolution 31/6 A, 26 October 1976), calling upon Governments to deny any form of recognition to the so-called independent Transkei and to refrain from having any dealings with Transkei or other Bantustans. In resolution 541 (1983), 18 November 1983, it called upon all States not to recognize any Cypriot State other than the Republic of Cyprus. In resolution 662 (1990), 9 August 1990, it called upon all States, international organizations and specialized agencies not to recognize the annexation of Kuwait by Iraq, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation.

As a bilateral matter, recognition can be withdrawn. However, the recall of a diplomatic representative, particularly a head of mission, and even the breaking off of diplomatic relations, does not in itself signify the withdrawal of recognition. Participation in an international organization or conference or in a multilateral treaty does not imply recognition of other States participating in that organization, conference or treaty. On the other hand, the conclusion of a bilateral treaty is an act of recognition, unless the treaty provides otherwise.

§ 7.04. The semi-independent State

For the purposes of international law the semi-independent State is a political entity with a limited capacity to act on the international plane, including capacity to conclude treaties coming within its competence (as opposed to general competence to conclude any treaty), not necessarily full capacity for all international purposes. Semi-independent States and other types of autonomous regions *can* possess all the characteristic attributes of a State without having full independent sovereign international capacity. Such political units may have unrestricted competence over defined matters governed by international law, including the competence to conclude treaties in respect of those matters. The outstanding examples are the semi-independent island States of the Pacific and the law of the sea. It would follow as a consequence that they could be internationally responsible for breaches of international law attributable to them, at least to the extent of their international capacity.

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nationally wrongful acts (above note 5) provides that no State shall recognize as lawful a situation created by a serious breach of an obligation assumed under a peremptory norm of general international law (*jus cogens)* nor render aid or assistance in maintaining that situation.

The degree to which a semi-independent State can participate in international activities directly, or only through its parent or metropolitan State, therefore depends upon the terms both of the instrument under which the contemplated action is taking place and of the instrument according to that entity the status of a semi-independent State. The constituent instrument of some international intergovernmental organizations admits semi-independent States as members. The World Health Organization, for example, admits entities that are dependent States to membership or associate membership.[26] For disputes arising out of the UN Law of the Sea Convention, such semi-independent States would have access to the ITLOS, in any capacity (applicant, respondent, intervening party). Under present practice they would not have access to the International Court of Justice notwithstanding the provisions of Article 287 of the Convention. They are not therefore on a footing of complete equality with other States parties to the Convention.

In current international law, the status of semi-independent State is mostly a consequence of the decolonization process following General Assembly resolution 1514 (XV), 14 December 1960. The International Court of Justice has explained that the resolution contemplates for non-self-governing territories more than one possibility. Those include emergence as a sovereign independent State, free association with an independent State, or integration with an independent State.[27] It is the last two, but more especially the free association of a territory with a sovereign independent State, that has produced the modern semi-independent State. Article 305, the participation clause, of the Convention on the Law of the Sea best expresses what is involved.[28] By that provision that Convention is open to participation by all self-governing associated States which by their respective instruments of association have competence over the matters governed by that Convention, including the competence to enter into treaties in respect of those matters; and all territories which enjoy full internal self-government, recognized as such by the UN, but have not attained full independence in accordance with resolution 1514, and which have competence

26 This required an unusual order by the ICJ in connection with the proceedings on the request by the World Health Assembly for an adv. op. on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Rep. 1993, 467. The initial procedural order regarding written statements referred to written statements by members of the WHO 'who are entitled to appear before the Court'. This implies that some members of that Organization are not entitled to appear before the Court. In turn that indicates that the legal position of semi-independent States requires further authoritative clarification.

27 *Western Sahara* adv. op. ICJ Rep. 1975, 12, 32 (para. 57).

28 1183 UNTS 3.

over the matters governed by the Convention, including the competence to conclude treaties in respect of those matters. Some semi-independent States coming within those categories are parties to that Convention.

Protectorates have virtually disappeared with the implementation of universal decolonization. Technically a State under a protectorate did not lose its international personality, although the protector State represented it in all foreign affairs.[29] With the disbandment of colonial empires, a protectorate regained its independent international personality.

§ 7.05. The international organization

The complexity of modern international relations has led to a multiplicity of public or intergovernmental international organizations.[30] Their origin lies in considerations of administrative convenience that emerged in Europe during the nineteenth century. In the twentieth, especially since 1945, this phenomenon has taken on an entirely new character, exemplified in the notion of a specialized agency set out in Article 57 of the Charter – agencies established by intergovernmental agreement having 'wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health and related fields' (chapter XII § 12.09 below). Of the international intergovernmental organizations, the UN is the most important, politically the most active, and functionally the most all-embracing. It stands at the apex of a complex system superficially parallelling the corresponding administrative arrangements found in virtually every State. The United Nations maintains direct relations with States through their heads of State or government and Ministries for Foreign Affairs. Other international organizations frequently maintain direct relations with corresponding government departments and agencies. For their part, the members and permanent observers maintain permanent missions or permanent observer missions at the different headquarters, not only of the UN but also of other international organizations in which they have a particular interest; or they confer appropriate functions on a member of the local embassy or consulate

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29 In the *U.S. Nationals in Morocco* case, France indicated that it was proceeding in the case both on its own account and as protecting power in Morocco, the judgment to be binding upon France and Morocco. ICJ Rep. 1951, 109.

30 The principal source of information on international organizations is the *Yearbook of International Organizations* (Munich, Saur, annual). And see H. G. Schermers & N. M. Blokker, *International Institutional Law: Unity within Diversity* (The Hague, Nijhoff, 1995). For a compilation of the constituent instruments of international intergovernmental organizations, see Kapteyn *et al*, above chapter IV note 12.

staff. These international intergovernmental organizations are subjects of international law.

The International Court of Justice explained this with reference to the UN:

> [T]he Organization is an international person. That is not the same as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is a "super-state" whatever that expression may mean. It does not even imply that *all* [italics supplied] its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing rights and duties, and that it has capacity to maintain its rights by bringing international claims.[31]

There are several classes of public international intergovernmental organizations: – organizations of a universal character, regional organizations, and regional organizations of economic integration. The Vienna Convention on the Representation of States in their Relations with Intergovernmental Organizations of a Universal Character of 1975 defines international organization of a universal character as 'the United Nations, its specialized agencies, the International Atomic Energy Agency, and any similar organization whose membership and responsibilities are on a worldwide scale'.[32] There is no formal definition of a regional organization, but *a contrario* it is obviously an intergovernmental organization whose membership and responsibilities are on a recognizable geographically regional scale. Examples are the Organization of American States, the Organization of African Unity, the League of Arab States, the Council of Europe, ASEAN, the Pacific Forum, and various smaller organized groupings and sub-groupings. None of those definitions are intended to include military and defence organizations such as the North Atlantic Treaty Organization (NATO)[33] or the former Treaty of Friendship, Co-operation and Mutual Assist-

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31 *Reparation* adv. op. above note 1 at 179. That remark about 'super-State' was reiterated and applied to the law of treaties in the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, adv. op. ICJ Rep. 1980, 73, 89 (para. 37). On the treaty-making capacity of international organizations, Art. 65 of the 1986 Convention (above chapter II note 3) provides that the capacity of an international organization to conclude treaties is governed by the rules of the organization. Most intergovernmental organizations have that capacity.

32 Above chapter II note 61.

33 34 UNTS 243.

ance (The Warsaw Pact) of 14 May 1955.[34] The general regional organizations are also to be distinguished from regional arrangements under Chapter VIII of the Charter (Articles 52 to 54). Chapter VIII encourages the existence of regional arrangements or agencies for dealing with matters relating to the maintenance of international peace and security as are appropriate for regional action. It also requires the Security Council to encourage the development of the pacific settlement of local disputes through the regional arrangements. No enforcement action shall be taken under regional arrangements without Security Council authorization. Regional organizations of economic integration are a new appearance, originating in Europe after 1945. Today only one exists on a large scale, the European Union/Community (there are signs of others coming into existence).[35] Organizations of universal character and regional organizations are organizations of co-ordination in the same sense that international law is a law of co-ordination. The principal feature of the new organization of economic integration is that its member States have agreed to pool their sovereignty in respect of defined matters and have transferred to the Union/Community some of their legislative and administrative competences, and with them some of the appurtenant international treaty-making competences and other obligations. When that is done, the organization acts in place of its member States. In the case of the European Union/Community the members have also incorporated the organization's judicial organ, the European Court of Justice, within their own judicial systems. Legislation of this type of organization and its case-law can therefore for some purposes be regarded as an extension of the national

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34 219 UNTS 3. Dissolved on 4 March 1991. *Yearbook of International Organizations 1990–1991* at 931. Cf. the statement of the legal counsel (C. Stavropoulos and E. Suy) on 25 October 1966 at the 918th meeting of the Sixth Committee and on 21 October 1974 at the Committee's 1481st meeting. 21 GAOR Sixth Committee 103; 29 GAOR Sixth Committee 100.

35 The European Union (formerly Community and before that the European Communities) now exists on the basis of the Maastricht Treaty on European Union of 7 February 1992. (1757 UNTS # 30615) as amended by the Treaties of Amsterdam of 2 Ocotber 1997 and Nice of 26 February 2001 (consolidated version published in the *Official Journal of the European Union* No. C 325, 24 December 2002). The Union was formed by an amalgamation of the European Coal and Steel Community created by the Paris Treaty of 18 April 1951 (261 UNTS 140), the European Economic Community established by the Treaty of Rome of 25 March 1957 (297 UNTS 17) and the European Atomic Energy Community created by the Treaty of Rome of 25 May 1957 (295 UNTS 259). The European Union also undertakes general political operations. The European Union must not be confused with the Council of Europe established by the Treaty of London of 5 May 1949 (87 UNTS 103). The website address of the European Communities is: http://europa.eu.int, and that of the Council of Europe is: http://www.coe.int.

legislation and national jurisprudence of the member States. The most important instance of this to date is the participation of the European Community in the UN Convention on the Law of the Sea of 1982, the 1994 Agreement relating to the Implementation of Part XI of that Convention,[36] and the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.[37] The European Community is a party to important treaties for the protection of the environment. As in the case of the semi-independent States, the Community is not on a footing of complete equality with the States parties in so far as concerns access to the International Court of Justice for the settlement of disputes. Its member States have not transferred their voting rights, for instance for the elections to the different bodies that the Law of the Sea Convention establishes. On the other hand, the Stockholm Convention on Persistent Organic Pollutants provides that a regional economic integration organization, on matters within its competence, shall exercise its right to vote with a number of votes equal to the number of its member States that are parties to the Convention, and that it shall not exercise its right to vote if any of its member States exercises its right to vote, and vice versa (Article 23).[38] Clearly the question of the voting rights of these organizations in an international organization requires careful attention. Organizations are normally created by an international treaty that sets out their structure, their membership, original and new, their functions, their principal organs, and their powers.[39] Their international personality is deduced from the constituent instrument, and it usually comprises capacity to enter into international agreements which are on a par with treaties between States.[40]

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36 See Arts. 1 (2) and 305 (1) (*f*) together with Annex IX of that Convention, 1183 UNTS 3. Both the Council of Europe and the European Community participated in the Conference as observers.

37 UNTS No. 37924. In that capacity the European Community has agreed with Chile to submit a dispute to an *ad hoc* Chamber of ITLOS: *The Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* case, ITLOS Rep. 2000, 148.Alongside the *Fisheries Jurisdiction* (Spain *v*. Canada) case in the ICJ there was a similar dispute between Canada and the European Community, settled diplomatically while the case was pending. ICJ Rep. 1998 432. And see K. R. Simmonds, 'The European Economic Community and the New Law of the Sea', 218 *Recueil* 9 (1989-VI).

38 Doc. UNEP/POPS/CONF/2, 9 March 2001; 40 ILM 531 (2001).

39 Cf. F. Morgenstern, *Legal Problems of International Organizations* 21 (Cambridge, Grotius Publications, 1986).

40 Cf. Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, above chapter II note 3. The UN and several

This international personality also includes the power to be party to international litigation procedures (subject to the constituent instrument of the forum), in any litigious capacity.

The ICJ has held that although the constituent instrument is an international treaty governed by the general law of international treaties, it is nevertheless a treaty with special characteristics.[41] It has recognized that an organization must be deemed to have those powers that, though not expressly provided in the constituent instrument, are conferred upon it by necessary implication as essential to the performance of its duties.[42] The Court has also incorporated the doctrine of *Omnia pro rite praesumuntur* – by stating that when the organization takes action that warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the organization, the presumption is that such action is not *ultra vires* the organization.[43]

Being constituent instruments of organizations functioning in a rapidly changing international environment, they are subject to processes of accretive interpretation that sometimes can even be seen as amending the instrument. Acquiescence in that interpretation means its acceptance. As the ICJ has put it, a procedure that has been generally accepted by members of the organization 'evidences a general practice of that Organization'.[44]

Whether an international intergovernmental organization has any capacity in the internal law of any State is a matter for the internal law of that State, and may vary from country to country.[45] The question may be regulated in the constituent instrument of the organization, and ratification of that instrument

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of the specialized agencies, as well as the Council of Europe, have taken all necessary steps to be parties to that Convention when it enters into force.

41 *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* adv. op., ICJ Rep. 1962 151 157; *Use of Nuclear Weapons* adv. op., above note 26 79 (para. 19). Art. 5 of each of the Vienna Conventions provides that the Convention applies to any treaty between one or more States and one or more international organizations which is the constituent instrument of an international organization and to any treaty adopted within an international organization, without prejudice to any relevant rules of the organization. By Art. 2 (1) (*f*), of the 1986 Convention, 'rules of the organization' means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization. And see *Developments* 181.

42 *Reparation* adv. op. above note 1, 182; *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* adv. op. ICJ Rep. 1954, 47, 56; *Threat or Use of Nuclear Weapons* adv. op. above note 26, 79 (para. 25).

43 *Certain Expenses* adv. op. above note 41, 168.

44 *Namibia* adv. op. above note 25, 22 (para. 22).

45 Cf. the Tin Council cases in the United Kingdom, 58 BYIL 399 (1987), 60 ibid. 462 (1989).

in many countries transforms the international instrument into the law of the land.

Each international organization has its own internal law. The constituent instrument determines what it is and how it is made and applied and the nature and extent of the binding character of its decisions. That can include the possibility that some of its decisions could be binding upon, or at least persuasive for, non-member States, as is the case, for instance, of the UN on the basis of Article 2 (6) of the Charter. For international organizations of a universal character and for regional organizations this internal organizational law, sometimes inaccurately called international constitutional law or international administrative law (for the international civil service), is a specialized branch of international law. This is not so for an organization of integration, at least as regards its members and to some extent for third parties also. However, the organization's relations with third States and with other international organizations are governed by general international law.[46]

Organizations perform their work through organs. A plenary organ consists of representatives of the total membership of the organization. Adopting UN terminology widely followed today, the constituent instrument establishes the principal organs, and principal organs can establish subsidiary organs as required. The Secretary-General of the United Nations and the corresponding chief administrative officer of the other organizations (frequently with the title Director-General) is usually part of a principal organ, the Secretariat, and the Secretariats make up the international civil service.[47] The Secretary-General has a general representative quality for the organization as a whole.

In its draft on the law of treaties between States and international organizations or between two or more international organizations, the ILC proposed a draft article (36 *bis*) on the obligations and rights arising for States members of an international organization from a treaty to which that organization is a party. Its gist was that obligations and rights arise for States members of an organization from the provisions of a treaty to which that organization is a party when the parties to the treaty intend those provisions to be the means of establishing such obligations and according such rights, and have defined the conditions and effects in the treaty or have otherwise agreed thereon. There were

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46 Note in this connection the *Fisheries Jurisdiction* dispute between Spain and Canada, where the ICJ distinguished between the bilateral dispute between Spain and Canada, and another bilateral dispute between Canada and the European Community. Above note 37, 444 (para. 20).

47 On the international civil service, see chapter XII § 12.11 below.

two conditions: (*a*) the States members of the Organization, by virtue of its constituent instrument or otherwise, have unanimously agreed to be bound by those provisions of the treaty; and (*b*) the assent of the States members to be bound by those provisions of the treaty has been duly brought to the knowledge of the negotiating States and negotiating organizations. That was the most controversial part of the draft. No agreement was reached at the 1986 Conference and the matter was dropped.[48] A parallel question arises in the codification of the law of State responsibility. Article 57 of the ILC's draft articles on responsibility of States for internationally wrongful acts addresses one half of the problem. It provides that the articles are without prejudice to any question that may arise in regard to the responsibility under international law of an international organization, or of any State for the conduct of an international organization.[49] In 2001 the General Assembly requested the ILC to take up the question of the international responsibility of international organizations.

§ 7.06. A State's representatives

The State acts on the international plane through representatives. There are two generic types of representative: high officers of State who by virtue of their office possess full powers to represent the State on the international plane and (subject to the provisions of the national law) to act and bind the State, and others with delegated authority. The representative dignitaries are the Head of the State, the Head of the Government, and the Minister for Foreign Affairs.[50]

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48 ILC Rep. 1982 (A/37/10*) Chap. II, Art. 36 *bis* ILCYB 1982/II/2. For the proceedings at the Conference, see United Nations Conference on the Law of Treaties between States and International Organizations or between Two or More International Organizations, Report of the Committee of the Whole, II *Official Records*. (A/CONF.129/13*). What is now Art. 73, on relationship to the 1969 Convention, took its place. By that, 'As between States parties to the Vienna Convention on the Law of Treaties of 1969, the relations of those States under a treaty between two or more States and one or more international organizations shall be governed by that Convention'. On this see C. Brölmann, 'The 1986 Vienna Convention on the Law of Treaties: The History of Article 36*Bis*', *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag* 121 (J. Klebbers and R. Lefeber, eds., The Hague, Nijhoff, 1998).

49 ILC Rep. 2001 chapter IV. And see the resolution of the Institute of International Law on Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations towards Third Parties, 66/II Annuaire IDI 445 (1995).

50 Vienna Conventions on the Law of Treaties, 1155 UNTS 331, Art. 7. 'The power of a Head of State to act on behalf of the State in its international relations is universally recognized', *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Provisional Measures) case, ICJ Rep. 1993, 3, 11 (para. 13). See

All other representatives require appropriate authorization or accreditation from one of those dignitaries. Under modern international law a Head of State, and likewise those other high dignitaries, can be held internationally responsible for violations of international criminal law committed under their authority while in office, provided that the court or tribunal which tries them has jurisdiction. The Statute of the International Criminal Court (Article 27) specifically lays down the irrelevance of the official capacity of the accused, referring in particular to the Head of State or Government, a member of the government or parliament, an elected official or a government official. Article 28 extends this to military commanders.[51]

Other representatives of States fall into three major categories. The traditional diplomatic service represents the Head of State in a bilateral relationship with the State to which the representative is accredited, the 'receiving' or 'host' State, which has to give its consent (*agrément*) to the person to be appointed

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also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Jurisdiction and Admissibility) case, ICJ Rep. 1994, 112, (para. 260), and Sh. Rosenne, 'The Qatar/Bahrain Case: What is a Treaty? A Framework Agreement and the Seising of the Court', 8 *Leiden Journal of International Law* 161 (1995). More in *Arrest Warrant of 11 April 2000* (Provisional Measures) case, ICJ Rep. 2000, 182, where an arrest warrant had been issued in Belgium for the person who at the time was the Foreign Minister of the Congo, but who, after a cabinet reshuffle, had become Minister of Education by the time the Court came to deliberate on the request for provisional measures aiming at lifting the arrest warrant. For the codification of the law regarding the representatives of States, above chapter II note 61. And note Art. 50 of the ILC's draft articles on the responsibility of States for internationally wrongful acts (above note 5) by which a State taking countermeasures is not relieved from fulfilling its obligations to respect the inviolability of diplomatic or consular agents, premises, archives and documents. See generally A. Watts, 'The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers', 247 *Recueil des cours* 9 (1994-II), and the resolution of the Institute of International Law of 21 August 2001 on the immunities from Jurisdiction and Execution of heads of State under international law., 69 Annuaire IDI 742.

51 Above chapter V § 5.08. This rule was applied by the Nuremberg and Tokyo Tribunals after The Second World War. It is incorporated in the Statute of the Yugoslav and Rwanda Tribunals established by the Security Council. In the ICTY see *Prosecutor* v. *Milošević*, Decision on Preliminary Motions, case IT-99-37-PT, 8 November 2001, para. 26; in the ICTR see *Prosecutor* v. *Kambanda*, Judgment of 4 September 1998, case ICTR 97-23-S. It has also been applied in internal courts. Cf. *United States* v. *Noriega*, 99 ILR 143 (1990, 1992); and in the United Kingdom the *Pinochet* cases, *R.* v. *Bow Street Metropolitan Stipendiary Magistrate and others*, ex parte *Pinochet Ugarte*, [1998] 1 A.C. 61; *R.* v. Bow Street *Metropolitan Stipendiary Magistrate*, ex parte *Pinochet Ugarte (No. 2)*, [1999] 1 A.C. 119; *R.* v *Metropolitan Stipendiary Magistrate and others,* ex parte *Pinochet Ugarte (No. 3)*, id. 147 [1999].

as ambassador. That representation will be general and extend to all aspects that could arise in the bilateral relations of the two States, or it can be special, for a specific purpose. Consular relations (which may be exercised through a diplomatic mission with the consent of the host State) are also bilateral: they concern the relations of the sending State's nationals with the local authorities of the host State. The head of a diplomatic mission today still carries the historic title of Ambassador Plenipotentiary and Extraordinary, heading an Embassy. The head of mission is frequently joined by specialist assistants who report to home authorities other than the Foreign Minister. The best known, and the longest established of these are the Military Attachés. Today, with the growing complexity of international relations, other Attachés are encountered, particularly Economic Attachés and others if a State has special interests in the receiving State requiring specialist attention.

Reciprocity is at the heart of the legal aspect of the general representation, and it provides the sanction for the observance of the customary rules governing the exercise of diplomatic and consular activities. The head of mission and any member of the staff can be declared *persona non grata* without reasons for any serious breach of diplomatic behaviour or etiquette. The nature of diplomatic relations has led the International Court of Justice to state unequivocally that the rules of diplomatic law constitute a self-contained regime which on the one hand lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.[52] The heads of mission together at the national capital constitute the diplomatic corps, usually presided over by the longest serving ambassador at that city, who carries the title of Dean of the Diplomatic Corps, and a corresponding Consular Corps. The diplomatic and consular corps as such have an accepted standing in the day-to-day conduct of international business.

The rapid expansion since 1945 of international intergovernmental organizations has produced a new type of representative of a State, namely a Permanent Representative to an organization.[53] The best known of these are the Permanent Representatives to the UN in New York, and the Permanent Representatives

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52 *United States Diplomatic and Consular Staff in Tehran* case, ICJ Rep. 1980, 3, 40 (para. 86).

53 On permanent missions to international organizations, see Dotation Carnegie pour la paix internationale (several editors), *Les missions permanentes auprès des organisations internationales* (Brussels, Bruylant, 1971-1976).

to the International Organizations in Geneva (neither of those cities being the capitals of the countries in which they are situated). The legal basis of this representation rests on treaty, more specifically the headquarters agreement between the host State and the organization and a general agreement on privileges and immunities, frequently an offshoot of the constituent instrument, although by now these have become also rules of customary law.[54] There is no element of reciprocity in it. Likewise, there is no element of generality in the tasks of the representative. Those tasks are functional corresponding to the functions of the organization to which the representative is sent. On the other hand, the host State requires protection. If it wishes to remove a person from its territory, it acts through the international organization unless the matter is settled through bilateral diplomatic channels. While the substantive content of the privileges and immunities of the two classes of representative (and of international officials) is identical in fact, their legal basis is entirely different. Unlike diplomatic relationships, here the relationship is trilateral, between the host State, the sending State and the international organization, and the protection that the host State is entitled to assure for itself can come within the purview of the organization.[55] In addition, the mutual obligations of States in connection with participation in an international organization or conference are unaffected by the absence of recognition of one by the other or by the severance of diplomatic relations between them, nor does the acceptance of a delegation prejudice those questions in any way.

All representatives of States except the three senior dignitaries require appropriate credentials emanating from the competent authority – frequently the Head of State or the Foreign Minister – of the sending State. An ambassador's credentials, Letters of Credence or *Lettres de Créance*, are presented to the Head of the receiving State with due ceremony.[56] Consuls require an *Exequatur* from the host State specifying the district in which the consul may operate: a State may have more than one consular post in a host State with its

54 Cf. the Convention on the Privileges and Immunities of the United Nations 1946, 1 UNTS 15, and the Convention on the Privileges and Immunities of the Specialized Agencies 1947, 33 UNTS. 261. Those Conventions also deal with the status, privileges and immunities of officials of the organizations especially when on mission away from their headquarters.

55 In New York, the General Assembly has established the Committee on Relations with the Host State to deal with this problem. It reports annually to the General Assembly.

56 On diplomacy in general, where it is sometimes difficult to separate the law from protocol, etiquette and tradition, see E Satow, *A Guide to Diplomatic Practice* (5th ed. by Lord Gore-Booth, London. Longman, 1979).

agreement. The Permanent Representative to an international organization is furnished with full powers which are presented to the Secretary-General of the organization in a ceremony modelled on the presentation of *lettres de créance* to the Head of State. They will indicate the extent to which the representative can go in binding the State.[57] In the case of an international conference, the head of the delegation and the other representatives will be furnished with credentials corresponding to the document accrediting the head of a diplomatic mission. The credentials are filed with the Secretariat and the credentials committee will report on them to the conference. The credentials are limited to participation in the work of the conference up to and including its conclusion, but they do not extend automatically to the signing of any treaty adopted at the conference, unless that is specifically mentioned. The reason is that full powers are required to sign a treaty even if it is subject to ratification: obligations enure from signature alone.[58]

Instead of participating fully in a meeting, whether of an organ of an organization or of a conference, a State may be represented by an observer delegation, whose participation in the deliberations will be regulated by the Rules of Procedure. UN practice also allows the participation as observers of recognized national liberation movements and in certain cases of non-governmental organizations. Observer delegations, of whatever kind, do not have the power to vote, and are not included in the calculation of the necessary quorum.

There is nothing to prevent a member of a diplomatic mission to the host State, even its head, from serving as a member of a delegation to a conference taking place in that State. However, this kind of *dédoublement personnel* occasionally creates difficulties and has attracted adverse comments in the ILC. The two major host States for international organizations, Switzerland (Geneva) and the United States (New York), tend to discourage this practice.

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57 For States that are parties to the Conventions on the Law of Treaties, a head of a diplomatic mission by virtue of his functions has power to adopt the text of a treaty between the sending State and the receiving State, and a representative to an organization or to an international conference likewise has power to adopt the text of a treaty. Particular full powers are required to go beyond that in binding the State. Vienna Conventions on the Law of Treaties, Art. 7 (2) (*b*) and 2(*c*). This is probably today a rule of customary law.

58 Vienna Conventions on the Law of Treaties, Art. 7. However, credentials to represent a State in a treaty-making conference do empower the representative to sign the final act of the Conference, even if it embodies a 'minitreaty', such as an agreement to establish a preparatory commission with temporary executive powers pending the entry into force of the treaty.

In all types of representation, the host State is under a special obligation to protect the mission and its members. The frequency of physical attacks on diplomatic missions and their personnel led the General Assembly to adopt the Convention on the Protection and Punishment of Crimes against in 1973 Internationally Protected Persons, including Diplomatic Agents.[59] This provides for the criminalization under the national law of the receiving State of different types of attack on internationally protected persons, that is Heads of State and all representatives, and requires international co-operation in the matter.

§ 7.07. National liberation movements

Like much else, national liberation movements can trace their origin to the League of Nations. There the 'A' mandates under Article 22 of the Covenant, consisting of the territories detached from the Ottoman Empire, had advanced political systems, with which the mandatory authorities, the British and French Governments respectively, had to take account. The Mandate for Palestine went further. Article 4 specifically recognized the Jewish Agency for Palestine as a public body for the purpose of advising and co-operating with the administration of Palestine in such economic, social and other matters as might affect the establishment of the Jewish national home and the interests of the Jewish population in Palestine.[60] In the nature of things this was followed shortly by the administration's recognition of the Arab Higher Committee with similar functions. Those bodies continued into the United Nations until superseded, on the one hand by the State of Israel and on the other by the Palestine Liberation Organization and the Palestine Authority.[61]

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59 1035 UNTS 167. It has been found necessary to extend the scope of that Convention, See General Assembly resolution A/RES/57/28, 19 November 2002.

60 The texts of the League of Nations mandates are conveniently reproduced in UN doc. A/70 (1946). On the status of the Jewish Agency for Palestine, see the pronouncement of the PCIJ in the *Mavrommatis Palestine Concessions* case, Ser. A No 2 (1924) at 21. And see N. Feinberg, 'The Recognition of the Jewish People in International Law', and 'New Terms created in Public International Law by the Jewish Question', *Studies in International Law* 229 and 273 (Jerusalem, Magnes Press, 1979).

61 Israel became a member of the UN on 11 May 1949. The Palestine Liberation Organization, established in 1964 replacing previous organizations, was accorded observer status in the General Assembly by A/Res. 3237 (XXIX), 2 November 1975. Further in A/Res.45/37, 28 November 1990. And see *Application of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* adv. op. ICJ Rep. 1988, 12. In an exchange of letters of 10 September 1993 between Prime Minister Rabin and Chairman Arafat the Government of Israel recognized the PLO as

As an actor on the international plane, a national liberation movement is thus not a new phenomenon. The decolonization resolution 1514 (XV) brought these movements into prominence, especially in Africa. General Assembly resolution 2621 (XXV), 12 October 1970, was a programme of action for the full implementation of the 1960 resolution. Among the actions it proposed was that whenever necessary representatives of liberation movements should be invited by the UN and other international organizations within the UN system to participate in an appropriate capacity in the proceedings of those organs relating to their countries. In many instances, the relevant movement assumed power on decolonization, and in that sense can be regarded as a State *in statu nascendi*. In other instances, however, the primacy of one movement has been challenged, and in some cases the Security Council found the internal disturbances to be a threat to international peace, justifying action by the Council.

Developing international law throughout the last half-century has given cautious acknowledgment to these movements. Attempts have been made to find accommodation for independence movements within the prohibition on the use of force.[62] They do have a certain status in international law, apart from their observer status in the United Nations and other international organizations. Article 3 of the Vienna Convention on the Law of Treaties reserves treaties concluded between States and 'other subjects of international law'. The ILC, in its report on the law of treaties, explained that as meaning 'other entities, such as insurgents, which may in some circumstances enter into treaties'.[63] Article 10 of the draft articles on responsibility of States for internationally wrongful acts deals with what it terms 'Conduct of an insurrectional or other movement'.[64] To some extent that might be relevant to actions attributable to a national liberation movement.

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the representative of the Palestine people. Doc. A/48/486–S/26560. That was followed by a series of agreements between the two bodies. See particularly docs. A/47/180–S/1994/727, A/51/889–A/1997/357. And see G. R. Watson, *The Oslo Accords: International Law and the Israel-Palestinian Peace Agreement* (Oxford University Press, 2000).

62 Cf. Art. 1 (4) of Additional Protocol I of 1977, 1125 UNTS 3.

63 ILC Rep. 1962 (A/5209*) Chap. II, Art. 1, Commentary, para. (8), YBILC 1962/II, 157, 162. The appropriate reservation is maintained in Art. 3 of the Vienna Conventions on the Law of Treaties.

64 See chapter XI §11.03 (ii) below. In the *Certain Phosphate Lands in Nauru* case, the ICJ examined whether before independence the Nauruan authorities had waived certain claims, and found in the negative. ICJ Rep. 1992, 240, 250 (para. 21). The Court's analysis indicates that the acts of authorities of a people before independence can be questioned after independence.

In the UN the evolution of the status of national liberation movements has been political. To some extent the position was clarified in the resolution annexed to the Final Act of the UN Conference on the Representation of States in their Relations with International Organizations. Seven national liberation movements participated in that Conference as observers. That resolution requested the General Assembly to examine the question of ensuring the effective participation of the national liberation movements as observers in the work of international organizations and, to that end, of regulating their status and the facilities, privileges and immunities necessary for the performance of their tasks. In the meantime it recommended to States concerned to accord the necessary facilities, privileges and immunities necessary for the performance of their tasks and to be guided by the pertinent provisions of the Convention.[65] In resolution 37/104, 16 December 1982, the General Assembly invited all States that had not done so, in particular those that were hosts to international organizations or to conferences convened by or held under the auspices of international organizations of a universal character, to consider as soon as possible the question of ratifying or acceding to that Vienna Convention. At the same time it called upon the States concerned to accord with the delegations of the national liberation movements recognized by the responsible regional organization and accorded observers' status by international organizations, the facilities, privileges and immunities necessary for the performance of their functions in accordance with the provisions of the Convention in question.[66] This stresses that those movements take part in the work of the international bodies in the capacity of observers.

The only known incidents of legal significance concerning national liberation movements concern the PLO. In December 1983 the Secretary-General authorized the flying of the UN flag alongside the national flag of the ship concerned on the ships that would evacuate elements of the PLO from Tripoli

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65 See the Final Act of the Conference, above chapter II note 61. And see the opinion of the Office of Legal Affairs of 27 August 1975 containing guidelines for the implementation of different General Assembly resolutions granting observer status on a regular basis to certain national liberation movements. UNJYB 1975 164.

66 The General Assembly repeated this in A/Res.41/71, 13 December 1986. That Convention has not yet entered into force. However, no difficulty has been noted as far as concerns the participation as observers of national liberation movements in universal conferences convened by the UN or in some other way. Most of the African movements concerned at the time have since gained their independence and no longer require special treatment in international organizations.

(Lebanon).[67] In 1987 the United States, acting under United States legislation, sought to close the offices of the PLO's observers' mission to the UN in New York. That led to a dispute between the UN and the United States. The General Assembly requested an advisory opinion of the ICJ on the question whether the United States was obliged to proceed to arbitration on that dispute, according to a provision in the Headquarters Agreement of 1946. The Court answered that question in the affirmative. The competent United States Court later ruled that the international obligations of the United States prevailed over the domestic legislation, and no further steps were taken to close the offices of the Mission.[68] In 1988 when the Host State (the United States) refused to give a visa to the Chairman of the PLO to enable him to enter the United States to appear in the General Assembly, the General Assembly decided to consider that agenda item in plenary in Geneva, without prejudice to normal practice.[69]

National liberation movements have not been accepted as parties to multilateral treaties, even when they have been invited to participate in the conference at which a given treaty was concluded. Thus, at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (the Geneva Conference of 1974–1977), although national liberation movements duly invited to participate in the Conference were accorded a standing under Rule 58 of the Rules of Procedure of that Conference[70], they were not permitted to sign the Additional Protocols since 'liberation movements do not have the status of States'.[71] In the Third United Nations Conference on the Law of the Sea a proposal was made to enable recognized liberation movements to accede to the Convention. The Conference finally decided that the national liberation movements that had participated in the

67 See docs. S/16194 and S/16195, *Resolutions and Decisions of the Security Council 1983* (S/INF/39) 5.

68 *Obligation to Arbitrate* adv. op. above note 61, 12. For the judgment of the United States District Court, Southern District of New York, see *United States* v. *Palestine Liberation Organization* (1988), 82 ILR 282.

69 A/Res.43/49, 2 December 1988. For criticism of this infraction of the Rules of Procedure of the General Assembly, see Y. Blum, above note 24 149.

70 See the *Official Records* of that Conference, vol. II (doc. CDDH/2/Rev.3), 1.

71 A. Sandoz et al. (eds.), *Commentary on the Additional Protocols of 8 June 1988 to the Geneva Conventions of 12 August 1949*, 1068 (para. 3691) (Geneva, ICRC/Nijhoff, 1987). This is significant, after the Algerian Front of National Liberation (FLN) had unsuccessfully tried to become party to the Geneva Conventions of 1949. See on this M. Bedjaoui, *Law and the Algerian Revolution* 183, 189 (Brussels, International Association of Democratic Lawyers, 1961). And see above chapter V note 59.

Conference could sign the Final Act 'in their capacity as observers'.[72] That, however, does not affect their capacity to conclude bilateral treaties with whatever other international entity is concerned, including the former metropolitan State or the State against which they are struggling.[73] It is also probable that engagements made by the proponents of a territory's independence before independence would be considered as binding on the new State after it attains its independence.[74]

In the law of State responsibility, Article 10 of the draft articles on responsibility of States for internationally wrongful acts can be relevant to a national liberation movement that attains its objectives, in whole or in part. By that provision, the conduct of what is there termed an 'insurrectional or other movement' which becomes the new government of a State shall be considered an act of that State under international law. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law. Those provisions are without prejudice to the attribution to a State of any conduct. However, related to that of the movement concerned, which is to be considered an act of that State by virtue of the provisions of the draft articles concerning the attribution of an act to a State. This goes a long way to bringing national liberation movements and other similar political movements within the scope of general international law, and matches the standing already acknowledged to those movements in international humanitarian law.

§ 7.08. The individual

In this context, the word 'entity' does not apply to individuals (other than an individual acting in an official capacity on a behalf of a State or other recognized international entity). The individual, man or woman, is in a *sui generis* position. There are treaties, especially those concerning human rights and international humanitarian law, which formulate rights enuring to individuals

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72 Resolution IV annexed to the Final Act of the Conference, 1185 UNTS 3.

73 The Evian Agreements between France and the FLN were later converted into an international agreement proper through a formal exchange of notes on the occasion of the recognition by France of the independence of Algeria. 507 UNTS 25. And see *Developments* 90.

74 This would follow from the Court's decision on the second Australian objection in the *Phosphate Lands in Nauru* case, above note 64 247 (paras. 12 ff.).

through their quality of human beings, or impose international criminal responsibility on individuals. On the universal level States have established means to enable those individuals to enforce those rights, and in two regions to enable them to bring legal proceedings even against their own State in Human Rights Courts (above chapter III § 3.09). Other treaties may give rights to individuals coming within a defined category, for instance foreigners deprived of their liberty and entitled to consular protection under the Vienna Convention on Consular Relations of 1963.[75] Breaches of the rules of international humanitarian law by an individual, whether acting under authority or not, can today be sanctioned through different international criminal courts that either are already in existence or are coming into existence, including the International Criminal Court. To that extent the individual has a degree of international personality. That personality, however, is a passive personality. It does not resemble the active personality of the other entities mentioned. While those developments, for the most part the product of the second half of the twentieth century, have not changed the *character* of international law as expressed in chapter I, a system of law made by and for independent States, they have certainly wrought profound changes in its substance and application and have required the development of new procedures and attitudes.

In dealing with the position of the individual, a natural or juridical person, in international law, the distinction between the individual acting as a representative of a State or other established entity in international law, and the individual person (including a body corporate) should be noted. Representative status is governed by international law. An individual who is not a representative of an international entity has a passive role in general international law.

Before attempting to answer questions about the standing of the individual human being in international law, one should keep in mind that all law, including international law, is concerned with regulating the conduct of human beings or with drawing conclusions from that conduct. If the conduct is attributable to a State or an international organization, that State or organization enjoys the rights and bears the responsibility that the conduct engenders and the individual concerned drops out of the picture. The State does not have to stand idly by if it is injured or considers that it is about to be injured by the activities of an individual, and may take appropriate action to defend itself and its interests, and those of its nationals, from such actions. Subject to that, if that is

75 596 UNTS 261 and the *LaGrand* case, Judgment of 21 June 2001.

not the case, the individual may well have rights, and equally may well be under duties, according to international law. The fact that there may be procedural obstacles to the direct enforcement of those rights on the international plane, at least without the intervention of the national State, does not alter the fact that those rights exist.

For responsibilities, the position is different. International criminal responsibilities are really of two kinds, those that are justiciable before one of the international criminal courts now functioning, and those that flow from the concept of universal jurisdiction in those instances in which the individual is regarded as *hostis humani generis*, an enemy of all humankind, when the courts of all States can exercise criminal jurisdiction. Piracy is the classic example of this, but not the only one, and most national criminal legal systems assert jurisdiction over persons committing this crime wherever the act took place and whatever the nationality of the accused. Article 105 of the Convention on the Law of the Sea states clearly that on the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, and that the courts of that State may decide on the penalties to be imposed. Other actions which have been criminalized by international treaty come within this category, and many of them are now included in the jurisdiction of the functioning international criminal tribunals or the International Criminal Court.

Traditional international law was inclined to classify the individual as anything but a subject of international law. That is misleading. It confuses the law as it applies to the individual, and the ability of the individual to act on the international plane. That ability is heavily, and in the view of some unjustly, circumscribed by two fundamental rules of international law. The first is the exhaustion of local remedies rule already encountered in connection with individual applications to human rights courts and to treaty organs of human rights treaties. It is not limited to that, and is particularly pressing in claims based on what is termed technically 'denial of justice'. At times the very existence of that rule may lead to a denial of justice. The second is the nationality of claims rule. This requires that a State may take up the case of an individual in international law provided that the individual concerned was a national of that State at the relevant time. The effect of this is that in many cases, unless a treaty provides otherwise, an individual is not able to vindicate a claim against a State otherwise than through his or her national authorities, who have discretion whether to espouse the case and how to present it. This rule applies both to the diplomatic presentation of an individual's claim to another State or international organization, and to its presentation to an international tribunal, especially the International Court of Justice. Since the First World War, and

again as a direct result of the decolonization process in the United Nations, there have been many, and at times multiple, changes of nationality of millions of individuals the world over and the impact of the nationality of claims rule is therefore serious and prejudicial in many cases.[76]

It is partly to overcome the disadvantages of this rule, which is firmly entrenched in modern international diplomatic and legal practice, that different types of claims commissions and arbitral tribunals have been instituted, to which an individual has direct access, though possibly with the participation of the representatives of the State.[77] Today the Iran–United States Claims Commission is the most prominent example of this type of procedure.

Against this background, it is difficult and perplexing to pinpoint the standing and status of the individual in international law. International law certainly gives the individual rights, and it certainly imposes obligations. The individual can rarely exercise those rights directly without some previous initiative on his or her part to obtain a remedy through applicable national procedures. Obligations are another matter, and in criminal cases may even be imposed directly, whether or not the individual's State is a party to the applicable international instrument in issue. This is an unbalanced state of affairs, but no change is likely in the foreseeable future.

§ 7.09. Non-governmental organizations

The intergovernmental organizations must be kept distinct from the non-governmental organizations (NGOs). Several thousand of these exist, and particulars are contained in the *Yearbook of International Organizations*. Naturally, they

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76 As part of an effort to meet this problem, in 1999 the ILC adopted a set of draft articles on nationality of natural persons in relation to succession of States, and recommended to the General Assembly their adoption in the form of a declaration. ILC Rep. 1999 (A/54/10 + Corr. 1, 2) chapter IV. In A/Res.55/153, 12 December 2000, the General Assembly took note of those articles which were annexed to the resolution and invited Governments to take them into account in dealing with issues of nationality of natural persons in relation to succession of States. It decided to include the topic in the provisional agenda of the 59th session (2004). Since then the Commission has commenced examination of the broader topic of diplomatic protection. The work is in its early stages. The Commission is looking at both rules with special reference to their impact on individual rights. See chapter XI notes 64 and 65 below.

77 In 1993 the Permanent Court of Arbitration adopted a set of optional rules for arbitrating disputes between two parties of which only one is a State, and in 1996 it adopted optional rules for arbitration between international organizations and private parties. Above chapter III note 6.

vary considerably in scope, field of operation, composition and standing. Some enjoy great prestige and perform valuable work which intergovernmental organizations might not always be able to undertake, or undertake directly. Many are incorporated under a system of national law or otherwise endowed with legal personality, and may even be subject to financial controls by national authorities, especially if there is an element of 'trust' in their make-up or financial arrangements, including tax exemptions. The International Commission of Jurists, Amnesty International and Greenpeace are among the best known of the NGOs working, the first two in the field of human rights, and the third for the protection of the environment on both a local and a planetary scale. The International Astronautical Federation has carried out important interdisciplinary, exploratory and preparatory work concerning the legal and practical problems of outer space and its increasing uses, especially before the topic had sufficiently advanced to be regulated by a series of international treaties (see chapter IX below). International civil aviation could not operate successfully without the active involvement of the International Air Transport Association (IATA).[78] Sectorial and professional interests are also organized in appropriate NGOs. For the law, alongside the Institute of International Law and the International Law Association, both specialized bodies dealing with both public and private international law, there are other associations such as the International Commission of Jurists and the International Bar Association. An International Criminal Defence Association has also recently come into existence.

Many NGOs have been accorded a status and limited rights in relation to different organs of the major international organizations, especially the UN and its specialized agencies. This is known as *consultative status*. There are several gradations of this, following the principle set out in Article 71 of the Charter. That empowers ECOSOC to make suitable arrangements for consultation with NGOs which are concerned with matters within its competence, and other international organizations, especially the specialized agencies, may make similar arrangements. Consultative status is not merely a question of prestige. It carries with it a recognized standing and a corresponding responsibility in the matters for which the NGO is competent, and entitles it to certain limited rights and privileges in its relations with the intergovernmental organization concerned. Although there is much political controversy over the issue of consultative status, Article 71 is an important provision of the Charter and on the whole it has proved valuable in practice. If a question arises in which an NGO en-

78 See chapter IX § 9.02 below.

joying consultative status has been involved, the proceedings of that NGO would form part of the material to be studied in connection with the case.

With the rapid expansion of the UN which now embraces many States that lack the necessary professional human resources to enable them to cope with the increasing international demands for political decisions of planetary significance, the role of NGOs in supplying technical advice to unequipped delegates and delegations in international conferences, including the general meetings of intergovernmental organizations, is increasing, and it is even becoming a cause for concern. Responsible though they might be in their specialized fields, NGOs do not carry the general political responsibility to a national constituency that a Government carries. This has endowed some NGOs with an unbalanced political approach to highly controversial issues. It is no secret that the two advisory opinions on the legality of the threat or use of nuclear weapons, requested by the World Health Assembly in 1993 and by the UN General Assembly in 1994, were largely promoted by politically interested NGOs without adequate consideration of the political and military factors involved, and it is an open question whether the results achieved have really furthered the cause of nuclear disarmament, in which all Governments and all peoples have a vital interest.[79] The NGOs were particularly active in the preparations for the Rome Conference on the International Criminal Court, in the Conference itself, and in the ratification process to bring the Statute into force. They were organized in the NGO Coalition for an International Criminal Court, and in all no less than 236 NGOs were accredited to the Rome Conference, by far outnumbering the official delegations.[80] Again it is an open question whether their combined pressures have really achieved the desired objective, although certainly a few

79 In the World Health Assembly one NGO went so far as to state its willingness to raise extra-budgetary funds to enable the Organization to participate in the advisory proceedings, after the responsible official of the WHO had indicated that there was no provision for this in its current budget (an unacceptable argument in itself). See WHO, Fifty-fourth World Health Assembly, *Verbatim Records*, Plenary Meetings (WHA45/1992/Rec/2) and Sh. Rosenne, 'The Nuclear Weapons Advisory Opinions', 27 IsYBHR 263, 271 note 6 (1998).

80 W. R. Pace and M. Thieroff, 'Participation of Non-Governmental Organizations', Roy S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute: Issues/Negotiations/Results* 391, 392 (The Hague, Nijhoff, 1999). In the words of one observer, in the Conference they were 'obdurate' and 'bluntly eschewed compromise, overlooking the need to reassure responsible military leaders'. R. Wedgwood, 'Fiddling in Rome: America and the International Criminal Court', *Foreign Affairs*, November/December 1998, 20, 21. That attitude is not consonant with diplomatic practice.

of the well-established NGOs active in the sphere of human rights more generally were helpful in the Conference.

There is on record one international arbitration between a State and an NGO. That is the *Rainbow Warrior* case which went through several phases. The incident involved the destruction by French representatives, in violation of the territorial sovereignty of New Zealand, of the *Rainbow Warrior*, a vessel belonging to Greenpeace, an NGO. On the international level this was technically a dispute between New Zealand and France. However, in the diplomatic phase New Zealand insisted on adequate compensation being paid to Greenpeace and to a Dutch citizen on board who was killed in the incident. In the diplomatic negotiations agreement was reached between the French Government and representatives of Greenpeace regarding compensation for the destruction of the ship.[81]

During the latter part of the twentieth century a new personality began to appear on the international scene, the indigenous people. In resolution 50/157, 21 December 1995, the General Assembly adopted a wide Programme of Activities for the International Decade of the World's Indigenous Peoples. Its goal is to strengthen international co-operation for the solution of problems faced by indigenous peoples in such areas as human rights, the environment, development, education and health. The problem is not an easy one, as in many cases, for instance in Canada and the United States, and again in New Zealand, relations between the Europeans and the indigenous peoples were settled by treaty or agreement, and with the revival of national consciousness, demands based on those agreements are appearing. In resolution 2000/22, 28 July 2000, the ECOSOC established a Permanent Forum on Indigenous Issues as a subsidiary organ. This resolution is said to integrate indigenous peoples and their representatives into the structure of the United Nations. The Forum commenced operating in 2002.

81 French memorandum to the Secretary-General of the United Nations, reproduced (in translation) in 74 ILR 241, 274 (1986), and para. 7 of the ruling of the Secretary-General of 6 July 1986, reproduced in para. 12 of the arbitration between New Zealand and France in the *Rainbow Warrior* case. XX RIAA 215, 224 (30 April 1990).

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CHAPTER VIII

MARITIME SPACES

Θάλαττα θάλαττα; Xenophon.

§ 8.01. The law of the sea in the twentieth century

Through all the bitterness, bloodshed, strife and crises of the twentieth century, one topic has been continuously on the international agenda. That is the law of the sea. Since the sea covers more than 70 per cent of the earth's surface, and the oceans are a major component of the world's ecosystem and biosphere, and a major source of food, anything to do with the sea is of immediate and general international and human concern. As a result of all this activity, the law of the sea at the end of the century bears little resemblance to what it was one hundred years earlier.

International treatment of the law of the sea during the twentieth century falls into four periods. Up to 1914 it was concerned with warfare at sea and the rights and duties of neutrals. It defined what would legitimately be a theatre of belligerent operations at sea, at least for the purposes of exercising the right of prize – pitting belligerents against neutrals.[1] For that purpose, the relevant Hague Conventions of 1899 and 1907 oversimplified matters (as we were to learn later) by merely dividing the sea into territorial waters and high seas. In doing this, a warning uttered by a representative of Norway was swept under

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1 For an overview of this problem in relation to the 3-mile rule for the breadth of the territorial sea, see J. H. W. Verzijl, *Le droit des prises de la grande guerre* 270 (Leyden, Sijthoff, 1924); W. Garner, *Prize Law during the World War: A Study of the Jurisprudence of the Prize Courts, 1914–1924*, 224 (New York, Macmillan, 1927); S.W.D. Rowson (Shabtai Rosenne), 'Prize Law during the Second World War', 14 BYIL 160, 174 (1947); C. John Colombos, *A Treatise on the Law of Prize* 121 (3rd ed. London, Longmans Green, 1949). For an earlier account of this problem following the Napoleonic Wars, see A. de Pistoye & Ch. Duverdy, I *Traité des prises maritimes* 92 (Paris, Auguste Durand, 1859).

the carpet: 'In the first place, the boundaries of territorial waters are very uncertain and are determined along very different lines by different States'.[2] Prophetic words!

The second phase started in 1924 and ended in apparent failure in 1930. As part of its project of codifying international law (above chapter II § 2.09), the League of Nations chose the law of territorial waters for immediate action. Many persons thought that it would be relatively easy to secure universal acceptance of three nautical miles (nm) as the breadth of territorial sea and agreement on the concept of innocent passage through the territorial waters, including straits of up to six nms in width between two States.[3] However, the Conference soon discovered that there was no general agreement on that. Although it made some technical progress on several aspects of the determination of the baselines from which the territorial waters would be measured and on the general question of the right of innocent passage through territorial waters, the absence of agreement on this fundamental question left the work incomplete and as drafts. The deteriorating international situation of the 1930s prevented further action by the League of Nations. The Second World War (1939–1945) again brought out questions of the exercise of belligerent rights at sea and the extent of the theatre of naval warfare, a repetition on a grander scale of what had occurred a generation earlier.[4]

The third phase began shortly after the establishment of the United Nations. One of the first topics that the ILC chose for codification was the law of the high seas, shortly to be joined by the law of the territorial sea (as it is now called), and later combined into a unified law of the sea. The Commission submitted its report on the law of the sea in 1956. That led to the UN Confer-

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2 *The Proceedings of the Hague Peace Conferences: The Conference of 1907*, vol. III, 580 (J. B. Scott, ed. New York, Oxford University Press, 1921). The speaker was Ambassador Hagerup, at the 3rd meeting of the Second Subcommission of the Third Commission, on 27 July 1907. Since then, all the conferences on the law of the sea have steered clear of the law of war at sea. Nevertheless, highly qualified informal bodies have turned their attention to it. See, for instance, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (L. Doswald-Beck, ed., Cambridge, Grotius Publications, 1995).

3 Although a nm is technically one per degree of latitude at the equator, the international nm has a conventional value of 1,852 metres (6,080 feet). University of Virginia, Center for Oceans Law and Policy, II *The United Nations Convention on the Law of the Sea 1982: A Commentary* 44 (S. N. Nandan and Sh. Rosenne, eds. Dordrecht, Nijhoff, 1993) (hereafter *Virginia Commentary*).

4 For an inside look at legal aspects of this, by one who was the legal adviser most directly concerned, see A. Carty and R. A. Smith, above chapter II note 50.

ence on the Law of the Sea of 1958, which shattered the unified law of the sea prepared by the Commission. Instead it produced four self-standing Conventions and an Optional Protocol, all still in force:[5]

- Convention on the Territorial Sea and Contiguous Zone;[6]
- Convention on the High Seas;[7]
- Fishing and Protection of the Resources of the High Seas;[8]
- Convention on the Continental Shelf;[9]
- Optional Protocol concerning the Compulsory Settlement of disputes.[10]

Together with these instruments, the Final Act of the Conference contains series of resolutions.[11] But agreement on the breadth of the territorial sea still eluded

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5 Each Convention came into force on a different date, and with different parties. The relevant documentation is reproduced in III *Virginia Commentary* at 461 (Report of the Second Committee of the 1930 Conference), 491 (Final Act, Conventions and Optional Protocol, Resolutions and related documents of the First UN Conference on the Law of the Sea [1958]); 535 (Final Act of the Second UN Conference on the Law of the Sea [1960]}. For the full documentation on the work of the League of Nations see above chapter II note 55; and of the United Nations, YBILC, 1950 to 1956 (passim); UN Conference on the Law of the Sea, *Official Records* (1958); Second UN Conference on the Law of the Sea, *Official Records* (1960); Third UN Conference on the Law of the Sea, *Official Records* (1973–1982); R. Platzöder, ed. *The Third United Nations Conference on the Law of the Sea: Documents* (Dobbs Ferry NY, Oceana, 1982–1988). Art. 311(1) of the 1982 Convention provides that the 1982 Convention shall prevail, as between States parties, over the Geneva Conventions of 1958. A few States remain as parties to one or more of the 1958 Conventions without having become a party to the 1982 Convention.

6 516 UNTS 205.

7 450 UNTS 11.

8 559 UNTS 285.

9 499 UNTS 311.

10 10 450 UNTS 169. In the Third Conference, the compulsory settlement of disputes, with defined exceptions, was an integral part of the negotiation. Part XI, section 6 (Arts. 186 to 191 and Part XV (Arts. 279 to 299), with Annexes V, VI, VII and VIII of UNCLOS deal with this aspect. They raise many problems and space does not permit adequate examination here. One of the organs established by UNCLOS is ITLOS, above chapter III § 3.07. In this book, the acronym UNCLOS refers to the Convention, following current usage of the UN and of States. Previously, the acronyms UNCLOS I, UNCLOS II and UNCLOS III referred to the First, Second and Third UN Conferences on the Law of the Sea and LOSC to the Convention. This change causes confusion. See W. R. Edeson, 'Confusion over the Use of "UNCLOS" and References to other Recent Agreements:', 15 *International Journal of Marine and Coastal Law* 413 (2000). The 1958 Conventions are now known collectively as the Geneva Conventions of 1958. See Art. 311 (1) of the 1982 Convention.

11 450 UNTS 11.

the international community. This aside, the Conference made a major contribution to rules for the delimitation of the territorial sea in different geographical formations, and on many other general aspects of the international law of the sea, particularly in the sphere of international communications including communication by air – free over the high seas – and by cables and pipelines. It also produced the first attempt to establish a legal regime for the new institution of the continental shelf, with its vast and at the time largely untapped mineral resources, especially hydrocarbons. The absence of agreement on the breadth of the territorial sea nevertheless punched a hole through the heart of the work of this Conference, although it laid the foundation for later more complex agreements combining the breadth of the territorial sea with coastal State rights and duties for the management of the living resources not only in an adjacent zone known as the Exclusive Economic Zone (EEZ, in § 8.04 below), but also for some stocks in the high seas.

The United Nations convened a second conference in 1960 for the purpose of considering further the questions of the breadth of the territorial sea and fishery limits. This showed growing realization that the topic of fishery limits is at least ancillary to if not part of coastal State rights and interests in the territorial sea, namely its rights over natural resources (particularly living resources) adjacent to but beyond the outer limit of the territorial sea, and its responsibilities for their management. That Conference too failed, by a narrow margin, to reach agreement.

Those Conferences brought out that in dealing with those issues, the problems became political in the widest sense of the term, not legal, and could best be resolved through a political approach with strong legal backing. The basic problem today facing the international community concerns fishing, and has been well expressed by the Appellate Body of the World Trade Organization:

> One lesson that modern biological sciences teach us is that living species, though in principle capable of reproduction and, in that sense,"'renewable" are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities. Living resources are just as "finite" as petroleum, iron ore and other non living resources.[12]

But fishing is not the only ingredient of modern pressures on the sea's resources. After the 1960 Conference, it became clear that the conflicting interests to be

12 WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998.

reconciled are the requirements of navigation, national security, economic interests, and the protection of the environment on a worldwide scale, and that there is an inherent tension between the codified law produced through the ILC and its development through political processes. Freedom of navigation (and overflight) requires adequate protection for the coastal State. The emerging concept of fisheries management, aggravated by rapidly developing science and technology for fishing and for the preservation of the catch for commercial use, leads to conflicts between coastal States and long-distance fishing States, challenging the basic concept of the freedom of fishing on the high seas. The growth of the world's population and changing dietary habits especially in the Western world have added pressures on the world's fish stocks. Added to these are problems of protection of the marine environment from pollution (including overfishing), securing access to the sea for landlocked and other geographically disadvantaged States (the number and geographical distribution of which have increased markedly through the decolonization process), and dealing with newly discovered mineral resources of the sea bed and subsoil, both the continental shelf in the relatively shallow seabed immediately adjacent to the coast and, as the century advanced, mineral resources containing metals of strategic importance lying several kilometres below the surface in the deep seabed. The new political approach came from an unexpected source.

On 1 November 1967 the representative of Malta to the UN, Ambassador A. Pardo, delivered a memorable address to the General Assembly.[13] In it he raised the issue of the internationalization of the mineral resources of the seabed beyond the limits of national jurisdiction, that is beyond the outer limits of the continental shelf, especially polymetallic nodules. By that time, technological advances had shown that the definition of continental shelf in the 1958 Convention, based on criteria of depth and exploitability, was inadequate (see § 8.05 below). With much less publicity, the United States and the Soviet Union had been examining the possibility of agreement on the breadth of the territorial sea and what now had come to the fore in that context, freedom of navigation and of overflight for military and civilian ships and aircraft through and over straits used for international navigation that would become territorial sea with any agreed extension of its breadth beyond the traditional (but not accepted universally) three nms.

The preliminary investigations in the UN brought out – what many had regarded as obvious – that a regime for the resources of the seabed beyond the

13 22 GAOR First Committee, A/C.1/PV 1515 and 1516.

limits of national jurisdiction (which the General Assembly impulsively called 'the common heritage of mankind', a term more appropriate to the whole of the sea and all its resources), could not be isolated from the general law of the sea.[14] That led to the conclusion that another conference on the law of the sea was needed to deal comprehensively with all the major aspects of the sea and its living and mineral resources. General Assembly resolution 2750 C (XXV), 17 December 1970, listed these as including the regime of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal States), the preservation of the marine environment (including, *inter alia,* the prevention of pollution) and scientific research. That was no small matter for a diplomatic conference to handle! After preparatory work between 1968 and 1973, the Third Conference was convened in December of 1973. It ended with the adoption of the UN Convention on the Law of the Sea on 10 December 1982, Human Rights day – a treaty of 320 articles and nine annexes, together with some other understandings annexed to the Final Act of the Conference.[15]

With that, the fourth and current phase began and it shows that UNCLOS is not and cannot be the last word on the matter. UNCLOS requires sixty ratifications or accessions for its entry into force one year later. That figure was reached on 16 November 1993, triggering a series of activities required for the smooth entry into force of UNCLOS on 16 November 1994 and the installation of the different bodies established by it. None of the industrialized

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14 On the concept of the common heritage of mankind as applied to the law of the sea, see UN, Division for Ocean Affairs and the Law of the Sea [DOALOS], *Concept of the Common Heritage of Mankind: Legislative History of Articles 133 to 150 and 311 (6) of the United Nations Convention on the Law of the Sea* (UN, 1996); M. C. W. Pinto, 'Common Heritage of Mankind' From Metaphor to Myth, and the Consequences of Constructive Ambiguity', *Theory of International Law at the Threshold of the 21st Century: Essays in honour of Krzystof Skubiszewski* 249 (The Hague, Nijhoff, 1996). In his acceptance of the presidency of the first Conference, Prince Wan Waithayakon (Thailand) referred to the whole of the sea as the common heritage of mankind. UN Conference on the Law of the Sea, II *Official Records*, 1st plenary meeting.

15 For the Convention, see 1833 UNTS 3. For the Final Act see 1135 UNTS 3. For the *Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, annexed to A/Res. 48/263, 28 July 1994, see UNTS # 31364; International Seabed Authority, *Compendium of Basic Documents* 1 (Jamaica, ISA, 2001); VI *Virginia Commentary* 857. On that Agreement, see § 8.07 below.

States of the West or the then Socialist States of Eastern Europe were among the sixty States that had brought UNCLOS into force. That was due to dissatisfaction with the regime established in Part XI of UNCLOS for the international seabed area. That meant that the institutions to be established by UNCLOS, particularly the Council of the International Seabed Authority, the ITLOS, and the Commission on the Limits of the Continental Shelf (CLCS), could not be composed in a politically balanced way as the Convention requires, and that adequate funds for those new institutions would not be forthcoming. The UN Secretary-General Pérez de Cuéllar commenced discreet negotiations to remedy this state of affairs, continued by his successor, Boutros Boutros-Ghali. In 1994 they were hastened both by the Convention's imminent entry into force and by the collapse of the strict Communist regimes of Eastern Europe. Agreement relating to the Implementation of Part XI of the Convention was reached in the middle of 1994 (see § 8.07 below), and that greatly accelerated the ratification process in nearly all the countries that had held reservations to the Convention in its original form.[16]

The end of the Conference also spurred widespread activity for delimiting the different maritime zones, both unilaterally in legislation, and where necessary through the conclusion of appropriate agreements, or through litigation.[17] By mid-1997 all the institutions established by UNCLOS had commenced functioning. The ISA held its first session at Kingston, Jamaica (its seat) in 1994–1995. The Judges of the ITLOS were elected in August 1996,[18] and by the end of

16 As at 31 September 2002, 141 States (including the European Community) were parties to the Convention and 111 to the 1994 Agreement. *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2002* (ST/LEG/SER.E/21), 230, 266.

17 The legislation is now reproduced in publications of the DOALOS: *The Law of the Sea: National Legislation on the Exclusive Economic Zone* (1985)*, the Economic Zone and the Exclusive Fishery Zone* (1986, 1993); *National Legislation on the Territorial Sea* (1995), *the Right of Innocent Passage* (1995) *the Contiguous Zone* (1995), and *National Legislation on the Continental Shelf* (1989), and Office of Ocean Affairs and the Law of the Sea [OOALOS], *The Law of the Sea, Maritime Boundary Agreements (1942-1969)* (1991)*, Maritime Boundary Agreements (1970-1984)* (1987) and *Maritime Boundary Agreements (1985-1991)* (1992). Current information is published in the *Law of the Sea Bulletin*, issued three times a year by DOALOS. See also the important publication sponsored by the American Society of International Law, *International Maritime Boundaries* (J. Charney and L. M. Alexander, eds., The Hague, Nijhoff, 1993) (also available on CD-ROM).

18 On the first election of the Members of ITLOS, see the report of the fifth meeting of States Parties (SPLOS/14, 20 September 1996). On the first organizational meetings of ITLOS, see the Report of ITLOS for the period 1996–1997, doc. SPLOS/27, 23 April 1998. These documents are reproduced annually by the Netherlands Institute for the

1997 the Tribunal had completed its internal organization and received its first case.[19] The CLCS was established in 1997. The Meeting of States Parties elects the members and has continuing functions in relation to each, from each of which it requires an annual report. The ISA and ITLOS have been granted observer status in the UN General Assembly.[20]

The entry into force of the new Convention – now the dominant international legal instrument regulating all matters connected with the sea – has not meant the end of international concern with the sea. The UN General Assembly requires an annual report by the Secretary-General on the law of the sea.[21] That annual report is not limited to developments concerning the implementation of UNCLOS. This report, frequently supplemented by special reports on named topics, ensures that ocean affairs in the broad sense remain on the international agenda.

Besides the UN, two specialized agencies, the International Maritime Organization (IMO) and the UN Food and Agriculture Organization (FAO), are continuously involved in the two major aspects of oceans affairs of general interest – maritime communications and the protection of the marine environment,[22] and the seas as a source of food, including universal aspects of fisheries management. The protection of the marine environment, which includes also its biological resources and their environment, assumed an important place in the UN Conference on Environment and Development – the Rio Conference – of 1992.[23] Chapter 17 of Agenda 21 dealt with the protection of the oceans and the protection, rational use and development of their living resources. It

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Law of the Sea (NILOS) in the *NILOS Yearbook*.

19 ITLOS, *Basic Documents 1998* (The Hague, Nijhoff, 1999).

20 A/Res. 51/6, 24 October 1996 (ISA) and 51/204, 17 December 1996 (ITLOS).

21 A/Res. 49/23, 5 December 1994. This action by the General Assembly is in addition to the requirements of UNCLOS (Art. 319 (2) (*a*)) for the Secretary-General of the UN to report to all States parties, the ISA, and competent international organizations on issues of a general nature that have arisen with respect to UNCLOS. The Secretary-General explained how he understood that reporting function in a note submitted to the 37th session of the General Assembly, 37 GAOR, annexes, a. i. 28 (A/37/561, 1982). Discussed more fully in V *Virginia Commentary*, 291. That was approved by the General Assembly in A/Res. 37/66, 3 December 1982. In A/Res. 54/33, 24 November 1999, the General Assembly introduced a new open-ended informal consultative process to facilitate its annual review of the Secretary General's report.

22 Sh. Rosenne, 'The International Maritime Organization Interface with the Law of the Sea Convention', *Current Maritime Issues and the International Maritime Organization* 251 (M. Nordquist & J. N. Moore, eds. The Hague, Nijhoff, 1999).

23 Report of the United Nations Conference on Environment and Development (A/CONF.151/26/Rev.1 (1992)).

led to the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.[24] Natural biogeography does not sit easily with artificial man-made lines of delimitation and jurisdiction. Nor does the geomorphology of the seabed, as will be seen later. Formal and esoteric to some extent though those elements might seem, they signify perhaps more than anything else how matters concerning the oceans have now become a major element of present-day international affairs. Annual reporting feeds the political dimension of the international interest. It also reflects that virtually every branch of human knowledge and experience is involved in ocean affairs.

Throughout the century questions relating to the law of the sea have come before the ICJ and international arbitral tribunals.[25] There has been a constant interplay between the diplomatic actions in the conferences and other diplomatic procedures, and the judicial activities of the Court and other tribunals. Four elements of the modern law of the sea particularly affected by this judicial activity concern the determination of the baselines from which the territorial sea is to be measured and related questions, passage through straits used for international navigation, aspects of the coastal State's rights in the adjacent area of sea, and the definition of the continental shelf. That includes the delimitation of overlapping claims, of areas of shelf and of areas of EEZ or fishery zones. This has led the law, and lawyers, into the intricacies of the arcs of circle method of drawing the outer limits of the territorial sea, and into the complexities and esoterica of loxodromes and geodesics for determining other maritime boundaries over long distances. The first case involving the management of a highly migratory stock came before ITLOS and an Arbitral Tribunal under Annex VII of UNCLOS in 1999-2000, the *Southern Bluefin Tuna* arbitration between Australia and New Zealand as one party, and Japan.[26]

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24 UNTS No. 37924; J.-P. Lévy and G. G. Schram, *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks* (The Hague, Nijhoff, 1996); ISA *Compendium* 271, above note 15.

25 Cf. B. Kwiatkowska, *Decisions of the World Court relevant to the UN Convention on the Law of the Sea* (The Hague, Kluwer Law International, 2002). In resolution 57/141, 12 December 2002, the General Assembly paid tribute to the important and long-standing role of the ICJ with regard to the peaceful settlement of disputes concerning the law of the sea.

26 For the proceedings in ITLOS, see ITLOS Rep. 1999, 262, 268, 274, 280. For my comment on that phase, see Sh. Rosenne, 'The International Tribunal for the Law of the Sea: Survey for 1999', 15 *The Int'l J. of Marine and Coastal Law* 443, 463 (2000).

In brief, the law of the sea at the end of the twentieth century shows more fundamental changes in comparison with what it was at the beginning of the century than any other branch of international law then existing (apart from the law governing the use of force). These changes reflect the extraordinary broadening of scientific knowledge about the sea and its resources and about the world generally combined with the very rapid technological advances leading to the hi-tech revolution of the twentieth century. The basic principle of the law remains, that maritime rights derive from the coastal State's sovereignty over the land, epitomized in the principle that the land dominates the sea.[27]

§ 8.02. The territorial sea

It is not necessary here to rehearse the provisions of the 1982 Convention on the territorial sea and contiguous zone (Part II, Articles 2–33). They largely repeat and update the relevant 1958 Convention. However, the agreement on a breadth not exceeding 12 nms measured from the baseline is the first of the major changes of 1982, and the first step in abridging the traditional freedom of the seas, although many States do not have the resources necessary to police effectively such vast areas of ocean space.

UNCLOS distinguishes between the landward limit of the territorial sea and its seaward limit. The landward limit is called the *baseline*, and everything between the coast and the baseline, technically internal waters, is part of the State's territory for all purposes.[28] The normal baseline is the low-water line along the coast (Article 5). A series of provisions deals with different coastal configurations and natural features, which can distance the baseline from the

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For the Arbitral Award of 4 August 2000 see 110 ILR 508. The ability of courts to settle disputes about fishery management is limited. The more likely probability is that a carefully crafted judicial pronouncement may lay the basis for an agreed settlement. See on this B. Mansfield, 'Letters to the Editor – The Southern Bluefin Tuna Arbitration: Comments on Professor Barbara Kwiatkowska's Article', 16 *The Int'l J. of Marine and Coastal Law* 361 (2001). The article is at page 239. Mansfield was counsel for New Zealand in both phases of that case.

27 Summarized in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, 15 March 2001 (para. 185).

28 OOALOS, *Baselines: National Legislation with Illustrative Maps* (1989); DOALOS, *Handbook on the Delimitation of Maritime Boundaries* (2000). This can be important in connection with the territorial application of a treaty. Art. 29 of the Conventions on the Law of Treaties provides that unless a contrary intention is established, a treaty applies to the entire territory of a State party. That includes the territorial sea. 1155 UNTS 331.

coast. One of the most important is Article 7. That allows straight baselines in localities where the coastline is deeply indented and cut into and in other like geographical circumstances, and it gives effect to the judgment of the ICJ in the *Fisheries* case.[29] These lines must not depart to any appreciable extent from the general direction of the coast.

Section 3 (Articles 17 to 32) deals with innocent passage in the territorial sea. Ships of all States enjoy the right of innocent passage, the details of which are set out in Articles 18 (meaning of passage) and 19 (meaning of innocent passage). Passage, continuous and expeditious traversing the sea, is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. The Convention places its emphasis on the activities of the ship as determining the innocence of the passage, not on the perceptions of the coastal State.

In a zone contiguous to the territorial sea, extending not more than 24 nms from the baseline, the coastal State may exercise control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory.[30] The coastal State has no sovereignty or sovereign rights over the sea for these control purposes, which do not come within the concept of the marine natural resources over which the coastal State has sovereign rights.

§ 8.03. International straits and archipelagic States

At the beginning of the 20th century, all the States bordering the world's three major straits or controlling their coasts – the Straits of Dover, Gibraltar and Bab-el-Mandeb – accepted a narrow belt of territorial sea of not more than three nms. Furthermore, freedom of passage for all ships was a vital interest for them. Other important straits were governed by treaties. Those were the Turkish Straits giving access to the Black Sea, the Danish Straits giving access to the Baltic, and the Strait of Magellan at the southern tip of the American Continent, joining

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29 U.K. *v*. Norway, ICJ Rep. 1951, 116. And see OOALOS, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (1989).

30 In its judgment in the *Saiga No. 2* case, ITLOS stated that UNCLOS does not empower a coastal State to apply its customs laws in respect of any other parts of the EEZ. ITLOS Rep. 1999, 10, 54 (para. 127). For my comments on that Judgment, above note 26, 449. Art. 303 gives the coastal State control over archaeological and historical objects found at sea and especially in the seabed of the contiguous zone. This has been amplified by the UNESCO Convention for the Protection of the Underwater Cultural Heritage of 2 November 2001. See § 8.10 below.

the Atlantic and Pacific Oceans.[31] A few other straits in this position did not present a serious international problem.

The agreed extension of the breadth of the territorial sea coupled with the independence of many coastal and archipelagic States has changed this radically. It became imperative to reinterpret the legal regime so that, while providing the coastal State with necessary security, it would ensure that all major navigational routes would remain open at all times to free passage and overflight for civil and military ships and for all aircraft. The issue arose in the 1958 Conference but in the absence of agreement on the breadth of the territorial sea, no acceptable solution could be found. This therefore became a major issue in the Third Conference. Part III (Articles 37 to 45) of the Convention, on straits used for international navigation, and especially the rules for transit passage give the answer for straits,[32] and Part IV (Articles 46 to 54) for archipelagic States.[33]

The essence of transit passage is that all ships and aircraft enjoy the right of transit passage. By Article 38, 'transit passage' means the exercise, in accordance with Part III, of the freedom of navigation and overflight solely for continuous and expeditious transit of the strait between one part of the high seas or an EEZ and another part of the high seas or an EEZ. Any activity that is not an exercise of the right of transit passage through a strait remains subject to the other provisions of UNCLOS. For their part, ships and aircraft in transit passage are to proceed without delay through or over the strait, refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait or in any other manner in violation of the principles of international law embodied in the Charter, refrain from any activities other than those incidental to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress, and comply with other relevant provisions of Part III of UNCLOS. Ships in

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31 Art. 35 (3) leaves unaffected the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits.

32 H. Caminos, 'The Legal Régime of Straits in the 1982 Convention on the Law of the Sea', 205 *Recueil des cours* 9 (1987-V); S .N. Nandan and D. H. Anderson, 'Straits used for International Navigation: Commentary on Part III of the United Nations Convention on the Law of the Sea', 60 BYIL 159 (1989); DOALOS, *Straits used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea* (1992).

33 OOALOS, *Archipelagic States: Legislative History of Part IV of the United Nations Convention on the Law of the Sea* (1990); *Practice of Archipelagic States* (1992).

transit passage are to observe all generally accepted international regulations for safety at sea and the control of pollution from ships, and aircraft are to observe ICAO's Rules of the Air and safety regulations, and are to monitor the radio frequency designated by the appropriate air traffic control or the appropriate international distress radio frequency (Article 39). Research or survey activities may only be undertaken with coastal State authorization (Article 40). The coastal State may establish sea lanes and traffic separation schemes after referral to IMO for adoption (Article 41). A regime of non-suspendable innocent passage applies in other straits (Article 45).

Navigation through archipelagic States parallels the freedom of transit through straits used for international navigation. The question of archipelagos had been superficially discussed in the earlier conferences, but had encountered strong opposition from the principal maritime States. The Third Conference could not avoid the issue. It decided to exclude from consideration both continental archipelagos, meaning a group of islands attached to a mainland State, and widely scattered islands together forming a State. Greece and its islands illustrate the former, and the Federated States of Micronesia and the Marshall Islands, both a product of decolonization, are examples of the latter. The solution reached was a carefully drawn definition of an archipelagic State, with a right of innocent passage through archipelagic waters, coupled with a right of archipelagic sea lanes passage, corresponding *mutatis mutandis* to transit passage, through properly designated sea lanes adopted after referral to IMO.

An archipelagic State is a State made up wholly by one or more archipelagos, that is a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such (Article 46). The prime examples are Indonesia and the Philippines. A State that would qualify as an archipelagic State is not obliged to accept that status. Prime examples are Japan and the United Kingdom. An archipelagic State may draw archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago, provided that within the lines are included the main islands and an area in which the ratio of the area of water to the area of land, including atolls, is between 1 to 1 and 9 to 1 (Article 47). The archipelagic baselines are the lines from which all the other maritime zones are measured (Article 48), and they correspond to the baselines of continental States. The sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines (archipelagic waters) and the superjacent airspace, to the territorial sea, and to the bed and subsoil and the resources of the archipelagic

waters (Article 49). Foreign ships have the right of innocent passage through archipelagic waters (Article 52). The archipelagic State is to respect existing agreements, traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters (Article 51).[34]

If the extension of the territorial sea to 12 nms is a major erosion of the freedom of the seas, the introduction of the regime of transit passage through straits used for international navigation and its parallel, archipelagic sea lanes passage through or over archipelagic waters, goes some way towards limiting its impact. No major unsettled disputes involving these matters have been recorded since the 1982.[35]

§ 8.04. The exclusive economic zone

Another major innovation of the 1982 Convention is the Exclusive Economic Zone (Part V, Articles 55 to 75).[36] The EEZ is an area of sea and seabed beyond and adjacent to the territorial sea, extending up to 200 nms from the

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34 Issues of this kind arose in the *Qatar-Bahrain* case, above note 27.

35 One of the major contentions regarding straits concerning the Strait of Tiran and the Gulf of Aqaba has been resolved by Art. 5 (2) of the Treaty of Peace between Israel and Egypt of 26 March 1979 and Art. 14 (3) of the Treaty of Peace between Israel and Jordan of 26 October 1994. 1138 UNTS 59 and UNTS # 35325. This latter is now complemented by the Maritime Boundary Agreement of 18 January 1996, UNTS # 35333. See R. Lapidoth-Eschelbacher, *The Red Sea and the Gulf of Aden* (Dordrecht, Nijhoff, 1982); Sh. Rosenne, 'Israel and the First United Nations Conference on the Law of the Sea (1958): The Strait of Tiran', *An International Law Miscellany* 723 (Dordrecht, Martinus Nijhoff, 1993); Environmental Law Institute, *Protecting the Gulf of Aqaba: A Regional Environmental Challenge* (P. Warburg and T. Bernstein, eds. Washington D.C. 1993).

36 DOALOS, *Exclusive Economic Zone: Legislative History of Articles 56, 58 and 59 of the United Nations Convention on the Law of the Sea* (1992); Same, *Conservation and Utilization of the Living Resources of the Exclusive Economic Zone: Legislative History of Articles 61 and 62 of the United Nations Convention on the Law of the Sea*. (1995); OOALOS, *National Legislation on the Exclusive Economic Zone and the Exclusive Fishery Zone*, (1985); DOALOS, *National Legislation on the Exclusive Economic Zone* (1993); F. Orrego Vicuña, *The Exclusive Economic Zone: Regime and legal nature under international law* (Cambridge University Press, 1989); B. Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (Dordrecht, Nijhoff, 1989). Some countries have established a Fishery Zone. The ICJ has explained the term 'fishery zone' as 'the area in which a State may claim exclusive fishery jurisdiction independent of its territorial sea'. *Fisheries Jurisdiction* (Merits) cases, ICJ Rep. 1974, 3, 23 (para. 52) and 175, 192 (para. 44). This appears to be something less than an EEZ.

baselines from which the breadth of the territorial sea is measured. That zone is subject to the legal regime established in Part V, governing the rights and jurisdiction of the coastal State and the rights and freedoms of other States (Articles 55, 57). Coastal State competence thus consists of two and possibly three juridically distinct but separate and adjacent parts, internal waters, the territorial sea extending from the baseline to whatever outer limit is determined for the territorial sea, and the EEZ from that outer limit to a distance not exceeding 200 nms from the baseline. In internal waters and in the territorial sea (and in the airspace above them) the coastal State has absolute sovereignty, subject in the territorial sea to the right of innocent passage (but no right of overflight), and beyond the outer limit of the territorial sea the coastal State has sovereign rights and jurisdiction over natural resources as established in Part V. This is important for navigation and overflight which are free through and over the EEZ. Briefly, the EEZ places the coastal State in a dominant position for the management of all the fisheries and other natural resources adjacent to its coast up to a distance of at least 200 nms, and in some respects beyond that. The coastal State also has sovereign rights over the resources of the seabed and subsoil of the EEZ, under the regime of the continental shelf (§ 8.05 below).

The ILC introduced the expression *sovereign rights* into the lexicon of international law in its 1956 report on the law of the sea, in relation to the continental shelf.[37] It explained that it wanted to avoid language lending itself to interpretations alien to an object that it considered of decisive importance, namely safeguarding the principle of the full freedom of the superjacent sea and the airspace above it. Therefore, it was unwilling to accept the sovereignty of the coastal State over the continental shelf. On the other hand, the expression left no doubt that the rights conferred upon the coastal State were exclusive and covered all rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf. A meaning like that is presumably required for the expression in relation to the EEZ, although there are two major differences. The first is that an EEZ has to be established by the coastal State and does not accrue to it *ipso facto*. This is done by the publication of charts or lists of geographical co-ordinates for ascertaining the outer limits of the zone and depositing a copy with the Secretary-General of

37 ILC Rep. 1956 (A/3159*) chapter II, Art. 68, Commentary, para. (2), YBILC 1956/II 253, 297. Earlier it had used the expression ‘jurisdiction and control’ but this was found to be inadequate. ILC Rep. 1951 (A/1858), Annex, Art. 2, Commentary, YBILC 1951/II 123, 142.

the UN (Art. 75). The UN has made appropriate arrangements for assuring publicity for this material. The second is that Part V envisages other States having rights in relation to the living resources of the Zone, at all events when the coastal State does not exploit those resources to the full. To that extent, the sovereign rights of a coastal State over the living resources in its EEZ are not 'exclusive', and may be regarded more as 'functional'. Articles 69 and 70 in particular deal with the rights of land-locked and geographically disadvantaged States to participate in the exploitation of the zone's living resources.

In the zone, the coastal State has sovereign rights for exploring and exploiting, conserving and managing the natural resources, whether living or nonliving, of the waters superjacent to the seabed and of the seabed and its subsoil, and regarding other activities for the economic exploration and exploitation of the zone, such as the production of energy from the water, currents and winds. It has jurisdiction regarding the establishment and uses of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment (Article 56). All States, whether coastal or landlocked, enjoy the high seas freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally recognized uses of the sea related to those freedoms, such as those associated with the operation of ships, aircraft, and submarine cables and pipelines, and compatible with the other provisions of UNCLOS. Those other States are to have due regard to the rights and duties of the coastal State and shall comply with its laws and regulations adopted in accordance with UNCLOS and other rules of international law in so far as they are not incompatible with Part V (Article 58). Where the Convention does not attribute rights or jurisdiction to the coastal State or to other States within the zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole (Article 59). The ICJ has explained the logic behind these provisions in the following terms:

> States have an obligation to take full account of each other's rights and of any fishery conservation measures the necessity of which is shown to exist in those waters. It is one of the advances in maritime international law, resulting from the intensification of fishing, that the former *laissez-faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all. Consequently, both Parties have the obligation to keep under review the fishery resources in the disputed waters and to examine together, in the light of scientific and other available information,

> the measures required for the conservation and development and equitable exploitation, of those resources[.][38]

The principal provisions of Part V are Articles 61 and 62. They lay down the essentials of fisheries management. While by Article 61 the coastal State determines the allowable catch of the living resources in its zone, Article 62 addresses its duty to promote the objective of optimum utilization of those living resources and related matters. Other provisions deal with highly migratory species, of which different species of tuna are the most important (Article 64 and annex I),[39] marine mammals (Article 65), anadromous stocks, of which salmon is the most significant (Article 66) and catadromous species, mainly the eel (Article 67). Their habitat is partly in the territorial sea and EEZ of the coastal State, and also beyond, in the high seas. Sedentary species come within the regime of the continental shelf (Articles 68 and 77, paragraph 4).

By Article 297 (3) a coastal State is not obliged to accept the submission to binding settlement of disputes concerning the interpretation or application of the provisions of UNCLOS with regard to fisheries, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations. If it declines to accept a binding dispute settlement procedure for this type of dispute, it must have recourse to conciliation under Annex V. The fact that the coastal State is not obliged to accept one of the compulsory binding settlement procedures for disputes relating to fisheries within the EEZ does not imply that the State is

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38 *Fisheries Jurisdiction* (Merits) cases, ICJ Rep. 1974 3, 31 (para.72); 175, 200 (para. 64). Those judgments were pronounced before the adoption of the 1982 Convention, and in them the term 'high seas' means all the sea beyond the outer limit of the territorial sea.

39 For an interpretation by ITLOS of this provision, see the *Southern Bluefin Tuna* (Provisional Measures) case ITLOS Rep. 1999, 280. The list of highly migratory species may not be adequate. Art. 1 (*f*) of the Honolulu Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean of 5 September 2000 defines, for the purposes of that instrument, highly migratory fish stocks not only by reference to Annex I, but adds 'and such other species of fish as the Commission [for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, established by the Convention] may determine'. 40 ILM 277 (2001). On that Convention, see T. Aqorau, 'Tuna Fisheries Management in the Western and Central Pacific Ocean: A Critical Analysis of the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean and its Implications for the Pacific Island States', 16 *The Int'l J. of Marine and Coastal Law* 379 (2001).

free to accept such procedures or not if the dispute relates to activities beyond the EEZ. In principle disputes concerning the interpretation or application of the provisions of UNCLOS with regard to fisheries are subject to the procedures for binding decision, exception being made for certain disputes relating to the actions of the coastal State in the EEZ. Behind that provision lay the recognized necessity to allow this exception, to justify the prohibition in Article 309 on reservations. At the same time it is to be recognized that there is here a fundamental inequality between coastal States and distant fishing States as regards migratory species and straddling stocks, both of which spend some of their life in the EEZ of the coastal State and on the high seas. Juvenile fish are more likely to inhabit waters close to the shore where they can be caught and allowed to grow in fish farms.

The provisions regarding the EEZ have to be read with Articles 116 to 120 on the conservation and management of the living resources of the high seas. Article 118 requires States to co-operate with each other in the conservation and management of the living resources of the high seas. Article 119, on the conservation of the living resources of the high seas, indicates the way in which States shall determine the allowable catch and other conservation measures for those living resources. UNCLOS envisages global, regional and subregional organizations as having competence in these matters, and a large number of such organizations now exist, many of them established in connection with the FAO. The application of those provisions has been substantially modified by the 1995 Agreement regarding highly migratory species and straddling stocks (above note 24).

The net effect is that not much remains of the traditional freedom of fishing as one of the freedoms of the seas, so zealously maintained in the past. It is now severely restricted, and is virtually abolished. This has greatly harmed what was a major industry, namely distant water fishing, an important economic activity of many European States and countries like Japan and Korea. In the second half of the twentieth century overfishing had reached serious proportions and major fishing grounds were becoming depleted and unproductive. This showed that the earlier view that the living resources of the oceans were self-reproducing could no longer be sustained and that scientifically justified management of fish stocks was urgently needed. This has called for a high level of international co-operation in restoring depleted fish stocks and in the management of fishery resources. Recognition that the coastal State must have a primary say in these matters was the price that had to be paid for the maintenance of the freedom of navigation and of overflight in straits used for international navigation following the agreement on the revised breadth of the territorial sea.

Only time will tell if the legal framework adopted in 1982 and since, especially through the FAO, is effective not merely to prevent further deterioration of the world's fish stocks but more important, to restore them to their earlier fertility and productivity. There are signs that the provisions of the 1982 Convention are on the one hand insufficient to provide for adequate fisheries management in parts of the oceans, and on the other are becoming a new source of friction between distant water fisheries and the coastal States claiming not only an EEZ but something more than that for highly migratory and straddling stocks. It is interesting that in quick succession the ITLOS received three applications directed against France for the prompt release of fishing vessels intercepted in French Southern and Antarctic Waters and the appurtenant EEZ, in each case the applicant States being flag of convenience States and the beneficial owners being European distant water fishing interests. ITLOS treated each case on an individual basis, and did not fit the French action in arresting those vessels into the broader picture of French fisheries management programmes in that part of the sea.[40]

One of the most difficult issues discussed in the Third Conference concerned the delimitation of the EEZ and following that of the continental shelf. While there was general recognition that agreement produced the best result, negotiations on the rule to be applied on failure to reach agreement reached a deadlock. The only acceptable formula was that the delimitation of the EEZ between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the ICJ 'in order to achieve an equitable solution' (Article 74 (1)). This is accompanied with detailed provisions on the drawing of the lines on appropriately scaled charts and their publicity through the UN. Although not saying much, this provision has opened the way to the settlement of many disputed claims regarding overlapping areas of EEZ or of continental shelf. It has also enabled the ICJ and arbitral tribunals to effect settlements of these disputes, applying sometimes a form of equity *infra legem*.

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40 These are the *Camouco* case (ITLOS Rep. 2000, 10) the *Monte Confurco* case, (ibid., 86), and the *Grand Prince* case (ibid., 2001, 17). But see the dissenting opinion of Judge Anderson in the *Monte Confurco* case, drawing attention to the need to balance properly the interests of the shipowners and those of the coastal State (at 127). Add to these the *Volga* case (Russian Federation *v.* Australia), Judgment of 23 December 2002, relating to the prompt release of a Russian fishing vessel arrested in the adjoining Australian EEZ.

§ 8.05. The continental shelf

When the Convention on the Continental Shelf was adopted in 1958, some thought that its definition was incorrect and would not stand the test of time.[41] Its deficiencies became apparent in 1969 in the *North Sea Continental Shelf* cases before the ICJ where, for technical reasons, the 1958 Convention was not applicable and the Court had to fall back on the general rules of international law.[42] In brief, the Court insisted on treating the continental shelf of the countries bordering the North Sea as the natural prolongation of their land territory, disregarding the formal criteria of depth and exploitability and physical features such as the Norwegian Trough, and on that basis laying down principles for delimitation of the shelf between the Netherlands, Germany and Denmark. That case led the General Assembly to adopt resolution 2574 (XXIV), 15 December 1969, where it expressed its view that the 1958 Convention 'does not define with sufficient precision the limits of the area over which a coastal State exercises sovereign rights . and that customary international law on the subject is inconclusive'. The Conference was thus faced with the difficult task of producing a new definition of the continental shelf and of a method of determining its outer limit, which would be the landward limit of the international seabed area designated as the common heritage of mankind. Article 76 of UNCLOS is the outcome, read with Article 134 defining the international area, and Annex II on the CLCS

The new legal definition of the continental shelf replaces the indeterminate depth and exploitability criteria of the 1958 Convention with two objective elements: distance from the baseline, and the natural prolongation of the coastal State's territory to the outer edge of the continental margin. As a result, the legal definition of continental shelf stands on its own, independent of the definitions used in other disciplines. Article 76 (1) provides that the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its

41 Art. 1 of the Convention reads:
For the purposes of these articles, the term 'continental shelf' is used as referring (*a*) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (*b*) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.
And see OOALOS, *National Legislation on the Continental Shelf* (1989).

42 ICJ Rep. 1969, 3.

land territory to the outer edge of the continental margin, or to a distance of 200 nms from the baselines where the outer edge of the continental margin does not extend up to that distance. This continental shelf accrues to the coastal State automatically, and no formal act is required for its acquisition. The fixed distance coincides with the maximum extent of the EEZ. Practice, however, shows that the two outer limits need not coincide, although most frequently they do. The reason is that the requirements of the coastal State for proper conservation and management of the living resources in the EEZ are not always the same as its requirements for management and exploitation of the mineral resources of the continental shelf. There, on the one hand a higher degree of precision in demarcation is possible, and on the other the presence of straddling mineral resources can lead to special arrangements for their rational exploitation and adjustments to what would otherwise be a tidy delimitation.[43] It is usual for delimitation treaties to make special provision for this type of situation.

The Conference also had to face the problem of broad shelves and vested rights under the depth and exploitability criteria of the 1958 Convention. In addition, the designation of the areas beyond the limits of national jurisdiction of the coastal State as the common heritage of mankind over which the ISA would have competence led to a demand that any extension of the continental shelf beyond 200 nms should be accompanied by some form of payment to that Authority.

The first problem requiring solution was the definition of the continental margin. Article 76. paragraph 3, provides:

> The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

Then came the problem of how to establish the outer edge of the continental margin wherever the margin extends beyond 200 nms from the baseline. Article 76, paragraphs 4 to 6, among the most difficult parts of UNCLOS, give the answer:

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43 See on this B. Kwiatkowska, 'Economic and Environmental Considerations in Maritime Boundary Delimitation', I *International Maritime Boundaries* (above note 17) at 86; D. M. Ong, 'Joint Development of Common Offshore Oil and Gas Deposits: 'Mere' State Practice or Customary International Law', 93 AJIL 771 (1999). If a coastal State has established an EEZ, by Art. 56 (3) the continental shelf under it is technically part of that zone, Part VI governing its rights with respect to the seabed and subsoil.

4. (*a*) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:
   (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or
   (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.
   (*b*) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.
5. The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (*a*)(I) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.
6. Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs.

Paragraph 7 requires the coastal State to delineate the outer limits of its continental shelf where the shelf extends beyond 200 nms from the baselines 'by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by co-ordinates of latitude and longitude'. Paragraph 8 requires the coastal State to submit information on the limits of the continental shelf beyond 200 nautical miles to the CLCS, which is to make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. Those limits, established by a coastal State on the basis of those recommendations, shall be final and binding.

Annex II establishes the CLCS. Its functions are to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nms, to make recommendations in accordance with Article 76, and to provide scientific and technical advice, if requested by the coastal State concerned during the preparation of those data. The coastal State is to submit the necessary particulars to the Commission as soon as possible, but in any case within 10 years from 13 May 1999 for States that were parties to UNCLOS on that date, the date when

the Commission adopted its scientific and technical guidelines.[44] The application of these complicated provisions is without doubt going to be difficult and protracted, and major controversies are likely to follow between the coastal States and the ISA.

The substantive law regarding the shelf as set out in Articles 77 to 84 of UNCLOS mostly repeats or supplements the 1958 Convention. Over the shelf the coastal State exercises sovereign rights for the purpose of exploring and exploiting its natural resources. Those rights are exclusive in the sense that if the coastal State does not explore the shelf or exploit its natural resources, no one may undertake those activities without the coastal State's express consent. Furthermore, those rights do not depend on occupation or on any express proclamation. They enure to the coastal State *ope juris*. The natural resources consist of the mineral and other nonliving resources of the seabed and subsoil together with living organisms belonging to sedentary species. Those are organisms which at the harvestable stage either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil (Article 77). The expression 'sovereign rights' thus has different meanings in Parts V and VI of the Convention.

The coastal State's rights over the continental shelf do not affect the legal status of the superjacent waters or of the airspace above them, and the exercise of the rights of the coastal State 'must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention' (Article 78). There are provisions governing submarine cables and pipelines on the shelf (Article 79), artificial islands and other installations (Articles 60 and 80), and drilling (Article 81).

Provisions on delimitation of the continental shelf and charting (Articles 83, 84) follow those for the EEZ. However, there is no provision for the settlement of delimitation disputes that might arise between a coastal State and the ISA, should the Commission's recommendations not be accepted. The existence of two identically worded provisions for the delimitation of the EEZ and for the delimitation of the continental shelf has led to the question whether an international tribunal is empowered to effect delimitation of both by a single all-purpose line. That question first arose in a Chamber of the ICJ in the *Gulf*

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44 For those guidelines, see doc. CLCS/11 and Add.1, 13 May 1999. Reproduced in NILOS, *International Organizations and the Law of the Sea: Documentary Yearbook*, 1999, 269. Art. 82 regulates the payments and contributions with respect to the exploitation of the shelf beyond 200 nms. Those payment and contributions are based on a percentage of the value or volume of production at the site after the first five years of production.

of Maine case. The Chamber was of opinion 'that there is certainly no rule of international law to the contrary, and, in the present case, there is no material impossibility in drawing a boundary of this kind. There can thus be no doubt that the Chamber can carry out the operation requested of it'.[45] Criticism is sometime heard of the presence in UNCLOS of the two substantively identical delimitation provisions. This criticism overlooks the relevance of equity in the settlement delimitation disputes. The Chamber of the ICJ was very careful to draw attention both to the legal and to the material aspects of delimitation. Material aspects, such as straddling mineral resources, may justify delimitation of the shelf that is different from that of the EEZ. The existence of the international seabed area and the rights of the ISA to its mineral resources may complicate delimitation of the shelf between two coastal States. In the *Delimitation of Maritime Areas between Canada and the French Republic (St. Pierre and Miquelon*) arbitration (1992), the arbitral tribunal pointed out that any decision recognizing or rejecting any rights of the parties over the shelf beyond 200 nms would constitute a pronouncement involving delimitation not between the parties but between each one of them and the international community represented by the organs entrusted with the administration and protection of the international seabed area 'that has been declared to be the common heritage of mankind', and that it was not competent to carry out a delimitation which affected the rights of a party not before it.[46]

§ 8.06. The high seas

The superjacent waters over the continental shelf, except where an EEZ has been established (when they have a *sui generis* status) and the waters over the Area are high seas. In so far as concerns the use of the high seas for communication, the law as codified in 1958 is substantially repeated and amplified

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45 *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case, ICJ Rep. 1984, 246, 267 (para. 27). Further explained in the *Qatar-Bahrain* case, above note 27 (paras. 169, 173). In the pending *Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea* and *Territorial and Maritime Dispute* (Nicaragua *v*. Colombia) cases, Nicaragua's Applications instituting the proceedings requested the Court to determine the course of a single maritime boundary for the continental shelf and the exclusive economic zone.

46 XXI RIAA 265, 292 (para. 78). This overlooks that the Convention does not expressly empower or require the ISA to be a party to international legal proceedings on delimitation, although this may not be excluded if there is agreement to that effect. The Convention was not in force when this award was given.

in Part VII (Articles 86 to 115) of the 1982 Convention. The main changes reflect the impact of the Convention's innovations on the freedom of the seas, which had to be redefined. By Article 87, the freedom of the high seas comprises, *inter alia*, both for coastal and land-locked States:

(a) freedom of navigation;
(b) freedom of overflight;
(c) freedom to lay submarine cables and pipelines, subject to Part VI [on the continental shelf];
(d) freedom to construct artificial islands and other installations permitted by international law, subject to Part VI;
(e) freedom of fishing, subject to the conditions laid down in section 2 [of Part VII];
(f) freedom of scientific research, subject to Parts VI and XIII [Articles 238– 265].

Article 87 goes on to provide that these freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under the Convention with respect to activities in the Area (§ 8.07 below). The main subtractions from the traditional freedom of the seas are in the freedom of fishing and applied scientific research related to the living resources of the sea, and freedom to exploit the resources of the seabed under the high seas, now subject to the regime of the continental shelf and beyond that, within the exclusive prerogative of the ISA. Notwithstanding the evolution of the EEZ and restrictions on fishing on the high seas, some States, especially in South America, are developing ideas of 'creeping jurisdiction' of coastal States into areas of high seas not directly adjacent to the coastal State or its EEZ, but where local fishing industries have developed a particular interest. One example of this is Chile's 'presential sea'.[47] Argentina and Canada[48] also have laid claims to exercise fishery jurisdiction over foreign ships on the high seas beyond their EEZ.

UNCLOS makes a mild attempt to mitigate the effect of this erosion of the freedom of the high seas. Article 292 in Part XV (on the settlement of disputes) provides that where the authorities of a State party have detained a foreign vessel of another State party and it is alleged that the detaining State has not complied with the provisions of the Convention for the prompt release of the

47 See on this Francisco Orrego Vicuña, *The Changing International Law of High Seas Fisheries* 107 (Cambridge University Press, 1999).

48 Cf. on this the *Fisheries Jurisdiction* (Spain *v*. Canada) case, ICJ Rep. 1998, 432. The Court found that it had no jurisdiction to adjudicate upon that case.

vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release may be submitted to any court or tribunal having jurisdiction accepted by the detaining State or to ITLOS, which has a compulsory residual jurisdiction for the prompt release of crews and vessels.

§ 8.07. The international seabed Area

Malta's initiative of 1967 led the General Assembly to adopt the Declaration of Principles governing the seabed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, annexed to resolution 2749 (XXV), 17 December 1970.[49] The principal elements of that Declaration are the following. The seabed and ocean floor and the subsoil, beyond the limits of national jurisdiction, now known as the Area (with an upper case A), and the resources of the Area, are the 'common heritage of mankind'. At the time those mineral resources consisted of solid, liquid or gaseous resources and polymetallic nodules. Recent discoveries have added cobalt bearing crusts and polymetallic sulphides. The Area is not to be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part of it. No State or person shall claim, exercise or acquire rights with respect to the Area or its resources incompatible with the international regime to be established and the principles of the Declaration. The future regime shall govern all activities regarding the exploration and exploitation of the resources of the Area, which shall be open to use exclusively by all States, coastal or landlocked, without discrimination in accordance with the future régime. The exploration of the Area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States and taking into consideration the interests and needs of the developing countries. The Area is to be reserved exclusively for peaceful purposes. That is without prejudice to any measures that have been or may be agreed in the context of international negotiations in the field of disarmament and which may be applicable to a broader area. The Declaration envisaged agreements to exclude the Area from the arms race. On the basis of those principles, Part XI (Articles 133 to 191 and Annexes III and IV, as adjusted by the 1994 Agreement) establish the international regime for the Area and its resources, including appropriate institutional machinery (the ISA and the operating organ, the Enterprise according to Annex IV).

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49 Reproduced in I *Virginia Commentary* 173.

To understand the import of this Declaration, adopted during the tensions of the Cold War, there was at the time a widely held assumption that the exploitation of the known mineral resources of the deep seabed under an international regime would provide the UN with an income that would not be dependent on the agreed assessment of States Members. Two factors have influenced later developments. One was realization that many claims and expectations regarding those mineral resources were exaggerated and that the cost of their exploration and exploitation would far exceed earlier estimates. The second was the attainment of independence, while the Third Conference was in progress, by African States which are primary land-based producers of those same minerals, and were therefore concerned at the possibility of international competition through the exploitation of the resources of the Area.

Dissatisfaction with major aspects of Part XI led to 17 abstentions and the negative vote of the United States, on the adoption of the Convention in April 1982.[50] At the time the reasons of the Western States, preferring a market economy approach, were not shared by the East European States which had other difficulties with Part XI. Abandonment of strict communist economic policies in Eastern Europe eased the way for a new agreement on the implementation of Part XI, achieved in the Agreement of 28 July 1994 annexed to General Assembly resolution 48/263 of that date.[51] That Agreement has introduced many changes into the original Part XI and Annex III, and rendered the Convention more widely acceptable. The General Assembly affirmed that the Agreement is to be interpreted and applied together with Part XI of the 1982 Convention 'as a single instrument'.

The management of the Area and its mineral resources is the function of the new International Seabed Authority, of which all States parties to UNCLOS

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50 Third Conference, XVI *Official Records*, 182nd meeting.

51 For a reproduction of Part XI adjusted in accordance with the 1994 Agreement, prepared by the ISA Office of Legal Affairs, see *Consolidation of Part XI of the Convention and the Implementation Agreement*, doc. ISA/98/04.E, June 1998; ISA *Compendium* 15 (above note 15); VI *Virginia Commentary* 875. On part of the historical background for this, see Sh. Rosenne, 'The United Nations Convention on the Law of the Sea, 1982: The Application of Part XI: An Element of Background', 29 *IsLR* 491 (1995). Art. 7 of the 1994 Agreement allowed for the provisional application of the Convention together with the 1994 Agreement for a period which terminated on 16 November 1998. Up to that date States which were not parties to the Convention but which had consented to the adoption of the 1994 Agreement were provisional members of ISA. That provisional membership terminated on 16 November 1998. The situation exists by which in September 2002 there were 34 States parties to the Convention which were not at that date parties to the 1994 Agreement.

are *ipso facto* members (Article 156 (2)) and, since 16 November 1998, none others. Articles 156 to 169 set out the constitution of the Authority. It follows the usual pattern for the constituent instrument of an operational international intergovernmental organization, with specifics for the functions that it is to perform. The voting rules of both the Assembly (Article 159) and of the Council (Article 161) are complicated, and Article 159 (10) envisages a special advisory procedure before the Seabed Disputes Chamber of ITLOS.[52]

Articles 185 to 191 deal with the settlement of disputes and advisory opinions concerning Part XI. It is separate from the general dispute settlement provisions of Part XV. In that respect, the Seabed Disputes Chamber, established by a combination of Article 186, and Annex VI, Articles 14 and 35 to 40, is really an independent judicial organ created within the configuration of ITLOS. It is composed of 11 members of ITLOS selected by a majority of the Tribunal's elected members. A unique feature of this Chamber is the provision of Annex VI, Article 39, to the effect that its decisions shall be enforceable in the territories of the States parties in the same manner as judgments or orders of the highest court of the State party in whose territory the enforcement is sought. The operation of this provision will be watched with interest. Unlike ITLOS, the jurisdiction of the Chamber *ratione personae* can extend to individuals who stand in some legal relationship to activities in the Area.

§ 8.08. Human geography in the law of the sea

Since the land dominates the sea, it follows that the population on that land is a factor that is impressed on the whole of the law of the sea, but especially on delimitations. Different provisions of UNCLOS relate to delimitation. The baseline is the direct landward line of the territorial sea, and the seaward limit of the territorial sea is the landward line of the EEZ and the continental shelf. The outer limit of the continental shelf is the landward boundary of the international seabed area. Since the baseline may in given circumstances be established by drawing straight lines joining visible points on the land, those lines may enclose large areas of the sea, which become internal waters of the coastal State. The ICJ has referred to human geography as a circumstance that it should take into account in determining the baseline. That is the most important of the delimitation lines.

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52 On the Authority, see M. C. Wood, 'International Seabed Authority: The First Four Years', 3 *Max-Planck YBUNL* 173 (1999).

The first inkling of this was in 1951, in the case between the United Kingdom and Norway concerning the validity in international law of the Norwegian legislation of 1935 establishing straight baselines as the landward delimitation of its fishery zones – an innovation at the time. The lines related to that part of Norway's coast situated northwards of 66° 28' 8" N, above the Arctic Circle. In its judgment upholding the validity of that legislation, the Court remarked: 'In these barren regions the inhabitants of the coastal State derive their livelihood essentially from fishing'. Later in the same judgment the Court said: 'there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by long usage'.[53] This was codified in Article 3 (4) of the 1958 Convention on the Territorial Sea and Contiguous Zone, now Article 7 (5) of the 1982 Convention, on straight baselines. When the Court indicated provisional measures of protection in the cases brought by the Federal Republic of Germany and the United Kingdom against Iceland in the 1970s regarding the validity of Icelandic fisheries legislation of 1972, it was careful to point out that 'it is necessary to bear in mind the exceptional dependence of the Icelandic nation upon coastal fisheries for its livelihood and economic development', and that 'from this point of view account must be taken of the need for the conservation of fish stocks in the Iceland area'.[54] In its judgments on the question of its own jurisdiction the Court repeated that statement, adding that the point was not disputed.[55] A year later in its judgments on the merits, the Court took that statement as its point of departure for its analysis of the coastal State's preferential rights in fishery matters.[56] That part of the judgments is today of historic interest. Its importance at the time, when the Third Conference was negotiating the details of the EEZ, was great.

The judgment in the *Tunisia/Libya Continental Shelf* case goes against this trend. There the Court refused to take into consideration economic factors as special circumstances to influence the delimitation of the continental shelf. The question arose in two forms. One was the relative poverty of Tunisia in relation to Libya's wealth, in the absence of natural resources that Libya possessed in

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53 ICJ Rep. 1951, pp. 128, 133. But for the outbreak of the Second World War, this dispute would probably have been referred to the PCIJ.

54 ICJ Rep. 1972, pp. 16 (paras. 23, 24) (U.K.), and 34 (paras. 24, 25) (F.R.G.). The Regulations in dispute were the *Reglugerð um Fiskveiðilandhelgi Islands* promulgated on 14 July 1972.

55 ICJ Rep. 1973, pp. 20 (para. 41) (U.K.) and 64 (para. 41) (F.R.G.).

56 ICJ Rep. 1974, pp. 3 (U.K.) and 175 (F.R.G.).

relative abundance. The second was that the fishing resources derived from claimed historic rights should be taken into account. The Court was curt in dismissing those arguments. They were virtually extraneous factors since they were variables that unpredictable national fortune or calamity might at any time cause to tilt the scale one way or another. A country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource.[57] While there might be some justification in not taking into account the relative wealth of the two countries as it existed at the time of the judgment, since in principle the law cannot refashion geography, the issue of fishing rights and their attendant human aspects are in a different category, and it is a matter for regret that the Court did not deal with that aspect more fully.

In the *Gulf of Maine* case geography played an important role, as the parties had not fully defined the area that they required the Chamber formed to deal with the case to delimit.[58] It concerned one of the world's richest fishing grounds – Georges Bank. The parties had shown a starting point for the delimitation, out to sea, by its co-ordinates, but left the seaward terminal to the decision of the Chamber to fall within a series of co-ordinates in the shape of a triangle, which the Chamber was to determine. The Chamber (with expert assistance) applied elements of geography (including political geography), biogeography, geology, geomorphology, and geometry to determine that triangle, before it could proceed to the delimitation. Then, in dealing with the delimitation, the Chamber stated:

> What the Chamber would regard as a legitimate scruple lies . . . in concern lest the overall result, even though achieved through the application of equitable criteria and the use of appropriate methods for giving them concrete effect, should unexpectedly be revealed as radically inequitable, that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned (para. 237).

Applying its criteria to one segment of the line that it was establishing, the Chamber took into account other circumstances produced by the Parties. Those other circumstances included data provided by 'human and economic geography' – probably the first use of the expression 'human geography' in international litigation. On that basis the Chamber went on to make its delimitation of

57 ICJ Rep. 1982, 18, 77 (para. 107).
58 ICJ Rep. 1984, 246, 294 (para. 84).

Georges Bank. It explained that by and large, an examination of the statistics produced by each side, 'which are sometimes difficult to compare', led it to the conclusion that nothing less than a decision that would have assigned the whole of Georges Bank to one of the Parties might possibly have entailed serious economic repercussions for the other.

This idea of 'catastrophic repercussions' has had an impact on later delimitation cases in which, even when a single line for the seabed and for the superjacent waters and their resources was in issue, fishery rights and practices were a factor. In the arbitration between Canada and France (St. Pierre and Miquelon) of 1992, it was evident that access to and control of fisheries in the disputed areas were central to the delimitation. Both parties emphasized the economic dependence of their nationals on fishing in the area and both considered that delimitation was a critical factor in safeguarding the legitimate interests of their fishing communities. Having recourse to the 'catastrophic repercussions' doctrine, the Arbitral Court satisfied itself that the demarcation it was proposing would not have a radical impact on the existing pattern of fishing in the area.[59] In the *Eritrea-Yemen* (Delimitation) arbitration, the Tribunal examined this aspect very carefully. It found that neither party had succeeded in demonstrating that the line of delimitation proposed by the other would produce a catastrophic or inequitable effect on the fishing activity of its nationals or detrimental effects on fishing communities and economic dislocation of its nationals.[60]

Human geography was a factor in the *Jan Mayen* case between Norway and Denmark.[61] That was a delimitation between opposite coasts, the distance between them being some 250 nm. The area lies north of the Arctic Circle. Part of it is permanently covered by compact ice and the whole area is much affected by drift ice, making this the first case before any international tribunal in which ice-covered sea was the object of the litigation. The Court noted that the presence of drift ice had a 'substantial impact on human activity'.[62] The total population of Greenland was estimated at 55,000, of whom about 6 per cent live in Eastern Greenland. The fisheries sector in Greenland employs about

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59 Above note 46, 294 (para. 84),

60 *Phase Two Maritime Delimitation* (Eritrea/Yemen), Award of 17 December 1999, 119 ILR 417, 442 (para. 72).

61 ICJ Rep. 1993, 38. Delimitation between Norway and Iceland in the Jan Mayen area had been completed in 1982 through a Conciliation Commission followed by an Agreement. 20 ILM 797 (1981); 21 ibid. 1222 (1982). The tripoint with Iceland is the terminal of the delimitation between Norway and Denmark.

62 Judgment at p. 73 (para. 78). On ice covered areas, note Art. 234 of the 1982 Convention.

one quarter of the labour force, and accounts for approximately 80 per cent of total export earnings. The sea area under dispute comprised an important fishing ground for summer capelin, the only fish that is commercially exploited in the area. Jan Mayen, on the other hand, has no settled population, being inhabited solely by technical and other staff, some 25 persons in all, who run the island's meteorological and radio stations. Norwegian activities in the seas have included whaling, sealing and fishing for capelin and other species, the vessels being based in mainland Norway. The Court also applied the previously cited dictum in the *Gulf of Maine* case (Judgment, paragraph 75).

Human geography is not limited to delimitation aspects of the modern law of the sea. It is also a factor in fisheries management. Article 61 (3) of the 1982 Convention, on the conservation of the living resources of the sea in the EEZ, gives the coastal State the power to determine the allowable catch of the living resources in its EEZ. In doing so it is to take into account fishing patterns and relevant environmental and economic factors, including the economic needs of coastal fishing communities. This has been carried further in Article 5 of the 1995 Straddling Stocks Agreement.[63] For the conservation and management of those stocks coastal States and States fishing on the high seas shall also take into account the interests of artisanal and subsistence fisheries. The human element is also relevant in connection with international action for the protection of the marine environment. The Washington Declaration on Protection of the Marine Environment from Land-Based Activities of 1 November 1995 recognized that the alleviation of poverty is an essential factor in addressing the impact of land-based activities on coastal and marine areas.[64]

The nutritional habits and requirements of the populations concerned, not necessarily the fishing populations, are also an aspect of human geography that can be relevant, particularly for the equities of a delimitation. In connection with fisheries management, for instance, this element was prevalent throughout the negotiations on the EEZ in the Third Conference, even if it was not openly articulated. In the ICJ the nutritional requirements of parts of the population of the United Kingdom were a counterbalance to the dependence of Iceland on its fisheries as a factor determining the provisional measures first indicated

63 Above note 24. The origin of this is found in the Declaration of Cancún adopted by the International Conference on Responsible Fishing (1992), doc. A/CONF.164/INF, Annex 2, 8 *NILOS Yearbook* 557 (1992).

64 UN doc. A/51/116, reproduced in 12 *NILOS Yearbook 1996* 386 at 400; UNEP, *Handbook of Environmental Law* 93 (1998).

by the Court in 1972.[65] The fullest discussion of the effect of the consumption of fish on maritime delimitation took place in the second phase of the arbitration between Eritrea and Yemen in 1999. The Tribunal's conclusions on this aspect of the case are interesting:

> The evidence concerning fish consumption advanced by each party was presumably aimed at establishing that the Tribunal's adoption of the line of delimitation proposed by the other Party would constitute a serious dietary or health threat to the population of the first Party. However, the evidence on this matter is conflicting and uncertain. It is difficult if not impossible to draw any generalized conclusions from the welter of alleged facts advanced by the Parties in this connection.
>
> The Tribunal can readily conclude, without having to weigh intangible and elusive points of proof or without having to indulge in nice calculations of nutritional theory, that fish as a present and future potential resource is important for the general and local populations of each Party on each side of the Red Sea. The Tribunal can also conclude, as a matter of common sense and judicial notice, that interest in and development of fish as a food source is an important and meritorious objective. Based on these two conclusions, however, the Tribunal can find no significant reason on these grounds for accepting – or rejecting – the arguments of either party as to the *line of delimitation* [italics in original] proposed by itself or by the other Party.[66]

These cases are all concerned with disputes in areas of sea – before the 1982 Convention high seas – exploited for fishing. Delimitation for mineral resources of the continental shelf does not posess the same direct human interest, although frequently the superjacent waters are important fishing grounds (the North Sea, for instance), and the law regarding the continental shelf has implications for the superjacent waters (and airspace). There is thus no mention of human considerations in the first of the cases dealing with delimitation of the shelf, the *North Sea Continental Shelf* cases.[67] This problem arose in the *Tunisia/ Libya Continental Shelf* case, where Tunisia partly based its claims on legislation for the protection of its fishing interests and on historic rights relating to different forms of fishing, especially in its Gulf of Gabes coast. As seen, the Court rejected those claims.[68]

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65 *Fisheries Jurisdiction* (Provisional Measures) U.K. case, ICJ Rep. 1972, 12. See the dissenting opinion of Judge Padilla Nervo at 27, with his reference to the 'eating habits' of people in the countries concerned. Those habits should not be disturbed.

66 Above note 60, paras. 70, 71.

67 ICJ Rep. 1969, 3.

68 ICJ Rep. 1982, 18. Behind the *Fisheries Jurisdiction* between Spain and Canada case lay the human tragedies, on both the American continent and the European (as distant

§ 8.09. The protection and preservation of the marine environment

The protection and preservation of the maritime environment are integral parts of the new law of the sea, both generally and specifically in regard to fisheries management. The marine environment consists of the waters of the oceans and their living resources, both flora and fauna. Its protection therefore embodies two different sets of problems, those relating to the maintenance of the quality of the waters, and those relating to the quality and quantity of the living resources. Specific features of the sea and of the rights and duties of States over the sea have led to the development of specific rules for the preservation and protection of the marine environment. Some are adaptations of general rules of international law relating to the environment. Others are only relevant for the sea.

Article 1 (1) (4) explains the term 'pollution of the marine environment' as meaning the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality of use of sea water and reduction of amenities. The Convention gives no meaning for the term 'marine environment'. At the Conference it was understood that the term included the atmosphere where relevant, and marine life. The ITLOS has seen the conservation of the living resources of the sea as an 'element' in the protection and preservation of the marine environment.[69] The general protection of marine life, flora and fauna, especially in terms of the prevention of overfishing and the maintenance of the health of fish stocks, is now one of the functions of fisheries management not only in the exclusive economic zone but also, where relevant, on the high seas.

The title of Part XII (Articles 192 to 237), *protection and preservation of the marine environment*, reflects this duality. Two international organizations

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water fisheries), caused by the overfishing in that area of the North-West Atlantic. The judgment of 4 December 1998 is completely 'abstract', making no mention of the human element. The theme runs through the dissenting opinion of Judge *ad hoc* Torres-Bernárdez. ICJ Rep. 1998 432,. 582.

69 *Southern Bluefin Tuna* (Provisional Measures) cases, ITLOS Rep. 1999, 280, 295 (para. 70). In the *Mox Plant* (Provisional Measures) case, the ITLOS stressed that 'the duty to co-operate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law'. ITLOS Rep. 2001, 95.

operate in these fields, the IMO for the maintenance of the quality of the water, and the FAO as regards the living resources. The IAEA also has an important role, since nuclear pollution affects both the living resources and the water. All organizations operate within the framework of the umbrella provisions of UNCLOS and against the background of general international law which, as the preamble to UNCLOS states, continues to govern all matters that are not regulated by the Convention.

Articles 192 and 193 set out the basic principles. All States have the obligation to protect and preserve the marine environment, a bold statement. States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment. Given the importance of the sea in the world's economy, the protection of the marine environment occupies a prominent place in the revised legal regulation of the oceans. Apart from its importance for the living resources, since the oceans are the major communication routes used by all States, many of the rules for the protection of the marine environment relate to problems of navigation, the principal right of States in the oceans. Harm to the marine environment is produced either by land-based pollution or by ship-based pollution. Ship-based pollution is attributable to the flag State under the general law of the sea that accords to the flag State exclusive jurisdiction over ships of its registry on the high seas, and responsibility for ensuring their compliance with applicable rules and standards (Convention, Articles 94 and 217). Both the UN Conference on the Human Environment (Stockholm 1972[70]) and the UN Conference on the Environment and Development (Rio de Janeiro 1992[71]) examined these problems closely. At the Stockholm Conference, recommendations 86 to 92 of the Action Plan addressed marine pollution and Annex III of the Report sets out a series of general principles for assessment and control of marine pollution. Those issues were taken up by the Third Conference. At the Rio Conference, Chapter 17 of Agenda 21 embodies the decisions regarding the protection of the oceans, all kinds of seas, including enclosed and semi-enclosed seas, and coastal areas and their protection, rational use and development of their living resources. It was based on the premise that international law, as reflected in UNCLOS, sets forth rights and obligations of States and provides the international basis upon which to pursue the protection and sustainable development of the marine and coastal environment and their resources. That required a new approach to marine and coastal area

70 For the report of the Conference, see A/CONF.48/14 + Corr.1 (1972).

71 Above note 23.

management and development at the national, subregional, regional and global levels, approaches that are integrated in content and are precautionary and anticipatory in their ambit. Paragraph 17.50 led to the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks and the 1995 Agreement.

The first element for the protection of the marine environment concerns ships, even if ship-based pollution, often caused by an accident, is relatively small on a universal scale, although potentially disastrous on a regional or local scale. Article 21 (2) of the 1982 Convention, on the laws and regulations of the coastal State relating to innocent passage, prohibits coastal State legislation from applying to the design, construction, manning or equipment of foreign ships exercising their right of innocent passage, unless those laws are giving effect to generally accepted international rules or standards. Those internationally accepted rules or standards are laid down by the IMO for the design and construction of ships (particularly important for tankers and ships carrying dangerous or noxious cargos), by the International Labour Organization for the manning of ships, and by the International Telecommunication Union for communication equipment. The principal IMO instruments are the Safety of Life at Sea (SOLAS) conventions, the International Convention on Load Lines, and the International Convention for the Prevention of Pollution from Ships (MARPOL 73-78).

Part XII includes a series of general provisions (Articles 192 to 196), provisions on global and regional co-operation (Articles 197 to 201), technical assistance (Articles 202, 203), monitoring and environmental assessment (Articles 204 to 206), and international rules and national legislation to prevent, reduce and control pollution of the marine environment (Articles 207 to 212). The general approach of this last set of articles is that States are obliged to enact appropriate legislation taking into account internationally agreed rules, standards, and recommended practices and procedures, and generally to try and harmonize their relevant legislation, especially at the regional level (Article 207). There are provisions dealing with pollution from seabed activities subject to national jurisdiction (Article 208). That refers to all seabed activities conducted by a coastal State in all seabed areas under its sovereignty or over which it has sovereign rights. Article 209 deals with pollution from activities in the international seabed area, and it is matched by Article 145 in Part XI. Article 227 sets out another important principle of UNCLOS: in exercising their rights and performing their duties under Part XII, States shall not discriminate in form or in fact against vessels of any other State. Dumping is regulated globally by the Convention on the Prevention of Marine Pollution by Dumping of Wastes

and Other Matter of 29 December 1972, which is integrated into the general law of the sea through Article 210.[72] Parallel to that, Article 216 contains provisions for enforcement with respect to pollution by dumping. The coastal State has enforcement powers with respect to dumping within its territorial sea, EEZ and continental shelf. The flag State has general responsibility with regard to all vessels flying its flag or vessels or aircraft of its registry. Every State has enforcement powers with regard to acts of loading of wastes or other matter occurring within its territory or at its offshore terminals. The control of the anti-dumping rules is a major responsibility of IMO.

Land-based sources are an important factor in marine pollution, through municipal, industrial or agricultural effluents flowing through rivers, canals or underground watercourses into the sea. The basic rule is that States have the duty to ensure that discharges from land-based sources within their territories do not cause pollution to the marine environment of other States or of areas beyond the limits of national jurisdiction. Article 213 of UNCLOS in general terms obliges States to adopt appropriate legislation to implement international rules and standards adopted through a competent international organization or a diplomatic conference. This is another provision designed to integrate a large number of global and regional instruments dealing with land-based pollution into the general law of the sea. The Washington Declaration on Protection of the Marine Environment from Land-based Sources, adopted at the High-level Segment of the Intergovernmental Conference to Adopt a Global Programme of Action for the Protection of the Marine Environment from Land-based Activities on 1 November 1995,[73] is the most important international instrument today dealing with this matter. It goes into detail in setting forth the different ways in which that duty can be met. It has since been completed by Article 23 of the Convention on the Law of the Non-navigational Uses of International Watercourses of 21 May 1997[74]. That requires watercourse States individually, and where appropriate in co-operation with other States, to take all measures with respect to an international watercourse that are necessary to protect and preserve the marine environment, including estuaries, taking into account generally accepted international rules and standards.

An important innovation is the introduction of port State competence for the enforcement of the measures for the protection of the marine environment. Article 218 allows a State to undertake investigations of a vessel that is within

72 As amended, 1046 UNTS 120.

73 Above note 64.

74 GA Res. 51/229, 21 May 1997, not yet in force.

one of its ports or offshore terminals voluntarily, and where the evidence so warrants to institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or EEZ of that State in violation of applicable international rules and standards established through competent international organizations or a general diplomatic conference. A port State may not institute proceedings if the discharge violation occurred in parts of the sea within the jurisdiction of another State unless requested by that other State or by the flag State or a State that is harmed or threatened by the discharge violation. The port State is to transmit the records of its investigation to the flag or coastal State on request. Article 226 sets out safeguards with respect to the investigation of foreign vessels. Article 228 requires the suspension and other restrictions on the institution of proceedings should the flag State wish to institute proceedings in respect of that same discharge violation, and in general the controlling position of the flag State is preserved. By Article 230, only monetary penalties may be imposed with respect to discharge violations, and the recognized rights of the accused are to be preserved.

Article 237 is a general savings clause for obligations under other conventions on the protection and preservation of the marine environment. This refers both to general obligations and to specific obligations assumed by State under special conventions. Those obligations are to be carried out in a manner that is consistent with the general principles of the Convention. This refers in particular to specific regional and sub-regional engagements.

The significance of Part XII is in its combination of international and national procedures for the adoption of accepted rules, regulations and standards, and their enforcement in national courts through duly authorized national authorities.

§ 8.10. Marine archaeology

On 2 November 2001 the General Conference of UNESCO adopted the Convention on the Protection of the Underwater Cultural Heritage.[75] Treatment of marine archaeology in the 1982 Convention is inadequate. Article 303 entitled *Archaeological and historical objects found at sea* states the duty of all States to protect objects of an archaeological and historical nature found at sea and to co-operate for this purpose. It goes on to provide that States may, in applying

75 UNESCO, General Conference, 31st session, Resolutions, 50; 40 ILM 37 (2002). In resolution 56/12, 28 November 2001, the General Assembly took note of the adoption of the Convention.

Article 33 (on the contiguous zone), in order to control traffic in such objects, presume that their removal from the seabed in that zone without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in Article 33. Article 303 is to be without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and [in French: *ou*] historical nature. Article 149 (in Part XI) on archaeological and historical objects found in the international seabed Area are to be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin. Leaving aside the confused terminology, those two provisions deal with archaeological or historical objects found on the seabed within 24 nms from the baselines from which the breadth of the territorial sea is measured, or found on the seabed of the international Area within the competence of the International Seabed Authority (an unlikely supposition), leaving the vast area between the outer limit of the territorial sea and the landward limit of the Area without legal provision.

The 2001 Convention defines underwater cultural heritage as all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least one hundred years, such as (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or parts thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character. Article 3 provides that nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the 1982 Convention, and that it shall be applied in the context of and in a manner consistent with international law, including the 1982 Convention. The Convention goes on to specify the rights of States in different parts of the sea, and incorporates Part XV of the 1982 Convention for the settlement of disputes. Its Annex contains detailed Rules concerning activities directed at underwater cultural heritage within the general sphere of activities of UNESCO.

While it is certainly timely that marine archaeology should be brought within the general context of the law of the sea, doubts have been expressed as to the compatibility of the 2001 Convention with the 1982 Convention as the dominant instrument for the law of the sea, and as to the competence of UNESCO acting alone to have adopted this instrument. At the same time, many of the States that abstained in the final vote had expressed satisfaction with the Rules of the

Annex, and indicated willingness to apply them unilaterally even if they did not become party to the Convention or already had similar rules.

CHAPTER IX

SPACE: AIR, OUTER, CYBER

I dedicate this chapter with the greatest respect to the memory of Colonel Ilan Ramon, IAF, and his fellow members of the crew on Space Shuttle Columbia Mission STS-107, 18 January–1 February 2003.

Air and space are part of the same continuum
Col. Ramon from the Columbia.

§ 9.01. A historical note

Flight and the law governing airspace, the entry of mankind into outer space and the use of the cyberspace are all creations of the twentieth century, and to some extent they are interconnected.[1] In 1900 radio communication in the form of Alexander Popov's headphone message receiver was used for the first time to rescue the crew of the Russian naval vessel *General Admiral Apraskin* and other fishermen icebound in the Gulf of Finland. Around the same time, Marconi's first transmission of radio waves through the cyberspace ushered the century in. Orville Wright made his first flight of a powered heavier-than-air machine in 1903. International commercial flying commenced shortly after the end of the First World War. During the Second World War air transport was used by all the major belligerents for non-operational purposes such as the transport of personnel and supplies, even on leave. This required the armed forces to introduce systems of ticketing and invoicing, air waybills, proper records. Indeed, civil air travel immediately after the War was remarkably similar to military travel by air during the War, in such matters as registering for a flight, documentation, the baggage one could carry, the seating of passengers according to their weight, and other preparatory steps. The Soviet Union launched the first satellite, Sputnik I, to orbit in space beyond the pull of Earth's

1 Balloons had been used earlier, notably during the Siege of Paris in the Franco-Prussian War of 1870–1871. The First Hague Peace Conference of 1899 adopted a Declaration respecting the discharge of projectiles from balloons, 187 CTS 456.

gravity on 4 October 1957. Major Yuri Gagarin, of the Soviet Air Force, in his vehicle Vostok I was the first human being to orbit the earth in space on 12 April 1961. Colonels Armstrong and Aldrin of the United States Air Force were the first human beings to set foot on the Moon in 1969 in their vehicle Apollo II. The law, both international and domestic, has had to keep pace with these swiftly moving technological and scientific developments.

The Convention relating to the Regulation of Aerial Navigation of 13 October 1919 was the first general regulation of civil aviation.[2] That instrument, however, was not widely accepted and did not meet the requirements of this new and rapidly expanding field of human endeavour. During the Second World War the aviation industry, especially in the United States, had grown to an immense size. With the prospect of peace, planners began to consider the economic and social problems that would follow from the demobilization of the major war industries, the aircraft industry amongst them. The growth of civil air transport was envisaged, and much of the war industry was converted to peacetime uses. It was also realized that the whole system of international civil aviation would have to be reconstructed. That is what lay behind the 1944 Chicago Conference on Civil Aviation and the Convention on International Civil Aviation of 7 December 1944, the Chicago Convention, laying down the basic elements of air law and establishing the International Civil Aviation Organization (ICAO), later to become a specialized agency of the United Nations.[3] One function of the re-organization of the system of civil aviation at the time was to ease the transition to peacetime conditions, in which it was anticipated that civilian aviation would come to play a major role in daily life. That Convention has performed a major non-political task in laying down the rules for civil aircraft services and all aspects of their operation. The ICAO works in close liaison with the International Air Transport Association (IATA), an NGO that

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2 11 LNTS 173, with additions amendments of 1 May 1920, ibid. 307, 22 October 1922, 78 ibid. 438, 30 June 1923, ibid. 441, 15 June 1929, 138 ibid. 418, 11 December 1929, ibid. 427 and 1 June 1935 (no longer in force).

3 15 UNTS 295, as modified by the following instruments: 27 May 1947, 418 ibid. 161, 14 June 1954, 320 ibid. 209, 21 June 1961, 514 ibid. 209, 15 September 1962, 1008 ibid. 213, 24 September 1968, 740 ibid. 21, 12 March 1971, 893 ibid. 117, 16 October 1974, 1175 ibid. 297, 30 September 1977), 6 October 1980, 10 May 1984, 6 October 1989 (not yet in force), 26 October 1990 (ditto). This had been preceded by an interim agreement on civil aviation and the Provisional Civil Aviation Organization (PICAO), in force until 4 April 1947 when the main Chicago agreement entered into force. 171 UNTS 345. See also P. J. G, Kapteyn, *International Organization and Integration: Annotated Basic Documents and Descriptive History of International Organizations and Arrangements* (2nd completely revised ed., The Hague, Nijhoff, from 1982), No. B.6.

was formally established by an Act of the Canadian Parliament, representing the industry, that is the international airlines (as opposed to internal airlines and charter airlines). The ICAO and IATA are integral parts of the law of civil aviation.

Turning to outer space, rockets are not new.[4] Both sides put them to military use during the Second World War. Their first major military operation was directed against London during the last stages of the War. With modern technology the speciality of today's rocket that does not require the introduction of air for its operation, so that it can work both within the atmosphere usually extending for at least some 160 kms above the earth's surface and beyond it, in space. Rockets are used today as vehicles for launching satellites. A satellite is an object, manned or unmanned, thrust by rockets beyond the pull of Earth's gravity either into orbit around the earth or aimed outwards into space. They are beyond the range of aircraft and of conventional artillery, and can only be brought down by force by another form of a specially designed rocket. Rockets as military missiles can carry conventional and non-conventional (biological, chemical and nuclear) warheads over long distances. They have been used in some of the local wars that took place towards the end of the century, notably in 'Desert Storm' of the 1990s including the launching by Iraq of Scud missiles against Saudi Arabia and Israel (not involved in that operation) and in the strikes on Yugoslavia in 1999 and on Afghanistan in 2001.

Satellites have many uses, both military and civilian.[5] Their rapid and spectacular development from the 1950s onwards has led to the law of outer space, consolidated in a series of treaties. Alongside this general international law, despite the Cold War the NATO and the Warsaw Pact countries, which at the time were the only ones that could launch satellites, reached several agreements relating to the use and the disarmament of outer space. While initially all activities in space were government controlled, recently space has become open to commercial enterprises, especially in the field of telecommunication. The law of airspace, the law of outer space, and the law of cyberspace, are three separate and independent branches of the law, and in some respects the law of outer space has developed in directions that are diametrically opposed to the trends of the law of airspace.

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4 Cf. W. Ley, *Rockets, Missiles, and Space Travel* (London, Chapman & Hall, 1959).

5 Cf. B. Cheng, 'Commercial Uses of Outer Space', *Studies in International Space Law* 541 (Oxford, Clarendon Press, 1997).

§ 9.02. The elements of airspace law

The basic rule of the law of airspace is that every State has complete and exclusive sovereignty over the airspace over its territory.[6] On the other hand, by virtue of Articles 58 (1), 78 and 87 of the 1982 Convention on the Law of the Sea there is complete freedom of overflight over all the oceans beyond the outer limit of the territorial seas.[7] Taking into account the new law of the sea, a State's airspace includes the airspace over its land areas, internal waters and the adjacent territorial sea under its sovereignty or protection (Chicago Convention, Articles 1 and 2). An archipelagic State (above chapter VIII § 8.03) has sovereignty over the airspace above its archipelagic waters, with the right of aircraft to fly over designated sea lanes in exercise of the right of archipelagic sea lanes passage (1982 Convention, Articles 49, 53). The coastal State has no rights over airspace over any other part of the sea that is within its jurisdiction, such as the exclusive economic zone and the continental self. For the purposes of the law of the air, those parts of the sea are treated as high seas. These prescriptions of treaty law respond to firmly established and longstanding tenets of customary international law. Unauthorized entry of a foreign aircraft, military or civilian, into the airspace of another State is a violation of that State's sovereignty.[8]

The Convention does not attempt to define airspace. The standard definition today of aircraft, as established by the ICAO, is 'any machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface'.[9] The Convention makes a fundamental distinction between civil aircraft and state aircraft (Article 3). State aircraft are aircraft used in military, custom and police services, including today the aircraft

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6 On a State's sovereignty over its superjacent airspace, above chapter VII § 7.01.

7 1183 UNTS 3.

8 *Military and Paramilitary Activities in and against Nicaragua* (Merits) case, ICJ Rep. 1986, 14, 111 (para. 212). Art. 58 (3) of the 1982 Convention on the Law of the Sea (see previous note) provides that in exercising their rights and performing their duties in the EEZ, State shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the Convention and other rules of international law in so far as they are not incompatible with Part V. It is sometimes asserted that Art. 301, on the peaceful uses of the seas, allows the coastal State to enforce its general security measures in the airspace over the EEZ. It is doubtful if that was the intention behind Art. 58 (3). The Conference did not accept a proposal that a reference to the security interests of the coastal State should appear in Art. 58. See II *Virginia Commentary* 558.

9 I *International Civil Aviation Vocabulary* (ICAO doc. 9713, 1998).

set aside for the head of State and other senior dignitaries (frequently known as *Air Force One*). No state aircraft may fly over the territory of another State or land on it without special agreement. The Convention requires States when issuing regulations for their state aircraft, to undertake 'that they will have due regard for the safety of civil aircraft'.[10] In practice, the civil air control services and the relevant corresponding military air services co-ordinate their activities.

The Convention is only applicable to civil aircraft, making a distinction between scheduled air services and other flights. Subject to the International Air Services Transit Agreement concluded at Chicago on 7 December 1944[11] and the International Air Transport Agreement of the same date,[12] no scheduled international air service may be operated by contracting States over or into the territory of a State except with special permission or other authorization and in accordance with the terms of the authorization or permission (Article 8). The parties to the Air Services Transit Agreement grant international air services permission to fly across their territory without landing and to land for non-traffic purposes, which is for refuelling or if necessary for repairs. This forms the basis for the network of bilateral air services agreements through which most of today's international civil air transport, passengers and goods, is conducted.[13] Unlike the law of the sea, which on navigation refers to all States, the navigation provisions of the Chicago instruments are limited to contracting parties. Today this is a technical matter since almost every State and its dependencies (if any) is a party to or is covered by those instruments, and all aircraft obey the rules of the air as established by ICAO. Aircraft of States parties to the Convention

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10 Arts. 24 to 31 of Additional Protocol No. I of 1977 to the Geneva Conventions of 1949 contain arrangements for medical aircraft applicable in time of armed conflict, above chapter V note 58.

11 84 UNTS 389. This agreement embodies the so-called two freedoms, and forms the basis for the organization of international air transport over land. Issues relating to this Convention came before the ICAO Council in 1971 in a dispute between India and Pakistan, and then by way of appeal before the ICJ in the *Appeal relating to the Jurisdiction of the ICAO Council* case, ICJ Rep. 1972, 46. The Court upheld the Council's jurisdiction in that case.

12 171 UNTS 387. This agreement, embodying the so-called five freedoms, has not been widely accepted.

13 Three major arbitrations relating to these bilateral agreements are recorded: the *Air Transport Agreement* case (France/U.S.A.), (1963, 1964 [interpretation]), XVI RIAA 7, 73; *Air Transport Services Agreement* advisory opinion (Italy/U.S.A.) (1965), ibid. 75; *Air Services Agreement of 27 March 1946* arbitration (France/U.S.A.) (1978), XVIII RIAA 415.These strong arbitral awards throw much light on the workings of these bilateral agreements. See also on a related matter the *Heathrow Airport User Charges* arbitration (United Kingdom/U.S.A.) (1993), 102 ILR 215.

not engaged in scheduled international services may make flights into or in transit non-stop across the territory of another contracting party, or make stops for non-traffic purposes without prior permission, subject to the right of the State concerned to require landing (Article 5). Pilotless aircraft require permission (Article 8).

An aircraft has the nationality of the State in which it is registered, and dual nationality is prohibited (Articles 17 to 21). Jurisdiction over events occurring in an aircraft is complicated. In the first place the law of the aircraft's nationality will be applicable. If the aircraft is in the airspace of a foreign State, that State may have concurrent jurisdiction. The issue may be intricate in the case of a birth on board an aircraft in flight. The law of the aircraft's nationality will certainly be the first to determine the infant's nationality, and when the aircraft is not within the airspace of another State, it will be the only applicable law. At the same time the law of the State in or over which the child was born may also apply, and then it would be necessary to establish with precision the location of the aircraft at the moment of birth. The position is similar for a crime. A 'normal' crime committed on board an aircraft, theft for instance, will in the first place be governed by the law of the aircraft's nationality. This is important as it gives the captain all necessary powers to maintain law and order in the aircraft, wherever it is at any moment. However, the law of the *locus in quo* may also be applicable, whatever the forum in which the person is tried. These jurisdictional problems have become important in connection with the prevention and punishment of acts of terrorism committed against aircraft in flight (further in § 9.03 below) and with the new phenomenon of air rage. The captain of a civil aircraft has full control over the aircraft and its crew and passengers during its journey. His position is similar to that of the captain of a merchant ship. Any interference with that control is criminal.

The ICAO (Convention, Articles 43 to 66) is the specialized agency with direct responsibilities for all international aspects of civil aviation. It is structured like all international organizations, with an Assembly, a Council and a Secretariat. Its objectives are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to ensure the safe and orderly growth of international civil aviation throughout the world, to encourage the arts of aircraft design and operation for peaceful purposes and sundry other related matters (Article 44). The Assembly meets once in three years. The Council is a permanent body. It elects its President who serves for three years and may be re-elected. With the Secretary-General, the President of the Council is responsible for the day to day running of the Organization. The Council appoints the members of the

Air Navigation Commission, the technical body responsible to the Council for all the technical aspects of international civil air navigation (Articles 56, 57). The Council also has dispute settlement powers if contracting States wish to submit to it disagreements relating to the interpretation or application of the Convention or its annexes, with a certain right of appeal to the International Court of Justice (Article 84).[14]

One major international treaty of universal impact affects international civil aviation. That is the Warsaw Convention of 12 October 1929 for the unification of certain rules relating to international carriage by air, as amended.[15] Its main purpose is the limitation of a carrier's liability in case of injury or death in an accident, or loss of goods. The limitation can be overridden if the plaintiff can establish culpable negligence by the carrier. The terms of the Convention are incorporated into the internal law of States and in any ticket (contract) of air transport. In the economics of civil aviation, including insurance, the Warsaw Convention plays a major role.

During the Cold War the aerial frontiers in Europe and Asia were very sensitive, and charges of unauthorized intrusion of military and civil aircraft were frequent.[16] Two serious incidents of the shooting down of civil airliners that strayed off course into forbidden airspace have attracted attention. One was the shooting down by Bulgarian air defence units of an Israeli civil airliner on 27 July 1955, leading to a dispute that was later settled after the ICJ found that it lacked jurisdiction to decide that case on the merits.[17] The second was

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14 Cf. the case cited above, note 11. The *Aerial Incident of 3 July 1988* case was presented to the ICJ as an appeal, but the ICAO informed the Court that this was not so. The case was discontinued. ICJ Rep. 1996(I) 9 and II Pleadings 619 (Observations by the ICAO Council).

15 137 LNTS 11, modified by Protocols of 28 September 1955, 8 March 1971 (not yet in force), 25 September 1975 (not yet in force), and a supplementary convention signed at Guadalajara on 18 September 1961. 478 UNTS 371; 500 ibid. 31. The Warsaw Convention is being updated and replaced by the Montreal Convention for the Unification of Certain Rules for International Carriage by Air of 28 May 1999, in force from 4 November 2003, ICAO doc. 9740. Unlike the Warsaw Convention, this Convention is authentic in the customary six official languages, and for the French word *dol*, which has caused so many difficulties in English-speaking countries in applying the Warsaw Convention, Art. 21 refers to 'the negligence or other wrongful act or omission' of the carrier or its servants or agents. This is a matter of internal law and of private international law, and it has given rise to much litigation, mainly claims against airlines and their insurers.

16 Cf. P. de Geouffre de La Pradelle, 'Les frontières de l'air', 85 *Recueil des cours* 117 (1954-II).

17 *Aerial Incident of 27 July 1955* case, ICJ Rep. 1959, 127.

the shooting down of the Korean airliner on KAL flight 007 on 1 September 1983, apparently within Soviet airspace.[18] The State whose territory is overflown without permission has the right to take proportionate defensive action that includes requiring the aircraft to land at a designated airport. It does not in principle extend to destroying a civil aircraft while in flight. Following the KAL incident, in 1984 the ICAO Assembly decided to amend the Chicago Convention by adding a new Article 3 *bis* reading:

> (*a*) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States as set forth in the Charter of the United Nations.
>
> (*b*) The contracting States recognize that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft other instructions to put an end to such violations. For this purpose, the contracting States may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph (*a*) of this Article. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft.
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> (*c*) Every civil aircraft shall comply with an order given in conformity with paragraph (*b*) of this Article. To this end each contracting State shall establish all necessary provisions in its national laws or regulations to make such compliance mandatory for any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State. Each contracting State shall make any violation of such applicable laws or regulations punishable by severe penalties and shall submit the case to its competent authorities in accordance with its laws or regulations.
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> (*d*) Each contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State for any purpose inconsistent with the aims of this Convention. This provision shall not affect paragraph (*a*) or derogate from paragraphs (*b*) or (*c*) of this Article.[19]

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18 See 22 ILM 1109 (1983); M. Leach, 'Destruction of Korean Airline: Action by International Organizations', 78 AJIL 244 (1984).

19 ICAO doc. 9436, adopted at the 25th (Extraordinary) session of the ICAO Assembly on 10 May 1984. Entered into force on 1 October 1998, UNTS # 36983.

§ 9.03. Crimes against aircraft

From the mid-1950s onwards, terrorist attacks against aircraft in flight and on the ground, and against airports, showed the extreme vulnerability of aircraft and airports to this kind of attack.[20] These attacks took two forms: the introduction of explosives timed to explode when the aircraft reached a certain height or at a fixed hour, and the hijacking of civil aircraft by armed persons concealed among the passengers. There are two forms of hijacking namely hijacking with a political motive, and individual hijacking for a personal motive, usually to seek asylum in another country: Both are equally dangerous to the aircraft and its passengers, since in both cases control of the flight is no longer exclusively in the hands of the captain and crew. The problem has engaged the attention of both the General Assembly and the Security Council of the United Nations, and of ICAO. In the early stages, political factors prevented action by the United Nations. However, at the same time, since these acts are criminal under any system of law, attention became focused on the possibility of strengthening the relevant domestic criminal law and international judicial co-operation, including the formal introduction of the rule of extradite or prosecute – *aut dedere aut judicare*. That aspect has been the concern of the ICAO, with the backing of the political organs.[21]

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20 In December 1968 an Israeli aircraft in Athens international airport was attacked by Palestinians and casualties and damages ensued. In retaliation Israel attacked Beirut airport inflicting casualties and damage. That attack was brought before the Security Council which expressed deep concern about the need to assure free uninterrupted international civil air traffic. It condemned Israel for its premeditated action and considered that Lebanon was entitled to 'appropriate redress for the destruction it has suffered, responsibility for which has been acknowledged by Israel'. S/Res. 262 (1968), 31 December 1968. Lebanon then brought the issue of appropriate redress before the ICAO Council, which decided to adjourn the discussion *sine die*. ICAO, Council Session January 1969, doc. 8793. The competent specialized agency found that in the circumstances the resolution of the Security Council was appropriate redress. On this incident see R. Falk, 'The Beirut Raid and the International Law of Retaliation', 63 AJIL 415 (1969); Y. Z. Blum, 'The Beirut Raid and the International Double Standard: Reply to Richard A. Falk', 64 ibid. 73 (1970). Generally, see W. P. Heere, 'Problems of Jurisdiction in Air and Outer Space', *Reflections on Principles and Practice of International Law: Essays in honour of Leo J. Bouchez*, 65 (The Hague, Nijhoff, 2000).

21 See in general, G. Guillaume, 'Terrorisme et droit international', 216 *Recueil des cours* 287 (1989-III). See also the resolution of the Institute of International Law of 3 September 1971 on the unlawful diversion of aircraft. 54/II Annuaire IDI 471. On the hijacking to Entebbe, Uganda, of a French civil airliner on the Paris-Tel Aviv route, above chapter IV note 51. In 1977 German military units rescued a hijacked German aircraft from

General Assembly resolution 2551 (XXIV), 12 December 1959, is the first of these instruments. Addressing forcible diversion of civil aircraft in flight, it called upon States to take every appropriate measure to ensure that their respective national legislation provided an adequate framework for effective legal measures against all kinds of acts of unlawful interference with, seizure of or other wrongful exercise of control by force or threat of force over civil aircraft in flight. In particular it called on States to ensure that persons on board who perpetrate such acts are prosecuted, and the General Assembly urged full support for the activities of ICAO in this respect. In resolution 2645 (XX), 25 November 1970, the General Assembly was forthright in condemning without exception whatsoever, all acts of aerial hijacking or other interference with civil air travel, and all acts of violence that may be directed against passengers, crew and aircraft engaged in, and air navigational facilities and aeronautical communications used by civil air transport. It called upon States to take appropriate action to deter such acts within their jurisdiction. It condemned the exploitation of unlawful seizure of aircraft for the purpose of taking hostages and the unlawful detention of passengers and crew in transit or otherwise engaged in civil air travel as another form of wrongful interference with free and uninterrupted air travel. It again encouraged the work of the ICAO in this field.

In resolution 49/60, 9 December 1994, the General Assembly adopted its first Declaration on Measures to Eliminate International Terrorism. It specifically recalled the long list of ICAO instruments relating to crimes against aircraft and airports and called upon States that had not done so to become parties to those treaties. This has been followed by supplementary declarations in resolutions 51/210 of 17 December 1996 and 55/158, 12 December 2000, and a major treaty for the suppression of terrorism is in preparation.[22]

In the Security Council, resolution 579 (1985), 18 December 1985, also condemned unequivocally all acts of hostage-taking and abduction. It affirmed the obligation of all States in whose territory hostages or abducted persons were held to take all appropriate measures to secure their safe release and to prevent the commission of acts of hostage-taking and abduction in the future. The Security Council gave its backing to the activities of ICAO. This was repeated in resolution 638 (1989), 31 July 1989. In resolution 635 (1989), 14 June 1989, the Security Council faced a new threat to civil aviation, caused by plastic

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Mogadishu airport, with the consent of the authorities of Somalia. See 82 RGDIP 627 (1978). The phrase Aut dedere aut judicare is based on Grotius, above chapter V note 2, Bk ii, ch. xxi, § iv, 1, English translation 527.

22 See generally above chapter IV § 4.10.

explosives that escape detection in the normal airport security devices then in use. It backed ICAO's activities in dealing with this new form of terrorism, and urged all States, and in particular the producers of plastic or sheet explosives, to intensify research into means of making those explosives more easily detectable. This in turn has led to the Convention on the Marking of Plastic Explosives for the Purposes of Detection of 1 March 1991.[23]

The reaction of those two principal organs of the UN to what was developing into a major international scourge and source of tension, slow though it was, shows growing determination not to permit alleged political considerations to interfere with international action for the suppression of criminal activities that have become an international scourge. That sluggishness, reflected also in the slow entry into force of the international instruments, is linked to the difficulties experienced by the international community in reaching a general understanding on how to deal with terrorism.[24]

Under the auspices of ICAO, and with the backing of the General Assembly and the Security Council, a series of Conventions has been adopted to deal with this menace. They include the following:

- The Tokyo Convention of 14 September 1963 on offences and certain acts committed on board aircraft;[25]
- The Hague Convention of 16 December 1970 for the suppression of unlawful seizure of aircraft;[26]
- The Montreal Convention of 23 September 1971 for the suppression of unlawful acts against the safety of civil aircraft;[27]
- Protocol of 24 February 1988 for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention of 1971.[28]

The 1971 Convention has been the subject of proceedings in the Security Council leading to SC resolution 731 (1992), 21 January, followed by resolution 748 (1992), 31 March, imposing sanctions on Libya under Chapter VII of the Charter. For its part, Libya introduced two cases in the International Court of Justice, against the United Kingdom and the United States. In 1999 agreement

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23 ICAO doc. 4571; UNTS No. 36984, in force from 21 June 1998.

24 On the intended inclusion of terrorism in the jurisdiction of the new International Criminal Court, see above chapter IV § 4.10.

25 704 UNTS 219, in force from 4 December 1969.

26 860 UNTS 105, in force from 14 October 1971.

27 974 UNTS 177, in force from 26 January 1973.

28 1589 UNTS 474, in force from 6 August 1998.

was reached between Libya and the two respondents regarding the trial of the personas allegedly responsible for the act in question, and that has led to the suspension of the proceedings in the Court.[29] The Convention has also been invoked in three cases brought by the Republic of Congo against Burundi, Rwanda and Uganda concerning an incident involving the shooting down of a Congolese aircraft on 9 October 1998, with consequent loss of life.[30]

In addition to those universal treaties, there are several regional treaties designed to strengthen the application of the universal rules. These include the following:

- The European Convention on the Suppression of Terrorism of 27 January 1977;[31]
- The South Asian Association for Regional Co-operation (SAARC) Convention on Suppression of Terrorism of 22 August 1988;[32]
- The Arab Convention on the Suppression of Terrorism of 22 April 1988;[33]
- The Convention of the Organization of the Islamic Conference on Combatting International Terrorism of 1 July 1999;[34]
- The OAU Convention on the Prevention and Combatting of Terrorism of 14 July 1999.[35]

Together with this series of major international instruments, and especially following the terrorist attacks on United States cities on 11 September 2001, airlines, airport authorities worldwide and Governments are introducing systems of inspection and control of persons and goods taken on board aircraft, although there are no internationally agreed standards for this.

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29 See the statement of the President of the Security Council at the Council's 3992nd meeting on 8 April 1999, doc. S/PRST/1999/10, 8 April 1999. For the proceedings in the Court, see the *Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* cases, ICJ Rep. 1992, 3, 114 (Provisional Measures), 1998, 9, 115 (Preliminary Objections), 1999, 975, 979 (Time-limits). Discontinued 10 September 2003.

30 *Armed Activities on the Territory of the Congo* cases, Congo *v*. Burundi, Rwanda and Uganda, ibid. 1999, 1018, 1025. Later the cases against Burundi and Rwanda were discontinued. Ibid. 2001, Orders of 30 January. A new application was filed against Rwanda in 2002 and is pending. See Orders of 10 July and 15 September 2002.

31 1137 UNTS No. 17828.

32 UN, *International Instruments related to the Prevention and Suppression of Terrrorism* 147 (2001).

33 Ibid. 152.

34 Ibid. 187.

35 Ibid. 210.

§ 9.04. Outer space

The United Nations General Assembly first concerned itself with outer space in resolution 1348 (XIII), 13 December 1958, when it established the *ad hoc* Committee on the Peaceful Uses of Outer Space (COPUOS), made permanent by resolution 1472 (XIV), 12 December 1959. There is no agreed definition of outer space. Consequently, there is no agreed determination of where the law of airspace ends and that of the outer space begins.[36] In 1967 the Scientific and Technical Subcommittee of COPUOS reported that 'it is not possible at the present time to identify the scientific or technical criteria that could permit a precise and lasting definition of outer space'.[37] However, the question arises whether any formal definition is necessary. It is clear today that the law of airspace, as embodied in the Chicago Convention and its related instruments, relates to 'aircraft', and that the treaties governing human activities in outer space address 'satellites', thrust into orbit around the earth or directed to other celestial bodies, which do not use the atmosphere for any purpose except during landing. Although both branches of the law are concerned with the activities of human beings, the law of airspace regulates their activities in the atmosphere, however high they can reach, and the law of outer space regulates their activities beyond the atmosphere and at most through the atmosphere during ascent and descent. At the same time, technological advances suggest that the time may come when hybrid passenger-carrying vehicles will be operating in both airspace and outer space. That could make it necessary to introduce more precise provisions to determine the legal régime applicable to such vehicles, that is the

36 For an account of the main features of that controversy, see E. Jiménez de Aréchaga, 'International Law in the Past Third of a Century', 159 *Recueil des cours* 1, 250 (1978-I).

37 Doc. A/AC.105/39, at 7. In a parliamentary answer to a written question on 19 October 1998, a representative of the British Government stated: 'There is no internationally agreed definition of where "outer space" starts. The most commonly used boundary between airspace and outer space is functional. This means, for instance, that the launching of satellites or other outer space objects is deemed to be an "outer space" activity and that of the flight of aircraft is considered to be an activity in airspace'. 'United Kingdom Materials on International Law 1998', G. Marston ed., 69 BYIL 551 (1998). In A/Res. 55/122, 8 December 2000, the General Assembly requested the Legal Subcommittee of COPUOS to consider as a regular agenda item matters relating to the definition and delimitation of outer space and the character and utilization of the geostationary orbit, including consideration of ways and means to ensure the rational and equitable use of the geostationary orbit without prejudice to the role of the ITU. For an account of its first consideration of the matter in 2001, see the Report of the Committee on Outer Space (A/56/20) para. 152. This is a continuing item.

Chicago Convention or a *sui generis* régime adapted to the requirements of those vehicles. But that belongs to the future, and there is no value in speculation. As this is being written, space tourism has already started, in April 2001!

In 1963 the General Assembly adopted its Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, annexed to resolution 1962 (XVIII), 13 December 1963.[38] This is significant. It occurred at a period of high tension during the Cold War, when only the two Superpowers had space capabilities. The main provisions of this carefully crafted document were that the exploration and use of outer space should be carried on for the benefit and in the interests of all humankind. Outer space and celestial bodies are free for exploration and use by all States on a basis of equality and in accordance with international law. Outer space and celestial bodies are not subject to national appropriation by claim of sovereignty, by means of use or occupation or by any other means. The activities of States in the exploration and use of outer space are to be carried on in accordance with international law, including the Charter, in the interest of maintaining international peace and security and promoting international co-operation and understanding. States are to bear international responsibility for national activities in outer space, whether carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the principles set forth in the Declaration. The activities of non-governmental entities in outer space will require authorization and continuing supervision by the State concerned. When activities are carried on in outer space by an international organization, responsibility for compliance with the principles of the Declaration shall be borne by the international organization concerned and by the States participating in it. The Declaration goes on to require that in the exploration and use of outer space, States shall be guided by the principle of co-operation and mutual assistance and shall conduct all their activities in outer space with due regard for the corresponding interests of other States. If a State has reason to believe that an outer space activity or experiment planned by it or its nationals would cause potentially harmful interference with activities of other States in the peaceful exploration and use of outer space, it shall undertake

38 The COPUOS had encountered difficulties in the preparation of this Declaration. A solution was found through the Institute of International Law which, under the guidance of Wilfred Jenks as rapporteur, and with a strong Commission of which both Ph. Jessup and G. Tunkin were members, adopted a resolution on the legal regime of outer space on 11 September 1963, shortly before that session of the General Assembly began. 50/II Annuaire IDI 361. See also UN, Office for Outer Space Affairs, *United Nations Treaties and Principles on Outer Space*, doc. A/AC.105/572 (UN, 1994).

appropriate international consultations before proceeding with any such activity or experiment. A State that has reason to believe that an outer space activity or experiment planned by another State would cause potentially harmful interference with activities in the peaceful exploration and use of outer space may request consultation concerning the activity or experiment. Each State that launches or procures the launching of an object into outer space, and each State from whose territory or facility an object is launched, is internationally liable for damage to a foreign State or to its natural or juridical persons by such object or its component parts in the earth, in airspace, or in outer space.

The State on whose registry an object launched into outer space is carried retains jurisdiction and control over the object and all persons on it while in outer space. Ownership of objects launched into outer space, and of their component parts, is not affected by their passage through outer space or by their return to the earth. Such objects found beyond the limits of the State of registry shall be returned to that State, which is to furnish identifying data on request before the return. The Declaration concludes that States shall regard astronauts as envoys of humankind in outer space, and shall render to them all possible assistance in case of accident, distress or emergency landing in the territory of a foreign State or on the high seas – an expression that today must include the new maritime zones established under the 1982 Convention on the Law of the Sea. Astronauts who make such a landing are to be safely and promptly returned to the State of registry of their space vehicle.

In resolution 47/68, 6 December 1995, the General Assembly adopted another declaration of principles about the use of nuclear power sources in outer space. This became necessary after it was recognized that for some missions in outer space nuclear power sources were particularly suited or even essential owing to their compactness, long life and other attributes. This resolution consists of a set of principles containing goals and guidelines to ensure the safe use of nuclear power sources in outer space. Again the principle of the application of international law is restated.

These resolutions are accompanied by a series of major treaties, as follows:

– the Treaty on Principles governing the activities of States in the exploration and use of Outer Space, including the Moon and other celestial bodies, of 27 January 1967;[39]

39 610 UNTS 205, in force from 10 October 1967.

- the Agreement on the Rescue of Astronauts, the return of astronauts and the return of objects launched into outer space of 22 April 1968;[40]
- the Convention on international liability for damage caused by space objects of 29 March 1972;[41]
- the Convention on the Registration of Objects launched into outer space of 12 November 1974;[42]
- the Agreement governing the activities of States on the Moon and other celestial bodies of 5 December 1979.[43]

That is a formidable body of law created in a relatively short time. Co-operation between the two leading powers in manned space activities, the United States and Russia, has been exemplary, and is a powerful illustration of common interests overriding political differences. Striking throughout this series of General Assembly resolutions and binding international treaties is the insistence that all human activities in outer space are governed by international law, including the Charter of the United Nations and the law of international responsibility. The major distinction of the law of outer space from the law of airspace, is that the law of outer space contains nothing comparable to the provisions of the Chicago Convention regarding the sovereignty of the territorial State over outer space beyond its superjacent airspace. The sovereignty of the subjacent State extends to all 'aircraft' and their activities in the airspace. It does not extend to 'satellites' and their activities in or connected with outer space, and no part of outer space can be subjected to the sovereignty of any State.

This is without any doubt a major creation of the twentieth century in the field of public international law. It gives the appearance of having been carefully conceived and well crafted.

§ 9.05. Cyberspace

We must start with a brief explanation of some of the terms in current use. American National Standard T1.523-2001 for Telecommunications - Telecom Glossary 2000 explains cyberspace as the impression of space and community

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40 672 UNTS 119, in force from 3 December 1968.

41 961 UNTS 187, in force from 1 September 1972. And see the *Soviet Cosmos 954* claim of Canada against the Soviet Union, 18 ILM 899 (1979).

42 1023 UNTS 15, in force from 15 September 1976.

43 1363 UNTS 3, in force from 11 July 1984. This Convention has nine parties; at present only France among them has space launching capacity.

formed by computers, computer networks, and their users; the virtual 'world' that Internet users inhabit when they are online.[44] It covers, among others, a complex series of elements:

- Numbering and addressing defines positions in cyberspace comparable to latitude and longitude to define positions on earth. Hence the term 'navigation' used to find one's way in the Internet maze. Telephone numbering is governed by the International Telecommunication Union (ITU).[45] Internet addressing is governed by the Internet Corporation for Assigned Names and Numbers (ICANN), a non-profit corporation incorporated in the United States.[46]
- Frequencies, another dimension of cyberspace, are co-ordinated by ITU, which runs the International Frequency Registration Bureau (IFRB). International co-ordination is required for utilization of the frequency spectrum to avoid cross-border interference and interference between terrestrial systems and space based or maritime systems.
- Physical objects and their locations, such as submarine cables and satellites, also come within the concept of cyberspace. Cables under the sea beyond the territorial sea come within the scope of the law of the sea. International co-ordination is required for satellites, defining issues such as satellite orbits or co-ordinating usage of specific slots in space orbits.
- Interconnection connects different networks and the commercial and technical arrangements involved. Many aspects are defined by ITU; others are left to national regulators and market forces.

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44 Last generated 28 February 15:39:21 MST 2000. The word was apparently invented by a writer of science fiction, William Gibson, in 1984.

45 Originally established in 1865 as the International Telegraph Union, 130 CTS 198. The current version of the Constitution of the ITU was adopted at Geneva on 22 December 1992, in force from 1 July 1994, as amended at Kyoto in October 1994, in force from 1 January 1996. See Kapteyn, above note 3 No. B.8 and Supp.

46 American National Standard T1.523-2001 defines *internet* (with a lower case i)as any interconnection among or between private, industrial or governmental computer (digital communication) networks; and the *Internet* (with an upper case I) as a worldwide interconnection of individual networks (a) with an agreement on how to talk to each other, and (b) operated by government, academia and private parties. The Internet originally served to interconnect laboratories engaged in government research, and has been expanded to serve millions of users and a multitude of purposes, such as in personal messaging, computer conferences, file transfer, and consulting of files containing documents. It has proved invaluable in preparing this course. ICANN is responsible for the allocation of domain names on the Internet. It has developed a special set of rules for uniform domain name dispute resolution. See 39 ILM 952 (2000).

Telecommunication refers to communication over distances by cable (including telephone and telegraph), or through broadcasting, that is today voice transmission by radio, graphics by facsimile and video by television. ITU has coordinating functions for telecommunication in general.

Unlike other spaces, cyberspace is invisible, unidentifiable, irrefrangible, intangible, and cannot be felt or identified in any way: it has no known natural characteristics. It is simply there, and used by electromagnetic impulses made by human beings. The law can control the use that human beings put to it.

Article 33 of the ITU Constitution lays down the basic principle of the right of the public to correspond by means of the international service of public correspondence, subject to restrictions for the protection of the security of the State. Article 40 requires international telecommunication services to give absolute priority to all telecommunications concerning safety of life at sea, on land, in the air or in outer space as well as to epidemiological telecommunications of exceptional urgency of the World Health Organization. An important function of ITU is the allocation of bands of the radio-frequency spectrum, the allotment of radio frequencies and registration of radio frequency assignments and any associated orbital positions in the geostationary-satellite orbit in order to avoid harmful interference between radio stations of different countries.[47] General freedom of communication over the high seas (including the exclusive economic zone) is also required by the law of the sea, which permits an exception only in the case of unauthorized broadcasting from the high seas.[48]

Modern technology has developed new forms of communication through the spectrum, especially through the Internet and the World Wide Web (www).[49] The Federal Communication Commission defines this as a client/server software to exchange documents and images. With the continuous spread

47 M. J. Rothblatt, 'Satellite Communication and Spectrum Allocation', 76 AJIL 56 (1982).

48 Convention on the Law of the Sea 1982, above note 7, 109 (with an exemption for distress calls).

49 See in general, Federal Communications Commission (FCC), *Connecting the Globe: A Regulator's Guide to Building a Global Information Community* (FCC, Washington D.C. 1999, Glossary); C. H. Kennedy, *An Introduction to International Telecommunications Law* (Boston, Artech House, 1996; and as regards national security, T. C. Wingfield, *The Law of Information Conflict: National Security Law in Cyberspace* (Falls Church, Virginia, Aegis Research Corporation, 2000); T. Stein and T. Marauhn, 'Völkerrechtliche Aspekte von Informationsoperationen', 60 *Zeitschrift für ausländisches Recht und Völkerrecht* 1 (2000). And see *The International Dimension of Cyberspace Law* (UNESCO Law of Cyberspace Series No. 1, 2000); H. Howe *et al*., *A Practitioner's Guide to the Regulation of the Internet* (Woking, City & Financial Publishing, 2000).

of computers and increasing interest in browsing, the www is posing new problems that so far modern technology has not developed methods for control. National sovereignty is unable to regulate what electromagnetic impulses pass through the spectrum over its territory, whether in its airspace or in outer space above it. Those impulses can be captured by any person on its territory. Unless appropriate blocking equipment is installed on the receiving apparatus, there is nothing to stop a browser of tender age from picking up the crudest pornography, to give one common example. Another is the use of the www for the spread of nazi propaganda and other racist and hate messages, xenophobia, drug trafficking, prostitution rings, money-laundering, terrorist activities, and appeals to the use of force in violation of the Charter. Some countries have tried to make it illegal for persons within their jurisdiction to transmit and to receive such materials.[50] The effectiveness of this approach remains to be tested. In 1999

50 Cf. in Germany, Bundesgerichtshof Urteil 1 StR 184/00, 12 December 2000; and see *International Herald Tribune* (Tel Aviv ed.) 13 December 2000 13; in France, Tribunal de Grande Instance de Paris, No. RG 00/05308, *LICRA [League against Racism and Antisemitism] v. Yahoo Inc.,* 20 November 2000, English translation in *Justice* (Tel Aviv), No. 26, Winter 2000, 31; and in the United States, *Yahoo, Inc.* v. *La Ligue contre le Racisme et l'Antisemitisme*, 145 F. Supp. 2d 1168 (N.D. Cal. 2001), refusing to enforce the French judgment on the basis of the First Amendment of the U.S. Constitution. In April 2001 Yahoo (USA) announced that it would pull adult related entertainment products and advertisements from its site in response to concerns raised by its customers. CNET News.com April 13, 2001, 6.25 a.m P.T., from http://news.cnet/com/news/0-1005-202-5592946.html. The significance of this is that Yahoo, one of the leading servers of www, had invoked the First Amendment of the American Constitution guaranteeing freedom of speech in defence of its policy of not excluding anything from its website. Also see American Society of International Law, *International Law in Brief 9-15/12/00*. A Committee of Experts of the European Committee on Crime Problems is now examining the criminalization of acts of a racist or xenophobic nature being committed through computer networks. On the need for international action to prevent criminal use of cyberspace, see the address of Hans Corell, Under Secretary-General for Legal Affairs in the Panel on the Challenge of Borderless Cyber Crime in the Symposium on the Occasion of the Signing of the United Nations Convention against Transnational Crime, Palermo, 14 December 2000, available on www.un.org/law/counsel/english/cybercrime.pdf. And see A/Res. 56/25, 15 November 2000, adopting the United Nations Convention against Transnational Organized Crime and A/Res./ 55/28, 28 November 2000, on developments in the field of information and telecommunications in the context of international security. In that resolution the General Assembly expressed concern that these technologies and means could potentially be used for purposes that are inconsistent with the objectives of maintaining international stability and security, and may adversely affect the security of States in both civil and military fields. That presages further international action in this matter. The evolution of crime in cyberspace (cybercrime) is leading to a new branch of criminal law and of international co-operation in

the UN General Assembly expressed concern that latest information technologies could potentially be used for purposes that are inconsistent with the objectives of maintaining international stability and security and may adversely affect the security of States in both civilian and military fields. It went on to consider it necessary to prevent the misuse or exploitation of information resources or technologies for criminal or terrorist purposes (resolution 54/49, 1 December 1999). That was adopted in the context of UN work on disarmament, but clearly the problem has wider implications. The studies are continuing at the time of writing, but we can anticipate co-ordinated international action in both the civilian and the military spheres in coming years.

Several international organizations have been established for telecommunication through satellites and cyberspace. They include:

- Special agreement concerning a global commercial communications satellite system (Intelsat) of 20 August 1964;[51]
- Agreement on the establishment of 'Intersputnik' international system and organization of space communications of 15 November 1971;[52]
- Convention on the International Maritime Satellite Organization (Inmarsat) of 3 September 1976 and since modified several times;[53]

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fighting crime. See as an example Council of Europe, Convention on Cybercrime, Budapest, 23 November 2001, ETS 185. For links of the U.S. Department of Justice to the European work, see http://www.usdoj.gov/criminal/cybercrime/intl.html. There is also a direct impact on private international law, for instance as regards electronic signatures. That has been examined by UNCITRAL which in 2001 produced a model law. In A/Res.56/80, 12 December 2001, the General Assembly drew this to the attention of Governments.

51 514 UNTS 48. For the Agreement of the same date establishing interim arrangements, see ibid. at 25. On the privatization of INTELSAT, See Press Release 99-30, 1 November 1999.

52 862 UNTS 3.

53 1143 UNTS 105. This organization was established by the International Maritime Organization for the purpose of implementing the Global Maritime Distress and Safety Systems (GMDSS), following amendments to the Safety of Life at Sea (SOLAS) Convention of 1974, as amended in 1988. 1184 UNTS 2. For the amendment of 10 November 1988, rewriting the constitution and changing the name of the international organization to International Maritime Satellite Organization (IMSO), see Report of the Thirteenth (Extraordinary) Session of the Inmarsat Assembly, 23-25 September 1998, Agenda Item 4, Future Structure of Inmarsat. The name Inmarsat is retained for the commercial operations, conducted by a company formed under English law. And see D. Sagar, 'Provisional Application in an International Organization', 27 *Journal of Space Law* 99 (1999). For the International Agreement on the use of INMARSAT Ship Earth Stations within the Territorial Sea and Ports of 16 October 1985, see 14 *International Journal of Marine and Coastal Law* 432 (1999).

– Convention establishing the European Telecommunication Satellite Organization (EUTELSAT);[54]
– The Arab Satellite Communications Organization (Arabsat);[55]
– An African system is being organized, following the African Internet and Telecom Summit at Banjul, The Gambia, in June 2000 and since.

These are mixed State and commercial enterprises, and with the expansion of market economies and the opening of all branches of the telecommunication industry to market forces and free economies, they are undergoing a complicated process of privatization, each according to its particular requirements. This process is likely to continue into the 21st century, and it will have to match the requirements of the general international law of outer space, as applied to natural persons and juridical persons in any State.

The topic has engaged the attention of the General Assembly. After preparatory work in COPUOS, in resolution 37/92, 10 December 1982, the General Assembly adopted a set of principles governing the use by States of artificial earth satellites for international direct television broadcasting. Activities in that field should be carried out in a manner compatible with the sovereign rights of States, including the principle of non-intervention, as well as the right of everyone to seek, receive and impart information and ideas as enshrined in the relevant United Nations instruments. Such activities should promote the free dissemination and mutual exchange of information and knowledge in cultural and scientific fields, assist in educational, social and economic development, particularly in developing countries, enhance the quality of life of all peoples and provide recreation with due respect to the political and cultural integrity of States. On the applicability of international law, the Principles included the statement that activities in the field should be conducted in accordance with international law, including the Charter, the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, the relevant provisions of the ITU Convention and its Radio Regulations and of international instruments relating to friendly relations and co-operation among States and to human rights. On State responsibility, Principles 8 and 9 established that States should bear international responsibility for activities in the field carried out by them or under their jurisdiction and for the conformity of any such activities with the Principles.

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54 1519 UNTS 149. On the restructuring of Eutelsat, see Assembly of States Parties, Cardiff, 18-20 May 1999, 26th Meeting, AP 26-3E Final.

55 Established 14 April 1976, 4 *Zeitschrift für Luft- und Weltraumrecht* 179 (1978). Modified 14 May 1990.

When an international intergovernmental organization carries out international direct TV broadcasting by satellite, that responsibility should be borne both by that organization and by the States participating in it. The practical application of these principles is, however, not easy. In particular, there is an apparent contradiction between two aspects of human rights, the right to privacy and the right of free speech, and the other requirements of the Principles, especially the development of mutual understanding and friendly relations among States. This, coupled with the present technology which does not enable the underlying territorial State to exercise any control over the electromagnetic waves that pass through its cyberspace, is producing the difficulties and even tensions to which earlier reference has been made.

§ 9.06. The protection of the atmosphere

During the second half of the twentieth century scientists observed that the atmosphere was becoming heavily polluted, to the point of endangering human survival. This was caused by the increasing industrialization, especially of the Northern Hemisphere, the increasing urbanization of large parts of the world, the worldwide use of certain fuels, especially fossil fuels, and the extensive use of noxious chemicals for many purposes, including domestic uses. Examples of widespread domestic pollutants include the propellants used for domestic sprays such as perfumes or deodorants, certain types of plastic materials, the gases used in refrigerators and air conditioners, and the exhaust fumes from automobiles.[56] Some forms of pollution harmed the atmosphere on a planetary scale – the term 'atmosphere' here referring both to the airspace and to outer space. Others, however, are local or regional. This has given rise to several distinct problems. These include transboundary pollution and planetary pollution, both requiring action on the international level together with appropriate regional and national implementation. The international community likewise has had to establish global organizations to deal with all these problems in a systematic way. This section is only concerned with international action to protect the atmosphere, that is the air itself, and other natural phenomena in and above the air (in outer space) on which the health of the planet depends – the ozone layer.

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56 'Smog', fog intensified by smoke – *Oxford English Dictionary*, first used in 1905. This is an atmospheric condition attributed to the action of sunlight on hydrocarbons and nitrogen. Automobiles are a primary source of smog, especially in urban areas.

On the regional and local levels, the general law of international responsibility is certainly the starting point for international action. That comes into play, however *after* an incident of pollution has occurred. The main international action is directed towards preventing further pollution by man-made pollutants, towards preventing accidents and minimizing their effects (so far as possible), and towards preserving the atmosphere from future pollution. The most important of the planetary instruments are the Convention on Long-Range Transboundary Air Pollution of 13 November 1979[57] with its series of Protocols, and the Vienna Convention on the Protection of the Ozone Layer of 12 March 1985.[58]

The United Nations Framework Convention on Climate Change of 9 May 1992 is of particular significance.[59] The principal object of this instrument is to reduce the harmful impact on the climate of certain gaseous omissions that are believed to contribute to the warming of the earth's surface, especially at the Poles. One of its major principles is that protection of the global climate against human induced change should proceed in an integrated manner with economic development in the light of the specific conditions of each country. Its object is to control and reduce the emission of greenhouse gases, particularly carbon dioxide. For this purpose a distinction is made between the developed countries and developing countries, more severe standards applying to the former. In 1997 the Kyoto Protocol dealt more specifically with carbon dioxide emissions but one of the principal propagators of those gases, the United States, has indicated that it will not ratify it in its present form.[60] While this attitude on the part of the United States has aroused widespread dissatisfaction and concern, the Framework Convention itself, and the Kyoto Protocol in particular, serve to emphasize the serious conflicts of interests that the protection of the climate raises. In addition, scientific opinion is divided over many issues affecting the climate of the planet and the protection of the atmosphere, increasing the difficulties of political agreement and its formulation in treaties.

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57 1302 UNTS 217, in force from 16 March 1983.

58 1513 UNTS. 293, in force from 22 September 1988.

59 1771 UNTS.107, in force from 21 March 1994.

60 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, not yet in force. At the end of 2002 this Protocol had 84 signatories and 101 parties.

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CHAPTER X

THE WRITTEN WORD

That which is gone out of thy lips thou should observe and do.

Deuteronomy XXIII: 24.

§ 10.01. The significance of the written word[1]

Virtually all international transactions are written somewhere, by someone. That writing may report a conversation or other happening, record a binding commitment or other understanding, set out a programme of action, describe something that struck the writer's attention or anything else. If whoever wrote it intended it to be a binding instrument, with the consequence that noncompliance with or a breach of its terms would be an internationally wrongful act, the writing could be a treaty. If it is not intended to have that effect, where nonobservance *per se* would not be an internationally wrongful act, it would not be a treaty (whatever else it might be). In sheer quantity, the non-binding pieces of writing by far outnumber the formal binding treaty or commitment, although in practice, the international treaty is probably the most important type of document that the international lawyer will encounter. For the diplomat, however, and the politician, the non-binding document, such as a statement of policy, may well loom larger in his eyes.

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1 The matters discussed in this chapter are treated in greater detail in *Developments*, especially chapters I and II to which the reader is referred. For views of the Institute of International Law on non-binding instruments, see resolutions of 29 August 1983 and 17 September 1987, 60/II *Annuaire IDI* 284 and 62/II *Annuaire* 294. The rapporteurs were Michel Vitally and Krzystof Skubiszewski. For an earlier analysis, see J. Basdevant, 'La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités', *Recueil des cours* 535 (1926) See further, D. M. Johnson, *Consent and Commitment in the World Community: The Classification and Analysis of International Instruments*, 204 (Irvington-on-Hudson NY, Transnational Publishers, 1991). Writing today need not be ink on paper. Electronic formats also are to be regarded as writing. That raises many other problems.

In some respects, the distinction between the two types of writing is becoming blurred. A written instrument treated by those who made it as a treaty (such as by its being registered with the Secretariat of the United Nations) may in fact not be intended to impose executory obligations on its parties. On the other side of the coin, a formal statement made in a political context or a non-binding resolution of an international organization may be accepted by a State as a basis for its future action. That may not be a treaty, but is likely to be found to constitute a commitment that those who made it are bound to act accordingly. A very common form of writing today is a resolution, however named, of an international organization, of an international conference, or of a meeting of a few States whether *ad hoc* or in some permanent grouping.[2] It would be rash to assume that, simply because the non-observance of something written in a non-binding document may not be an internationally wrongful act, the document is of no legal effect. It may be what some writers are inclined to call *soft law*, a difficult expression which apparently is intended to convey something like a rule of law *in statu nascendi*, not yet a binding rule of law, but a norm negligence or ignorance of which could lead to unexpected legal consequences.[3]

Consequently, in all international relations, the written word plays a major role. It sets down the particulars of an international transaction of whatever magnitude, from the purchase of a railway ticket for a foreign visitor to a joint enterprise of action in outer space. It records commitments and understandings, such as undertaking announced in a speech in an international court or tribunal

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2 For the view of the International Court of Justice of the role of non-binding resolutions in the formation of customary international law, see the quotation from the *Legality of the Threat or Use of Nuclear Weapons* adv. op., ICJ Rep. 1996(I) 236, 254 (para. 65), above chapter II note 58. And see O. Schachter, 'The Twilight existence of Non-binding International Agreements'; 71 AJIL 296 (1977), and his *International Law in Theory and Practice* 94 (Dordrecht, Nijhoff, 1991). Somewhat similar is the Court's decision in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case to the effect that a certain decision by the former Protecting Power did not constitute *res judicata* as of an arbitration, but nevertheless was a political decision binding the two States. Above chapter I note 37 (paras. 113, 139).

3 On soft law see for instance I. Seidl-Hohenveldern, 'International Economic "Soft Law"', 163 *Recueil des cours* 165 (1979-II); P. Weil, 'Le droit international en quête de son identité; Cours général de droit international public', 237 *Recueil des cours* 215 (1992-VI). A good illustration of this is the so-called 'precautionary principle' in connection with the environment. Opinion is divided on whether this is a rule of law or a principle to guide the application of the law.

or other organ such as the Security Council.[4] It announces a State's policy or the policy of a group of States, or of an international organization. It lays down programmes for future actions. It embodies the settlement of an international dispute. There is not a single aspect of international relations that cannot be, and normally is not, recorded somewhere in writing. How far that writing is binding on those between whom it was made depends on many factors, including the circumstances in which the writing was made, the rank and standing of those who made it and their object and purpose, who authenticated it, its text, what kind of writing it is, that is something permanent or something transient like a chalk notice on a blackboard or an e-mail that can be deleted. For the law, the name given to the written text is not important, although it may indicate or hint at the intentions behind it. What is important is the intention of those responsible for it. It is not important whether it is signed or unsigned or initialled, or authenticated by a thumb-print, or is a competent stenogram of a statement made say in a meeting of an international organization or conference or of a national parliament, or even a tape or a video-recording. What is important it that the persons who spoke or wrote it were authorized to do so or, if not, that what is recorded or written is subsequently adopted and confirmed by whoever is competent to do so. Unratified treaties can also have legal significance. The ICJ has stated that signed but unratified treaties may constitute an accurate expression of the understanding of the parties at the time of signature.[5]

Texts said to be not binding are of sufficient legal significance to have twice been examined by the Institute of International Law since 1945.[6] In 1983 the Institute considered a series of reports on the topic of international texts of legal import in the mutual relations of their authors and texts devoid of such import. In its resolution of 29 August 1983, it included a paragraph observing that States frequently adopt variously denominated texts by which they accept commitments in their mutual relations in respect of which there is an express or implicit agreement that they are not of a legal character, or the character or import of

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4 For undertakings made in court proceedings, cf. in the International Court of Justice the *Interhandel* (Provisional Measures) case, ICJ Rep. 1957, 105, 112; the *Passage through the Great Belt* (Provisional Measures) case, ICJ Rep. 1991, 12, 18 (para. 27) and in the ITLOS, the *Mox Plant* case, ITLOS Rep. 2001, 95, 109 (para. 80); and as regards engagements made before the Security Council cf. the *Nuclear Weapons* adv. op. above note 2, 253 (para. 63) and operative para. 105 (2) D (with its reference to 'other undertakings').

5 *Qatar-Bahrain* case, above note 2, para. 89.

6 Above note 1.

which it is difficult to determine. It annexed to that resolution the conclusions reached by its rapporteur, Michel Vitally, as amended by him in light of the debates. That was followed by a resolution of 17 September 1987 on the elaboration of general multilateral conventions and of non-contractual instruments having a normative function or objective. In that resolution the Institute recognized that some resolutions of the General Assembly have that role and, following on what it had done in 1983, annexed the Commission's conclusions to that resolution.

The principal formal texts coming into these categories are the Final Act of a diplomatic conference or a conference of plenipotentiaries convened to negotiate a treaty, certain recommendations of international intergovernmental organizations, and treaties adopted in a diplomatic conference or in an international organization, but which have not entered into force. Yet, as Vitally wrote in No. 4 of his conclusions, a specific text, whatever its name, may contain at the same time provisions of a legal character and purely political commitments. He explained that as meaning texts containing commitments which States that accepted them intended to be binding solely at the political level, and which have all their effects at that level: these do not constitute international texts of legal import in the mutual relations between their authors.

The Final Act as we know it today originated in the 1899 Hague Conference.[7] It was conceived as an instrument that all delegations taking part in the Conference could sign without any commitment, and was therefore drawn up as a summary account of the work of the Conference. All the instruments adopted by the Conference were annexed to it, that annexure constituting the authentication of their texts. To add to the solemnity of the document, all the delegations signed it, without any commitment as to the future ratification of the instruments requiring ratification, or acceptance of the other resolutions, in those days usually designated as *vœux*, a virtually untranslatable word. That form of Final Act was in use throughout the time of the League of Nations and was taken over by the United Nations for treaty-making conferences. The 1969 Vienna Convention on the Law of Treaties (§ 10.03 below) directly ascribes one function to the Final Act. By Article 10 (2), on the authentication of the text of a treaty, the signature of the Final Act of a conference incorporating the text of the treaty is one of the procedures for authenticating the text. This

7 See *Developments* at 107 and Sh. Rosenne (ed.), *The Hague Peace Conferences of 1899 and 1907 and International Arbitration; Reports and Documents*, at xxiv (The Hague. Asser Press, 2001). In conferences convened for some purpose other than the adoption of a treaty, the concluding document is usually denominated *Report*.

carries through to the other functions ascribed to authentication, notably, by Article 31 (2 (*b*)) any instrument made by one or more of the parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty, as part of the general rule on interpretation. By Article 33, when a treaty has been authenticated in two or more languages, the text is equally valid in each language unless otherwise agreed. The Final Act is thus an important example of an instrument itself in principle not having legal force, but at the same time having important legal functions and consequences. More recently, the Final Act has been used as a medium for other texts of a legal character for which it was found to be more convenient than the text of the treaty itself. For instance, the Final Act of the UN Conference on the Law of the Sea contained four resolutions as well as an 'understanding' concerning a specific method to be used in establishing the outer edge of the continental margin (above chapter VIII § 8.05). Two of those resolutions were mini-treaties (and in earlier practice would probably have been treated as such). One was on the establishment of a preparatory commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea. The second was a resolution governing preparatory investment in pioneer activities relating to polymetallic nodules (above chapter VIII § 8.06), making the Preparatory Commission equivalent to a provisional ISA. Since those resolutions were adopted as part of the entry into force provisions of that Convention, they came within the scope of Article 24 (4) of the Vienna Convention on the Law of Treaties.[8]

More far reaching is the Final Act of the Rome Conference on the International Criminal Court.[9] In addition to a resolution establishing the Preparatory Commission, that Final Act reproduces a resolution regarding two crimes, terrorism and drug trafficking, to be included later in the crimes over which that Court is to exercise jurisdiction, while the Preparatory Commission is to prepare proposals for a provision on the crime of aggression. This Final Act, therefore, includes directives that will require amendment to the Rome Statute itself.

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8 For that Final Act, see Third UN Conference on the Law of the Sea, XVII *Official Records* (doc. A/CONF.62/121). Unusually, this Conference adopted that Final Act, prepared after several weeks of negotiation, paragraph by paragraph at its 184th plenary meeting. Id. On Art. 24 (4) of the Vienna Convention, see note 24 below.

9 For that Final Act, see doc. A/CONF.183/10, 17 July 1998.

An exceptional instrument is the Final Act of the Conference on Security and Co-operation in Europe, the Helsinki Final Act, signed on 1 August 1975.[10] That document was carefully negotiated. It was signed at the highest level with much ceremony. It looks like a treaty and it reads like a treaty. Yet expressly it is not a treaty. It was not registered with the UN Secretariat, as would have been required were it a treaty, and it has been stated that ten members of the European Community undertook to comply with all its provisions. This political document, embodying political commitments, was the creation of its time, and served as a stabilizing factor during the Cold War. In effect it constituted the political settlement of the western frontiers of the USSR and of Poland, and the eastern frontiers of the German Democratic Republic after the Second World War, the formal *legal* settlement coming later when political conditions were propitious. Some of its provisions may in fact, even if not in intention, have hastened the collapse of single-party regimes in Eastern Europe and the end of the Cold War.

In unsettled political conditions the non-binding instrument, whatever its designation and form, and whatever the commitments underlying it, has constructive potentialities as a stabilizer and for dealing with unprecedented situations which may constitute a threat to international peace. The maintenance and the restoration of international peace are more important than accepted legal orthodoxy, inherited from a different era and a different pattern of international relations.

In brief, anything written in the course of the pursuit of national policy, whether on the bilateral level or on the multilateral level, may have legal consequences. What those consequences are or could be depends on all the circumstances. But no one sent to represent his country or organization should assume that what that person writes and signs is not necessarily a paper without legal consequence.[11]

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10 14 ILM 1292 (1975). And see *Developments* at 133, citing the reply to question 1120/83 in the European Parliament on 11 March 1985.

11 The major modern illustration of this is the first Judgment in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Jurisdiction and Admissibility) case, ICJ Rep. 1994, 112, *passim*. The Court held that a signed minute of a conversation between two Ministers for Foreign Affairs constituted, in the circumstances in which it was made and after an analysis of the text, an agreement to refer a dispute to the Court. And see above, chapter VII note 36.

§ 10.02. The treaty

An international treaty always exists within the broader context of international law as whole, and within the time-frame of the date of its conclusion. With that general observation, there are two ways of looking at a treaty. One is that it is an instrument setting out legal obligations, so that the 'law of treaties' refers primarily to that instrument. The other way is to look to the result of the treaty, that is to the obligations assumed by its parties. In one sense that would be a law making treaty, making law for its parties or for the international community as a whole. Broadly speaking, this is the distinction between the law of treaties and the law of obligations or, in more current international usage, the law of State or international responsibility (see chapter XI below). The International Court of Justice has noted this distinction:

> A determination of whether a convention [treaty] is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility.[12]

The ILC for its part has adopted a similar attitude as the basis for its draft articles on the responsibility of States for internationally wrongful acts:

> It is a matter for the law of treaties to determine whether a State is a party to a valid treaty, whether the treaty is in force for that State and with respect to which provisions, and how the treaty is to be interpreted.[13]

The articles on responsibility provide the framework for determining whether the consequent obligations of each State have been breached, and with what legal consequences for other States.

The law of the treaty as an instrument is now embodied in a series of treaties (conventions) adopted in diplomatic conferences, produced through the codification process of the United Nations, notably the International Law Commis-

12 *Gabčíkovo-Nagymaros Project* case, ICJ Rep. 1997, 7, 38 (para. 47).

13 Draft articles on the responsibility of States for internationally wrongful acts, ILC Rep. 2001 (A/56/10) chapter IV Commentary, introductory section para. (4).

sion.[14] The principal instrument is the Vienna Convention on the Law of Treaties of 23 May 1969, in force from 27 January 1980. The Vienna Convention on Succession of States in respect of Treaties of 23 August 1978, in force from 6 November 1996, and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986, not yet in force, complete this codification. This series of Conventions relates primarily to the law regarding the instrument in which a treaty is made: its formation, its application, its interpretation, its relation to other like instruments (treaties), and the grounds on which it may be found to be invalid or to have been lawfully terminated. The codified law does not deal with the substantive obligations that can arise from a treaty, beyond stating in general and lapidary terms that a treaty in force must be performed by its parties in good faith (Vienna Convention, Article 26, the rule *pacta servanda sunt*). Article 73 of the Vienna Convention provides that its provisions 'shall not prejudge any question that may arise in regard to a treaty from the international responsibility of a State'.

For international purposes, a composite definition of the term 'treaty', based on Article 2 (1) (*a*) of each of the Conventions of 1969 and 1986, could read:

> the term *treaty* means an international agreement concluded between States, between States and international [intergovernmental] organizations or between international organizations in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments [such as an exchange of notes] and whatever its particular designation.

International law attaches no significance to the formal name or description given to the instrument. Many designations have been identified, and more are being added, since the choice is largely a matter of diplomatic nuance and

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14 Above chapter II note 3. There is an enormous literature on the law of treaties. For the law before its codification, see for example Ch. Rousseau, I *Principes généraux de droit international public* (Paris, Pedone, 1944); Lord McNair, *The Law of Treaties* (Oxford, Clarendon Press, 1961). On the Vienna Convention, see Sh. Rosenne, *The Law of Treaties: A Guide to the Legislative History of the Vienna Convention* (Leyden/Dobbs Ferry NY, A. W. Sijthoff/Oceana Publications, 1970). On the law following the Vienna Conventions, cf. I. M. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed. Manchester University Press, 1984); S. Bastid, *Les traités dans la vie internationale* (Paris, Economica, 1985); P. Reuter, *Introduction to the Law of Treaties* (London, Pinter Publishers, 1989); A. Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000); UN, Treaty Section of the Office of Legal Affairs, *Treaty Handbook* (Sales No. E.02.V.2, 2001).

political acceptability. The internal law of a State, however, may draw distinctions, sometime fine, between instruments according to their designation.[15] This can be important for internal ratification processes, and for the question whether and to what extent a duly ratified treaty becomes part of the law of the land. It is not of significance in international law. Article 2 (2) of the Vienna Convention protects internal usages of the terms used in the Convention and the meanings given to them in the internal law of any State.

An engrossed document signed and sealed as a treaty, and a formal exchange of notes constituting an agreement, cause no difficulty. Problems can arise with 'agreements' written in some informal way, such as in a press communiqué, an agreed minute of a conversation, on the back of an envelope or a restaurant menu, or in an unsigned telegram, facsimile message or today, e-mail or other electronic transmission. In the *Aegean Sea Continental Shelf* case the International Court of Justice, having regard to the relevant circumstances, did not see in a joint press communiqué issued by the two Prime Ministers after a conference an agreement to refer the dispute to the Court.[16] In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case the Court three times refused to see in a letter of the respondent State to one of the organs trying to restore peace after the dissolution of Yugoslavia an agreement to accept the Court's jurisdiction in the case before it.[17] On the other hand, in the *Qatar-Bahrain* case the Court found that a minute signed by the Foreign Ministers of the two countries (Qatar and Bahrain) was in the circumstances a binding agreement, even though the Foreign Minister of Bahrain himself had not thought so.[18] That case is significant, because of the perpetual

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15 Cf. D. P. Myers, 'The Names and Scope of Treaties', 51 AJIL 574 (1957); D. M. Johnston, above note 1. The common distinction is between treaties that require a form of parliamentary approval and those which can be made by the executive branch alone, frequently designated as 'executive agreements'. The distinction is a matter of internal constitutional law and practice. It is highly developed in the United States. See e.g. American Law Institute, I *Restatement of the Law of the Foreign Relations of the United States* 153 § 302 (St. Paul, Minn, American Law Institute Publishers, 1987).

16 ICJ Rep. 1978, 3, 44 (para. 107). This follows a close analysis of the diplomatic history of the events leading up to the joint communiqué.

17 ICJ Rep. 1993, 3, 18 (para. 32) and 325, 340 (para. 32) (Provisional Measures); ICJ Rep. 1996, 595, 618 (para. 37 (Preliminary Objections). That finding too was made after consideration of the circumstances in which the letter was sent, and in light of its terms.

18 Above note 11, 120 (paras. 21 ff.). And see above chapter VII note 50. The Court followed the rule laid down in the *Aegean Sea Continental Shelf* case that in this type of case it must have regard above all to the terms of the paper and to the particular circumstances in which it was drawn up, above note 16.

movement of the high dignitaries of State, often unaccompanied by legal advisers, and their inclination to hold video recorded press conferences and to sign communiqués and other documents after each visit. *Caveant!*

Parties may write their treaties in whatever language they like. Frequently, treaties are negotiated in one of the universal languages and then 'translated' into the languages of the parties, which are stated to be the authentic texts of the treaties. Multilateral treaties of universal application are today authenticated in the six official languages of the UN, Arabic, Chinese, English, French, Russian and Spanish, and regional treaties are usually authenticated in the official languages of the region (whether spoken or not!). In law, Article 33 of the Vienna Conventions on the interpretation of treaties authenticated in two or more languages creates a presumption based on the equality of each language version in a single treaty. In a well-organized conference the Drafting Committee and the Secretariat are together responsible for ensuring the concordance of the language versions – meaning juridical concordance, not bare linguistic concordance. However, often that presumption is a fiction and can be rebutted, the treaty having in fact been negotiated in one language and only later rendered into more than one. By the end of the twentieth century English had become the most frequently used language of multilateral diplomacy. Here a word of warning is required. Subtle differences exist between British English and American English. This is not merely a matter of spelling (the spelling of the UN Charter is British) but more important, a matter of usage and the ordinary meaning of words. The spelling might suggest which of the two variants the negotiators were using, but inconsistency in the spelling can lead to difficulties. The ILC saw interpretation as an art, and the rules for interpretation in Articles 31 and 32 of the Vienna Convention are little more than general guidelines. The same can be said about drafting a treaty, whether in one language, or in more than one. Drafting is an art no less than interpretation, and good drafting keeps an eye on interpretation and application of the treaty, in all its authentic texts.[19]

It is sometimes said that a *Memorandum of Understanding* (MOU) is not a binding agreement. As a generalization that should be avoided. The degree to which an MOU is binding is a matter for the intention of those who made it. It may be binding on the national administration of the day, leaving any future administration free to adopt whatever position it likes on it. On the other

19 Cf. the exchange between the delegations of Israel and Syria in the Drafting Committee of the Armistice Conference on 5 July 1949, Israel State Archives, *Documents on the Foreign Policy of Israel*, vol. 3, *Armistice Negotiations with the Arab States December 1948–July 1949* at 655 (Y. Rosenthal, ed. Jerusalem, 1983).

hand, it may be a treaty in the full sense of the word, at least as a matter of international law. An MOU made between two Government departments or agencies may be a binding treaty for the States parties to it.

A special kind of agreement occasionally encountered is the so-called 'gentlemen's agreement'.[20] Frequently oral, that is technically not an international agreement but the word of honour between two or more representatives of States regarding their attitude towards a given problem currently before them. It leads to an expectation in the other parties as to the behaviour of those taking part in the agreement. If any of the individuals concerned should not behave in accordance with that understanding and the behaviour is attributable to the State, that may give rise to an instance of State responsibility, although so far reaching a consequence is unlikely. However, a diplomat or other representative of a State who does not keep his or her word would not survive long as a useful diplomat.

This kind of proceeding, resting on personal honour and trustworthiness, is an indispensable tool of diplomacy, especially multilateral diplomacy in international organizations and in conferences. It is however a fragile tool, dependent on developments turning out as anticipated – *rebus sic stantibus*. A change in the assumed scenario can justify a change in the individual's position. If the gentlemen's agreement is accepted by the States concerned as satisfactory and its permanence is wanted, it will usually be converted into an appropriate formal instrument, in many cases a resolution of the international body in which the gentlemen's agreement was first made. In most instances, however, it is not intended to be long-lasting, but to deal with immediacies.

In the last twenty-five years a veritable explosion in treaty-making has occurred. On the basis of information supplied by the Treaty Section of the UN Office of Legal Affairs, by the end of June 2003, 39, 434 original agreements and 10,462 subsequent agreements (total 49,896) had been registered with the UN Secretariat and a further 1,260 original agreement and 132 subsequent agreements (total 1392) had been filed and recorded, published in more than 100 volumes of the *United Nations Treaty Series.* In 2002, the Section sent out no less than 1363 depositary notifications (in English and in French).[21] The UN is today depositary of more than 520 major international treaties. Other

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20 W. Fiedler, II EPIL 546 (1995); E. Lauterpacht, 'Gentlemen's Agreements', *Internationales Recht und Wirtschaftsordnung: Festschrift für F. A. Mann* 381 (Munich, Beck, 1997). I once heard a Foreign Minister tell the Sixth Committee of the General Assembly, that before you can have a gentlemen's agreement you have to have gentlemen.

21 E-mail Badea to Rosenne, 12 September 2003.

international organizations and a few Governments also serve as depositaries for multilateral treaties, the largest being the International Labour Office. There was, and to some extent still is, a major problem of keeping track of all this, although increasing use of electronic formats and data bases by international organizations and by Governments is showing the way to overcome logistical difficulties. Obtaining the texts of treaties today is not as difficult as it was, but there is room for improvement. Since 1919 the registration of all treaties after entry into force with the Secretariat of the League of Nations and since 1946 with that of the United Nations has been obligatory for members of the League of Nations and of the United Nations, and the publication of treaties by those Secretariats together with translations into English and French has also been required. Three major series of treaties are current and they cover the whole period from 1648 to date. The UNTS is also available on line.[22] Although the UN is the largest depositary of multilateral treaties, it is not the only one. The secretariats of several international organizations perform that function for treaties negotiated within that organization, and several Governments also perform that function. There is certainly room for more co-ordination. In resolution 39/90, 13 December 1984, the General Assembly requested the Secretary-General to examine the feasibility and financial implications of consolidating information regarding depositary functions, but this has remained a dead letter. Many countries produce their own national series of treaties to which they are parties, frequently with a translation into the national language (this may be needed for the internal ratification process). Many of these are now available on a website or through one of the general research engines.

§ 10.03. The Vienna Conventions of 1969 and 1986

As stated, the Vienna Conventions, which should be read with the ILC's commentaries,[23] concentrate on the instrument in which a treaty is formulated, not on the obligations arising out of that instrument. By supplying rules for what are commonly known as the 'final clauses' of a treaty – 'final' not because they come at the end of the treaty but because they cannot all be negotiated before the substance of the treaty is settled – the Vienna Convention has sim-

22 Address: <http://www.un.org/Dept/Treaty>. For current collections of treaties, see above chapter II note 2.

23 For those Commentaries, see ILC Rep. 1966 (A/6309/Rev.1) Part II, chapter II YBILC 1996/II 173 and ILC Rep. 1982 (A/37/10*) chapter II. YBILC 1982/II/2

plified the process of treaty drafting and treaty negotiation.[24] It allows the negotiators to concentrate on the substance without being distracted by technical legal problems of the law of treaties. That has become important in the universal international conferences now a common feature of multilateral diplomacy.

The Vienna Convention of 1969 consists of a preamble followed by 85 articles plus an annex of seven articles. The title of each article states the hypothesis that the article addresses, and the text of the article gives the normative answer. That is frequently cast as a residual rule, meaning that the parties to a treaty are free to it adopt or not, the Conventions thus falling into the category of *jus dispositivum*. That has endowed the codified law of treaties with necessary flexibility, enabling it adapt itself to new conditions and new requirements. Technically the Vienna Convention only applies to treaties concluded after its entry into force (27 January 1980). However, much of it is regarded as restating a rule of customary international law, not subject to that temporal limitation.[25]

Giving to the codified law of treaties its proper place in any systematic exposition of the rules of international law is essential. Focused on the instrument and not on the obligations resulting from it, neither Vienna Convention deals directly with instruments embodying an agreement between a State or an intergovernmental organization and an individual, whether a natural or a juridical person. Formally it lays down no rules for international treaties or transnational treaties that are not made between States or international intergovernmental organizations. Even less can it apply to unilateral acts of States or other international entities. And within those limits, the codified law of treaties does not exhaust the rules of international law that may be applicable. Article 3 of the Convention leaves open international agreements concluded between States and other subjects of international law, between such other subjects of international law, and international agreements not in written form. Nothing in the Convention shall affect the legal force of such instruments, or

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24 The rules for the application of the law of treaties to a treaty go under the generic name of *final clauses*. Although technical, they can have important implications for the treaty's substance. The Conference on the Law of Treaties introduced a happy innovation regarding final clauses, something that had caused perplexity in the past. Art. 24 (4) of the Convention provides that the provisions of a treaty regulating the authentication of the text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary 'and other matters arising necessarily before the entry into force of the treaty, apply from the time of the adoption of the text'.

25 *Kaskili/Sedudu Island* case, ICJ Rep. 1999(II), 1045, 1059 (para. 18).

the application to them of rules set forth in the Convention.[26] Other reserved topics are the implications of the outbreak of armed hostilities between States parties to a treaty[27] or the breach of diplomatic relations between them, international responsibility for breach of a treaty or its non-performance,[28] unilateral engagements,[29] and treaties imposing rights and duties only upon individuals. Above all, it refrains from directly discussing the major issue of the relations between conventional and customary international law, a delicate matter, and consequently it does not really touch the intertemporal law.[30]

It is, therefore, fair to say that if, on the one hand, the Vienna Conventions taken together are a convenient and practical recapitulation of the principal rules of current public international law applicable to treaties between States or to which an international intergovernmental organization is a party, and to the mutual relations of their parties under the treaty, on the other hand one should always keep in mind that their articles do not contain all those rules or exhaust the law. Moreover, when dealing with a legal situation in which one element is an international agreement, and the subject-matter of the discussion does not concern the mutual relations of the parties to the agreement, the Vienna Conventions can neither easily be applied nor can they supply controlling guidance, at least not exclusively. Accordingly, major codification conventions today frequently contain what is now a usual affirmation that the rules of customary international law will continue to govern questions not regulated by the conven-

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26 Israel has included in its *Treaty Series (Kitvei Amana)* some of the Agreements with the Palestine Liberation Organization mentioned above in chapter VII note 61.

27 See on this the resolution of the Institute of International Law of 28 August 1985 on the effects of armed conflicts on treaties, 62/II Annuaire IDI, 278 (1985).

28 See on this the important pronouncement of the ICJ in the *Gabčíkovo-Nagymaros Project* case above note 12 . The title of Art. 60 of the Vienna Convention is 'Termination or suspension of the operation of a treaty as a consequence of its breach', but in terms the article only deals with 'material breach' as there defined. Every breach of a treaty is an internationally wrongful act and engages the international responsibility of the State or organization concerned.

29 Now under examination by the ILC. See ILC Rep. 2001 (A.56/10) Chap. VIII.

30 On the intertemporal law see above chapter II note 6. In the *Aegean Sea Continental Shelf* case (above note 18, 34, para. 80), the Court stated that the expression 'disputes relating to the territorial status of Greece' must be interpreted in accordance with the rules of international law today, and not as they existed when the instrument was drawn up in 1931. In interpreting that instrument the Court had to take account of the evolution that has occurred in the rules of international law concerning a coastal State's rights of exploration and exploitation over the continental shelf.

tion. Although probably not strictly necessary, that leaves the door open to the future evolution of the law.[31]

One of the innovations of the Vienna Convention is its clarification in Article 25 of the provisional application of a treaty. Here the Conference made a fundamental change in the ILC's original proposal. The Commission had proposed, in Article 22, to deal with the provisional entry into force of a treaty. The Conference reformulated the article and renamed it *Provisional application*. Through force of circumstances and the urgency that has attended some recent instances of treaty-making, the procedure of provisional application has been used where urgency required the immediate application of the new or revised instrument, with the understanding that agreement to immediate provisional application would be irrevocable once the provisional application came into effect, even if an individual State that has agreed to apply the instrument provisionally should withdraw that assent.

There are two outstanding examples of this. The first is the provisional application of the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea. General Assembly resolution 48/263, 28 July 1994, adopted that Agreement and opened it for signature and ratification or other formal consent to be bound by it. That Agreement was concluded before the Law of the Sea Convention had entered into force but after the required number of States parties to bring it into force had been reached.[32] Another instance of an irrevocable provisional application is the adoption by the Assembly of Inmarsat in its Rhodes session of 1998 of fundamental revisions of its constituent instrument, replacing the existing constitution and format for that organization's commercial operations with a new format based on the conditions of market economy.[33] In both cases the fundamental changes in the basic texts became necessary through the changed world political and economic conditions, requiring a revaluation of the existing

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31 For discussion of this clause, usually contained in the preamble, see *Developments* at p. 7 and above chapter II note 5.

32 Above chapter VIII note 15. Part IV of the Vienna Convention on the amendment and modification of treaties applies to a treaty which has entered into force. Before that event, amendment can be effected by the normal treaty-making process and is not bound to any amendment provisions in the treaty. All the States that had expressed their consent to become parties to the Law of the Sea Convention, and all the States entitled to become parties to it under its participation clause (Art. 305), were members of the UN entitled to participate in the meeting of the General Assembly. Not all the States that are parties to the 1982 Convention have completed the process of becoming a party to the 1994 Agreement.

33 Above chapter IX note 53.

regimes. Traditional treaty procedures of signing the instrument, followed by ratification, are found inadequate and cumbersome, in face of rapidly changing political, economic and at times technological conditions requiring quick adaptation and rapid implementation of the changes. The use of this technique does not displace the formal processes of signature and ratification. It enables the changes to enter into effect immediately, and if a State does not later ratify the new instrument, it may no longer be a party to the instrument (this is unlikely to happen as regards those States that did not oppose the provisional application of the new text) or it may be regarded as having tacitly accepted it.

There is another factor that is coming to the fore. That is growing resistance to the amendment of what the international community regards as fundamental instruments for the modern international society, even if they have become outdated. In one sense, the attitude of the San Francisco Conference (1945) to the Statute of the International Court of Justice is an early example of this, although it was not perceived as such at the time. Article 109 of the Charter provides machinery for 'reviewing the present Charter' at a specially convened General Conference of Members. By paragraph 3, if such a General Conference had not been held before the tenth annual session of the General Assembly following the entry into force of the Charter (22 October 1945), that is by 1955, the proposal to convene such a Conference was to be placed on the agenda of that session and would be held if so decided by a majority vote of the General Assembly and any seven members of the Security Council. Technical preparations for this began as early as the eighth session (1953). At the tenth session there was no enthusiasm for a review conference and in resolution 992 (X), 21 November 1955, the General Assembly decided that a General Conference would be held at an appropriate time and that, in the meantime, a Committee on Arrangements for a Conference for the Purpose of Reviewing the Charter should be created.[34] This Committee continued in existence until 1967 when its mandate was not renewed. Although the Charter has been amended twice to increase the size of the Security Council and the ECOSOC, no general review as contemplated by Article 109 has taken place. Instead of that, the Charter has been invoked and applied in many unforeseen circumstances and practice has enabled it to adapt itself to new requirements.

Resistance to 'amending' fundamental instruments has been well brought out by the recommendation of the Steering Committee of the Permanent Court

34 See J. Robinson, 'The General Review Conference', 8 *International Organization* 316 (1954); E. Giraud, 'La révision de la Charte des Nations Unies', 90 *Recueil des cours* 307 (1956-II).

of Arbitration not to go forward with any idea of 'revising' or 'amending' or even 'reviewing' the Hague Convention No. I of 1907 on the Pacific Settlement of Disputes, although it probably requires updating.[35] Other methods were found to bring the institution up to date, notably here the preparation of a series of optional rules for use in new types of arbitration not envisaged in 1907. In place of that, a new practice is coming into prominence. That is to conclude new agreements explicating the implementation of the treaty or part of a treaty, or even producing a treaty with no formal connection with the treaty being 'implemented'. The law of the sea provides examples of both, in the 1994 Agreement regarding the implementation of Part XI, and in the 1995 Agreement on the implementation of the provisions of the Law of the Sea Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (above chapter VIII §§ 8.07, 8.04).

Towards the end of the century, another innovation appeared, that of 'witnesses' to the signing of a treaty. It is believed that the first invitation to a foreign head of State to witness the signature of a treaty was in connection with the Tashkent Declaration of 10 January 1966, a peace treaty between India and Pakistan.[36] The highest dignitaries of the two parties signed the treaty and they invited the Chairman of the Council of Ministers of the USSR to witness the declaration. Israel's Peace Treaties with Egypt and Jordan, and its agreements with the PLO, were also witnessed by more than one dignitary of several foreign Powers. The legal significance of this witnessing, if any, is not clear. It is not new for outside Powers to broker an agreement of this kind. One of the most famous of these is the Treaty of Portsmouth of 23 August/5 September 1905 between Japan and Russia ending the Russo-Japanese War of 1904–05.[37] Brokered by the President of the United States (Th. Roosevelt), it was signed in the United States and the ratifications were to be exchanged in Washington D.C. But no American signature appears on the document. In such circumstances, the States signing the text as witnesses show their political support for the arrangement embodied in the instrument and a political commitment to its terms. Witnessing the signature of a treaty does not confer on that signature any special legal quality and does not affect the requirement of ratification if that is stipulated in the treaty.

35 See PCA, 1999 Steering Committee, Report and Recommendations to the Administrative Council, §§ 21 ff. (June 1997).

36 560 UNTS 39.

37 199 CTS 144.

§ 10.04. The classification of treaties

The classification of treaties, sometimes called the taxonomy of treaties (although importing technical words of another discipline into the law is to be avoided, as William Safire has pointed out[38]), is a controversial topic. There are two broad methods of classification, one by form and the other by content. Since the Vienna Conventions are focused on the instrument, the main classifications there relate to the treaty's form. In principle, the Conventions apply to all treaties coming within their scope as set out in Article 1 of each treaty. Most treaties are bilateral or, if not bilateral, are made between only a small number of States. However, since the end of the nineteenth century the multilateral treaty, both of universal and of regional scope, has become established and many of the most important treaties today are multilateral. The Conventions therefore had to include provisions for multilateral treaties. Treaties concluded between a limited number of parties are in a midway position between the two.

The multilateral treaty, now the major method for setting out agreed rules for general application, often *erga omnes* both in terms of addressees and in terms of the beneficiaries of the obligation, is often asynallagmatic, even when embodying compromises between differing positions.[39] The multilateral treaty is one of the innovations of the twentieth century. Before that, such treaties were engrossed in the *alternat*, that is in as many signed originals as there were parties, one for each, with detailed rules for the order of listing the parties in each engrossed text. Today a multilateral treaty is engrossed and signed in a single copy left with the depositary, whose duties are set out in the Vienna Conventions subject to any special terms of the treaty itself.[40] The depositary supplies a certified copy required by most States for their archives and as part of the ratification process.

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38 W. Safire, 'Language Raiders and the End of Very', *International Herald Tribune,* Tel Aviv ed., 2 April 2001, 5.

39 The first modern multilateral treaty was probably the Geneva Convention of 1864 for the amelioration of the wounded in armies in the field, above chapter V note 7, but it was really with the Hague Conventions of 1899 (above chapter III note 6) that the multilateral treaty was introduced into general use. Cf. M. Lachs, 'Le développement et les fonctions des traités multilatéraux', 92 *Recueil des cours* 229 (1957-II). And see P. Szasz, 'Reforming the Multilateral Treaty-Making Process: An Opportunity Missed?', *International Law at a Time of Perplexity* 909 (Y. Dinstein and M.Tabory, eds., Dordrecht, Martinus Nijhoff, 1989).

40 Cf. *Developments* 415; *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, (Prepared by the Treaty Section of the Office of Legal Affairs), doc. ST/LEG/8 (1994) + LA41TR/220 (Summary), 9 April 1996.

Other differentiations recognized by the Vienna Conventions are treaties constituting international organizations and treaties adopted within an international organization (Articles 5 and 20 (3)), and treaties of a humanitarian character (Article 60 (5)) as regards breach. In the early stages of the codification the ILC attempted to deal with what it termed a 'general multilateral treaty', meaning a multilateral treaty which concerns general norms of international law or deals with matters of general interest to States as a whole.[41] In the context that was controversial and was intimately linked to one of the central issues of the Cold War, namely the position of the divided States after the Second World War (particularly Germany and Korea) and the so-called 'all States clause' in treaties being drawn up in the United Nations or other international organizations. On second reading the Commission dropped that notion, and although it was raised in the Vienna Conference of 1968, it was dropped there after a long debate. There is no doubt that treaties fitting that description are daily becoming more common. However, from the point of view of the treaty as an instrument, they are no different from any other treaty as far as concerns the formal aspects with which the Vienna Conventions deal.

The classification of treaties by reference to their substance is a different matter, and it is not clear that it serves any useful purpose. It is not so much the classification of treaties that is relevant, as the branch of the law for which they are being invoked. A treaty provision providing for the settlement of disputes over its interpretation or application will, when invoked, bring into play the international law governing the settlement of disputes by the duly qualified organ, and for that purpose it is immaterial what branch of the law is involved. On the other hand, for systematic presentation of the rules of law, it is convenient to talk about 'diplomatic law', the 'law of the sea' (although the Convention of 1982 will defy all attempts at classification), the 'law of human rights', or the 'law of the environment', or indeed any other branch of the law. The Conventions on the Law of Treaties recognize that kind of differentiation through use of the expression 'object and purpose of the treaty' in various provisions, but especially in Article 31, paragraph 1, the general rule on interpretation of a treaty.[42]

This approach owes its origin to the work of the German scholar Triepel at the beginning of the last century, when the multilateral treaty was in its infancy. Triepel correctly perceived a difference between what he termed a

41 ILC Rep. 1962 Chap. II, Art. 1 (*c*), above note 25; and see para. (12) of the Commentary.

42 That expression is taken from the passage in the *Reservations to the Genocide Convention*, adv. op. quoted above in chapter V note 39; ICJ Rep. 1951, 15, 23.

Vertrag and a *Vereinbarung* or, as it is often put, between a *traité-contrat* and a *traité-loi*.[43] The former, essentially but not necessarily bilateral, creates obligations running between the parties only, and for other entities is *res inter alios acta*. The latter sets out general regulations applying to all international entities that come within its scope, much the same as what the ILC in 1962 called a general multilateral treaty. The same law of treaties applies to both types of treaty as an instrument. It is otherwise as regards obligations deriving from a treaty. That is of no relevance to the instrument and the codified law does not attempt to classify the instruments beyond the distinction already mentioned, between bilateral treaties and multilateral treaties. All the parties to a multilateral treaty have a general interest and standing in relation to its interpretation and application. At the same time, Article 60 of the Vienna Conventions, on the termination or suspension of the operation of a treaty as a consequence of its breach, recognizes that a party specially affected by the breach is in a special position. As seen (above, chapter II § 2.02), a dispute between two States over the interpretation or the application of general international law, including a multilateral treaty of general application, will be a bilateral dispute if it is submitted to an international court or tribunal.

§ 10.05. Reservations to treaties

With the development of the multilateral treaty came also the concept of reservations to treaties. The Vienna Conventions (Article 2 (1) (*d*)) describe a reservation as a unilateral statement, however phrased or named, made by a State or international organization, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or organization. For a long time as use of the multilateral treaty increased the problem of reservations disturbed the smooth conduct of international affairs, especially for the depositary of a multilateral treaty. The depositary frequently had to determine whether a State that had ratified a treaty with reservations was to be regarded as a party to the treaty if other States parties objected to the reservations. Two schools of thought emerged to deal with that problem. The European view was that to be established, a reservation required the assent of all the parties to the treaty. That rule was adopted by the Secretary-General of the

43 H. C. Triepel, *Völkerrecht und Landesrecht* (Leipzig, Hirschfeld, 1899); translated by R. Brunet, *Droit international et droit interne* (Paris, Pedone, 1920).

League of Nations in 1927 after consultation with the Committee of Experts for the Progressive Codification of International Law.[44] It became the initial rule for the Secretary-General of the United Nations. The second approach, followed by the Latin American States, was that a State making a reservation became a party to the treaty subject to that reservation, and that other parties objecting to the reservation had the option of not entering into treaty relations with that State. The issue was brought to a head in 1950, in connection with the entry into force of the Genocide Convention. That Convention requires twenty parties for its entry into force. By the end of 1950 the Secretary-General had received eighteen instruments of ratification, some of them with reservations to which other States objected. In those circumstances he approached the General Assembly for guidance on how to proceed. The General Assembly decided to ask the International Court of Justice for an advisory opinion *de lega lata* limited to the Genocide Convention, and the ILC, which was working on the law of treaties, for a general report *de lege ferenda*. During the Court proceedings, the Secretary-General received a sufficient number of ratifications unaccompanied with reservations to bring the Convention into force on 17 January 1951, but nothing was done to halt the Court proceedings. To wide surprise the Court's opinion was close to the Latin American approach.[45] On the other hand, the Commission rejected the Court's position and came down in favour of maintaining the inherited unanimity rule of the League of Nations.[46] Faced with this conflicting advice, the General Assembly decided that for the Genocide Convention the Secretary-General should follow the opinion of the Court, and in future for other instruments he should not pass upon the legal effect of reservations but should leave it to each State to draw legal consequences (resolution 598 (VI), 12 January 1952). This turned out to be unsatisfactory and in resolution 1452 (XIV), 7 December 1959, the General Assembly extended that to all conventions concluded under the auspices of the United Nations which did not contain provisions to the contrary.[47] In 1966, in its comprehensive draft on the law of treaties, the ILC reversed itself and based its proposals for reservations on that latter approach. That is embodied

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44 *Admissibility of Reservations to General Conventions*, note by the Secretary-General, League of Nations doc. C.357.M.130.1927.V, Publication V. Legal 1927.V.16; reproduced in Sh. Rosenne (ed.), 2 *Committee of Experts for the Progressive Codification of International Law* 25 (Dobbs Ferry NY, Oceana Publications, 1972).

45 *Reservations to the Genocide Convention* adv. op., note 42 above.

46 ILC Rep. 1951 (A/1858) Chap. II YBILC 1951/II 125.

47 For the Secretary-General's report on the application of those resolutions, see doc. A/5687, reproduced in YBILC 1965/II.

in Articles 19 to 23 of each Vienna Convention, in the general context of the conclusion and entry into force of treaties. With that, reservations ceased to be a general irritant on international affairs.[48]

Interest in reservations has been revived by two occurrences. One derives from a practice of including in a major treaty a provision prohibiting reservations. This has led States to look for other ways to protect their interests that may be affected in unexpected ways by the treaty if they become party to it. The second arose out of difficulties encountered in the Human Rights Courts and related bodies over reservations to human rights treaties. The stated reason for those difficulties was that although these treaties are concluded between States, States are not their beneficiaries in the contractual sense, but individuals who are not parties to the treaties. This came to a head following the Human Rights Committee's General Comment No. 24 (52) of 2 November 1994, on issues relating to reservations made upon ratification or accession to the Covenant on Civil and Political Rights or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant.[49] In 1993 the ILC had decided to re-examine the topic of reservations to treaties. The General Assembly endorsed that decision in resolution 48/31, 9 December 1993. In 1994 the Commission commenced work and appointed a special rapporteur.[50] Debate in the Sixth Committee and in the Commission showed strong resistance to any change in the relevant provisions of the Vienna Conventions. That leaves it to States to accept or object to reservations, and does not give that power to outside bodies. On the substance of the matter, the Commission directed its attention primarily to the definition of reservations and interpretative declarations to both multilateral and bilateral treaties. The discussion has led the Commission

48 See J. M. Ruda, 'Reservations to Treaties', 146 *Recueil des cours* 95 (1975-II); P.-H. Imbert, *Les réserves aux traités multilatéraux: Evolution du droit et de la pratique depuis l'avis donné par la Cour internationale de Justice le 28 mai 1951* (Paris, Pedone, 1979). And see, in the Inter-American Court of Human Rights, the adv. op. of 24 September 1982, above chapter VI note 75.

49 50 GAOR Sup. 40 (A/50/40), vol. I, reproduced in 107 ILR 64. The Committee had assumed the right to pass upon the compatibility of certain reservations with the object and purpose of the Convention, notwithstanding that the Vienna Convention of 1969 limited that competence to States only.

50 The rapporteur is A. Pellet (France). For his reports to date, see docs. A/CN.4/470 + Corr. 1, 2 (1995); A/CN.4/477 + Corr.2 + Add.1 + Add.1/Corr.1-3 and A/CN.4/478 (1996); A/CN.4/491 + Corr.1 + Add.1, Add.2, Add.2/Corr.1, Adds 3–6 (1998); A/CN.4/499 (1999), A/CN.4/508 + Adds/1-4 (2000); A/CN.4/518 + Adds.1-4 (2001); A/CN.4/526 + Adds 1-3 (2002); A/CN.4/535 + Add. 1 (2003).

to prepare a guide to practice on reservations. The work is continuing at the present writing.

§ 10.06 Treaties and jus cogens

The Covenant of the League of Nations led some international lawyers to examine whether rules of international law exist having a more compelling force than most of the rules – now designated as norms of *jus cogens*. The essence of this idea is that States cannot derogate from the application of such a norm. The issue was controversial, and remains so. Debate became more intense after the establishment of the United Nations. The Charter is widely regarded as embodying norms of that character. Opinion became strong enough that the issue could not be avoided in the codification of the law of treaties. In consequence, the ILC proposed that a treaty would be void if it conflicted with a peremptory norm of general international law from which no derogation is possible and which could be modified only by a subsequent norm of general international law having the same character. The Commission completed this by another provision to the effect that if a new peremptory norm of general international law is established, any existing treaty which is in conflict with that norm becomes void and terminates (*jus cogens superveniens*). The Commission went on to include a provision on the consequences of the nullity or termination of a treaty conflicting with such a peremptory norm. In the case of nullity, the parties were to eliminate as far as possible the consequences of any act done in reliance on any provision which conflicts with a peremptory norm, and were to bring their relations into conformity with the peremptory norm. In cases of termination, the termination released the parties from any obligation further to perform the treaty, but did not affect any right, obligation or legal situation of the parties created through execution of the treaty before its termination. Those rights, obligations or situations might afterwards be maintained only to the extent that their maintenance was not in itself in conflict with the new peremptory norm.[51]

The Conference on the Law of Treaties examined these proposals in depth, finally including the three provisions in the following terms:

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51 ILC Rep. 1966 Part II, Chap. II, Arts. 50, 61, 67 (above note 23).

Article 53. Treaties conflicting with a peremptory norm of general international law (jus cogens)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes 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.[52]

Article 64. Emergence of a new peremptory norm of general international law(jus cogens)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

Article 71. Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

1. In the case of a treaty which is void under article 53 the parties shall:
   (*a*) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and
   (*b*) bring their mutual relations into conformity with the peremptory norm of general international law.
2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:
   (*a*) releases the parties from any obligation further to perform the treaty;
   (*b*) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 66 of each Convention, on procedures for judicial settlement, arbitration and conciliation, has a special provision (in paragraph 2) regarding Articles 54 and 63. It provides that if after a certain delay no solution has been reached

52 In connection with that provision, the Chairman of the Drafting Committee at the Conference explained the expression 'as a whole' as meaning 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.' UN Conference on the Law of Treaties, First Session, *0ffical Records*, Committee of the Whole, 80th meeting.

regarding the invalidity, termination, withdrawal from, or suspension of the operation of a treaty, any one of the parties to a dispute concerning the application or the interpretation of Article 53 or 64 may, by written application, submit it to the International Court of Justice for decision unless the parties, by common consent agree to submit the dispute to arbitration.[53] This is the only provision of its kind, giving the Court contentious jurisdiction over a case concerning the interpretation or application of an *erga omnes* provision, and it remains open whether the Court will require to be satisfied of the applicant's legal right or interest to sustain its *locus standi in judicio*, beyond its being a party to the Vienna Convention.

No attempt has been made to define in a black letter text what norms of general international law qualify as norms of *jus cogens*. In its 1966 report, the ILC commenced its commentary on what was then Article 50 as follows:

> The view that in the last analysis there is no rule of international law from which States cannot at their own free will contract out has become increasingly difficult to sustain, although some jurists deny the existence of any rules of *jus cogens* in international law, since in their view even the most general rules still fall short of being universal. The Commission pointed out that the law of the Charter concerning the prohibition on the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*. Moreover, if some Governments in their comments have expressed doubts as to the advisability of this article unless it is accompanied by provision for independent adjudication, only one questioned the existence of rules of *jus cogens* in the international law of today. Accordingly, the Commission concluded that in codifying the law of treaties it must start from the basis that today there are certain rules from which States are not competent to derogate at all by a treaty arrangement, and which may be changed only by another rule of the same character.[54]

It gave some illustrations: (*a*) a treaty contemplating an unlawful use of force contrary to the principles of the Charter; (*b*) a treaty contemplating the performance of any other act criminal under international law; and (*c*) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate.

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53 In addition, Art. 44 on the separability of treaty provisions prohibits the separation of treaty provisions in cases falling under Art. 53, but not in cases falling under Art. 64. These provisions are repeated in the 1986 Convention, with the addition of provisions regarding decisive advisory opinions in the case of international organizations.

54 Above note 23, Art. 50, Commentary para. (1).

States have shown little inclination to designate any rule in a treaty under negotiation as a norm of *jus cogens*. An outstanding illustration of this occurred during the Third UN Conference on the Law of the Sea. In the negotiation of the final clauses, a proposal was advanced with the title *jus cogens* to the effect that the provision in the Convention relating to the common heritage of mankind (Article 136) was a peremptory norm of general international law from which no derogation was permitted and which, consequently, could be modified only by a subsequent norm of general international law having the same character. This proposal attracted opposition in particular because of the use of the expression *jus cogens* and because it followed too closely the language of Article 53 of the Vienna Convention. The compromise was the inclusion in Article 311 of the Convention (on the relation of the Convention to other conventions and international agreements) of paragraph 6. By that, the parties agreed that there should be no amendments to the basic principle relating to the common heritage of mankind set forth in Article 136, and that they should not be party to any agreement in derogation thereof.[55] The International Court of Justice too has shown no enthusiasm in recognizing principles and rules as having the character of norms of *jus cogens*. In an enigmatic and circular statement it has said that the question whether a norm is part of *jus cogens* as defined in Article 53 of the Vienna Convention 'relates to the legal character of the norm'.[56]

In so far as concerns black letter texts of international law, the Vienna Conventions, the only instruments dealing with the matter directly, limit themselves to declaring the invalidity, *ex tunc* or *ex nunc* as may be, of any treaty that violates an existing or an emerging norm of *jus cogens*. There is no black letter treaty text declaring in positive terms what *is* a peremptory norm of general international law, and what its consequences are in terms of the behaviour of States. One consequence is the unrestrained use of the idea of breach of a peremptory norm for propaganda purposes in times of high crisis and conflict. This cheapens the idea.

The hypothesis of Article 53 is unlikely to be encountered.[57] While it is not possible to set out a list of norms coming within the category of *jus cogens*,

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55 This is reflected particularly in arts. 311 (6) and 317 (6) of the Convention. See V *Virginia Commentary*, above chapter VIII note 3, 241.

56 *Nuclear Weapons* adv. op. above note 4, 258 (para. 83). The Court found that the question put to it did not relate to the character of the humanitarian law that would apply to the use of nuclear weapons, so that there was no need for it to pronounce on this matter.

57 Cf. the observation of E. Jiménez de Aréchaga in 52/I Annuaire IDI 378 (1957).

some of the underlying principles of the Charter are today widely understood as having that character. One of these is the obligation not to use armed force in a manner that is inconsistent with the provisions of the Charter. Taking that as an example, States are unlikely to conclude treaties in violation of that principle, or if they do, to publish them. At the Vienna Conference there was a feeling that the introduction of this concept in that negative form into the law of treaties would lead to instability in the general run of international relations, and especially in treaty relations. That anxiety has been proved groundless. What the international society needs is machinery to establish norms of *jus cogens* and the will to enforce those norms. Both those tasks are political operations, and bodies such as the ILC or the Institute of International Law and the International Law Association have wisely held back from interfering too much in that and from attempting to draw up lists of norms of *jus cogens*.

Article 53, and following it Article 64 of the Vienna Conventions, are the only provisions singled out in Article 66 for the compulsory settlement of disputes concerning the application or the interpretation of those provisions through the International Court of Justice or through arbitration if so agreed by the States parties to the dispute. (In the case of the 1986 Convention, if an international organization is a party to the dispute, the possibility exists for a request to the Court for an advisory opinion which shall be accepted as decisive by all the parties to the dispute.) This does not exclude the creation of new norms of *jus cogens* by treaty, as is envisaged in Article 54. But it goes further and also opens the way to judge-made law through the International Court of Justice. This is a radical innovation in international practice and in the theoretical basis of international law which, on the whole, is hesitant in accepting the concept of judge-made rules of international law. It may be assumed, therefore, that in such a case the International Court of Justice would exercise the greatest caution, and require firm assurances that it is required to perform this function, whether the issue comes before it in a contentious or in an advisory case.[58]

58 On the impact of the concept of *jus cogens* on the law of international responsibility, see chapter XI § 11.04 below.

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CHAPTER XI

RESPONSIBILITY AND REMEDIES

Da mihi factum, dabo tibi jus,

from the Separate Opinion of Judge de Castro in the *Western Sahara* case, ICJ Rep. 1975 at p. 138.

§ 11.01. The codification of the law of State responsibility

Next to the law of treaties and obligations arising from treaties and other commitments of the State, questions of responsibility come high on the agenda of the legal departments of Foreign Ministries and of international intergovernmental organizations. As in the case of treaty commitments, frequently these differences can be settled at the official level without seriously ruffling political relations. Only in serious cases, or where matters of major principle are involved, will the difference reach higher levels of the national or international administration, and many of these cases are settled by arbitration or through an international court. Against that background, codification of the rules governing the matter has as its primary objective to smooth this day-to-day work and prevent minor differences from developing into major disputes.

The root of international responsibility is a breach of international law. This is always a question of fact, and the law of responsibility always deals with the legal consequences of facts, the behaviour of one or more individuals that is attributable to a State or other entity of international law. The breach can be one of two principal kinds. It can be a one-time breach, perhaps even unintentional, attributed to the respondent. Or it can be a continuing breach, whether intentional as a matter of policy or unintentional due to a misinterpretation or misapplication of a relevant international treaty or other rule of international law. It may be self-evident and require little to substantiate it, or the facts are disputed, and another dispute can arise as to whether established facts constitute an internationally wrongful act within the meaning of the law of responsibility, including its attribution to the respondent State or other entity.

The large number of judicial and arbitral precedents relating to international responsibility reflects the immense variety of factors triggering international responsibility.

Of all branches of international law, the law of responsibility is the most influenced by case law, the greater part concerning claims by States alleging ill-treatment of their nationals in a foreign country. During the nineteenth century a practice developed by which if international disputes of that character arose out of a single incident or event (such as a revolutionary change of government), they would be settled on the international level through the establishment of a claims commission that in turn would settle the claims of individuals. The origin of this practice is frequently traced to the Jay Treaties of 1794 putting an end to the American War of Independence. Those treaties provided for mixed commissions to settle claims of British and United States citizens. Many such bodies were employed during the nineteenth century, especially to settle claims of Europeans against the new States of Latin America. The practice was resumed on a large scale in the 1919 Peace Treaties, and after the Second World War it appeared in the Peace Treaties with Italy (1947) and Japan (1951). Today the Iran-U.S. Claims Tribunal is the most prominent body of this type. This method of settling individual claims against a foreign State is matched by a system of block settlements, leaving the individual with recourse only against his national authorities.[1]

Following this activity, there are many arbitrations and judicial decisions going into the minutiae of the matter. This aspect of the law frequently goes under the name of denial of justice, and it is associated with both the nationality of claims rule and the exhaustion of local remedies rule, giving protection to the respondent State against inadmissible claims. At the same time, there were a few international arbitrations proper, raising claims of international responsibility for damage caused by one State to another, although often this type of case was (and is today) frequently resolved through the diplomatic channel. As for the concept of responsibility, classical international law eschewed the idea of absolute responsibility, and looked not only for a breach of a rule of international law but also for some evidence that this was intentional (culpability) and caused harm to the claimant party. The existence of this accumulation of case law looked like promising material for codification. However, the inter-

1 On block or global settlements, see the memorandum of Jiménez de Aréchaga (doc. ILC/(XIV)/SC.1WP1 (1963)), paras. 20 ff., on the duty to compensate for the nationalization of foreign property. ILC Rep. 1963 (A/5509*) Annex I (A/CN.4/152), Annex II, in YBILC 1963/II.

national community organized first in the League of Nations and now in the United Nations has encountered difficulties in finding the area on which to concentrate its codification activities.

Like the law of the sea, the law of State responsibility has been on the international agenda since 1924. At first it was limited to responsibility for injuries to aliens. Like the law of the sea, early thinking was that its codification could be completed at the 1930 Codification Conference. Events were to prove otherwise. The topic is delicate and controversial, both legally and politically. It frequently has undertones of economic colonialism or at least paternalism. In the nineteenth century the newly independent Latin American States saw in it attempts by powerful European States and the U.S.A. to consolidate control through economic and commercial means, and in the twentieth century the decolonized States had a similar perception. The International Law Commission (ILC) has been wrestling with the topic since 1949.

Responsibility indicates a legal relationship created by the act of or attributable to a State or other international actor that is a breach of international law and as such affects the rights under international law of another State or international actor. That legal relationship derives directly from the action (or inaction) of the State or entity concerned. The law of responsibility defines that relationship, its cause, its effect, and its discharge (called in the draft articles of 2001 *implementation*). That relationship is in the first place bilateral, even when the impugned action, a breach of the law, affects more than one entity or the international community as a whole, when it violates an obligation that is owed *erga omnes* (to use a common expression in use today). In those cases, international action, for example through the Security Council, is independent of bilateral action to put an end to that relationship, although the two forms of reaction and remedy may be combined or otherwise interlinked. This is demonstrated by the crisis produced by the occupation of the United States Embassy in Teheran in November 1979. The Security Council first dealt with that situation as one the continuance of which was likely to endanger international peace and security. While the Security Council was seised of this dispute, the United States instituted independent bilateral proceedings in the ICJ alleging a series of violations of the Conventions on Diplomatic and Consular Relations. The two principal organs of the United Nations worked side by side. There are other instances of this.

Official codification of the law of State responsibility falls into four phases. The first phase covers the years 1924 to 1930. It is expressed in the work of League of Nations Conference for the Codification of International Law of 1930, concentrating on responsibility for damage done in the territory of a State to

the person or property of foreigners (above chapter II note 55). The deterioration of the general international situation leading to the Second World War in 1939 stopped further substantive action for the codification of international law. Work was resumed in 1947, within the framework of the UN, in entirely new conditions.

The second phase runs from 1949 to 1961. It covers the initial action of the ILC and the reactions of the United Nations General Assembly. The ILC put the topic on its list of topics for codification in 1949, but took no action until 1955 when it appointed F. V. García-Amador (Cuba) as special rapporteur. Then, at the prompting of the General Assembly, it decided to commence study of the topic, which still remained within the parameters established by the League of Nations. García-Amador's term of office as a member of the Commission came to an end in 1961, when the General Assembly requested the Commission to re-examine its programme of work. In 1962, the ILC appointed a Sub-Committee consisting of ten of its members, under the chairmanship of Professor (as he then was) Roberto Ago of Rome, to examine responsibility. The Sub-Committee recommended a radical change of direction. State responsibility was no longer to be confined within the limits that the League of Nations had imposed, but was broadened to cover the international responsibility of States in a wide sense, as commensurate with the Charter of the United Nations.

The third phase commenced in 1963 with the endorsement by the General Assembly of that new approach and continued until 1996 when the Commission completed the first reading of its draft articles on State responsibility. Ago was appointed special Rapporteur.[2] The ILC adopted Ago's articles in Part I (articles 1–35) piecemeal between 1973 and 1980. Ago was followed as special rapporteur by Professor Willem Riphagen of Rotterdam (1979–1986). After he ceased to be a member of the ILC, Professor Gaetano Arangio-Ruiz of Rome was appointed special rapporteur in 1987, serving until 1996. Riphagen and Arangio-Ruiz were both preoccupied with Parts II (Articles 36–53) and III (Articles 54–60) of the draft, which was completed in its first reading in 1996 and circulated to Governments for their comments.[3] The different styles of the

2 See ILC Rep. 1979 (A/34/10*), para. 69, YBILC 1979/II/2. Ago became a member of the ICJ on 6 February 1979, and the Court agreed that he could continue to participate in his individual and personal capacity in the Commission's work on this topic. For a consolidated edition of Part I adopted on first reading, see Sh. Rosenne, *The International Law Commission's Draft Articles on State Responsibility, Part I, articles 1-35* (Dordrecht, Nijhoff, 1991). The series was discontinued.

3 ILC Rep 1996 (A/51/10*), chapter. II, YBILC 1996/II/2. The final draft adopted at that stage consisted of 60 articles and two annexes.

initial texts of the articles and of the commentaries of Parts II and III reflect the changes of special rapporteur. Consequently the second reading required major work of restyling to ensure proper integration of the text as a whole.

Grosso modo the ILC's change of direction in 1963 coincided with the expansion in the membership of the UN following the decolonization process of the 1960s. The completely changed character of the UN and of the relations between the different groupings of States in it form the backdrop of this third phase. This became more marked after the end of the Cold War in the 1990s. It coincided with another development. That is the enormous increase of international obligations based on an international treaty within the scope of the Vienna Convention on the Law of Treaties, so much so that as a practical matter, an internationally wrongful act of a State giving rise to responsibility will very likely also be a breach of one treaty or more. In those circumstances, as an arbitral tribunal has recently said, it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute and there is no reason why a given act of State may not violate its obligations under more than one treaty.[4]

The fourth phase commenced in 1997 when the Australian Professor James Crawford assumed the duties of special rapporteur. For the first time since 1924 a jurist of common-law formation had charge of the topic of State responsibility. The Commission submitted its final report in 2001, and the future is now in the hands of the political organs of the United Nations.[5]

§ 11.02. The League of Nations (1924–1930)

As seen (above chapter II § 2.09), in 1924 the League of Nations decided to embark on a project of codification of international law. After preparatory work it convened the Conference for the Codification of International Law in March 1930. The agenda included responsibility of States for damage done in their territory to the persons or property of foreigners. The topic was allocated to the Third Committee with Jules Basdevant (France) as chairman, A. L. Diaz

4 *Southern Bluefin Tuna* case, arbitral award of 4 August 2000, 110 ILR 508 (para. 52).

5 ILC Report 2001 (A/56/10) chapter IV. Hereafter in this chapter *Report 2001*. This final draft consisted of 59 articles and no annexes. A major change from the previous text was the omission of any provision for the settlement of disputes. That omission explains the unusual recommendation that the ILC made to the General Assembly in paragraphs 72 and 73 of that Report which, as will be seen, was adopted by the General Assembly. And see J. Crawford., *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002).

de Villar (Cuba) as Vice-Chairman and Charles De Visscher (Belgium) as Rapporteur.[6]

From the start the Committee's work was marked by formidable differences. Nevertheless, it produced 10 articles on first reading which were revised by the Drafting Committee and circulated on 4 April. No further discussion took place. At the Chairman's request, the Rapporteur drew up a draft report which was circulated on 10 April but was not discussed. That draft report included the following paragraphs:

> In the course of its discussions, the Committee was obliged to recognise that the time assigned for its work was not sufficient to allow it to bring to a conclusion the studies which it had pursued with such assiduity. In point of fact, owing to the comprehensive nature and extreme complexity of the problems raised, it was only able to discuss ten out of the thirty-one Bases submitted to it. The fact, moreover, that the various questions were closely interdependent, each being subordinated to the others, precluded any attempt to reach a partial settlement. The Committee accordingly, though in agreement as to certain fundamental principles, was unable, owing to lack, of time, to determine the exact limits of their application. It therefore decided to refrain from any endeavour to embody them in definitive formulae.
>
> The importance of the methods of pacific settlement was unanimously recognized. Recourse to these methods, as laid down in general or particular treaties to which most of the States represented at the Conference are parties, is calculated to minimise the acuteness of disputes caused by claims concerning damage suffered by foreigners. The development of international case law will thus contribute most effectively to the gradual definition of the scope and limits of the principle of international responsibility. The settlement of actual cases by international tribunals – first among which must be placed the Permanent Court of International Justice – will provide one precedent after another, each helping to consolidate still further the foundation for an ultimate conventional settlement of this question.

The Final Act of the Conference merely stated that the Responsibility Committee was unable to complete its study of the question of the responsibility of States for damages caused on their territory to the person or property of foreigners, and accordingly was unable to make any report to the Conference.[7] However, this work was not in vain. As perusal of the ILC's 2001 Report shows, the work

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6 The proceedings of this Committee, originally published in League of Nations doc. C.351(c).M.145(c).1930.V, are reproduced in Rosenne, above, chapter II note 55, vol. 4, pp. 1425–1661.

7 League of Nations doc. C.228.M.115.1930.V, section C, and doc. C.351.M.145.1930.V, vol. I, 139, 169. Reproduced in op. cit. previous note, vol. 3, 841, 871.

accomplished in connection with that Conference has found a place in the broader examination of the topic undertaken by the ILC since 1963.

§ 11.03. The United Nations (1947–2001)

(i) The International Law Commission: the first phase (1949–1961)

The Lauterpacht *Survey of International Law* contains a long section entitled 'The individual in international law'.[8] That section was subdivided into several chapters, which included (1) the law of nationality; (2) the treatment of aliens; (3) extradition; and (4) the right of asylum. The question of the treatment of aliens was not presented *per se* as an aspect of State responsibility, but more as one of the protection of rights, including rights of establishment in foreign countries and related matters, and the new concept of human rights in its application to aliens.

On the question of State responsibility, paragraph 97 remarked that a substantial portion of international law relating to State responsibility had received attention and considerable study in connection with the League's codification. That work, however inconclusive, had made a notable contribution to the further study of the subject.[9] For two reasons it was natural that the preparatory work of a codification of the responsibility of States for damage to the person and property of aliens should cover what is perhaps the major part of the law of State responsibility. Those topics have constituted the most conspicuous application of the law of responsibility of States. In the jurisprudence of international tribunals claims arising out of injuries to the person and property of aliens have constituted the bulk of the cases decided by them. Secondly, whatever may be the occasion for charging a State with responsibility under international law – whether it is the treatment of aliens, or the breach of a treaty, or failure to prevent the use of national territory as a base for acts harming the legitimate interests of neighbouring States – these questions are connected, in most cases, with the central problems of State responsibility and call for elucidation of conditions under which a State is liable. Thus questions of responsibility of the State for acts of officials acting outside the scope of their competence, its responsibility for acts of private persons, the degree, if any, to which national law may be invoked as a reason for the non-fulfilment of international obliga-

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8 Above chapter II note 58, paras. 76–89.

9 The same applies to the Draft Convention prepared under the auspices of the Harvard Research in International Law, directed by M. O. Hudson, rapporteur E. M. Borchard, 23 AJIL Special Sup. 133 (1929).

tions, the requirement of fault as a condition of liability – these questions are common to all aspects of State responsibility. Some of these questions were discussed at the Hague Conference. Others, referred to in the Bases of Discussion, were not considered by the Conference. These included concessions and public debts, extent of liability for deprivation of liberty, losses incurred by foreigners as the result of insurrections and riots, liability of the State for the acts of its political subdivisions and protected States, the measure of damages, nationality of claims, factors excluding or limiting liability such as self-defence, reprisals and the Calvo clause. As mentioned, some of these problems are common to other aspects of the law of State responsibility.

The *Survey* continued:

> 98. However, it is clear that that branch of international law transcends the question of responsibility for the treatment of aliens. Its codification must take into account the problems which have arisen in connexion with recent developments such as the question of the criminal responsibility of States as well as that of individuals acting on behalf of the State. These, together with the question of superior orders, may be considered in conjunction with the codification of the principles of the Nürnberg Charter and judgment as envisaged in the resolution of the Assembly. There are other questions which will require consideration in connexion with a codification of the law of State responsibility. These include the problem of the prohibition of abuse of rights – a subject of increasing importance in the growing and interdependent international society; the forms of reparation; the question of penal damages; and the various forms and occasions of responsibility resulting from the increasing activities of the State in the commercial and economic field. Probably the Commission will also be confronted with the necessity of reconsidering the decision of the League of Nations Committee of Experts, reached by a majority vote at its fourth session, that extinctive prescription does not form a part of international law and need not therefore be considered as a subject for codification. Apart from the controversial nature of the reasons adduced by the Committee in support of its decision, the question of suitability for codification in respect of extinctive prescription – as, indeed, in respect of some other questions of limited compass – will assume a different complexion when considered as part of a codification of a wider branch of international law. It will be noted that the Eighth International Conference of American States decided in 1938 to proceed with the codification of various aspects of pecuniary claims, including the question of "prescription as extinguishing international obligations in the matter of pecuniary claims" (resolution No. XIX). Previously, the Seventh Conference had decided to recommend the study, in connexion with the work of codification under the League of Nations, of the entire problem relating to the international responsibility of States (resolution No. LXXIV).

The ILC discussed the treatment of aliens at its 5th meeting. After debate, the Chairman (Manley O. Hudson, United States of America) concluded that this

question would be placed on the list of topics suitable for codification.[10] At the next (6th) meeting, the Commission discussed State responsibility. There was criticism of the *Survey* primarily on the ground that it was not sufficiently detailed and did not take into account many developments that had occurred since the 1930 Conference. G. Scelle (France) did not consider that the failure of the 1930 Conference was an adequate reason for not undertaking the codification of the subject. With foresight, he warned that the Commission should be cautious and should approach the subject in such a way as to avoid any very great difficulties, at least in the early stages. 'The question of State responsibility would recur constantly during the study of the majority of the subjects which the Commission had already placed on the list of topics for codification', he said. The Chairman then concluded that the general opinion was in favour of including the question of State responsibility on the list of topics to be retained.[11] The provisional list of 14 topics selected in 1949 for codification therefore included both, but at that time the Commission gave neither of them any priority.[12]

Nothing occurred until 1953. Then, during the General Assembly's discussion of the Commission's annual report, Cuba submitted a draft resolution (A/C.6/L.311) requesting the ILC to undertake the codification of the principles of international law governing State responsibility and to include it amongst the topics having priority. The Sixth Committee decided by 16 votes to 5, with 24 abstentions, to consider the draft which was adopted as resolution 799 (VIII), 7 December 1953, without the reference to priority. The many abstentions show the hesitations and uncertainty prevailing amongst the member States of the United Nations.

At the Commission's following session (1954), F.V. García-Amador submitted a long memorandum dealing with the General Assembly's resolution, but the ILC reported that in view of its heavy agenda it had decided not to begin work on the subject for the time being.[13] In 1955, García-Amador was appointed special rapporteur, but without any public debate which could have

10 YBILC 1949. The topic of treatment of aliens has since been dropped as an independent topic. However, in 1996 the ILC decided to undertake a study of the topic of diplomatic protection, and that will embrace some aspects of the treatment of aliens. Further in § 11.06 below.

11 Ibid.

12 ILC Rep. 1949 (A/925) para. 18, YBILC 1949. The General Assembly approved this general decision of the ILC in A/Res. 373 (IV), 6 December 1949.

13 ILC Rep. 1954 (A/2693) para. 74, YBILC 1954/II. For García-Amador's memorandum (A/CN.4/80), see YBILC 1954/II (in Spanish, English version mimeographed only).

furnished him with an idea of the Commission's thinking, and no instructions were given to him.[14] Between 1956 and 1961 he submitted six reports.[15] They were briefly discussed at the Commission's 8th, 9th, 11th, and 12th sessions, without, however, the ILC adopting any draft articles. García-Amador had started where the 1930 Conference had left off, concentrating on the responsibility of States for injuries to aliens, although there are signs in his later reports that he recognized the inadequacy of that approach. On the other hand, there was little awareness at the time in the ILC of the significance of certain remarks in the Lauterpacht *Survey*: 'it is clear that that branch of international law transcends the question of responsibility for the treatment of aliens'. The discussions began to show that the topic could not be so limited and that broader issues were involved, including at least some aspects of human rights law as it was developing under the influence of the Charter.

(ii) The International Law Commission: the second phase (1962–1996)

García-Amador ceased to be a member of the Commission in 1961. In that year, the General Assembly recommended the Commission to continue its work on the law of State responsibility. At the same time it requested it to consider its future programme of work in the light of a series of recent discussions in the Sixth Committee. The Commission appointed a Sub-Committee of ten members to undertake preparatory work before a new special rapporteur was appointed. Specifically, the Sub-Committee was to submit a preliminary report containing suggestions concerning the scope and approach of the future study. Professor R. Ago was appointed chairman.[16]

The Sub-Committee unanimously recommended that the Commission should give priority to the definition of the general rules governing the international responsibility of the State. It was agreed, firstly that there would be no question of neglecting the experience and material gathered in certain special sectors,

14 ILC Rep. 1955 (A/2934) para. 33., YBILC 1955/II.

15 For García-Amador's six reports see Report 2001, note 21. They are reproduced as a continuous text in F.V. García-Amador, Louis B. Sohn and R. R. Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Dobbs Ferry NY, Oceana Publications, 1974). The Harvard Law School also prepared a Convention on the International Responsibility of States for Injuries to Aliens, an update of its earlier work, ibid. 135. The rapporteurs were L. B. Sohn and R. Baxter.

16 ILC Rep. 1962 (A/5209*), paras. 33–48, 67–68, YBILC 1962/II. The other members of the Sub-Committee were H. Briggs (U.S.A.), A. Gros (France), E. Jiménez de Aréchaga (Uruguay), M. Lachs (Poland), A. de Luna (Spain), A. M. Paredes (Ecuador), S. Tsuruoka (Japan), G. I. Tunkin (USSR) and M. Yasseen (Iraq).

specially that of responsibility for injuries to the person or property of aliens. Secondly, that careful attention should be paid to the possible repercussions which new developments in international law might have had on responsibility. Having reached this general conclusion, the Sub-Committee discussed in detail an outline programme of work submitted by Ago and decided unanimously to recommend to the Commission the following indications on the main points to be considered as to the general aspects of the international responsibility of the State, those indications serving as a guide to the work of a future special rapporteur:

Preliminary point: Definition of the concept of the international responsibility of the State [2]

First point: Origin of international responsibility.

(1) *International wrongful act:* the breach of a State of a legal obligation imposed upon it by a rule of international law whatever its origin and in whatever sphere.

(2) *Determination of the component parts of the international wrongful act:*

(a) Objective element: act or omission objectively conflicting with an international legal obligation of the State.[3] Problem of the abuse of right. Cases where the act or omission itself suffices to constitute the objective element of the wrongful act and cases where there must also be an extraneous event caused by the conduct.

(b) Subjective element: imputability to a subject of international law of conduct contrary to an international obligation. Questions relating to imputation. Imputation of the wrongful act and of responsibility. Problem of indirect responsibility. Questions relating to the requirement that the act or omission contrary to an international obligation should emanate from a State organ. System of law applicable for determining the status of organ. Legislative, administrative and judicial organs. Organs acting *ultra vires.*

State responsibility in respect of acts of private persons. Question of the real origin of international responsibility in such cases.

Must there be fault on the part of the organ whose conduct is the subject of a complaint? Objective responsibility and responsibility related to fault *lato sensu*. Problems of the degree of fault.[4]

(3) *The various kinds of violations of international obligations*. Questions relating to the practical scope of the distinctions which can be made.

International wrongful acts arising from conduct alone and those arising from events. The causal relationship between conduct and event. Practical consequences of the distinction.

International wrongful, acts and omissions. Possible consequences of the distinction, particularly with regard to *restitutio in integrum*.

Simple and complex, non-recurring and continuous international wrongful acts. Importance of these distinctions for the determination of the *tempus commissi delicti* and for the question of the exhaustion of local remedies.

> Problems of participation in the international wrongful act.
>
> (4) *Circumstances in which an act is not wrongful*
>
> Consent of the injured party. Problem of presumed consent;
>
> Legitimate sanction against the author of an international wrongful act;
>
> Self-defence;
>
> State of necessity.
>
> *Second point: The forms of international responsibility*
>
> (1) *The duty to make reparation,* and the right to apply sanctions to a State committing a wrongful act, as consequences of responsibility. Question of the penalty in international law. Relationship between consequences giving rise to reparation and those giving rise to punitive action. Possible distinction between international wrongful acts involving merely a duty to make reparation and those involving the application of sanctions. Possible basis for such a distinction.
>
> (2) *Reparation.* Its forms. *Restitutio in integrum* and reparation by equivalent or compensation. Extent of reparation. Reparation of indirect damage. Satisfaction and its forms.
>
> (3) *Sanction.* Individual sanctions provided for in general international law. Reprisals and their possible role as a sanction for an international wrongful act. Collective sanctions.[17]

In 1963, the ILC approved that report and appointed Ago as special rapporteur.[18] The General Assembly, in its resolution 1963 (XVIII), 18 November 1963, endorsed the Commission's conclusions, and went further. It requested the ILC to continue work on the topic of State responsibility, taking into account the views expressed during the 18th session of the General Assembly and the Sub-Committee's report, and also to give due consideration to the purposes and principles of the Charter of the United Nations. That has been the general directive guiding the Commission since 1963.

Those decisions are a turning point in the official codification of the topic of State responsibility. They took it out of its nineteenth century mould and

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17 ILC Rep. 1963 (A/5509*), Annex I (A/CN.4/152) para., YBILC 1963/II. The footnotes in the original are as follows:

[2] The Sub-Committee suggested that the responsibility of other subjects of international law, such as international organizations, should be left aside.

[3] The question of possible responsibility based on 'risk', in cases where a State's conduct does not constitute a breach of an international obligation may be studied in this connexion.

[4] It would be desirable to consider whether or not the study should include the very important questions which may arise in connexion with the proof of the events giving rise to responsibility.

18 Report cited in previous note, paras. 51–55.

cast it squarely into the international legal order established by the Charter. There was no question but that time would be needed for the implications to be assimilated. Moreover, then the Commission was fully occupied on the final stages of its work on the law of treaties, which it finished in 1966. Consequently, having in mind the terms of resolution 799 (VIII), it took no further action for the moment.

Things began to change in 1967. The term of office of its members who had produced the 1963 report had come to an end and a new Commission was elected in 1966. Accordingly Ago, who had been re-elected, decided to ask the Commission in its new composition to confirm the instructions given to him in 1963, which it did.[19] The General Assembly too began increasing its pressure on the ILC to accelerate its work. Ago accordingly commenced submitting his series of reports, eight in all, in 1969.[20]

Ago's first report was exploratory and that enabled the Commission to reach several decisions of principle on the character of the work to be done. In 1969 it came to the general conclusion that the codification of the topic should not start with a definition of those rules of international law which laid obligations on States in one or other sector of inter-State relations, but that the starting point should be the imputability to a State of the breach of the obligations arising from those rules. The second stage would be the determination of the consequences of imputing to a State an internationally illicit act. In that respect, the ILC recognized that two factors in particular would guide it: the greater or lesser importance to the international community of the rules giving rise to the obligations violated, and the greater or lesser seriousness of the breach itself. A third stage would be what the ILC tentatively called the 'implementation' of responsibility and questions concerning the settlement of disputes which might be caused by a specific breach of the rules relating to international responsibility. This explains the subsequent division of the work first into three parts and finally into four. The principle is now stated in Articles 1 and 2 of the draft articles of 2001: 'Every internationally wrongful act of a State entails the international responsibility of that State' (Article 1). 'There is an internationally wrongful act of a State when conduct consisting of an action or omission (*a*) is attributable to the State under international law; and (*b*) con-

19 Doc. A/CN.4/196, YBILC 1967/II. For the Commission's confirmation see its Rep. 1967 (A/6709/Rev.1) para. 42, YBILC ibid.

20 For Ago's eight reports, see Report 2001 note 19. For a consolidated version in the original French, see R. Ago, *Scritti sulla responsabilità degli stati* (Pubblicazioni della Facoltà di Giurisprudenza della Università di Camerino, Juvene Editore, 1986).

stitutes a breach of an international obligation of the State' (Article 2). That is objective responsibility, arising from the action or inaction of the State or other international entity subject to a given obligation, and regardless of whether damage was caused, or what was the intention of the responsible actor. At the same time the Commentary to Article 1 makes it clear that no attempt is made to deal with the consequences of a breach for the continued validity or binding effect of the primary rule (e.g. the right of an injured State to terminate or suspend a treaty for material breach, as reflected in Article 60 of the Vienna Convention on the Law of Treaties), and that the articles, being general in character, are also for the most part residual.

The ILC also agreed in recognizing the importance of the so-called responsibility for risk arising out of the performance of certain lawful activities, and it mentioned in particular spatial and nuclear activities. But it would not deal with those questions in connection with State responsibility 'mainly in order to avoid any confusion between two such sharply different hypotheses'. This led to General Assembly resolution. 3071 (XVIII), 30 November 1973, concerning 'International liability for injurious consequences arising out of acts not prohibited by international law'. That topic was placed on the Commission's active work programme in 1977 (further in § 11.07 below). The Commission decided to defer study of questions relating to the responsibility of other subjects of international law than States.[21] The Commission continued its preliminary discussion in 1970. It reached an important conclusion on terminology, essential for an understanding of the whole draft, and best given in its own words (as revised in 2001):

> As to terminology, the French term "fait internationalement illicite" is preferable to "délit" or other similar expressions which may have a special meaning in internal law. For the same reason, it is best to avoid, in English, such terms as 'tort', "delict" or "delinquency", or in Spanish the term "delito". The French term "fait internationalement illicite" is better than "acte internationalement illicite", since wrongfulness often results

21 ILC Rep. 1969 (A/7610/Rev.1) paras. 64–84, YBILC 1979/II. Accordingly Art. 57 of the draft articles provides that the articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization. On this topic, see the Lisbon resolution of the Institute of International Law on Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations towards Third Parties, 66/II *Annuaire IDI* 334 (1995). In A/Res. 56/82, 12 December 2001, the General Assembly requested the Commission to begin work on the topic 'Responsibility of international organizations', on which it started in 2002, with Professor Gaja as special rapporteur. 146 Rep. 2002 (A/57/10) para. 519.

> from omissions which are hardly indicated by the term "acte". Moreover, the latter term appears to imply that the legal consequences are intended by its author. For the same reason, the term "hecho internacionalmente ilícito" is adopted in the Spanish text. In the English text, it is necessary to maintain the expression "internationally wrongful act", since the French "fait" has no exact equivalent; nevertheless, the term is intended to encompass omissions, and this is made clear in article 2.[22]

The ILC started to prepare the draft articles in 1973. Following its usual practice, and without prejudicing its final decision, it decided to prepare its work in the form of draft articles which could be used as a basis for a convention. More important was the Commission's distinction between what it called the 'primary' rules of international law, and the 'secondary' rules. The primary rules are those which impose obligations on States; and the secondary rules – the rules of responsibility determine the legal consequences of failure to fulfil obligations established by the primary rules. This distinction forms the basis for the Commission's approach to the topic, and notwithstanding that it may raise a series of fundamental problems and objections, it must be constantly kept in mind in considering the Commission's proposals. It means that the responsibility is established by the mere breach of an international obligation of the State. The articles deal with the consequences that flow from an internationally wrongful actor as such.[23]

On the foundations of these and other considerations spelled out in that report, the Commission formalized its decision to treat the topic in two, and possibly three parts. Part I, originally entitled the origin of international responsibility, would determine on what grounds and under what circumstances a State might be held to have committed an internationally wrongful act which, as such, gives rise to international responsibility. That led, in the 35 articles of Part I, to a systematic presentation of rules dealing above all with the question of imputability in its different forms, the typology of breaches of international obligations, and circumstances precluding wrongfulness. Part II would deal with the content, forms and degrees of international responsibility, that is the determination of the consequences under international law of an internationally wrongful act. The Commission also reached a tentative conclusion – later confirmed – that there would probably be a need for a Part III, on the implementation (*mise en œuvre*) of State responsibility, an awkward expression

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22 Report 2001, chapter IV, para. 77, Art. 1, Commentary para. (8). For the original version of this, see ILC Rep. 1970 (A/8010/Rev.1*) chapter IV, para. 76, YBILC 1970/II.

23 Report 2001, Art 1, Commentary para. (4).

which seems to relate to measures to put an end to the legal relationship of responsibility.

The commentaries on Part I adopted on first reading are distinguished by their unusually broad sweep. They are much more than simple *exposés des motifs*, the usual characteristic of the Commission's commentaries (which it is obliged, under Article 20 of its Statute, to attach to its projects). They closely follow Ago's reports, modified to take into account the debate and the text of each article as adopted on first reading. They are probably of greater general significance than the draft articles which, with exceptions, broadly speaking are fairly straightforward, conservative in fact and, while certainly clarifying the law, contain little in the way of innovation (although what innovation there is controversial).[24] They were simplified on second reading.

The Commission's conclusions between 1973 and 1980 were circulated to Governments for their observations so that the Commission could prepare itself for the second reading. The annual debates in the Sixth Committee on the Commission's reports also furnished Governments with opportunities to express their opinion on the work achieved and on its future, and this was reflected in the series of resolutions adopted by the General Assembly in this period.[25]

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24 Cf. B. Simma, 'Bilateralism and Community Interest in the Law of State Responsibility', *International Law at a Time of Perplexity* 821 (Y. Dinstein and M. Tabory, eds., Dordrecht, Nijhoff, 1989).

25 For the analytical reports of the Sixth Committee (originally included in the Committee's report to the General Assembly on the agenda item (a.i.) and hence in the Annexes to the *Official Records* of the session, and since 1979 issued as documents of the ILC in the A/CN.4/- series), and referring to the previous session of the General Assembly, see the following: GAOR, 28th session, a.i. 89 (A/9334) paras. 25–58 (1973); 29th session, a.i. 87 (A/9897) paras. 101–135 (1974); 30th session, a.i. 108 (A/10393) paras. 15–96 (1975); 31st session, a.i. 106 (A/31/370) paras. 86–179 (1976); 32nd session, a.i. 112 (A/32/433) paras. 26–115 (1977); 33rd session, a.i. 114 (A/33/414) paras. 133–192 (1978); and from 1979 mimeographed topical summaries, as follows: A/CN.4/L.311 paras. 137–161 (1980); L.326, paras. 96–154 (1981); L.339, paras. 111–130 (1982); L.351, paras 36–131 (1983); L.369, paras. 229–301 (1984); L.382, paras. 457–561 (1985); L.398, paras. 148–246 (1986); L.410, paras. 361–470 (1987); L.420, paras. 238–239; L.431, paras. 412–417 (1989), L.443, paras. 120–157 (1990), L.456, paras. 377–409 (1991), L.469, paras. 359–387 (1992), A/CN.4/446, paras. 135–242 (1993), A/CN.4/457, paras. 267 –376, (1994), A/CN.4/464/Add.2, paras. 1–58 (1995), A/CN.4/472/Add.1, paras. 30–99 (1996), A/CN.4/479/Add.1, paras. 1–87 (1997), A/CN.4/483, paras. 94–109 (1998), A/CN.4/496, paras. 107–127 (1999), A/CN.4/504, paras. 5-83 (2000), A/CN.4/513 paras. 5–190 (2001). For the written comments of Governments on Part I, Arts. 1-35, see docs. A/CN.4/328 + Add.1-4, YBILC 1980/II-1; A/CN.4/351 + Add. 1-3, ibid. 1982/II/1; A/CN.4/362, ibid. 1983/II/1, and on the articles as a whole, A/CN.4/488 + Add.1–3 (1998), A/CN.4/492 (1999); A/CN.4/515 + Adds.1, 2 (2001).

In 1979, when Ago, no longer a member of the Commission, was completing his work on Part I, Riphagen was appointed special rapporteur. At the same time the Commission decided that as soon as it had completed the first reading of Part I, it would be in a position to take up Part II, dealing with the content, forms and degrees of international responsibility. Riphagen's first task, therefore, was to guide the Commission on that aspect. He submitted seven reports.[26] During this period the Commission adopted Part II, Articles 1 to 5, on the content, forms and degrees of international responsibility. In 1987 Arangio-Ruiz was appointed special rapporteur. He submitted eight reports.[27] He resigned as special rapporteur in 1996 but continued as a member of the Commission until the end of his term of office. In 1996 the Commission completed on first reading the draft articles as a whole, and renumbered the articles of Parts II (Articles 36 to 53) and III (Articles 54 to 60) consecutively after Part I.

Placing the international responsibility of States on the objective basis of the result of an internationally wrongful act has led to a special problem when the internationally wrongful act is a breach of a treaty.[28] One question, which is not easily answered, is what are the primary rules and what are the secondary rules in an instance of breach of treaty. The primary rules should be the obligations that the treaty imposes. On that basis there are two sets of secondary rules, the rules arising from the law of treaties and those arising from the law of responsibility. Article 60 of the Conventions on the Law of Treaties deals with the termination or suspension of the operation of a treaty as a consequence of its breach. In terms that provision is limited to what it designates as a 'material breach'. That is either a repudiation of the treaty not sanctioned by the Convention on the Law of Treaties, or breach of a provision essential to the accomplishment of the object or purpose of the treaty. However, most breaches of treaty do not reach that high threshold, and may frequently be relatively minor and even 'routine'. That does not prevent the breach from being an internationally wrongful act entailing the international responsibility of the State to which they are attributed. In turn this gives rise to the problem of the relationship between the law of treaties and the law of responsibility. Article 73 of the 1969 Convention and Article 74 of the 1986 Convention leave that matter open. The reason is that the remedy that the Conventions suggest for breach of treaty, namely invocation of a material breach as a ground for terminating the treaty or sus-

26 For Riphagen's seven reports, see Report 2001, note 22.

27 For Arangio-Ruiz's eight reports, see id. note 23.

28 Sh. Rosenne, *Breach of Treaty* (Cambridge, Grotius, 1985).

pending its operation, is rarely the adequate or desirable remedy for that or any other breach. That issue arose before the International Court of Justice in the *Gabćíkovo-Nagymaros Project* case. In its judgment the Court first made the statement cited above in the text at chapter X note 12 and then noted that Article 60 of the Convention only applied to material breaches.

> The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties (para. 106).

The reason for this is simple: those two branches of the law have a scope that is distinct.[29] While this may clarify a little the field of operation of the two branches of international law which, in some respects, can be seen as two sides of the same coin, the coin of obligation, it still leaves many questions open.

(iii) The International Law Commission: the third phase (1997–2001)

In 1997 the ILC decided to complete the work in the current term of office of its members, that is by the year 2001. Crawford submitted four reports.[30] In the final text of the articles, the title was changed to *Responsibility of States for internationally wrongful acts*. That was to make it clear that the draft articles only concern internationally wrongful acts, and not the responsibility of the State under internal law.[31] Part One, the internationally wrongful act of a State, chapter I (Articles 1 to 3), sets out the general principle of objective responsibility mentioned earlier. Chapter II (Articles 4 to 11) deals with attribution of conduct to a State. The basic principle is in Article 4:

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

Paragraph 2 goes on to clarify that an organ 'includes any person or entity which has that status in accordance with the internal law of the State'. Those provisions might be satisfactory for polynomous States, whether federal States or not, in which the different systems of law have a defined territorial application. For

29 *Gabčíkovo Nagymaros Project* case, ICJ Rep. 1997, 7, 65 (para. 106).
30 For Crawford's four reports, see Report 2001, notes 26, 30.
31 Report 2001, para. 68, explaining the reasons for the change of title.

other States with sectorial legal systems within their political boundaries, those provisions may not be adequate (cf. above chapter I § 1.05).

In the case of federal States in which administration is decentralized into a number of semi-independent entities, international responsibility, from whatever source it derives, is attributable to the federal authorities. Referring to Article 6 of the draft articles adopted in 1996 (Article 4 of the final draft), the International Court of Justice has stated:

> The governmental authorities of a party to [a treaty] are . . . under an obligation to convey such information [relating to privileges and immunities] to the national courts concerned., since a proper application of the [treaty] is dependent on such information.
>
> Failure to comply with this obligation, among others, could give rise to the institution of proceedings . . . .
>
> The Court concludes that the Government . . . had an obligation . . . 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 . . . [T]he conduct of an organ of a State – even an organ independent of the executive power – must be regarded as an act of that State.[32]

In the *LaGrand* case the Court went further. It emphasized that the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be, and it indicated that the Government of the United States should transmit an order indicating provisional measures of protection to the Governor of one of the States of the Union, who was under the obligation to act in conformity with the international undertakings of the United States.[33] As the WTO Review Panel has put it, in reference to an act of a government department, the State in question 'bears responsibility for acts of all its departments of government, including the judiciary'.[34]

Other provisions of Part One, chapter II, deal with different aspects of the attribution of an act to a State. This is a more concise reproduction of the main elements of Part I as adopted on first reading. A major clarification is introduced in Article 10 on the conduct of what it terms 'an insurrectional or other movement'. Article 10 lays down when the conduct of an insurrectional movement

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32 *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* adv. op. ICJ Rep. 1999, 62, 87 (paras. 61, 62). The country concerned is a federal State.

33 *LaGrand* (Provisional Measures) case, ICJ Rep 1999(I), 9, 16 (para. 28) and operative para. 29 (*b*).

34 WTO Appellate Body, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, Report, 12 October 1998, para. 173, doc. WT/DS48/AB/R.

becomes attributable to a new Government or a new State (above, chapter VII § 7.07). Article 10 also closes a gap left open in the codified law of treaties and takes account of modern developments in the field of decolonization and that of the dissolution of a State.

Chapter V (Articles 20 to 27) formulates the usual set of circumstances that preclude wrongfulness – consent (Article 20), self-defence (Article 21), provided that the act was a lawful measure of self-defence taken in conformity with the Charter (above chapter IV § 4.04), countermeasures taken in accordance with the provisions governing countermeasures (Article 22), *force majeure* (Article 23), distress (Article 24), and necessity (Article 25). By Article 27, invocation of a circumstance precluding wrongfulness in accordance with that chapter is without prejudice to compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists, and to the question of compensation for any material loss caused by the act in question.

§ 11.04. Breach of norms of jus cogens *and rules* erga omnes

The introduction of the concept of norms of *jus cogens* into international law through the Conventions on the Law of Treaties required that in dealing with State responsibility, the Commission could not pass over breaches of norms of that character. Most of those norms would have their basis in a treaty, and their violation would be a breach of treaty and probably, given the nature of the treaty, a material breach within the meaning of Article 60 of the Vienna Conventions. This posed a problem for the Commission, and has provoked lively controversy. The question is whether there can be a differential, in the matter of the nature of a breach and the consequences and termination of the responsibility relationship, between different acts giving rise to that relationship. The problem is not new. It existed when the view was current that international responsibility required some element of intent or negligence on the part of the impugned State. It has assumed a new form with the decision to base the codification on the objective act without regard for intention or negligence or other cause. In turn this has produced a related problem of a possible differential in responsibility for violation of a norm of *jus cogens* affecting the international community as a whole including the directly injured State for violation of an obligation owed *erga omnes*, and the State's individual and bilateral relationship of responsibility towards another State for breach of the same international rule. Its growth broadly speaking has followed the development of international humanitarian law since 1864 and it has become more rapid with the attempts

to abolish the uncontrolled use of force. The introduction of the concept of the 'common heritage of mankind', for instance in the law of outer space[36] and in the law of the sea,[37] is another innovation of the last fifty years that is bound to have an effect on the international responsibility both of States and of other entities, including private law entities, active in those spheres. In addition, the issue of the international responsibility of the State has become associated with the distinct issue of the international criminal responsibility of an individual, whether acting as an organ of a State or not, in cases of breach of the rules of international humanitarian law.[38]

The Stimson doctrine of the non-recognition of territorial situations brought about by the illegal use of armed force is an important example.[39] The condemnation of wartime leaders for breaches of the peace in the Nuremberg and Tokyo Trials as the most heinous (then) of the crimes against the law of nations is a powerful indication of this. The Conventions on the Law of Treaties emphasize the negative factor in this differential, its effect of voiding a treaty that conflicts with a norm having the character of *jus cogens*. A more positive content can be given to this in the law of responsibility and liability and remedies for breach of international law.

A preliminary question concerns the relationship between *jus cogens* norms and international obligations owed to the international community as a whole, obligations *erga omnes.*[40] To start, while norms *erga omnes* will normally flow from a multilateral treaty, not every multilateral treaty produces obligations *erga omnes*. Frequently a multilateral treaty is a bundle of rights and duties which States apply synallagmatically in their bilateral relations *with* one another, not *to* each other. Typical of this are the multilateral conventions on say diplomatic relations. While all States parties may have an undefined general interest in the operation of the treaty at large, the law of treaties distinguishes that general interest from the interest of a party specially affected by the treaty's

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36 Above chapter IX.

37 Above chapter VIII.

38 Above, text to chapter V note 102.

39 This doctrine was enunciated in the Note of 7 January 1932 by the United States Secretary of State in connection with the Japanese invasion of Manchuria. 26 AJIL 342 (1932). It is a reformulation of a doctrine enunciated by the Foreign Minister of Argentina in a note of 27 December 1869: 'La victoria no da derechos'. República Argentina, *Memoria de relaciones exteriores* 164 (1870).

40 Sh. Rosenne, 'Some Reflections *erga omnes*', *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* 509 (The Hague, Nijhoff, 1998). Further above chapter X § 10.06.

operation.[41] Taking the Convention on the Law of the Sea as an example, many of its provisions formulate rights and duties of 'States' or 'all States'. Other provisions, especially those of a procedural nature, are addressed to 'States parties'. Rules in the former category are rules addressed *erga omnes*, but that *per se* does not put them in the category of norms of *jus cogens* or of obligations *erga omnes*. The International Court of Justice has carefully distinguished between responsibility *erga omnes* and bilateral responsibility, its procedure, and particularly its current doctrine of *jus standi in judicio*, not being adapted to the former class of responsibility.[42]

In the *East Timor* case the Court recognized that the right of the people of East Timor to self-determination had an *erga omnes* character and Portugal's assertion to that effect was irreproachable. However, the *erga omnes* character of a norm and the consensual basis of that Court's jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which was not a party to the proceedings. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes.*[43] The effect of that judgment, upholding

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41 This is recognized in Art. 60 of the Conventions on the Law of Treaties with its distinction between a party specially affected by a material breach of a multilateral treaty and the other parties to the treaty. Art 63 of the Statute of the ICJ gives a right to intervene to States parties to a multilateral treaty whenever the construction of a treaty to which States other than those concerned in a case is in question. It is interesting to note that in recent cases involving the Conventions on Diplomatic and Consular Relations, no third State attempted to intervene on the basis of that provision: *U.S. Diplomatic and Consular Staff in Teheran* and *LaGrand* cases, ICJ Rep. 1980, 3, and 27 June 2001.

42 In Art. 48 of it draft articles on the responsibility of States for internationally wrongful acts, the ILC has made a deliberate departure from the ICJ's much-criticized ruling on *jus standi* in the *South West Africa* (Second Phase) cases, ICJ Rep. 1966, 6. ILC Report 2001, chapter IV, Art. 48, Commentary, para. (7) and note 766.

43 *East Timor* case, ICJ Rep. 1995, 90, 102 (para. 29). This is a matter of procedure: the Court gave no explanation of what it meant by the *erga omnes* character of the rights allegedly breached by Australia. After the liberation of East Timor, Australia and Indonesia agreed that the treaty was terminated as between them. At the same time, Australia agreed with the United Nations Transitional Administration in East Timor (UNTAET), acting on behalf of East Timor, regarding practical arrangements for the continuity of the terms of the 1989 Treaty and providing that all rights and obligations under it previously exercised by Indonesia were assumed by UNTAET on behalf of East Timor. Australian Treaty Series 2000 No. 9. The wording about continuing the terms of the 1989 Treaty reflects the view of the UN and of East Timor that the 1989 Treaty was illegal so that they could not formally accede to it. B. Campbell to the author, e-mail, 15 September 2000. On that strait see S. B. Kaye, *The Torres Strait* (The Hague,

Australia's preliminary objections and declaring that it could not exercise jurisdiction in the case, was that the Court did not pronounce itself directly on the central issue of the validity of the Timor Gap Treaty delimitating the continental shelf between Australia and East Timor under Indonesian occupation, while hinting that the Treaty might nevertheless be flawed. There is a close connection between the issue of the violation of a norm of *jus cogens* and violation of an *erga omnes* rule imposing obligations on States towards the international community as a whole and towards its individual members. Although there is no agreed definition of the norms of *jus cogens*, we can assume that most of them, having a treaty basis and thus the easier to identify, would also come within the category of *erga omnes* obligations.[44]

The ILC first picked up this challenge in Part I, Article 19, adopted in 1976. The theme of that article is the distinction between international crimes and international delicts. Paragraph 2 defines an 'international crime' as an internationally wrongful act which results from a breach by a State of an international obligation so essential for the protection of the fundamental interests of the international community that its breach is recognized as a crime by that community as a whole. This was later completed on first reading by Part II, Articles 51 to 53, on the consequences. That was probably the most controversial part of the draft articles as adopted on first reading, and has been the subject of extensive criticism.[45] At the same time, it has met with much approval, especially from Socialist writers with whom, in some respects, the idea originated.[46]

Nijhoff, 1997); B. Campbell, 'Maritime Boundary Arrangements in the Timor Sea', 1 *International Trade and Business Law* (Sydney) 61 (2000). Similarly, in the *Application of the Genocide Convention* (Counter-claims) case, where the Court expressly stated that the *erga omnes* character of the obligations flowing from the Convention was not an obstacle to a bilateral dispute coming within the scope of its compromissory clause, in which claim and counter-claim were raised. ICJ Rep. 1997, 243, 258 (para. 35). These counter-claims have since been withdrawn. ICJ Rep. 2001, Order of 10 September.

44 Above chapter X.

45 See e.g. J. H. H. Weiler *et al*., *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Berlin/New York, de Gruyter, 1989); Sh. Rosenne, 'State Responsibility and International Crimes: Further Reflections on Article 19 of the Draft Articles on State Responsibility', 30 *New York University Journal of International Law and Politics* 145 (1998); N. B. Jørgensen, *The Responsibility of States for International Crimes* (Oxford University Press, 2000).

46 The ILC's Commentary on the original Art. 19 contains several references to Socialist writers on this aspect. And see B. Graefrath, 'Responsibility and Damages Caused: Relationship between Responsibility and Damages', 185 *Recueil des cours* 9 (1984-I).

Following difficulties encountered on first reading, and generally on second reading, the Commission changed its approach. It dropped the differentiation between international crimes and international delicts, replacing it by introducing the category of a serious breach of an obligation arising under a peremptory norm of general international law, meaning a breach involving 'a gross or systematic failure by the responsible State to fulfil the obligation' (Article 40). This type of breach leads to the particular consequences that States are to co-operate to bring to an end through lawful means any such serious breach, and shall not recognize as lawful a situation created by a serious breach, nor render aid or assistance in maintaining that situation (Article 41). Further acknowledgment of the special position of the norms of *jus cogens* appears in Article 26, in chapter V on circumstances precluding wrongfulness. By that provision nothing in that chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law. In Part Three, chapter II on countermeasures, Article 50 (1) (d) provides that countermeasures shall not affect other obligations under peremptory norms of general international law.

With regard to obligations *erga omnes*, Part Two, on the content of the international responsibility of a State, chapter I, Article 33, recognizes that the obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending on the character and content of the international obligation and on the circumstances of the breach. This is picked up in Part Three, on the implementation of the international responsibility of a State. Chapter I addresses the invocation of the responsibility of a State, and the principle is stated in Article 42:

> A State is entitled as an injured State to invoke the responsibility of another State if the obligation is owed to:
> (a) That State individually; or
> (b) A group of States including that State, or the international community as a whole, and the breach of the obligation:
> (i) Specially affects that State; or
> (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the act (Article 46). Added to this, Article 48 provides that any State other than the injured State may invoke the responsibility of another State if

the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group, or the obligation breached is owed to the international community as a whole.

That last phrase is an abbreviation of the fuller expression in Article 53 of the Conventions on the Law of Treaties explaining what is meant by a norm of *jus cogens*. The difficulty, however, is the absence of any clear and agreed indication or enumeration of what norms of general international law are 'peremptory' in the sense of requiring a State to perform an act that otherwise would be a violation of international law. The presence of this provision in the draft articles on responsibility may open the way to far-fetched excuses for the commission of wrongful acts that otherwise would engage the international responsibility of the State or other international entity, since it is unlikely that the hypothesis of this article would be encountered. Should this be so, however, it could be offset to some extent by Article 66 of the 1969 Convention on the Law of Treaties, conferring compulsory jurisdiction on the International Court of Justice over disputes between States concerning the interpretation or application of the *jus cogens* Articles (53 and 64) of that Vienna Convention.

With this clearer indication of the States entitled to invoke the breach the Commission replaced the distinction between an international crime and an international delict with the revised text of Article 3. By that, the characterization of an act of a State as internationally wrongful is governed by international law, and is not affected by the characterization of the same act as lawful by internal law. This applies to every State and to every unlawful act without exception.

§ 11.05. Remedies

The objective definition of responsibility as set out in Article 1 simplifies the problem of remedies for breach of the law. Remedy ends the legal relationship of responsibility. It is no longer necessary to take account of factors unrelated to the breach and its consequences. From that point of departure, the remedies available to the injured international entity are either political (non-judicial) or judicial, and possibly a combination of both.[47] Even a political solution of the difference will frequently be based, and justified, on an assessment of the probable outcome of litigation. Judicial or arbitral proceedings are often

47 See Ch. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, revised paperback ed. 1996); and more generally, M. Evans (ed.), *Remedies in International Law: The Institutional Dilemma* (Oxford, Hart Publishing, 1998).

suitable for the determination of contested facts and their classification as internationally wrongful acts, and for determination of the appropriate remedy. Non-compliance with the obligations of a State under a judgment of the International Court of Justice gives the injured State a right of recourse to the Security Council under Article 94 of the Charter. There is no similar automatic right in the event of non-compliance with the decisions of any other international tribunal or arbitration, but if the situation should constitute a dispute the continuance of which is likely to endanger the maintenance of international peace and security, the injured State may have recourse to the means of peaceful settlement set out in Chapter VI of the Charter (including recourse to the Security Council). If the situation becomes a threat to the peace, breach of the peace or an act of aggression, the Security Council may take action under Chapter VII. Both are extreme situations. Frequently, in diplomatic practice, where the internationally wrongful act is patent, the parties agree on the remedy, but the diplomatic exchange recording this and closing the incident will state that the respondent is taking the remedial action *ex gratia* and without recognition of liability. On one occasion after such an exchange, the amount of monetary compensation to be paid was referred to arbitration.[48]

The normal forms of reparation are, singly or in common (Article 34), restitution (Article 35), compensation (Article 36), and satisfaction (Article 37), it being for the injured State to determine what reparation it will require. The *non ultra petita* rule prevents an adjudicating body from going further. Restitution implies the re-establishment of the situation that existed before the wrongful act was committed, provided that restitution is not materially impossible and would not involve a burden out of all proportion to the benefit deriving from the restitution instead of compensation. Compensation should cover any financially assessable damage including loss of profits in so far as it is established, with the possibility of interest (Article 38). Satisfaction, probably in diplomatic practice the most common form of reparation, combined with compensation if there is assessable material loss, consists in an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality, but is not to be out of proportion to the injury 'and may not take a form humiliating to the responsible State'. If the circumstances so require, the responsible State may be required to furnish assurances and adequate guarantees of non-repetition (Article 30). The use of the expression 'responsible State' in this context can be misleading, since it implies that the responsibility is already established. But

48 *Letelier and Moffitt* arbitration (Chile/United States of America) (1992), 88 ILR 727.

responsibility cannot be established simply because it has been invoked. If the difference is not resolved through the diplomatic channels, consideration may have to be given to seeking either political relief from a competent international organization or judicial remedies.

Judicial remedies depend on the title of jurisdiction on the basis of which the international court or tribunal can be seised of the case. If none exists, it may have to be negotiated. In the International Court of Justice, if the jurisdiction is based on Article 36 (2) of the Statute (above chapter III note 45), it will include the nature or extent of the reparation to be made for the breach of an international obligation. The Court can only assess pecuniary reparation that is due after it has determined with the force of *res judicata* what breaches of international law are established. If the jurisdiction is based on a special agreement, that will determine how far the Court may go in awarding any remedy. In many cases, especially if the internationally wrongful act is a breach of a treaty, the court or tribunal will declare what the proper interpretation and application of the treaty are, and that should determine the future action of the parties. The *Gabćíkovo-Nagymaros Project* case is an illustration of a complicated judgment relating both to past actions and to the future relations of the parties. One form of reparation, frequently going under the name of *satisfaction*, is a formal declaration by the court or tribunal seised of the case that an internationally wrongful act has been committed. The International Court of Justice,[49] ITLOS,[50] and international arbitrations[51] all supply examples of this. A resolution of an international organ can have a similar effect. However, in those cases some act of acceptance of the decision by the injured party would be appropriate.[52]

It also occurs that the relationship of responsibility cannot be resolved through pacific means, and that a more active reaction on the part of the directly injured entity is required. For example, no State is obliged to sit back and watch its border – land, sea and air – being violated by another State or even by a private person. Likewise, no State is obliged to sit back and watch its economy being ruined through another State's actions that violate its obligations due to

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49 *Corfu Channel* (Merits) case, ICJ Rep. 1949, 4, 35, 36. That was the satisfaction requested by the injured party.

50 *Saiga No. 2* case, ITLOS Rep. 1999, 10, 67 (para. 176). Here the Tribunal rejected a claim for compensation and decided that the declaration in the judgment was adequate satisfaction.

51 *Rainbow Warrior* (France/New Zealand) (1990), XX RIAA 217, 272 (paras. 121 ff.).

52 Cf. above, chapter VII note 18, the settlement of Israel's dispute with Argentina over the abduction of Eichmann, after S/C Res.138 (1960, 19 July 1960.

the injured State. In some of these cases, the law prescribes the nature of permissible reaction to such unlawful acts, and anything beyond that will itself be unlawful and give rise to responsibility. An example of this is the care that is required in dealing with unlawful penetration of national airspace by foreign aircraft. In others, the law is silent. In those circumstances, the directly injured State is entitled to adopt appropriate countermeasures,[53] which must be proportionate to the injuries suffered. If force is used in those circumstances, it must also not be excessive or used in violation of Article 2 (4) of the Charter (above chapter IV § 4.03), or violate the rules of international humanitarian law (Article 53).

Part Three, chapter II (Articles 49 to 54), deals with countermeasures. The prime rule is laid down in Article 49. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act 'in order to induce that State to comply with its obligations under Part Two'. The measures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State and shall as far as possible be taken in such a way as not to prevent the resumption of performance of the actions in question. A major element of the law of responsibility is that any countermeasures must be commensurate with the injury suffered, taking account of the rights in question, language that follows the expression used by the International Court (Article 51).[54]

Article 52 sets out the conditions to be met by a State resorting to countermeasures. Before taking countermeasures, the injured State is to call on the responsible State to fulfil its obligations under Part Two of the draft articles. This wording, however, assumes that the injured State is entitled unilaterally to determine that there has been a breach of an international obligation owed to it by the 'responsible State'. After it has made that call, the injured State is to notify the responsible State of any decision to take countermeasures, and offer to negotiate with that State. It is not clear what relation this negotiation would have with other negotiations that surely would, in the normal course of events, have taken place between the States concerned when the breach of the international obligation first came to light. However, that requirement does not prevent the injured State from taking such urgent measures as are necessary to preserve its rights. Countermeasures may not be taken, and if already taken

53 The modern term 'countermeasures' used by the ILC covers all actions responsive to an internationally wrongful act. Previous distinctions such as reprisals, retorsion and the like are no longer relevant.

54 *Gabčíkovo-Nagymaros Project* case, above note 29, 56 (para. 85).

must be suspended without undue delay, if the internationally wrongful act has ceased and the dispute is submitted to a court or tribunal with authority to make decisions binding on the parties. That does not apply, however, if the responsible State fails to implement the dispute settlement procedures in good faith, another expression which in the context is ambiguous and open to abuse. This is complemented by Article 59 already mentioned, to the effect that all the draft articles are without prejudice to the Charter of the United Nations. One consequence of this is that countermeasures, to be legal, must not breach the Charter obligation not to use force otherwise than in accordance with the Charter.

The question of the settlement of disputes gave rise to difficulties in the second reading and in 2000 the Commission decided to omit it from the draft articles. This question does not relate to the submission of international claims and related matters to adjudication, but to the issue of whether the application of any provision of the draft articles should require recourse to any procedure for a third party decision or recommendation. It was put aside on the second reading in 2000, when the Commission added a fourth part consisting of some general provisions, and it does not appear in the final text, being left as a matter for a diplomatic conference to decide. In putting this question aside the Commission abandoned an idea that is found in the incomplete work of the Second Committee at the 1930 Conference as well as in the Lauterpacht *Survey*. The absence of any allusion to the question whether third party settlement is an integral element of the law of responsibility, not even a general reference to the means indicated in Article 33 of the Charter (as the International Court of Justice recalled in the *Legality of Use of Force* cases[55] and as was done for the law of treaties), leaves the 2001 articles open-ended. They *assume* the responsibility of a State without giving any indication as to how that responsibility is to be established. For an internationally wrongful act that is a breach of a treaty, the 2001 articles may not be fully co-ordinated with the Vienna Conventions which, in their Article 66, each provide a procedure for judicial settlement, arbitration and conciliation as part of their procedure for dealing with breach of a treaty.

In 2001 the ILC submitted to the General Assembly its draft articles on responsibility of States for internationally wrongful acts with a recommendation that the General Assembly 'take note of the draft articles on responsibility of States for internationally wrongful acts in a resolution, and that it annex the draft articles to the resolution'. It went further and recommended that the

55 ICJ Rep. 1999 124, 140 (Belgium) and the corresponding passage in the other nine cases.

General Assembly consider, at a later stage, and in light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles with a view to concluding a convention on the topic. It was of the view that the question of the settlement of disputes could be dealt with by that conference, if it considered that a legal mechanism on the settlement of disputes should be provided in connection with the draft articles. At its 56th session, the General Assembly in resolution 56/83, 12 December 2001, adopted that proposal and commended the draft articles to the attention of Governments without prejudice to the question of their future adoption or other appropriate action. It also decided to continue the discussion at the 59th session (2004). It may be regretted that in making this recommendation, the commission did not insist on the importance of the Commentaries for a proper understanding of the draft articles.

§ 11.06. Harm done to Aliens

Closely connected with international responsibility is the question of diplomatic protection. It takes the place of the earlier topic of responsibility for injuries to the persons or property of aliens, but has been broadened not only in light of the reformulation of the general law on State responsibility, but also to take account of the new possibilities which modern international law gives to individuals to proceed directly against a foreign State on the international level. The work of the ILC on this topic is at an early stage.[56] As in the case of State responsibility, the Commission has been working on what it terms the secondary rules, not the primary rules. The set of articles on this topic are to some extent an adjunct to the main articles on State responsibility, and they provide directives for the practical application of the rules of responsibility in many instances. Whenever the internationally wrongful act originates in harm caused to an alien on a State's territory, a dispute between the two countries could implicate the law of diplomatic protection. Article 3 (1) (*b*) of the Vienna Convention on Diplomatic Relations of 1961 includes among the functions of a diplomatic mission 'Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law'.[57] Consular functions as set out in the Vienna Convention on Consular

56 Report 2002 (A/57/10), Chapter V.
57 500 UNTS 95.

Relations of 1963 deal in greater detail with the rights and duties of consuls in the protection of their nationals.[58]

The ILC has had the topic of diplomatic protection under study since 1998, first with Professor Mohamed Banana (Morocco) as special rapporteur,[59] and after his election as a judge in the ICTY, Professor Dugard (South Africa).[60] The basis of the study is the existing customary law that the exercise of the right of diplomatic protection is the right of the State and that unlawful injury to a national abroad is a violation of the State's rights.[61] The State is also to take into account the development of international law in increasing recognition and protection of individuals and in providing them with more direct and indirect access to international forums to protect their rights.[62] This recalls the development of international interest in the codification of the law of international responsibility.

In this topic, two further rules of international law, both directly relevant to the law of responsibility, come into play. One is the exhaustion of local remedies rule,[63] and the second is the nationality of claims rule.[64] During the last fifty years the force of this approach may have been weakened, especially through the developments in the sphere of human rights and recognition of sectorial elements in the law. As an arbitral award has recently said:

> There is no reason to import into the Red Sea the western legal fiction – which is in any event losing its importance – whereby all legal rights, even those in reality held by individuals, were deemed to be those of the State. That legal fiction served the purpose of allowing diplomatic representation (where the representing State so chose)

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58 596 UNTS 251.

59 For his report, see A/CN.4/484 (1998).

60 For his reports see A/CN.4/506 + Add.1 (2000), A/CN.4/514 (2001), A/CN.4/523 + Add.1 (2002), A/CN.4/530 + Add. 1 (2003).

61 *Mavrommatis Palestine Concessions* (Preliminary Objection) case, PCIJ, Ser. A No. 2 (1925), 12.

62 ILC Rep. 1998 (A/53/10*) para. 108, YBILC 1998/II/2. As has been seen above in chapter III, the exhaustion of local remedies is a condition for a direct application by an injured individual to the European, Inter-American and African Courts of Human Rights. On the other had, States can by treaty agree to waive the application of the rule. The 'Calvo Clause' is a notable instance of this.

63 A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (Cambridge University Press, 1983); C. Amerasinghe, *Local remedies in International Law* (Cambridge, Grotius Publications, 1990).

64 See the resolution of the Institute of International Law on the national character of an international claim presented by a State for injury suffered by an individual of 10 September 1965, 51/II Annuaire IDI 260 (1965).

> in a world in which individuals had no opportunities to advance their own rights. It was never meant to be the case however that, were the right to be held by an individual, neither the individual nor his State should have access to international redress.[65]

The ILC has included the exhaustion of local remedies rule in draft Article 44 of the 2001 articles, on the admissibility of claims. According to that, the responsibility of a State may not be invoked if the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted. It will probably amplify this in the articles on diplomatic protection. The rule was never an absolute bar to the exercise of diplomatic protection. In a modified form, this has been embodied in different international treaties. In the case of ICSID, a State party, may require the exhaustion of local remedies before it consents to the jurisdiction of the Centre.[66] Likewise, the regional human rights treaties require the exhaustion of local remedies before recourse to the regional human rights courts.

The nationality of claims rule is not mentioned in the 2001 articles. It is an inherent part of the law relating to diplomatic protection, and it will be examined in the broader context of the law of diplomatic protection.

§ 11.07. International liability for injurious consequences arising out of acts not prohibited by international law

In resolution 3071 (XXVIII), 30 November 1973, the General Assembly asked the ILC to undertake at an appropriate time a separate study of the topic of international liability for injurious consequences arising out of the performance of other activities.[67] The voting on this in the Sixth Committee was close. On a roll-call vote, unusual in that Committee, the proposal was adopted by a vote of 42:40:21. That was a political foretaste of the difficulties ahead. By using the word 'other' the General Assembly accepted the Commission's opinion that this topic should be treated separately from responsibility. The significance of this is that while the law of responsibility deals, as stated, with the secondary

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65 *Phase Two Maritime Delimitation* (Eritrea/Yemen), 119 ILR 417, 340 (para. 101).

66 ICSID Convention, 575 UNTS 159, Art. 26.

67 The English word *liability* as something distinct from *responsibility*, is virtually untranslatable into other languages, and is normally rendered by the same word that is used for *responsibility*. This is a frequent source of confusion. The word *responsibility* usually implies 'civil' responsibility, and *liability* 'criminal' responsibility. In the present state of the law, criminal responsibility enures to individuals, not to States, in environmental matters.

rules, with the consequences of breach of an obligation set out in the primary rule, this topic sets out primary rules, breach of which would come within the scope of the law of responsibility. That is the measure of the difference between the two, and in it lies the explanation for the great difficulties that the ILC has encountered.

In resolution 31/151, 19 December 1976, the General Assembly went further and asked the ILC to take the matter up at the earliest possible time, which it did. In 1978 the ILC established a Working Group to consider in a preliminary way the scope and nature of the topic, and appointed R. Q. Quentin-Baxter (New Zealand) as special rapporteur. He submitted five reports until his death in 1984.[68] He was followed by Professor Julio Barboza (Argentina) who submitted twelve reports.[69] Barboza's term of office as a member of the Commission came to an end in 1996, and in 1997 the Commission appointed P. S. Rao (India) to succeed him. He has submitted three reports.[70] The Commission asked him to deal first with a segment of the topic, namely the prevention of transboundary damage from hazardous activities.

Treatment of this topic by the ILC has been difficult. The law of responsibility is based on the objective fact of a breach of a rule of international law, whether conventional or customary, and that deliberately excludes any pejorative element. This topic is based on the contrary proposition, that the impugned State has been in some way at fault, and that imports an element of blame. The topic is also complicated by the fact that many incidents arise out of the transboundary effects of actions by individuals, normally after due authorization by the competent authorities of the responsible State. In practice, the topic is closely linked to the protection of the environment, that being where most transboundary harm is caused. A growing number of treaties regulate foreseeable cases of this character. One of the best known is the Convention on international liability for damage caused by space objects of 1972.[71]

On the basis of Rao's first report the ILC in 1998 adopted on first reading a set of 17 draft articles on that aspect, and decided to refer them to Governments for comments and observations. In 2001 it completed this part of the work and submitted draft articles to the General Assembly recommending the

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68 For Quentin-Baxter's reports, see Report 2001, note 889.

69 For Barboza's reports, see ibid. note 892. And see J. Barboza, 'International Liability for Injurious Consequences of Acts not Prohibited by International Law and the Protection of the Environment', 247 *Recueil des cours* 291 (1994-III).

70 For Rao's reports, see ibid. notes 898, 899 and 900.

71 961 UNTS 187.

elaboration of a convention by the General Assembly.[72] The draft articles are in some respects residual rules, and Article 19 expressly states that they are without prejudice to any obligation incurred by States under relevant treaties or rules of customary international law.

The main obligation proposed in the draft articles is that States shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof (Article 3). This is probably a rule of customary law, for which the *Trail Smelter* arbitration of 1938/1941 supplies an early example.[73] Specific obligations now proposed are that States are to take the necessary legislative, administrative or other action including the establishment of suitable monitoring systems to implement the provisions of the articles (Article 5). In many respects these draft articles are a generalization of relevant provisions from Part XII of the Convention on the Law of the Sea (above chapter VIII § 8.09). At its 56th session, the General Assembly in resolution 56/82, 12 December 2001, expressed its appreciation for the draft articles and requested the Commission to resume work on the liability aspects of transboundary harm caused by hazardous activities, taking into account developments in international law and comments by Governments.

In 2002, following that resolution of the General Assembly, the ILC, on the basis of a a report by a working group, decided to take up the second part of the topic and proceed to develop a model of allocation of loss. It continued the appointment of P. S. Rao as special rapporteur.[74] In 2003 Rao submitted his First Report on the legal regime for allocation of loss in case of transboundary harm arising out of hazardous acitivites. The Commission established another working group to assist the special rapporteur in considering the future orientation of the topic in the light of that report and the debate in the Commission.[75]

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72 Report 2001 chapter V. For the comments of Governments, see docs. A/CN.4/509 and A/CN.4/516.

73 III RIAA 1911, 1938,

74 ILC Rep. 2002 (A/57/10) Chapter VII.

75 See ILC Rep. 2003 (A/68/10) Chapter V. For Rao's report, see doc. A.CN.4/531.

CHAPTER XII

THE UNITED NATIONS SYSTEM

The U.N. has in its history achieved many successes, and suffered many setbacks. Through this first Peace Prize to the U.N. as such, the Norwegian Nobel Committee wishes in its centenary year to proclaim that the only negotiable route to global peace and cooperation goes by way of the United Nations.

The Norwegian Nobel Committee, Oslo, 12 October 2001.

§ 12.01. The system of the United Nations

The United Nations is the major universal international organization with global functions not merely in the political sphere but, together with the specialized agencies, in every other field of human activity.[1] It reflects the international society as it existed at the end of the twentieth century and the beginning of the twenty-first. The UN commenced in 1945 with 51 original members (including three units of the USSR), most of them members of the anti-Nazi coalition that had fought the Second World War, together with a few States that had formally declared war on what was left of the Axis Powers in order to be able to take part in the San Francisco Conference.[2] Today the UN has

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1 P. J. G. Kapteyn *et al*. (Eds.), *International Organization and Integration: Annotated Basic Documents and Descriptive History of International Organizations and Arrangements* (2nd completely revised ed. The Hague, Nijhoff, from 1982). Many of these instruments have been amended since publication of those volumes. For an important collection of documents on this, see F. Knipping *et al*., *The United Nations System and its Antecedents* (Oxford University Press, 1997). The English acronym is UN. Terminological Bulletin No. 311/Rev.1, doc. ST/CS/SER.F/311/Rev.1, 1981. And see the UN website for current information, www.un.org, and the website of every other specialized agency: www.[organization's acronym].org or www.[acronym].int.

2 There is confusion over the name *United Nations*. Originally that was the name of the fighting wartime coalition against the Axis Powers, under the Declaration of the United Nations, Washington, 1 January 1942, 204 LNTS 381. The San Francisco Conference was convened in the name of *that* United Nations. The Conference decided to adopt the name *United Nations* for the new Organization that it established. For an example

190 member States, every independent State in the world except the Holy See (Vatican City), which is closely associated with the United Nations and its work. It concerns itself in one way or another with virtually every aspect of human activity that extends beyond the bounds of any single State, and with much that happens inside States. The Charter, however, remains as it was drawn up in 1945 with only minor changes in the composition of two of its principal organs, the Security Council and the Economic and Social Council (ECOSOC). On the other hand, accumulated practice is in continuous change in what was thought to be the rule, sometimes even not in accordance with legal advice received from the Organization's legal advisers.

The reference to the 'system' of the UN in the title to this chapter comes from a passage in an advisory opinion of the ICJ:

> the Charter of the United Nations laid the basis of a 'system' designed to organize international co-operation in a coherent fashion by bringing the United Nations, invested with powers of general scope, into relationship with various autonomous and complementary organizations, invested with sectoral powers. The exercise of these powers by the organizations belonging to the 'United Nations system' is co-ordinated, notably by the relationship agreements concluded by the United Nations and each of the specialized agencies.[3]

The UN is a political organization with the widest general powers. Its principal organs (other than the ICJ and the Secretariat) are political organs. The ICJ has made the following comment on this:

> The political character of an organ cannot release it from the observance of treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution.[4]

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of possible confusion between the two uses of *United Nations*, see the letter of the Secretary-General of 16 May 1986 regarding access to the archives of the United Nations War Crimes Commission, [1986] UNJYB 269. That Commission was established by the fighting United Nations. Unlike the Covenant of the League of Nations which was part of the 1919 Peace Treaties (see note 13 below), the UN Charter is not associated with the peace treaties following the Second World War. The unconditional surrender of Germany took place while the San Francisco Conference was in progress, and that of Japan several months after it had terminated.

3 *Legality of the Use by a State of Nuclear Weapons* adv. op. ICJ Rep. 1996(I), 66, 80 (para. 26). On the specialized agencies, see § 12.09 below.

4 *Conditions of Admission of a State to membership in the United Nations (Article 4 of the Charter)* adv. op., ICJ Rep. 1948, 57, 64.

Every decision of every organ of the UN (except the ICJ) is therefore a political decision, whatever its legal implications.[5] The thrust of this chapter is the nature and the functioning of that system.

The need for international organizations for what the Court called 'sectoral' purposes began to be felt in the last part of the nineteenth century, but was not then matched by any corresponding demand for an international organization for general purposes. Such ideas would have crumbled on the rock of national sovereignty and the legitimacy of Great Power direction of world affairs. The nineteenth century was nevertheless marked by a series of major international political conferences (usually called Congress) – the Congress of Vienna (1815)[6], the Congress of Paris (1856), the Congress of Berlin (1878), ending with the so-called Hague Peace Conferences of 1899 and 1907. The first three Congresses were convened to restore peace and reorganize the international community in Europe after a war. They also adopted decisions regarding rules of international law on matters that, at the time, were seen as sufficiently important to warrant general regulation. Thus, the Congress of Vienna adopted the first codification of the rules on the precedence of diplomatic representatives.[7] That had become necessary after the appearance of two great republics in the international community, France and the United States, making irrelevant previous rules and practices based on the precedence of emperors, kings and princes. It also laid the basis for the abolition of slavery and the slave trade.[8] The Congress of Paris adopted the first codification of aspects of prize law in the Declaration of Paris, still regarded as a fundamental element of the law of prize in maritime warfare.[9] The Congress of Berlin produced the first internationally agreed treaty for the protection of minorities in Europe, the Treaty of Berlin of 13 July 1878 for the Settlement of the Affairs of the East.[10]

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5 On the place of resolutions of international organizations in the general thesaurus of international law, above chapter II § 2.07.

6 Above chapiter VI note 5. On what must be an early instance of non-State 'lobbying' at that Congress, see S. Baron, *Die Judenfrage auf dem Wiener Kongreß auf Grund von zum Teil ungedruckten Quellen dargestellt* (Vienna, Lömit, 1920). And see Sh. Rosenne, 'Conferences and Congresses', I EPIL 739.

7 64 CTS 1.

8 Declaration relative to the universal abolition of the slave trade, 8 February 1815, 63 CTS 473.

9 115 CTS 1. Many other States have acceded to this Declaration.

10 153 CTS. 171, Art. XIV. Romania, whose independence was recognized in that Treaty, was not a party to it. For an important opinion on that provision, see J. C. Bluntschli, above chapter VI note 8.

Unlike the earlier congresses, the two Hague Conferences of 1899 and 1907 were convened with the aim of concluding a series of treaties. In an effort to ward off the oncoming First World War, the Powers sought agreement on their military expenditure and their disarmament, and with that the development of machineries for the peaceful settlement of international disputes, especially arbitration as an alternative to the use of armed force. They also went ahead with the process of humanizing the laws of war, the *jus in bello*, or humanitarian law. Although diplomacy at the time was aristocratic, elitist and secretive, it was nevertheless at those Congresses that current concepts of the democratization of the conduct of international affairs, and transparency in their transaction, began to appear. The 1899 Conference marked a turning point.[11] Non-state actors, including the press and influential individuals (publicists),[12] started to make their presence felt. Those Conferences also set the pattern for the structure of multilateral conferences.

The Peace Treaties of 1919 gave the first opportunity to establish a standing international organization with general political responsibilities for the maintenance of international peace – the League of Nations.[13] The Covenant of the

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11 A. Eyffinger, *The 1899 Hague Peace Conference: 'the Parliament of Man, the Federation of the World*", (The Hague, Kluwer Law International, 1999); F. Kalshoven (ed.), above chapter III note 32. For an amusing personal account of the Conference by a leading Russian delegate, see F. F. Martens, *La Conférence de la Haye: Étude d'histoire contemporaine* (Paris, Rousseau, 1900). For a centenary reassessment of that Conference, see G. Best, 'Peace Conferences and the Century of Total War: The 1899 Hague Conference and what came after', 75 *International Affairs* (London) 619 (1999).

12 Cf. Bertha von Suttner, *Die Haager Friedenskonferenz: Tagebuchblätter* (Dresden, E. Piersons Verlag, 1900). The Austrian Baroness von Suttner was a distinguished social hostess of the period and her diaries give an informed outsider's view of the 1899 Conference, not always complementary to the leading personalities there. She was active in the peace movement of the time and in 1905 was awarded the Nobel Peace Prize, the first woman to be so honoured.

13 The Covenant of the League of Nations was Part I of the 1919 Peace Treaties with Germany, Austria, Bulgaria, Hungary and the Treaty of Sèvres with Turkey (this did not enter into force). It is reproduced in Kapteyn, above note 1 No. I.A.1.b. The decision to separate the Covenant from the Peace Treaties had not been finally ratified when the Second World War broke out in 1939. There is a vast literature on the League of Nations. See in particular, W. Schiffer, *Repertoire of Questions of General International Law before the League of Nations 1920-1940* (Geneva, Geneva Research Centre, 1940); H. Aufricht, *Guide to League of Nations Publications; A Bibliographical Survey of the Work of the League, 1920-1947* (New York, Columbia University Press, 1951); F. P. Walters, *A History of the League of Nations* (Oxford University Press, 1952); V. Yves and C. Ghebali, *A Repertoire of League of Nations Serial Documents, 1919–1947* (Dobbs Ferry NY, Oceana, 1973). The League's archives are today in the custody of the UN,

League of Nations was Part I of the 1919 Peace Treaties, and ideologically and politically the League was initially linked to those Treaties. Two of its characteristic features call for mention. One was the unanimity rule for the adoption of decisions by League organs, a rule which started eroding but which nevertheless remained a central feature of its decision-making. The second was that the meetings of the League Council were in principle not open to the public, although the proceedings were later published. That shielded the Council from immediate pressures of public opinion. Both those features were dropped in the Charter. The League was unable to cope with the crises of the 1930s leading into the Second World War.

§ 12.02. The Charter as the constituent instrument

During the War, the Western Powers recognized the need for a universal international organization of general scope and with wide powers, and were able to associate the Soviet Union in that post-War planning. After a series of preparatory conferences between the Great Four – China, the USSR, the United Kingdom and the United States of America – the United Nations Conference on International Organization (UNCIO) convened at San Francisco between 25 April and 26 June 1945, when the Charter was signed. It came into force after ratification on 24 October 1945, a date since observed annually as United Nations Day.[14]

The Charter is the constituent instrument of an international intergovernmental organization, an entity with international personality and subject to international law. It is not a 'constitution' as that term is understood for the internal organization of States. It does not lay out rules for the separation of powers, legislative, administrative and judicial, because that conception does not exist in international law. What it does is to set out the purposes and functions, the conditions of membership, the organs and the method of work of each

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mostly in the Palais des Nations in Geneva.

14 For the records of the Conference, see *Documents of the United Nations Conference on International Organization, San Francisco, 1945* (London/New York, Library of Congress/United Nations, 1945–1955). The major American account of the negotiations leading to the Charter is R. B. Russell with J. E. Murther, *A History of the United Nations Charter: The Role of the United States 1940-1945* (Washington, Brookings Institution, 1958). For a parallel but less informative Soviet account, see the six volume work Советсий Союз на международных конференцях в период Великой Отечественной Войны 1941-1945 гг. (Moscow, Izdatelstvo Politicheskoi Literatury, 1978- 1980).

organ. That includes voting and the adoption of decisions, and the character of those decisions, whether and if so on whom they are binding, or whether they are graded as recommendations, and if so to whom they are addressed. The ICJ has described the constituent instrument and its functions in the following terms:

> 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 . . . 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 instruments.[15]

The Charter is a living instrument, self-adapting to the kaleidoscopic changing circumstances of the international society.[16] By 31 December 2002, the General Assembly had adopted more than 9250 resolutions; the Security Council 1454 in 4683 formal meetings, and ECOSOC some 3000, and countless other 'decisions' not given the standing of 'resolution'. That shows intense activity over more than half a century, unparalleled in the history of international relations. But there is more than that. The resolutions and decisions are practical applications of the Charter, frequently expressing new interpretations and reinterpretations of that instrument. Many of those actions took place in circumstances that the founders of the UN could not have foreseen, and they are witness to the adaptability of the Charter. The General Assembly is today virtually in per-

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15 *Use of Nuclear Weapons* adv. op. above note 3. 74 (para. 19). And see *Developments* 181.

16 Cf. J. Robinson, 'The Metamorphosis of the United Nations', 94 *Recueil des cours* 493 (1958-II) for an early and critical account of this. The major recent commentaries on the Charter, both collective works, are *La Charte des Nations Unies: Commentaire article par article sous la direction de* J.-P. Cot et A. Pellet (eds.), (2nd ed. revue et augmentée, Paris, Economica, 1991); B. Simma (ed.), *The Charter of the United Nations: A Commentary*, (2nd ed., Oxford University Press, 2002). Indispensable for the practitioner is the *Repertory of the Practice of United Nations Organs* and Supplements, continuing (but heavily in arrears).

manent session throughout the year, alongside the Security Council, and for many countries the Permanent Mission to the UN in New York ranks high among its national diplomatic missions.[17]

The Charter does not displace general international law but is superimposed on it, and the UN, as an international person, is subject to it in respect of matters not governed by the Charter. The Charter is a treaty, even if of a particular type, as the ICJ has repeatedly emphasized.[18] Being the constituent instrument of an international organization, Article 5 of the Vienna Conventions on the Law of Treaties comes into play. By that, the Conventions apply to any treaty which is the constituent instrument of an international organization 'without prejudice to any relevant rules of the organization'.[19] Breach of the treaty, or non-compliance with its terms, or the desuetude of some of its provisions, opens the way to the application of all the remedies and correctives that exist when States parties to a treaty are faced with a situation that organs created by the treaty cannot or will not face themselves.

An important provision of the Charter is Article 103 by which, in the event of a conflict between the obligations of members of the UN under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail.[20] This provision is important when the Security Council decides under Chapter VII of the Charter on economic measures against a specific State or, as in resolution 1306 (2000), 5 July 2000, requires measures to be taken by a specific industry. Application of those measures may require the suspension of the operation of governing international treaties, for example treaties governing civil air communications, or of private-law contracts.[21] The

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17 On permanent missions, see Dotation Carnegie pour la paix internationale (several editors), *Les missions permanentes auprès des organisations internationales* (Brussels, Bruylant, 1971–1976).

18 *Competence of the General Assembly for the Admission to Membership of a State to the United Nations* adv. op. ICJ Rep. 1950, 4, 8; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* adv. op, ICJ Rep. 1962, 151, 157.

19 For the Vienna Conventions, see above chapter II note 3. On the constituent instrument, see *Developments* 181.

20 This is incorporated into the codified law of treaties in Art. 30 of the Conventions on the Law of Treaties. That article addresses the application of successive treaties dealing with the same subject matter. In the 1986 Convention (Art. 30 (6)), it is worded more emphatically and is made applicable not only to States but also to international organizations.

21 As interesting examples of this see, in the Court of Justice of the European Communities, the cases of *Bosphorous Hava Yollari Turizm Tacaret AS* v. *Minister for Transport, Energy and Communications, Ireland, and the Attorney-General* (Case C-84/95, 1996)

ICJ has applied this provision to the effect that enforcement measures prevail over the obligations of the parties under the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.[22]

The preamble proclaims the broad aims of the UN. Its first and primary objective is 'to save succeeding generations from the scourge of war'. Together with this, it is to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small. Its aims also include the establishment of conditions under which justice and respect for the obligations of international law can be maintained and to promote social standards and better standards of life in larger freedom. Those aims reflect the war aims of the fighting United Nations in the Second World War.

Articles 1 (Purposes) and 2 (Principles) declare the purposes and principles of the UN. Its purposes are to maintain international peace and security, to develop friendly relations among nations based on respect for the principle of equal rights and self-determination, to achieve international co-operation in solving international problems of an economic, social, cultural and humanitarian character and to be a centre for harmonizing the actions of nations in the attainment of these common aims.

The major principles of the Organization are that it is based on the sovereign equality of its members, that all members shall fulfil in good faith their obligations under the Charter, and that all members shall settle their international disputes by peaceful means. Article 2 (4) is fundamental to the concept of collective security, the central theme of the Charter. That is the provision on the non-use of force, discussed above in chapter IV. All members are to give to the UN every assistance in any action it takes in accordance with the Charter and shall refrain from giving assistance to any State against which preventive or enforcement action is being taken by the UN. The Organization is to ensure that non-member States act in accordance with the Principles in so far as may be necessary for the maintenance of international peace and security. Finally

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regarding the sanctions against Yugoslavia, and *Dorsch Consult Ingenieursgesellschaft mbH* v. *Council of the European Union and Commission of the European Communities* (Case T-184/95, 1998), regarding sanctions against Iraq, both in 117 ILR at 267 and 363.

22 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* cases (Provisional Measures), ICJ Rep. 1992, 3, 15 (para. 39) and 115, 126 (para. 42). In the preliminary objections phase the Court left this aspect to the merits; ICJ Rep. 1998, 9, 29 (para. 50) and. 115, 134 (para. 50). These cases were discontinued with prejudice on 10 September 2003.

among the principles, Article 2 (7) lays down that nothing in the Charter shall authorize the UN to interfere 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 Charter. However, that principle shall not prejudice the application of enforcement measures under Chapter VII of the Charter.

The International Court of Justice has given a broad interpretation of those provisions:

> The primary place ascribed to international peace and security is natural, since the fulfilment of the other purposes will be dependent upon the attainment of that basic condition. These purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action. But when the Organization takes action which warrants the assertion that it was appropriate for the attainment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization.[23]

§ 12.03. 'Sovereign equality'

One of the dilemmas of the UN is the treatment of 'sovereign equality' of States. The Charter recognizes the inequality of States in the privileged position that it gives to the permanent members of the Security Council – China, France, the Russian Federation, the United Kingdom and the United States of America.[24] As we have seen (above chapter VII § 7.01), sovereignty today is not the sovereignty of the international society at the end of the nineteenth century, intolerant of any outside interference or intervention in its internal affairs and in its treatment of its citizens and subjects. At most, lip service is paid to the

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23 *Certain Expenses* adv. op. above note 18, 168.

24 See Art. 27, on voting in the Security Council, and Art. 106 on amendments to the Charter (this requiring formal ratification by each one of those permanent members). The permanent members also have the right of veto in connection with the recommendation of the Security Council for the appointment of a Secretary-General under Art. 93. In the financial specialized agencies, the system of 'weighted voting' is usual, but the Charter does not require this even when dealing with the financial affairs of the UN or the other international organizations. There is a general understanding that a permanent member wishing to be a member of another principal organ or major subsidiary organ will be elected, and that the national of a permanent member will be elected to serve as a judge of the ICJ. The non re-election of the British member of the ILC in 1986 – himself a highly qualified jurist of international standing – came as a shock. It showed the fragility of this understanding.

principle.[25] The Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations annexed to General Assembly resolution 2625 (XXV), 24 October 1970, contains a section on the sovereign equality of States.[26] It reads:

> All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.
> In particular, sovereign equality includes the following elements:
> (*a*) States are juridically equal;
> (*b*) Each State enjoys the rights inherent in full sovereignty;
> (*c*) Each State has the duty to respect the personality of other States;
> (*d*) The territorial integrity and political independence of the State are inviolable;
> (*e*) Each State has the right freely to choose and develop its political, social, economic and cultural systems;
> (*f*) Each State has the duty to comply fully with its international obligations and to live in peace with other States.

But State practice does not support those platitudes, except perhaps the view that all States are *juridically* equal, whatever that might mean.[27] The introductory sentence can with difficulty be reconciled with the proclamation of equal rights and self-determination in Article 1 (2) of the Charter or with Article 21 of the Universal Declaration of Human Rights, today commonly accepted as declaratory of principles of international law, and possibly possessing the force of a norm of *jus cogens*:

> 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 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

25 A. D. Efraim, *Sovereign (In)equality in International Organizations* (The Hague, Nijhoff, 2000).

26 On that Declaration, see chapter II note 44 above.

27 In international litigation, the principle of procedural parity is an expression of the formal equality of States. International law being impersonal, the equality of States also finds substantive expression in the application of the law by international courts and tribunals.

> and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.[28]

The voting system in all UN organs except the Security Council, where different considerations apply, is also not compatible with the principle of the sovereign equality of States. This is because the majority voting principle, limited to States present and voting yea or nay, does not take into account the States that although present abstain or otherwise do not vote yea or nay. This distorts the 'majority' by which a given resolution is adopted, producing the curious situation of a resolution affecting all members of the UN being adopted in the General Assembly by a minority of its members, over strong opposition.[29] That situation was not envisaged when the UN was organized in 1945. A State that is present and abstains does vote. The presiding officer calls for abstentions and the vote appears on the electronic voting machines now current and a recorded vote is recorded in the *Official Records*. Pressing the yellow button on invitation of the presiding officer is as deliberate an action as pressing the green or red button. There is no obvious reason why a State that does not vote yea or nay should be placed in a position of inequality *vis-à-vis* those that do so vote.

When there is a vote, a State has five options. It can vote affirmative or negative, it can abstain, it can announce that it is not participating in the vote, and it can absent itself. Since General Assembly decisions are mostly recommendations, and where they are binding they bind all the members regardless of how any individual member voted, only a known abstention creates doubt as to the member's position. That is, however, of no legal significance.[30] Voting

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28 Since the end of the Cold War the UN has become increasingly involved in monitoring elections on the basis of principles enunciated in GA Res. 50/172, 22 December 1995.

29 A significant instance of this was A/Res. 49/75K, 15 December 1994, requesting the *Legality of the Threat or Use of Nuclear Weapons* adv. op., ICJ Rep. 1996(I) 226. That resolution was adopted on a vote of 78 to 43, with 38 abstentions, out of a total membership at the time of 185 States. In the adv. op. the Court alluded to this, stating that in exercising its discretion to give the opinion, it would not have regard to the distribution of votes in respect of the adopted resolution (para. 16). In view of the indecisive nature of that advisory opinion, and considering how the request for the opinion was adopted, one may ask whether the Court would not have done better had it declined to give that opinion.

30 Except, possibly, if that State is directly concerned in a matter that is the subject of a request for an advisory opinion to which it objects. That State's abstention in the final vote in the plenary might be interpreted as signifying no objection to the request. *Western Sahara* adv. op., ICJ Rep. 1975, 12, 23 (para. 29).

today, thanks to the electronic voting equipment, is usually either recorded or not. Roll-call votes are occasionally required. That is a matter of a diplomatic nuance and of 'parliamentary' procedure, not a requirement of the law.

However, voting is not essential and any international organ can adopt a valid decision by other means. There are perhaps subtle diplomatic distinctions between adoption of a decision by acclamation, or without a vote, or today, by 'consensus'. As a matter of procedure, 'consensus' means the adoption of a decision without formal opposition.[31] It is the responsibility of the presiding officer to establish whether there is formal opposition, since a State is always entitled to ask for a vote. In consensus procedure, the emphasis is on *formal* opposition, in the sense that a State requests a vote to enable it to give formal expression to its position. By whatever means a decision is adopted, any State (other than a sponsor) can make an 'explanation of vote' before or after the vote, or an 'explanation of position' if the decision is adopted without a vote. That explanation will appear in the record of the meeting.

Sovereign equality is linked to the principle of non-intervention in the domestic affairs of any State. That principle was included in the League Covenant, and the PCIJ early recognized that it was a relative, not a static concept.[32] Although reworded in more emphatic terms in the Charter, that relativity remains. The unparalleled increase in the number and scope of international treaties during the last fifty years has brought many formerly internal matters within the scope of international law and even within the scope of international judicial or monitoring organs, leading to corresponding erosion of the principle.

§ 12.04. Organs of the organization

All international organizations act through 'organs', as determined by the constituent instrument. There is one plenary organ composed of all the members, meeting in regular sessions at fixed intervals and usually controlling the organization's finances.

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31 The formal definition of consensus is taken from Art. 161 (8) (*e*) of the UN Convention on the Law of the Sea 1982, 1833 UNTS 3. The Institute of International Law examined the question of consensus, but was unable to adopt any resolution and abandoned the attempt in 1999. See L. B. Sohn, 'The Role of Consensus in the Framing of International Law', 67/I Annuaire IDI 13 (1997); 67/II ibid. 195 (1997); 68/II ibid. 155 (1999).

32 *Nationality Decrees issued in Tunis and Morocco* adv. op. PCIJ, Ser. B No. 4 (1923), 24; applied by the ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* adv. op. ICJ Rep. 1950, 65, 70.

The principal organs of the UN established in Article 7 (1) of the Charter in existence today are the General Assembly, the Security Council, the Economic and Social Council, the ICJ,[33] and the Secretariat.[34] The General Assembly, the plenary organ, consists of all the members of the United Nations. Observers can be permitted to take part in its work, on conditions specified. The other organs are of restricted membership, the members being elected by the General Assembly except the five permanent members of the Security Council. All the principal organs except the ICJ and the Secretariat are composed of States. The Court and the Secretariat are composed of individuals, the members of the Court being elected by the General Assembly and the Security Council and the Secretary-General being appointed by the General Assembly on the nomination of the Security Council (that decision of the Security Council is subject to the veto).

Subsidiary organs as may be found necessary may be established, and these can be composed of States or of individuals working in their personal capacity. However, the formal distinction of Article 7 between the principal and the subsidiary organs is no longer adequate. The General Assembly has established several autonomous bodies, which are in effect international organizations or organs in their own right. This is sometimes done by treaty, sometimes by resolution, and sometimes by a combination of both. Among the autonomous bodies that play important roles in the work of the organization are the United Nations Emergency Children's Fund (UNICEF), the United Nations Institute on Training and Research (UNITAR), the United Nations Environment Programme (UNEP), the United Nations Conference on Trade and Development

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33 Although the ICJ is a principal organ of the UN, it has a certain degree of autonomy (except in the all-important financial matters) by virtue of its status as the principal judicial organ of the UN. It is the only principal organ that in its Statute, itself an integral part of the Charter, its seat is established at The Hague, away from the seat of the UN. Its Secretariat, the Registrar and staff, is independent of the UN Secretariat and the solemn declaration required of staff members is different from that required of members of the Secretariat. See UNJYB [1972] at 189, 199. In 1997 the jurisdiction of the UN Administrative Tribunal was extended to the Registry staff. *Yearbook of the ICJ 1997-1998* at 268. And see Art. 14 (1) of the revised Statute of the Administrative Tribunal, annexed to A/Res. 55/159, 12 December 2000.

34 It is the Secretariat as a whole, and not simply the Secretary-General, that is named as a principal organ. The Secretary-General has a separate standing in the Charter (Art. 99). The Trusteeship Council, also named in Art. 7 (1), no longer exists following the independence of all the territories formerly under UN Trusteeship or League of Nations Mandate. The Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization is examining what new functions could usefully be performed through a replacement of the Trusteeship Council.

(UNCTAD), and others. Many treaties, especially in the field of disarmament, fisheries management and the environment, establish a small nucleus secretariat for their administration, and if the treaty is concluded under the auspices of the UN these can be regarded as UN treaty organs. Bodies established by a combination of treaty and resolution include the UN High Commissioner for Refugees (UNHCR), the United Nations High Commissioner for Human Rights, and others. These report to the General Assembly, either directly or through ECOSOC. What are called 'treaty organs' are organs such as the Human Rights Committee established to control the application of the Conventions on Human Rights (above chapter VI § 6.06), and Meetings of States Parties of treaties that have been concluded under the auspices of the UN. This chapter, aside from some necessary generalities, is limited to salient features of the General Assembly and the Security Council.

§ 12.05. Membership

Articles 3 and 4 govern membership in the UN. By Article 3, the States that participated in the San Francisco Conference are original members. This has had an unexpected consequence. In a political compromise reached at the Yalta Conference of 1945, the USSR was given three votes in the General Assembly by the admission of the Ukrainian SSR and the Byelorussian SSR to participate in the Conference, and hence to membership in the UN. When they became independent States in 1991, they were already in the position of original members of the UN. Article 4 deals with the admission of new members, effected by decision of the General Assembly on the recommendation of the Security Council (that decision being subject to the veto). Membership is open to all peace-loving States which accept the obligations contained in the Charter and, in the judgment of the Organization, are able and willing to carry out those obligations.[35] This has become little more than a formality with the progress of decolonization, membership in the UN being now the formal termination of a decolonization project that leads to complete independence. In the 1990s it was extended to the dismemberment of some federal States in Europe, in-

35 For the interpretation of Art. 4, see the *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* adv. op., above note 18, 57 and *Competence of the General Assembly* adv. op. above note 28. The question of the admission of new members was the first 'Cold War' crisis to affect the structure of the UN. In the 1950 Opinion the Court wisely declined to allow the General Assembly to effect admission in the absence of any recommendation of the Security Council.

cluding Russia, Czechoslovakia and Yugoslavia (as part of a political settlement). A political decision was required to determine which was the new State requiring admission under Article 4, and which was the original member under Article 3.[36]

In the same order of ideas, Articles 5 and 6 deal with suspension of the rights of membership and expulsion from the Organization, each to be decided by the General Assembly on the recommendation of the Security Council. Those two processes are distinct from the 'sanction' that has been developed in the General Assembly of the rejection of a delegation's credentials, a matter decided in the General Assembly by a simple majority on the report of the Credentials Committee.[37] That aspect has been prominent in the UN, where it first arose in connection with the representation of China in the Organization. That led to the assertion of the primacy of the General Assembly for all organs of the UN and other international organs. The major pronouncement of the General Assembly is resolution 396 (V), 14 December 1949 (above chapter VII § 7.02). Later, in resolution 2758 (XXVI), 25 October 1971, the General Assembly recognized the People's Republic of China as the lawful representative of China in the UN, and decided to expel the representatives of Taiwan from the UN and from 'all the organizations related to it'. Something similar occurred in the case of Yugoslavia. Here the Security Council decided in resolution 777

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36 The question first arose in 1946, when Pakistan requested to be admitted into the UN. It was decided that India was an original member. Pakistan was admitted by A/Res. 102 (II), 30 September 1947. For a legal analysis, see *Succession of States in relation to membership in the United Nations*, memorandum prepared by the Secretariat, doc. A/CN.4/149 + Add.1, YBILC 1962/II. The question arose again with the dissolution of the Soviet Union. It was decided that the Russian Federation, Belarus and Ukraine were original members. In the cases of Czechoslovakia and Yugoslavia, all the new States were admitted under Art. 4.

37 Above chapter VII § 7.02. A roll-call vote to delete part of the report of the Credentials Committee at a UN Conference led to the seating of the delegation of Hungary, whose credentials had not been accepted in the immediately preceding session of the General Assembly. See the discussion on the report of the Credentials Committee in the 1958 Conference on the Law of the Sea at the 16th plenary meeting, II *Official Records*. That led to the regularization of that country's position in the General Assembly. The classic procedure was for the report of the Credentials Committee to be the first item discussed in an international conference, including a meeting of an organ of an international organization. The practice of the UN has changed this. Rule 29 of the Rules of Procedure of the General Assembly (and the corresponding provision in other Rules of Procedure) states that a representative to whose admission a member has made objection shall be seated provisionally with the same rights as other representatives until the Credentials Committee has reported and the General Assembly has given its decision. That brings out the political nature of the decision on the report of the Credentials Committee.

(1992), 19 September 1992, that the Federal Republic of Yugoslavia could not continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the UN and therefore recommended to the General Assembly that it decide that the Federal Republic should apply for membership. The General Assembly followed that advice in resolution 47/1, 22 September 1992. That left Yugoslavia in an unclear situation, which was only regularized when Yugoslavia was formally admitted under Article 4 in resolution 55/12, 1 November 2000.[38]

The Charter contains no provision regarding withdrawal from membership. At the San Francisco Conference, it was understood that a State could withdraw for specific reasons. There has been one attempt to withdraw, by Indonesia in January 1965. The purported withdrawal was not immediately accepted and in September Indonesia announced that it would be resuming full co-operation with the UN and participation in its activities.[39]

§ 12.06. The General Assembly

Article 10 of the Charter is the main provision setting out the powers of the General Assembly.

> The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations

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38 For the recommendation of the Security Council, see S/Res. 1326 (2000), 31 October 2000. Nevertheless, the ICJ continued to regard the Federal Republic as a party to the Statute, but found it unnecessary to decide the question in provisional measures proceedings. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Provisional Measures) case, ICJ Rep. 1993 3 18. In the *Legality of Use of Force* cases, the Court found it unnecessary to examine the question (raised by the respondents) whether the Federal Republic was a member of the UN and as such a party to the Statute. ICJ Rep. 1999 123 and following. Those cases are pending. The Federal Republic at the time did not accept that decision of the General Assembly, and consequently did not itself raise the issue, nor did the Court raise it *proprio motu*. Later, Yugoslavia changed its position. On 24 April 2001 Yugoslavia filed with the ICJ a request for the revision of its judgment in the preliminary objection phase of the *Genocide* case (ICJ Rep. 1996(II), 595) on the ground that it had since become clear that Yugoslavia was not a member of the UN or a party to the Statute when the original application was filed. In a judgment of 3 February 2003 the Court held that the application was inadmissible.

39 See on this, Y. Z. Blum, 'Indonesia's Return to the United Nations', 16 ICLQ 522 (1967).

> to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

Article 12 provides the main limitation:

> When the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendations unless the Security Council so requests.

Technically always in force and applied, the Security Council has whenever necessary taken the necessary steps to enable the General Assembly to discuss and adopt resolutions on a question on which the Security Council is exercising its functions. From this provision the ICJ, reasoning *a contrario*, has asserted that it can deal with a case when the Security Council is exercising its functions in relation to the same matter.[40]

Although in general the power of the General Assembly is to make recommendations, some of its decisions are definitive. These are all resolutions or other decisions concerning the internal organization of the UN or closely related matters, although they may have legal implications. By Article 17 it approves the budget of the Organization and apportions the expenses among the members. By Article 21 it elects the non-permanent members of the Security Council and by Article 61 the members of ECOSOC. By Article 85, it approves Trusteeship Agreements (except those for strategic trust areas, a matter for the Security Council under Article 84). By Article 91 it permits a non-member State to become a party to the Statute of the ICJ, on the recommendation of the Security Council. By Article 96 it may authorize certain other organs of the UN and specialized agencies to request advisory opinions of the Court. By Article 98 it appoints the Secretary-General on the recommendation of the Security Council. Article 101 requires it to establish the regulations for the staff of the Secretariat. By Article 4 of the Statute of the ICJ, the General Assembly together with the Security Council elects the members of the Court, and by Article 70 of the Statute, again on the recommendation of the Security Council,

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40 *Military and Paramilitary Activities in and against Nicaragua* (Jurisdiction and Admissibility) case, ICJ Rep. 1864, 392, 434 (para. 95); *Application of Genocide Convention* (Provisional Measures) case, above note 38, 19 (para. 33); *Armed Activities on the Territory of the Congo* (Provisional Measures) case, ICJ Rep. 2000, 111, 126 (para. 36). The Court explained that the Security Council has functions of a political nature whereas the Court exercises purely judicial functions, and that both organs can accordingly perform their separate but complementary functions with respect to the same events.

it decides on the participation in the amendment of the Statute of a State that is a party to the Statute without being a member of the UN. Furthermore, although most of the decisions of the General Assembly are recommendations for States, the Secretary-General, by Article 98, shall perform such functions as are entrusted to him by other organs. That injects an institutional element into formally non-binding recommendations of both the General Assembly and the Security Council, and indeed of any other organ of the UN.

By Article 11 the General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments and may make recommendations in regard to that. That is one of its most important functions, and much of what disarmament exists, or controls over modern armaments that have been established, have their roots in the work of the First Committee of the General Assembly, except where they have been negotiated directly between the Super Powers. It may also discuss any questions relating to the maintenance of international peace and security brought before it by any member of the UN or by the Security Council, but its power to make recommendations is limited by virtue of Article 12. It may call the attention of the Security Council to situations which are likely to endanger international peace and security.

By Article 13, the General Assembly is required to initiate studies and make recommendations for the purpose of promoting international co-operation in the political field and encouraging the progressive development of international law and its codification.[41] Likewise it is to make recommendations for promoting international co-operation in the economic, social, cultural, educational and health fields, and to assist in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

The Charter has not been amended in any of these respects.[42] However, in 1950 the General Assembly adopted resolution 377 (V), 3 November 1950, the Uniting for Peace Resolution. Partly prompted by what was widely regarded

41 On the codification and progressive development of international law, above chapter II § 2.09.

42 In A/Res. 111 (II), 13 November 1947, the General Assembly in a Cold War context established an Interim Committee of the General Assembly. That controversial resolution addressed the situation created by the inability of the Security Council to act at the time through the use of the veto by a permanent member. The Interim Committee has fallen into disuse, although it still exists on paper and is authorized to request advisory opinions of the ICJ on legal questions arising within the scope of its activities. A/Res. 295, 21 November 1949.

as abuse or misuse of the right of veto in the Security Council (see § 12.07 below), it decided that if the Security Council, because of lack of unanimity of its permanent members, failed to exercise its primary responsibility for the maintenance of international peace and security in any case in which there appeared to be a threat to the peace, a breach of the peace, or act of aggression, the General Assembly would consider the matter immediately with a view to making appropriate recommendations to members for collective measures. In the case of a breach of the peace or act of aggression this could include the use of armed force where necessary, to maintain or restore international peace and security. The resolution went on to provide that if the General Assembly was not in session at the time, it may meet in an emergency session within 24 hours of the request, and that such sessions shall be called if requested by the Security Council on the vote of any nine (originally seven) members, or by a majority of the members of the UN. Although bitterly criticized at the time in the tensions of the Cold War, and in the eyes of some of doubtful compatibility with the Charter, it has become generally accepted. Its legality was endorsed, *sub silentio*, by the International Court of Justice in the *Expenses* case: 'The Charter makes it abundantly clear . . . .that the General Assembly is also to be concerned with international peace and security'. After quoting Article 14 of the Charter, the Court continued:

> while it is the Security Council which, exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations. They are not merely hortatory.[43]

The General Assembly takes decisions by a majority of those present and voting (Charter, Article 18(2)). A majority of members constitutes a quorum (Rules of Procedure, Rule 66). By virtue of Rule 86, in the calculation of that majority, a State that is present but abstains in the vote is considered as not voting (above § 12.03). By Article 18, a qualified majority of two thirds of those present and voting is required for recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of ECOSOC (and of the

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43 *Certain Expenses* adv. op. above note 18, 168. By Art. 14, subject to Art. 12 the General 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 relations among nations, including situations resulting from a violation of the provisions of the Charter setting forth the Purposes and Principles of the UN.

Trusteeship Council), the admission of new members, the suspension of the rights of membership, the expulsion of members, questions relating to the trusteeship system and budgetary questions.

For the first thirty years or so of the Organization, this voting system worked satisfactorily. The normal practice of the General Assembly was for an item first to be discussed in the competent Main Committee before coming to the plenary on a report from that Main Committee. In the Committees, a quorum of one quarter is required for discussion and a simple majority of those present and voting is required for the adoption of a decision, which would be a draft resolution recommended to the General Assembly for adoption. That would show whether the necessary two-thirds majority could be reached in the plenary.[44] However, the unanticipated expansion in the agenda of a session of the General Assembly has led to the practice of having many agenda items discussed directly in the plenary without reference to a Committee, not a commendable practice. In addition the steady increase in the membership as the process of decolonization proceeded has led to a fundamental change in voting patterns, and to the introduction of the group system of regional representation in the General Assembly.

The group system has its origin in resolution 1192 (XIX), 12 December 1957. It is now incorporated in the Rules of Procedure as footnote 13, and is deeply entrenched in United Nations practice. That resolution was adopted in connection with the allocation of the office of Vice-President of the General Assembly. It acknowledged the existence of five regional groups: African States, Asian States, Eastern European (Warsaw Pact) States, Latin American States (with a recent subdivision of Caribbean States), and Western European and Other (NATO) States. That division reflected the Cold War situation as it was in 1957. It has since become a fixture, and as such it means that every member of the United Nations should be a member of one of those groups. In the course of time this group system became applicable to elections generally, including in particular elections of non-permanent members of the Security Council, the

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44 Practice developed that apart from the matters specifically mentioned in Art. 18, a two-thirds majority would only be required in draft resolutions recommended by the First (Political Affairs) Committee, unless the General Assembly itself decided otherwise. The President would rule whether a resolution had been adopted, and that ruling could be challenged in the normal way. Only in relation to South West Africa, following an adv. op. from the ICJ, did the Rules of Procedure of the General Assembly require a two-thirds majority. All other cases were decided on an *ad hoc* basis. Particulars are found in the *Repertory of the Practice of United Nations Organs* and its Supplements, under Art. 18.

members and officers of ECOSOC and its subsidiary organs, and members of the ICJ. When possible, for instance where the membership in an organ is not a Charter matter but derives from a resolution containing provisions about the regional distribution of seats, such as membership in the ILC, it has become so obligatory that ballot papers for elections are appropriately prepared. If in an election the number of candidates from a regional group corresponds to the number of vacancies for that group, the election becomes little more than a formality. This system is no longer limited to elections, but has extended in the nature of things to almost all items on the agenda of the General Assembly where a vote is required. A consequence is that nowadays where resolutions are adopted after a vote, the numerical majority can be enormous, with perhaps only one or two States voting negative. This distorts the deliberative character of the General Assembly and frequently overrides transparency in the decision-making process, once one of the distinguishing features of the UN.

§ 12.07. The Security Council

The Security Council is the principal organ of the UN with major responsibility for the maintenance of international peace and security, examined above in chapter IV. Here we are concerned with its place in the system of the UN. We may note, however, that unlike the Council of the League of Nations and the corresponding body of many other international organisations, the Security Council is not an 'executive' organ with any direct responsibilities for the day-to-day activities of the UN. Its role is limited to what is laid down in those provisions of the Charter that refer to it.

As adopted at San Francisco, the Security Council consisted of eleven members, five permanent and six elected by the General Assembly for a term of two years on the basis of an agreed regional allocation (without re-election). A majority of seven votes was required for any decision, so that no decision, not even to break for lunch, could be adopted without the concurrence of at least one permanent member. By resolution 1991 B (XVIII), 17 December 1963, Article 23 of the Charter was amended as from 31 August 1965. The Security Council now consists of fifteen members, and a majority of nine is required for any decision. That was more than a simple enlargement to accommodate the increased membership of the UN as it then stood (before the major de-colonization). It was a small structural change. It has the consequence that the Security Council can adopt any decision without the positive vote of any permanent member. All voting in the Security Council is recorded.

Every decision of the Security Council now requires at least nine favourable votes (except, under Article 10 (2) of the Statute of the Court for the election of members of the Court, where a simple majority of eight is sufficient). If the vote is not on a procedural matter, a negative vote by any permanent member prevents the adoption of the motion – the so-called veto. The expression in Article 27 'affirmative vote' has from the start been interpreted to mean that a permanent member has not cast a negative vote.[45] An abstention is not a veto. Whether a matter is procedural or not is also subject to the veto, known as the 'double veto'. A permanent member is free to vote as it wishes on any proposition before the Security Council, the Charter not imposing any conditions for this. The existence of the veto power is both a political necessity and a reality, and account must always be taken of it before the Security Council can reach any decision other than on a matter of procedure. The introduction in the Charter of majority voting in all organs, even with the veto and a qualified majority in the Security Council, was a major change in international practice from the League Covenant, where unanimity was always required. Acknowledgment of the right of veto by the permanent members was the counterpart to acceptance of majority voting, which the small Powers demanded. Adoption of decisions by a majority also conforms to the basic principle of the equality of States.

As for the rotating non-permanent members, Article 23 (1) requires the General Assembly, in electing them, specially to pay 'due attention . . . in the first instance, to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes [with a lower case *p*] of the Organization, and also to equitable geographical distribution'. 'Equitable geographical distribution', in the Charter, is not in the first instance a qualification for election to the Security Council, for which the group system supplies the key. However, the only provision in the Charter of relevance to this is the requirement of a majority of two thirds in the election in the General Assembly, and Article 23 (1) has proved to be a dead letter. The distribution of the non-permanent seats among the regional groups is a matter of tacit understanding and, as in the case of other elections in the General

45 That interpretation was endorsed by the ICJ in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia South West Africa notwithstanding Security Council Resolution 276 (1970)* adv. op, ICJ Rep. 1975 12, 22 (para. 22). On Security Council procedure, see S. D. Bailey & S. Dawes, *The Procedure of the United Nations Security Council* (Oxford, Clarendon Press, 1998). See also the *Repertoire of Practice of the Security Council, 1945–1951* and Supplements, a continuing publication that is heavily in arrears (doc. ST/PCA and addenda).

Assembly or elsewhere, if a regional group submits the same number of candidates as there are vacancies for it, the General Assembly has very little to do but to endorse that or not give the required two-thirds majority, regardless of whether the candidate meets the requirements of Article 23 (1) of the Charter. If the two-thirds majority is not reached, that would leave the Security Council short of one member on 1 January of the following year.[46] In most cases, the group selects its candidate without regard for the requirement of Article 23 (1).

After the one enlargement of 1965 with its change in the minimum required majority, the general make-up of the Security Council has not been changed. There are now strong pressures, both from 'old' States and from the new, for a thorough restructuring of the Security Council, particularly by a combination of additional permanent members, a general enlargement, a more rational distribution of seats and the introduction of some control over the use of the veto. The item 'Question of equitable representation and increase in the membership of the Security Council and related matters' is on the agenda of the General Assembly. Delicate negotiations are in progress in the diplomatic channels, but as yet no agreed solution has been reached.

During the Cold War, the Security Council was a major site for confrontation between the two major adversary power blocs, the Western European and Other Group (NATO) and the Eastern European Group (Warsaw Pact). It has witnessed many scenes of high drama. Otherwise, the world has heard nothing but shrill language and vetoes – stalemate. The frequent use or threat of the veto demonstrated unbridgeable differences between the permanent members (it still does). The view is widespread that it was virtually paralysed during this long and tense period, save in those few instances where the interests of the two Super-Powers coincided. Yet, as Joseph Johnson, at the time President of the Carnegie Foundation for International Peace, wrote in 1950:

> The Security Council has for nearly five years operated as it were on two frequencies. The first is the staccato daily frequency of dramatic cases … The other frequency is a great deal lower … In the less than five years of its existence, it has developed … a body of precedent and a form of practice, a set of techniques and customs … [T]he

46 On the question of what happens should the General Assembly fail to elect a non-permanent member by 31 December, see the statement of Legal Counsel at the 34/118th meeting of the General Assembly, 31 December 1979. The conclusion was that the failure of the General Assembly to meet the requirement of Art. 23 would not produce legal consequences for the functioning of the Security Council and thus would not impair a decision of the Security Council taken in accordance with Art. 27. Reproduced in [1979] UNJYB 164.

> Council has manifested great consistency … [D]espite the conflicts of national interest … the Council is a corporate body, endeavouring to fulfill in a responsible way its duty to the United Nations.[47]

That has proved wise. The virtual paralysis was to be found in all the organs of the UN, although the major codifications of international law occurred in that period, as well as some major examples of progressive development, for instance the law of outer space. In extreme cases the Security Council was able to act, or perhaps it would be more accurate to say that during the Cold War, where critical security situations arose in which the interests in the two sides coincided or coalesced, they would make use of the Security Council as the channel through which their common interests, not necessarily common aspirations, could find expression. An example of this is in the Middle East, especially after the Six Days War in 1967 and the Yom Kippur War in 1973.[48] There are less prominent examples, also from that part of the world, for instance the situation in Cyprus and in the Aegean.

By Article 24 of the Charter, in order to secure prompt and effective action by the UN, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility, the Security Council acts on their behalf. This is the only provision in the Charter allowing an organ of limited membership to act on behalf of the whole membership. By paragraph 2, in discharging those duties, the Security Council 'shall act in accordance with the Purposes and Principles of the United Nations'. The ICJ has given the following interpretation to that provision: 'The reference in paragraph 2 of this Article to specific powers of the Security Council under certain Chapters of the Charter does not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1'.[49] At the same time, the Charter does not confer exclusive power on the Security Council for this purpose.[50] By Article 25, the members agree to accept and carry out the decisions of the Security Council in accordance with the Charter.

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47 Joseph E. Johnson, Foreword to E. Jiménez de Aréchaga, *Voting and the Handling of Disputes in the Security Council*, p. x (New York, Carnegie Endowment for International Peace, 1950).

48 What became S/Res. 338 (1993), 22 October 1993, was proposed jointly by the Soviet Union and the United States, doc. S/11036, adopted at the 1747th meeting.

49 The *Namibia* adv. op. above note 45, 52 (para. 110).

50 *Nicaragua* (Jurisdiction and Admissibility) case, above note 40, 434 (para. 95).

Those two provisions have raised the question whether the Security Council has complete freedom of action, or whether, through the reference to the Purposes and Principles of the United Nations (with an upper case *P*), Articles 1 and 2, headed *Purposes and Principles*, and with the reference in Article 1 (1) to the 'principles of justice and international law', the Charter properly interpreted and applied, and with it international law itself, imposes limitations on the freedom of action of the Security Council. A related question is the meaning of the expression 'decisions of the Security Council' in Article 25. That question arises through the consequences of Article 103 on the suspension of the obligations of States members of the UN under other international treaties (above § 12.01). Concretely, that issue is whether Article 25 applies to all decisions (resolutions) of the Security Council, or whether it applies only to decisions expressly taken under Chapter VII of the Charter. It has also raised the issue of possible judicial review of decisions of the Security Council (further in § 12.10 below). The practice of the Security Council seems to be the assumption that Article 25 applies to all its decisions, something that explains the punctiliousness with which most decisions are drafted.

Under Chapter VI (Articles 33 to 38) on the pacific settlement of disputes, the Security Council may call upon the parties to a dispute to settle it by peaceful means of their own choice. It may investigate any dispute or situation that 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. It may recommend appropriate procedures or methods of adjustment at any time under Article 36. In making such recommendations it should also take into consideration that legal disputes should as a general rule be referred by the parties to the ICJ 'in accordance with the provisions of the Statute'. By Article 37, 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. The Security Council has employed all these procedures, and more. The repeated use of the word 'recommend' in Chapter VI, alongside the word 'decide' in Article 37, suggests that the obligation to accept and carry out the recommendations of the Security Council requires no more than good faith consideration of the recommendations of the Security Council and that only decisions taken under Chapter VII create binding obligations for the member States. The Court has indeed specified that a 'mere recommendation

[is] without binding effect'.[51] There are some who consider that only decisions clearly taken under Chapter VII can create rules binding on all States. Chapter VI action is limited to the States directly concerned. In practice, the Security Council has been careful in the language used in its resolutions. As is the case of the General Assembly, a request in a resolution of the Security Council to the Secretary-General to take action and to report on the implementation of the resolution may import into it an institutional element.

To some extent the ICJ has given partial answers to this question. It has affirmed that Article 25 applies to all decisions of the Security Council and is not confined to decisions in regard to enforcement action. But that does not mean that every decision is executory for all States, which must comply with it. 'The language of a resolution should be carefully analysed before a conclusion can be made as to its binding effect'. Moreover,

> In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the Security Council resolution.[52]

Since the end of the Cold War, the Security Council has assumed a more active role than earlier, and states that it is acting under Chapter VII. That expression is not free of ambiguity. Nevertheless, the conflicting interests and aspirations that characterized the Cold War continue, and the veto remains as a possible restraint on action by the Security Council. This has in turn produced a change in the procedure of the Security Council which makes more frequent use of 'informal discussions' not open to the public, leaving the open meetings for formal endorsement of the decision reached in the informal meeting. This freer use by the Security Council of its powers under Chapter VII has led to increasing demands to introduce into the UN system some sort of judicial review. There

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51 The *Lockerbie* cases (Provisional Measures) above note 22, 3, 26 (para. 44) and 115, 131 (para. 43). On Art. 39 see § 12.08 below. At the same time, the Security Council has given instructions to the Secretary-General how to act in a given situation, and, as stated, the Secretary- General shall perform whatever functions are entrusted to him. Moreover, even in cases where the Security Council has clearly been acting under Chapter VI and has couched its decision in terms of a recommendation (with nevertheless a formal instruction to the Secretary-General), it has expressed its intention to move into Chapter VII if its decision is not implemented. This can be sufficient to remove a particular threat to international peace and security.

52 *Nicaragua* (Merits) case ICJ Rep. 1986, 14, 53 (para. 114).

is always a current of opinion that will think that a decision of the Security Council under Chapter VII does not meet the requirements of justice or of international law, or is appropriate to meet the situation confronting it at the time, or that improper use was made of the veto. The legal question is how far is the Security Council bound by the general purposes and principles set out in Articles 1 and 2 of the Charter. Security Council practice, or more accurately the practice of the member States represented in the Security Council, particularly its permanent members, suggests a negative answer to that question. The maintenance or the restoration of international peace has priority.

The relations of the Security Council with the General Assembly and with the International Court of Justice have been the subject of judicial pronouncements. As for the General Assembly, in the *Competence of Assembly* advisory opinion the Court said:

> The General Assembly and the Security Council are both principal organs of the United Nations. The Charter does not place the Security Council in a subordinate position. Article 24 confers upon it 'primary responsibility' for the maintenance of international peace and security', and the Charter grants it for this purpose certain powers of decision.

The Court was meticulous in emphasizing that nowhere has the General Assembly received the power to change, to the point of reversing, the meaning of a vote of the Security Council.[53] As regards the Court, the classic statement is that there is no parallel to Article 12 of the Charter as regards the matters which the Court may examine. At the same time, the Court has always been careful, when it has had a case before it which refers to a situation or dispute also before the Security Council, not to trespass on the functions and prerogatives of the Security Council. The Security Council has also shown similar regard for the Court.

The Rome Statute of the International Criminal Court purports to confer other functions on the Security Council, especially if it is acting under Chapter VII of the Charter.[54] By Article 13 (b), the Court may exercise its jurisdiction with respect to a crime within its jurisdiction if the Security Council acting under Chapter VII of the Charter refers to the Prosecutor a situation in which

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53 The *Competence of Assembly* adv. op. above note 28, 10.

54 Above chapter V § 5.09. The Rome Statute cannot affect the manner of working of the Security Council which is governed exclusively by the Charter. It would be for the International Criminal Court to resolve any question relating to its own powers and competences should there be doubt as to how the Security Council had been acting in a particular matter.

one or more of those crimes appears to have been committed. By Article 16, the Security Council, by a resolution adopted under Chapter VII, may request the deferral of an investigation or prosecution that is pending before the Court. It is by no means clear how this will operate in practice, or whether the Security Council will always be able to ensure that its decision states that the decision was adopted under Chapter VII, and the rigidity of the language of the Rome Statute in this respect is curious. Article 53 (3) (a) gives the Security Council standing to request the Pre-Trial Chamber to review a decision by the Prosecutor not to proceed with a case and may request the Prosecutor to reconsider the decision. Here there is no direct reference to the method by which the Security Council shall reach its decision. By Article 87, paragraphs 5 (b) and 7, when the Security Council has referred a matter to the Court, the Court is to inform the Security Council if a State, whether that State is a party to the Rome Statute or, if not, has entered into an *ad hoc* arrangement or agreement with the Court regarding co-operation, fails to co-operate with requests for co-operation.[55] While those provisions may give the Security Council an important if not predominant role in the working of the International Criminal Court, they do not convert the Court into an organ of the Security Council. It remains, as stated in the preamble to the Rome Statute, an 'independent' permanent Court in relationship with the United Nations system. The insistence in two provisions of the Statute that the Security Council be acting under Chapter VII may prove to be an impediment to the effective action of the new Court in cases in which the Security Council has not formally stated that it is acting under Chapter VII, for instance where the required majority could only be reached if there were no reference to Chapter VII.

§ 12.08. Sanctions, peace-keeping and peace-making

Collective security under the supervision of the Security Council is the concept behind Chapters VI and VII. However, as seen (above chapter IV § 4.03), this has remained a dead letter since 1945. The operation of Chapter VII has accordingly not been what was anticipated when the Charter was adopted in that year. The disuse of the collective measures provisions of the Charter has led to the view that the Security Council may authorize States to use force in a given situation and for a given purpose, including non-compliance with the terms of

55 The application of these provisions is a matter for the Relationship Agreement between the UN and the ICC. See Assembly of States Parties to the Rome Statute of the International Criminal Court, first session (2002), *Official Records* 243.

a Chapter VII resolution directed against a State, and that without such authorization any use of armed force is a violation of the Charter. The Charter does not furnish direct support for this view, but it is now a general practice. This view is based on Article 41 of the Charter, and Iraq's non-compliance with a series of such resolutions formed the basis for the Anglo-American action against the Baathist regime in Iraq in 2003.[56]

Article 39 is the transition from Chapter VI to Chapter VII (Articles 39 to 51). By Article 39, the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression, and make recommendations, or decide what measures shall be taken in accordance with Articles 41 or 42 to maintain or restore international peace and security. Those provisions refer to measures not involving the use of armed force (Article 41) and measures requiring the use of armed force (Article 42), to maintain or restore international peace and security. On the whole the Security Council has been cautious in making formal determinations under Article 39. Common practice is for the Security Council to include in a sanctions resolution a statement that it is acting under Chapter VII (which includes Article 39). Many resolutions of the Security Council, especially during the Cold War, are ambiguous and it is not always clear under which provision the Security Council was acting.

The Charter envisages two kinds of sanctions that the Security Council can order under Chapter VII. Article 41 deals with non-military sanctions. During the Cold War, economic sanctions were ordered by the Security Council in the case of Southern Rhodesia (resolution 232 (1966), 16 December 1966). That was followed by a Chapter VII arms embargo on South Africa in resolution 418 (1977), 4 November 1977, the first instance of Chapter VII action against a member State of the UN. Since the end of the Cold War, economic sanctions have become more frequent and, moreover, have given rise to many legal problems.[57] Those decisions without doubt bring Article 103 into play. In con-

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56 For the position of the United States, see the letter of the Permanent Representative of the United States to the President of the Security Council of 20 March 2003, doc. S/2003/351. For the position of the United Kingdom, see the statement of the Attorney General in the House of Lords on 17 March 2003, Hansard House of Lords Weekly Index at http://www.parliament.the-stationary-office.co.uk/pa/ld/ldwindx/htm, 17 March 2003, columns WA2-WA3.

57 Note, as an example, Sub-Commission on the Promotion and Protection of Human Rights, *The adverse consequences of economic sanctions on the enjoyment of human rights*: Working paper prepared by Marc Bossuyt, doc. E/CN/4/Sub.3/2000/33, 21 June 2000. Economic sanctions may require the use of armed force to ensure their application, for

nection with requests for the indication of provisional measures where the Security Council had adopted Article 41 sanctions, the ICJ stated that since all parties in the cases were members of the UN and therefore bound by Article 25, prima facie the obligation imposed by that provision extended to the relevant Security Council decision and 'in accordance with Article 103 . . . the obligations of the Parties in that respect prevail over their obligations under any other international agreement'.[58]

The Security Council has interpreted its powers under Chapter VII widely, as extending also to the establishment of international criminal courts for the trial of individuals accused of crimes under international humanitarian law (above chapter V § 5.06), to the establishment of a compensation commission to determine the amounts of compensation payable to persons injured by actions which the Security Council determined to come within the scope of Chapter VII (and to that extent were violations of international law[59]), and to deal with acts of terrorism that constitute a threat to international peace and security (above chapter IV § 4.10). The authority to use force under Article 42 has also become frequent since 1990, as is described in § 4.04 above.

A recent report prepared for the Secretary-General has explained that there are today three principal types of activity conducted under the maintenance of peace provisions of the Charter. They are conflict prevention and peacemaking, peace-keeping, and peace building. According to that document, peacemaking addresses conflicts in progress and is a form of diplomatic action aiming at bringing an ongoing armed conflict to a halt. Peace-keeping, occasionally encountered in the League of Nations, has evolved during the existence of the UN. Traditionally it was primarily a military model of observing ceasefires and force separation schemes after inter-State armed hostilities. It has come to incorporate many elements, military and civilian, to build peace in the dangerous aftermath of a civil war. What that report calls 'peace-building' consists of activities 'undertaken on the far side of conflict to reassemble the

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instance quasi-blockade (in the modern sense) of access to a country's ports or other interference with its seaborne and airborne commerce.

58 *Lockerbie* cases (Provisional Measures), above note 22, 15 (para. 39); 126 (para. 42). The Court also held that an objection according to which the claims became moot because the Security Council resolutions rendered them without object did not, in the circumstances of the case, have an exclusively preliminary character, but was more a defence on the merits: ibid. .29 (para. 50); 134 (para. 49).

59 S/Res. 687 (1991), 3 April 1991, section E and 692 (1991), 20 May 1991, concerning damages to third parties arising out of Iraq's invasion of Kuwait. For early decisions of the Compensation Commission, see 109 ILR. Its document symbol is S/AC.26/-.

foundations of peace and provide the tools for building on those foundations something that is more than just the absence of war'.[60] In this broad sense, in addition to the Secretary-General and the Department of Peace-keeping Operations (DPKO) responsible for the peace-keeping activities of the UN, other UN institutions, including in particular the UN High Commissioner for Refugees and the High Commissioner for Human Rights can be involved.

The Security Council has done much more than that. To give some recent examples, it has ordered the demarcation of a frontier in accordance with an existing delimitation agreement (resolution 687 A (1991), 3 April 1991); it has established an international civil presence after giving retroactive endorsement of the use of force to compel acceptance of a political solution (resolution 1244 (1999), 10 June 1999) and a United Nations Transitional Administration with overall responsibility for the administration of newly liberated territory (resolution 1272 (1999), 25 October 1999); it has directed attention to the trade in diamonds to avoid financing of illegal movements in Africa (resolutions 1295 (2000), 18 April 2000, 1306 (2000), 5 July 2000, 1343 (2001), 7 March 2001); it has addressed the HIV/AIDS pandemic (resolution 1308 (2000), 17 July 2000); has shown concern at the position of women in situations of armed conflict (resolution 1325 (2000), 11 October 2000), and has addressed the targeting of children and other abuses of children in crisis situations in Africa (resolutions 1314 (2000), 11 August 2000, 1379 (2001), 20 November 2001). This is a wide range of activities that surely were not in the contemplation of those who drafted the Charter in 1945. In the case of Iraq in 2003, failure to comply with a series of resolutions adopted under Chapter VII of the Charter has been interpreted as authorizing the use of armed force for the purpose of removing the recalcitrant regime, seen to be a threat to international peace and security.[61]

Peace-keeping activities under Security Council authorization have taken many forms, from the secondment of a few military personnel for observer

60 Letters from the Secretary-General to the President of the General Assembly and the President of the Security Council forwarding the report of a high-level Panel convened to undertake a thorough review of UN peace and security activities, doc. A/55/305–S/2000/809, 21 August 2000. And see S/Res. 1318 (2000), 7 September 2000, the Millennium Summit Declaration in which it welcomed that report, S/Res. 1327 (2000), 13 November 2000 on recommendations on peace-keeping operations, and S/Res. 1353 (2001), 13 June 2001 on strengthening co-operation with troop-contributing countries. See also chapter IV note 46 above.

61 Above note 56.

functions required by UN brokered ceasefire or truce arrangements[62] to the supply of large national military contingents, under national command but subject to overall UN policy directives, to separate warring armed forces, whether of different countries or of factions in a situation of non-international conflict, and to ensure the performance by a country of obligations imposed on it through Chapter VII of the Charter. Furthermore, although today such peace-keeping activities are authorized by the Security Council, at the height of the Cold War it was found necessary for the General Assembly to assume that function, although decisions of the General Assembly lacked the binding force of decisions of the Security Council and therefore did not bring Article 103 into play. Largely under the inspiration of the Secretary-General at the time, Dag Hammarskjöld, the General Assembly in resolution 997 (ES-1), 2 November 1956, authorized the establishment of the United Nations Emergency Force (UNEF or UNEF I) to secure and supervise the cessation of hostilities of October 1956, involving France, the United Kingdom, Israel and Egypt. In resolution 1583 (XV), 20 December 1960 the General Assembly (following a series of resolutions adopted by the Security Council) adopted a resolution dealing with the financing of the UN operations in the Congo (ONUC). The question of the financing of both those operations ran into many difficulties, both political and legal. In 1961, the General Assembly asked the ICJ for an advisory opinion on whether the expenditures authorized by the General Assembly for those two operations constituted 'expenses of the Organization' within

62 The situation in Palestine provides an early example of this. In 1948 the Security Council set up two observation missions that operated with the consent of the local parties concerned. In S/Res. 48 (1948), 23 April 1948, it established a Truce Commission for Palestine composed of representatives of the Security Council with career consular officers in Jerusalem (other than Syria, which declined to serve). Following the appointment of a UN Mediator in Palestine by the General Assembly there came into existence the Mediator's military arm, known as the United Nations Truce Supervision Organization (UNTSO), which was in operation, partly as a UN supervisory organ and partly at the request of the parties to the General Armistice Agreements of 1949, until the Six Days War in 1967. The military personnel were seconded as individuals from national armed forces to the UN. This occasionally gave rise to questions about their functional immunity for unexpected events like tortious acts committed when off duty, paternity cases and other actions that did not come within the scope of the UN Privileges and Immunities Convention. Those matters were always settled by negotiation. Occasionally the UN was requested to remove a person from Israel. On the initial organization of UNTSO, see UN, Organization and Procedure of United Nations Commissions, X, *The United Nations Mediator (and Acting Mediator) for Palestine* (Sales No. 1950.X.3). And see A. Shalev, *The Israel-Syrian Armistice Regime 1949-1955* (Tel Aviv University, Jafee Center for Strategic Studies (1993).

the meaning of Article 17 (2) of the Charter. The Court answered that question in the affirmative.[63] While that clarified the legal position for the majority of the General Assembly, it did not resolve the political question since two of the permanent members of the Security Council held a different view of the legal position, and had opposed both the request for the advisory opinion and the resolution adopted on its receipt. However, after the majority had accepted the advisory opinion that these were expenses of the Organization, Article 19 of the Charter (providing for the suspension of voting rights in the General Assembly of a member that is more than two years in arrears in its assessed contribution due for the preceding two years) came into play. In 1964 those two States had no voting rights in the nineteenth session of the General Assembly. That led to the farcical situation of a session at which no substantive business was transacted, and by agreement only essential matters, such as the election of members of the Security Council and the annual budget, were handled by consensus. One major result of that was that the question of the financing of this type of operation was later put on a more solid foundation. In brief, the operation is today authorized by the Security Council, and the budgetary arrangements by the General Assembly.

All this type of operation that is authorized otherwise than by the Security Council in application of Chapter VII requires the consent of the sovereign of the territory in which the force is to operate. In the case of regular peace-keeping in an international armed conflict, that consent is one of normal treaty relationship.[64] Difficulties arise in situations of civil war and low intensity non-international armed conflict. While the UN is disinclined to become involved in questions of 'recognition', the operation of compulsory peace-keeping forces working on the basis of Chapter VII of the Charter necessarily requires some *de facto* dealing with the warring elements.

Following the disuse of Articles 43 to 47 of the Charter, there has been no instance of military action being undertaken directly by the UN. In its place,

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63 *Certain Expenses* adv. op. above note 18.

64 However, there can be fundamental difficulties and differences over what is included in the formal agreement, and what are private understandings between the Secretary-General and the State or States concerned. This became an important element in connection with the outbreak of the Six Days War of 1967. See the letter of a former assistant legal adviser of the State Department who had been closely involved in the establishment of UNEF I and its deployment in Egypt in the *New York Times*, 26 May 1967, reproduced in 6 ILM 581 (1967), and the answer of the Secretary-General at the time, U Thant, *Report on the withdrawal of UNEF, June 26, 1967*, GAOR, Fifth Emergency Special Session, Annexes (doc. A/6730/Add.3).

the Security Council has in different ways authorized the use of military force by different countries for different purposes, sometimes with the consent of the countries in whose territories they operated. The degree of force used by the military personnel has varied from light arms for self-defence to all out warfare under a designated commander, frequently but not always technically reporting to the Security Council. Military forces placed in this way at the disposal of the Security Council are popularly known as 'Blue Helmets', and, as national contingents, normally remain under the direct command of their own officers.[65] If direct Security Council authorization is not forthcoming, as seen individual permanent members of the Security Council have found it possible to embark on direct military action on the basis of a careful reading of relevant earlier resolutions of the Security Council.

This is not the place for consideration of the different types of force that have been employed in this way and the uses to which they have been put. There are, however, several more general legal issues that require notice. Some of these have been examined by the Institute of International Law, and its conclusions have influenced the practical application of rules governing the status and the conduct of the different types of armed forces employed in the service of the UN. In 1971 the Institute adopted a resolution on the conditions of the application of humanitarian rules of armed conflict to hostilities in which UN forces may be engaged.[66] The thrust of that resolution was that the humanitarian rules of the law of armed conflict apply to the UN as of right and must be complied with in all circumstances by UN forces which are engaged in hostilities. In 1975 the Institute adopted a resolution on the conditions of application of rules, other than humanitarian rules, of armed conflicts to hostilities to which the UN forces may be engaged.[67] Here the general principle was that the rules of armed conflict apply to hostilities in which UN forces are engaged, even if those rules are not specifically humanitarian in character. This went on to recommend that the UN state in an appropriate form that it considers itself bound by the 1949 Geneva Conventions in all operations to which its forces might be parties. This has since been adopted by the Secretary-General.[68]

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65 Above note 59. In S/Res. 1121 (1997), 27 July 1997, the Security Council established the Dag Hammarskjöld Medal in tribute to those who have lost their life as a result of service in peace-keeping operations under the operational control and authority of the United Nations.

66 54/II IDI 449.

67 56 IDI 541.

68 Above chapter V note 69.

§ 12.09. The specialized agencies

The UN stands at the apex of the 'system'. The system consists of the UN as an organization,with its ramifications of autonomous institutions, and high commissions also virtual international organizations in themselves, and a series of specialized agencies.[69] A specialized agency is an intergovernmental international organization established by intergovernmental agreement, having wide international responsibilities, as defined in its constituent instrument, in economic, social, cultural, educational, health and related fields (Charter, Article 57). The UN, through ECOSOC, and subject to the approval of the General Assembly, may enter into agreements with any of those agencies, defining the terms on which the agency concerned shall be brought into relationship with the UN. The ECOSOC *may* (not *shall*) co-ordinate the activities of the specialized agencies through consultation and recommendations to such agencies and through recommendations to the General Assembly and to members of the UN (Article 63).

The agencies, and other international intergovernmental organizations which are not specialized agencies in the sense of Articles 57 and 63, are autonomous, and are jealous of their autonomy and zealous in its protection. In this respect while, as seen, the General Assembly may occupy a dominant position in major political issues, the UN as a whole is only part of the UN system and its Secretariat is not able to do much in the way of real co-ordination except at the Secretariat level. Two examples may be given of this, one minor (but symptomatic) and one major.

The minor one relates to the dissemination of information regarding multilateral treaties that are deposited with the Secretary-General or with the corresponding officer of another international organization. General Assembly resolution 39/90, 13 December 1984, on Review of the multilateral treaty-making

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69 At the time of writing, the following are specialized agencies: International Labour Organization (ILO), Food and Agriculture Organization of the United Nations (FAO), United Nations Educational, Scientific and Cultural Organization (UNESCO), World Health Organization (WHO), International Bank for Reconstruction and Development (IBRD), International Finance Corporation (IFC), International Development Association (IDA), International Monetary Fund (IMF), International Civil Aviation Organization (ICAO), International Telecommunication Union (ITU), World Meteorological Organization (WMO), International Maritime Organization (IMO), World Intellectual Property Organization(WIPO), International Fund for Agricultural Development, United Nations Industrial Development Organization (UNIDO), Universal Postal Union (UPU) and, assimilated to a specialized agency, the International Atomic Energy Agency (IAEA). For their constituent instruments and related texts, above note 1.

process, has remained a dead letter (above chapter XI § 11.02). More serious is the action of UNESCO in adopting in 2001 the Convention on the Protection of the Underwater Cultural Heritage, in the view of many not compatible or fully co-ordinated with the UN Convention on the Law of the Sea, and doing this notwithstanding the central position occupied by the UN General Assembly in all current matters relating to the oceans under the umbrella of the 1982 Convention (above chapter VIII § 8.10). There is a gap in the Convention on the Law of the Sea, which the Third Conference was unable to fill. There is no difficulty over scientific work in that connection being done by a specialized agency such as UNESCO. However, a universal convention ought to have been concluded under the auspices of the UN itself, to ensure full co-ordination with all other activities on the sea.

§ 12.10. Other international meetings – Conferences

Apart from the UN and the specialized agencies, which together manage virtually all human activities on the international level, conferences of States, both universal and regional, also take place. Today they are mostly convened by the UN or one of the specialized agencies, the main exceptions being the humanitarian law conferences. By tradition, Switzerland convenes those conferences, which meet in Geneva (but not in the Palais des Nations). Unlike the plenary organ of an international organization which usually has a multiple agenda, an international conference is today convened to examine a single topic. That enables States to compose their delegations accordingly and ensures an adequately staffed Secretariat, with available expertise.

These conferences are of two main kinds: treaty-making conferences and programme-making conferences. The difference is primarily in the object being pursued. That can affect the organization of the Conference, its duration and its location. When an international organization decides to convene a conference, the convening resolution settles the logistical matters, the principles for participation in it, both in full and as observers, and the general terms of reference. It also supplies the secretariat. The preliminary work and diplomatic soundings should first indicate the feasibility of the proposed conference, and establish the basic text, especially if the conference is intended to adopt a treaty.[70] Sub-

70 For an instance of a diplomatic conference that failed principally because of the absence of adequate official preparatory work and a feasibility study, see the UN Conference on Territorial Asylum, in session in Geneva from 10 January to 4 February 1977 (doc. symbol A/CONF.78/-).

ject to that, a diplomatic conference of plenipotentiaries is a completely autonomous body.

Before the League of Nations there was little need for special legal regulation of conferences. The host Government (if the Conference was not held in Geneva) could be expected to grant all the customary facilities, privileges, immunities and protection according to the rank and style of the participants and their colleagues and assistants. Since the establishment of the League, and more so since the establishment of the UN, the greatly increasing number of international conferences, their duration, their location, sometimes the size and rank of the participating delegations and the rapid expansion of the world's diplomatic and related services have made more detailed regulation of these matters necessary, both for the protection of the participants in the conference and for the protection of the host State. In some respects the codification of the law of diplomatic relations, especially the Convention on Special Missions of 1969[71] and less the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 1975,[72] have filled this gap. If a conference convened by an international organization takes place in one of its headquarter premises for which an appropriate standing headquarters agreement exists, that will normally be sufficient. In other cases, the international organization and the host State will conclude an *ad hoc* agreement on the matter.

Although technically a diplomatic conference of plenipotentiaries is autonomous, to some extent, and especially in the matter of representation and credentials and similar questions of international policy, as stated (above chapter VII § 7.03) decisions of the General Assembly are dominant. The procedure of international conferences today also closely follows that of the General Assembly with changes rendered necessary by the topic under discussion, on the basis of Rules of Procedure adopted by the Conference.[73] Normally these

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71 1400 UNTS 231,

72 Above chapter II note 104 above. Not yet in force. None of the traditional host countries for international organizations have accepted this Convention, which was concluded on the basis of a draft prepared by the ILC, mainly because it grants excessive privileges and immunities, more than the normal functional immunities, to delegations to international conferences,

73 On modern conference procedure, see P. C. Jessup, 'Parliamentary Diplomacy: An Examination of the Legal Quality of the Rules of Procedure of Organs of the United Nations', 89 *Recueil des cours* 185 (1956-I); J. Kaufmann, *Conference Diplomacy: An Introductory Analysis* (3rd ed. London, MacMillan, 1996); R. Sabel, *Procedure in International Conferences: A Study of the Rules of Procedure of Conferences and*

cause little difficulty. Occasionally, however, the subject-matter of the Conference and existing political agreements, especially for decision-making, require special treatment. An important example of this is the Third UN Conference on the Law of the Sea, where the General Assembly required if possible that the decisions of the Conference should be reached by consensus and that there should be no voting on substantive matters until all efforts at consensus have been exhausted.[74] Nevertheless, Rules of Procedure notwithstanding, the huge increase in the number of participants, States and others, in many modern international conferences is leading to practical changes in the methods of work. Formal meetings on the record are being replaced by informal working groups (often working in a discreet way) whose reports consist only of texts of articles, frequently put up on a take-it-or-leave-it basis, without opportunity for discussion in the conference as a whole. To some extent this process was a major characteristic of the Third Law of the Sea Conference, where nearly all the meetings of the main committees, and some of the meetings of the plenary, were informal, that is without formal records and not transparent, that is open to the press and public. However, in that case, the large number of informal papers circulated in that conference have been published by private enterprise and can be placed alongside the *Official Records* of the Conference.[75] In many cases, given the vast extent of matters covered by that conference, only States directly interested in a particular aspect of the law of the sea would prepare a text acceptable to them. But in that conference, the Drafting Committee performed an essential task not merely of ensuring the accuracy of the text in

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Assemblies of International Inter-governmental Organizations (Cambridge University Press, 1997).

74 The adoption of the Rules of Procedure of this Conference required the best part of six months of formal and informal discussions. See Third UN Conference on the Law of the Sea, *Official Records*, vol. I.

75 R. Platzöder, *Third United Nations Conference on the Law of the Sea: Documents* (Dobbs Ferry NY, Oceana Publications, 1982-1994). One consequence of this form of procedure is that the articles of a treaty are not introduced for individual discussion and decision, whether in a committee or in plenary. This may give rise to difficulties of interpretation. Cf. the observation of Judge Oda in para. 19 of his separate opinion appended to the Court's Judgment on the merits in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, 16 March 2001. However, the fact that draft articles are not discussed on the record and put to the vote individually does not mean that they were not examined fully, whether in informal meetings or between interested delegations. But it does reduce reliance on *travaux préparatoires* in the process of interpretation: in fact often there are no *travaux*, thereby throwing the interpreter squarely back to the text standing on its own (but in its historical context),

one language, but also in supervising the juridical concordance of the six authentic texts of the Convention on the Law of the Sea.[76] The Rome Conference on the International Criminal Court was mostly conducted in working groups with very little substantive discussion in the conference itself or in its Committee of the Whole, and no coordination or concordance work by the Drafting Committee and no proper reports.[77]

There are several ways of recording the termination of a conference and its conclusions, the commonest being a final communiqué, a declaration, a report, and a final act. Whether the first three contain any legal implications is a matter of interpretation and of the intention of the conference. In particular, the final communiqué after a conference of two or three States may, if so intended, embody legal undertakings, especially if the States were represented by one of the dignitaries for whom full powers are not required – the Head of State, the Head of Government or the Minister for Foreign Affairs. A conference convened to examine a general matter of international concern usually concludes its work with a report setting out the recommendations of the Conference. Those reports become the starting point for long-term international action on that matter and may be considered as an indication of a developing *opinio juris*. An important example of this is the report of the Rio Conference on the Environment and Development.[78]

The ease of modern communications has led to an increasing number of conferences taking place at the highest level, popularly known as Summit Conferences, bilateral or multilateral. They can even take place by a telephone conference call. Some summit conferences are institutionalized and take place at regular intervals. The most notable of these are the regular conferences of the heads of State or Government of the European Union and those of the so-called G7 (actually eight), the heads of State or Government of the major industrialized States and the Russian Federation. Regional summit conferences are also a regular occurrence. The conclusions of these conferences are usually a statement of a programme.

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76 See L. Dolliver M. Nelson, 'The Work of the Drafting Committee', I *Virginia Commentary* 136.

77 This has had unfortunate results (above chapter V note 91).

78 A/CONF.151/26/Rev.1 (1992). On the Final Act, see above chapter X §10.01.

§ 12.11. The international civil service

Article 7 of the Charter includes the Secretariat as one of the principal organs. That is amplified in Chapter XV, Articles 97 to 101. By Article 97 the Secretariat shall comprise a Secretary-General and such staff as the Organization shall require. The Secretary-General is the 'chief administrative officer of the Organization'. The constituent instruments of other international organizations are similar, the chief administrative officer being frequently designated *Director-General*. By Article 99, 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. This is a special power granted to the Secretary-General. As the chief administrative officer of the Organization the Secretary-General can bring anything relevant to the attention of any organ and request its adoption on that organ's agenda. By Article 100 the Secretary-General and the staff 'shall not seek or receive instructions from any government or from any other authority external to the Organization'. By Article 101 (3), the paramount consideration in the employment of the staff and the determination of the conditions of service is the necessity of securing the highest standards of efficiency, competence and integrity. At the same time, 'Due regard shall be paid to the importance of recruiting staff on as wide a geographical basis as possible.' Those are the fundamental requirements of the international civil service

Each organization has its own Secretariat. The autonomy of the international organizations within the UN system means that each chief administrative officer and each Secretariat are independent and self-contained organs. Together they (and others outside the UN system) constitute the international civil service.[79] The difference between the international civil service and a national civil service is that there is no integrated international service in which an official can easily be transferred from one Secretariat to another. The official's duties and loyalty are to the Organization, and not to the UN as an abstraction. Several elements exist to unify and co-ordinate the international civil service. These include the

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79 See Th. Meron, 'Status and independence of the International Civil Servant', 167 *Recueil des cours*, 289 (1980-II); M. Bettati, 'Recrutement et carrière des fonctionnaires internationaux', 204 ibid. 171 (1987-IV); C. Amerasinghe, *The Law of the International Civil Service as applied by the International Administrative Tribunals* (Oxford, Clarendon Press, 1988). For a severe critique and proposals for a reorganization of the Secretariat and indeed of the UN system as a whole, see B. Urquhart, *Renewing the United Nations System* (Uppsala, Dag Hammarskjöld Foundation, 1994).

International Civil Service Commission working under a Statute adopted by General Assembly resolution 3042 (XXVII), 18 December 1974, a unified system of salaries and pensions, and a set of Administrative Tribunals to decide disputes between the administration and a staff member. Within the UN system there are three administrative tribunals, the United Nations Administrative Tribunal (UNAT), the ILO Administrative Tribunal (ILOAT), and the World Bank Administrative Tribunal. Historically the ILOAT is the first and has supplied the model for the others. There is an accepted division of work between the UNAT and ILOAT and no overlapping. The staff of the World Bank serves under different conditions than the general international civil service, and this requires a special administrative tribunal.[80]

§ 12.12. The question of judicial review

A hotly debated question, especially in academic circles, is whether Security Council decisions should be subject to any form of judicial review by the International Court of Justice or by a special constitutional court.[81] Some have gone so far as to propose recognizing the ICJ as a 'constitutional court' for the UN (whatever that expression might mean), notwithstanding that the international community in general, and as seen the UN system in particular, do not possess anything like a constitution as that term is understood in national law. In fact the Court has had no difficulty in examining the compatibility with

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80 The different administrative tribunals to determine disputes between staff members and the administration are in a class of their own, and not settling international disputes are not included in the general international courts system. Between 1955 (A/Res. 957 (X), 8 November 1955) and 1995 (A/Res. 50/65, 11 December 1995), a system of cassation by the ICJ was in force in relation to the UNAT. In 2000 the Joint Inspection Unit, in a report on the administration of justice in the UN, recommended that further consideration should be given to reviving the role of the ICJ in this context. Doc. A/55/57, 7 March 2000, para. 151. However, the Advisory Committee on Administrative and Budgetary Questions had serious doubts over the appropriateness of involving the Court in staff disputes. A/55/514, 23 October 2000, para. 15. The revised Statute of UNAT provides that the decisions shall be final and without appeal. A/Res. 55/159, 12 December 2000, Annex, Art. 11 (2). And see C. F. Amerasinghe (ed.), *Documents on International Administrative Tribunals* (Oxford, Clarendon Press, 1989). All the administrative tribunals publish reports of their decisions, and these go to make up the corpus of the law governing the international civil service.

81 See M. Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts* (Dordrecht, Nijhoff, 1994); D. Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter: The Limits and the Role of the International Court of Justice* (The Hague, Kluwer Law International, 2001).

the Charter of actions of different organs of the UN when this has been necessary as part of its decision in a contentious case or when it has been asked to do so in an advisory case. The General Assembly, the Security Council, and ECOSOC have all requested it to render advisory opinions on legal questions that have arisen in the course of their activities, those advisory opinions furnishing guidance to the requesting organ. The Court has delivered an advisory opinion on the compatibility with the constituent instrument of a major organ of one specialized agency, the IMO,[82] and has examined the actions of the Council of another specialized agency, ICAO, in a contentious case designed to test the legality of that Council's action.[83] It has always been careful to maintain the integrity of the system established at San Francisco in 1945, not to trespass upon the powers and functions of other organs, and in particular not to substitute its discretion for that of the Security Council.[84]

There is no reason however, why, if one is talking about judicial review of the actions of the UN organs, only Chapter VII decisions of the Security Council should be singled out for special mention, especially as a resolution may convey instructions to the Secretary-General and thus introduce an institutional element into a non-binding recommendation. Other organs, and notably the General Assembly, have all taken actions that have aroused controversy in both political and legal circles, without directly seeking any advice from the ICJ or from an independent committee of jurists.[85] Likewise, if that kind of scrutiny is to be introduced, there is no reason why actions of the Secretary-

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82 *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, ICJ Rep. 1960, 150. That opinion led to a substantial revision of the constituent instrument of that agency, and its transformation from an advisory body to an organization with executive powers.

83 *Appeal relating to the Jurisdiction of the ICAO Council* case, ICJ Rep. 1982, 46.

84 In its orders in the *Use of Force* cases brought by Yugoslavia against ten NATO members, the Court recalled the purposes and principles of the UN Charter and of its own responsibilities in the maintenance of peace and security under the Charter and Statute; and it stressed that when a dispute gives rise to a threat to the peace, breach of the peace or act of aggression, the Security Council has special responsibilities under Chapter VII of the Charter. Above note 38, 132 and 140 (paras. 17, 50) (Belgium) and the equivalent in the other orders. The issue has arisen more frequently in advisory opinions. Cf: *Conditions of Admission* adv. op. above note 4, 57; *Competence of the General Assembly* adv. op. above note 17, 4; *Certain Expenses* adv. op. above note 17, 151; *Namibia* adv. op. above note 45, 16. In contentious cases, issues of this kind have arisen more recently, in the *Lockerbie* cases, above note 22, 1993, 3 and 114, 1998, 9 and 115 (pending); *Application of the Genocide Convention* case, above note 38 (pending).

85 One of the most significant and legally open to criticism of these actions of the General Assembly is its Uniting for Peace, A/Res. 377 (V), 3 November 1950, above note 43.

General and of the Secretariat should be exempt from it. There is no justification for limiting the role of any review authority in the UN system only to some actions of the Security Council.

The ICJ has given the following explanation of the situation that it faces when, in a contentious case, it is asked to review a decision by an organ of another international organization:

> The case is presented to the Court in the guise of an ordinary dispute between States (and such a dispute underlies it). Yet in the proceedings before the Court, it is the act of a third entity – the Council of ICAO – which one of the Parties is impugning and the other defending. In that aspect of the matter, the appeal to the Court contemplated by the Chicago Convention [above chapter IX § 9.01] . . . must be regarded as an element of the general régime established in respect of ICAO. In thus providing for judicial review by way of appeal to the Court against decisions of Council concerning interpretation and application . . . the Chicago Treaties gave member States, and through them the Council, the possibility of ensuring a certain measure of supervision by the Court over those decisions. To this extent, these Treaties enlist the support of the Court for the good functioning of the Organization, and therefore the first assurance for the Council lies in the knowledge that means exist for determining whether a decision as to its own competence is in conformity or not with the provisions of the treaties governing its action.[86]

That passage has to be read in its context. The provision under which the Council was acting itself provided for an 'appeal' to the International Court of Justice from the Council's decision. 'Appeal' is not the same as 'review'. The Court realized that its role in that situation was limited, and that when it spoke about assurance for the Council, it was referring to a situation in which the Council's powers were themselves limited by the relevant treaties, including the constituent instrument of the organization concerned.

What happened at the San Francisco Conference of 1945, where the UN was established, is largely forgotten today.[87] Two incidents there have a direct relation to this aspect of the matter. The first concerns the general problem of the interpretation of the Charter. The competent Committee of the Conference

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86 *ICAO Council* case, above note 81, 60 (para. 26).

87 For a powerful reminder of what the San Francisco Conference was about and the conditions in which it was convened, see the dissenting opinions of Judge Schwebel in the two *Lockerbie* (Preliminary Objections) cases, above chapter IX note 29, 64 and 155. Those San Francisco statements are equally valid today, even if one accepts the view that in interpreting the Charter current State practice overrides interpretations made by the original members of the UN, now a minority of its membership.

(Committee IV/2) rejected a Belgian proposal that interpretation disputes should be referred to the Court. After deep discussion it adopted a formal statement, of which the key passage is in its opening words:

> In the course of the operations from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. The process is inherent in the functioning of any body which operates under an instrument defining its functions and powers.

Regarding the Court, the statement remarks that if two member States are at variance concerning the correct interpretation of the Charter, they are free to bring the dispute to the Court as in the case of any other treaty.[88] That may be so, but of course should two States decide to put a dispute over the interpretation of the Charter to the Court in a contentious case, the decision would be binding only on those two States, leaving the rest of the membership free to do as it likes. More important was the second suggestion in that Statement, to the effect that it would always be open to the General Assembly or to the Security Council to ask the Court for an advisory opinion concerning the meaning of an expression in the Charter. That procedure has been used, although infrequently.

The second incident was the statement of the rapporteur of Committee IV/1, responsible for drafting Chapter XIV (Articles 92 to 96) of the Charter and the Statute of the Court. He stressed that the relevant provisions of the Charter gave evidence of a firm intention that an international court should play an important role in the new organization of nations for peace and security. As one of the principal organs, the Court was to have the support of all members. 'It is only natural that such prominence should be ascribed to the judicial process when an international organization is being created which will have as one of its purposes the settlement of disputes between States by peaceful means and with due regard to justice and international law'.[89] But today, fifty-eight years after the Charter was adopted, those half-forgotten documents are inadequate. The UN has changed beyond all recognition from what its war-weary founders contemplated.

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88 13 UNCIO 703, and for the discussion on the Belgian proposal, see ibid. p. 633; I *Law and Practice*, 78. Endorsed by the Court in the *Certain Expenses* adv. op. above note 22.

89 13 UNCIO 381; I *Law and Practice* 63.

Proposals for judicial review have to face up to several questions. What does that expression mean? Who is to initiate review proceedings? Who would be the respondent, for instance if the object of the review were to be actions of the Secretary-General? Does the term carry a single widely accepted meaning that could perhaps bring it within the general notion of a principle of law accepted by the nations of the world? This question answers itself with a strong NO. There can be judicial review of proposed action before the decision is taken, to test its compatibility with the constituent or enabling instrument. There can be judicial review of an action after the decision has been taken, with the possibility of a finding that the action was wholly or in part not in conformity with the constituent or enabling instrument. Those are the two extremes, and one can consider various intermediate propositions. In the meantime, what happens to action on which the Security Council has decided, or proposes to decide, in pursuance of its primary functions for the maintenance of international peace and security? And a further question arises, namely, given the dynamics of international relations, would it be politically wise to crystallize Charter provisions, many of which are in deliberately loose language intended to meet situations unforeseeable at the San Francisco Conference?

Secondly, many of the proponents of the idea of judicial review of the actions of the Security Council find inspiration in the evolution of the concept of judicial review in the United States of America. Early in the history of the United States the Supreme Court assumed a role not expressly allotted to it in the Constitution, of reviewing actions of the legislature, of the Congress itself, and not only of the administration, to ensure their compatibility with the Constitution.[90] The matter was discussed during 1999 in the context of the celebration of the centenary of the first Hague Conference of 1899. The report to the General Assembly by the Governments of the Netherlands and the Russian Federation contains the following summary of a long discussion at The Hague:

> The report [by Ch. Pinto and F. Orrego Vicuña] requests the interesting possibility of an international constitutional court be studied. Partly, the ICJ is already fulfilling a constitutional role within the UN-system, protecting that system from disintegration. In many domestic systems a Constitutional Court as well as a Supreme Court exist side

90 This is the doctrine frequently cited by American writers of *Marbury* v. *Madison* (1803) 1 Cranch 137. But that has to be seen against the decisions of the same Court declaring invalid no less than twelve pieces of legislation connected with President Franklin D. Roosevelt's New Deal, symbolized by *Schechter Poultry Corporation* v. *United States* (1935), 295 U.S. 495.

> by side. The view was expressed, however, that in order to have a Constitutional Court, a Constitution would be a prerequisite.[91]

As seen, the Charter, and likewise the constituent instruments of other international organizations do not set up a carefully integrated system of allocation of functions and of checks and balances, which is the justification for judicial review because, as seen, the international organizations do not operate on the basis of the separation of powers as is widely accepted for the internal organization of States. There are no 'powers' to separate, nothing to 'check' and 'balance'. The organizations have the powers allocated to them and work through organs, each acting in accordance with its duties under the constituent instrument. There is nothing to prevent the powers and duties of one organ overlapping or even coinciding with those of another organ. That is one of the explanations for the well-known statement by the International Court of Justice that the UN is not a State and even less is it 'a "super-State", whatever that expression may mean'.[92] It is significant that the ILC has consistently used the expression 'constituent instrument' of an international organization and not its 'constitution', for instance in its 1966 report on the law of treaties. In the same order of ideas, the ICJ has explained that from a formal standpoint, the constituent instruments of international organizations are multilateral treaties, to which the well-established rules of treaty interpretation apply, albeit treaties with special characteristics.[93]

In 1975 the General Assembly established the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (resolution 3499 (XXX), 5 December 1975). For several years it .dealt with the role of the ICJ, and in particular with expanding its jurisdiction without involving any amendment of the Statute. There was never any suggestion that the International Court of Justice should perform a standing role

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91 54 GAOR Annexes, a.i. 154 (A/54/381, para. 113). A footnote reference explains that the ICJ performs this role through advisory opinions, on the basis of Art. 65 of the Statute. For the report under discussion and other documents presented at that conference, see F. Kalshoven, *The Centennial of the First International Peace Conference: Reports and Conclusions* (The Hague, Kluwer Law International, 1999). On the Court's role in preventing the disintegration of the UN system, see Sh. Rosenne, 'The Contribution of the International Court of Justice to the United Nations', 35 *The Indian J. Int'l L.* 67 (1995).

92 *Reaparation for Injuries suffered in the Service of the United Nations* adv. op., ICJ rep. 1949 174, above chapter VII note 31.

93 *Use of Nuclear Weapons* adv. op. above note 3, 74 (para. 19), citing the *Certain Expenses* adv. op. above note 18, 157.

in the nature of juridical review of any of the actions of any of the organs of the UN, nor has there been any suggestion that a constitutional court should be established within the UN. If anything, political opinion is for the moment reserved towards this. The General Assembly has repeatedly in recent years insisted that whatever improvements are made in the Court's working methods, nothing should be done that would require amendment of the Statute. That does not have to be seen as a permanent position. It will probably change, especially if agreement should be reached regarding the expansion of the Security Council which is a burning issue in the UN at the present moment. I have suggested that the time is coming when the Court's Statute should be submitted to a serious diplomatic review to bring it up to date to meet the requirements of the new century.[94] But that is a long way off. There is no sign in diplomatic circles of any strong movement in favour of setting up any permanent system of judicial review within a UN context.

However, leaving aside the legal aspects, what about the political aspects? The Security Council must act quickly if it is effectively to perform its proper role in crisis management. Close examination of how the Security Council operates may well show that if legal considerations are not overtly expressed in its public debates, they are nevertheless required and important. The delegations of the permanent members of the Security Council usually include a legal adviser in their senior staff. Any country that is involved in Security Council action must be alert to all the legal implications of what is going on and its delegation has to be able to explain the country's legal construction. Governments represented on the Security Council will consider the delegation's presentation and in one way or another it will have an influence in the diplomatic consultations that usually precede a resolution of the Security Council. The Secretariat too frequently requires direct knowledge of a State's legal position. If the Secretary-General or the Security Council require formal legal advice, they will usually want it immediately, overnight, and the only body available to them for that purpose is the Secretariat's Office of Legal Affairs. It is not by chance that the Legal Counsel has the rank and standing of Under Secretary-General in the UN official hierarchy.

But the Security Council is a political organ, established to perform political functions. Its first aim must be to bring the situation of crisis under control,

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94 'Lessons of the Past and Needs of the Future', *Increasing the Effectiveness of the International Court of Justice; Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court* 466 (C. Peck and R. Lee, eds. The Hague, Nijhoff, 1997).

to prevent it from spreading. For that it needs the powers that Chapter VII gives it. Only after that has been done is it possible to look for ways to settle the crisis. Often diplomacy will prefer a temporary settlement which a government can justify to its home constituency by reference to decisions of the Security Council to formal agreements with its opponent which may have to run the gauntlet of parliamentary ratification or approval. Time works wonders, and a later generation may find it easier and more practical to reach a practical solution of the situation kept under the control by UN peace-keeping forces working on the basis of a decision of the Security Council. The modern world expects rapid results quickly announced *urbi et orbi* in real time immediately. But diplomacy, and politics, international and internal, cannot work under pressures of the news media and deadlines. Time is an important element in the political solution of any situation of crisis. Given the conditions in which the Security Council is called upon to act, I find it difficult to accept the position that any form of judicial review of its decisions, unless requested by the Security Council itself, would be a contribution to the primary purpose of the UN, namely the maintenance of international peace and security.

This can be borne out by a brief glance at the questions which the Security Council has decided not to put to the Court.[95] Many of those proposals were tendentiously drafted, and they raise the question whether it can be seriously accepted that such questions put to the Court could have contributed anything worthwhile to the evolution of those crises in relation to which they were made. Were they genuine requests for legal guidance, or were they, like some of the recent contentious cases, attempts to delay political action? And given the tensions in most of those instances, would delay in political action by the Security Council have calmed or exacerbated the tensions which led to the matters coming to the Security Council in the first place? Would they have made a later settlement of the crisis easier or not? The questions cannot be answered definitively, but it is enough to put them to show the problematic character of judicial review of Security Council decisions.

At the same time we can recognize that in appropriate circumstances, and through appropriate means, the international community is prepared to accept some form of judicial review. An outstanding example of this is Article 159 of the UN Convention on the Law of the Sea of 1982 (above chapter III § 3.10). That provision has been so far not been invoked. Article VI of the comprehensive Nuclear Test-Ban Treaty of 10 September 1996 (not yet in force) is

95 I *Law and Practice* 324. For the questions not put by the General Assembly, see p. 306.

another example. That provides that the Conference of States Parties and the Executive Council of the new Comprehensive Nuclear Test-Ban Treaty Organization are separately empowered, subject to authorization from the General Assembly of the UN, to request an advisory opinion of the ICJ on any legal question arising within the scope of the activities of the Organization. An agreement between the UN and the Organization is to be concluded for this purpose.[96]

Apart from these being interesting attempts to extend the circle of organs and organizations empowered to request advisory opinions, they point in the direction of a possible conception of judicial review and indicate a method of providing for this if the parties to a treaty consider that provision for judicial review is necessary.

96 See doc. A/50/1027 and A/Res. 50/245, 10 September 1996.

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CHAPTER XIII

SOME CLOSING THOUGHTS

> *I do not presume to think that this work settles every doubt in the minds of those who understand it, but I maintain that it settles the greater part of their difficulties. No intelligent man will require and expect that on introducing any subject I shall completely exhaust it; or that in commencing the exposition of a figure I shall fully explain all its parts. Such a course could not be followed by a teacher in a viva voce examination, much less by an author in writing a book, without becoming a target for every foolish conceited person to discharge the arrows of folly at him*. Moses Maimonides, *Guide for the Perplexed*,
>
> trans. M. Friedländer, Introduction, p. 2
> (London, Routledge & Kegan Paul Ltd., 1904).

It will by now be obvious that in sheer bulk and in the variety of matters with which it deals, international law at the beginning of the twenty-first century is a massive branch of law, much more than the most able jurist can carry in his head. As Judge Higgins has recently written:

> 'There was a time when international law was perceived as consisting of a manageable corpus of rules over a finite and ascertainable subject matter, relevant in the relations of States. Today the corpus is vast, the subject matter apparently expanding indefinitely'.[1]

There is hardly a branch of cross-border human activity for which somewhere or other international law is not asked to supply a legal framework, ranging from the naming of cheese or the composition of cosmetic sprays, international sport,[2] leading to the use of nuclear energy for military and for peaceful purposes, and a reply that there is no rule of law (*non liquet*) is not acceptable.

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1 R. Higgins, 'Respecting Sovereign States and Running a Tight Courtroom', 50 ICLQ 121 (2001).

2 D. Hascher *et al.* 'Tribunal arbitral du sport Chronique des sentences arbitrales', 130 *Journal du droit international* 261 (2003).

In addition, because of that the law today is not only interdisciplinary, that is intermingled with other branches of law, but also multidisciplinary, closely interacting with other branches of the social sciences and the natural and applied sciences. Questions about fisheries management cannot be answered without a good understanding of the relevant sciences, for example, and so it is with everything else. Nor are the actors limited as they were a century ago to sovereign States. If international law rarely goes into the minutiae of human conduct in the way that the internal law of States does, that is because the practical implementation of internationally agreed rules is delegated to national authorities, and they supply the details. International law today is as comprehensive and as sophisticated as the most advanced system of internal law. This not the same as saying that international law is 'complete' – is any law complete? To quote from Charles De Visscher:

> The present structure of international relations . . . sharply contradicts the thesis that represents international law as an order at once universal and logically closed, embracing all relations of international interest. This is the thesis of the so-called formal completeness of international law. There are in international relations many matters which, however desirable their regulation may be seen in the common interest, remain outside international law either by the deliberate will of States to reserve discretionary judgment in them, or because the States find it impossible to agree on the terms of regulation. In this domain, extralegal factors of all sorts continue to exert an inhibiting influence not only on the regulatory action of power but on public opinion as well.[3]

At the same time, we have to acknowledge fundamental dilemmas that international law presents to the practitioner.

What I call the thesaurus, or the corpus, of international law draws inspiration from many sources, much more than is set out in Article 38 of the Statute of the International Court of Justice. The reader will not fail to have noticed that I have been free in referring to resolutions of the General Assembly and of the Security Council and to the work of the ICJ and other international tribunals and arbitrations. There is permanent tension between the political side of international relations and the legal requirements, and if there is a tendency to see in those resolutions some sort of coalescence between the two, neverthe-

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3 Ch. De Visscher, *Theory and Reality in Public International Law* 141 (Rev. ed. trans. P. E. Corbett, Princeton University Press, 1968). The ongoing discussion about what international law might have to say about 'terrorism' and how to deal with it is striking confirmation of those words of the great Belgian jurist, member of both the PCIJ and the ICJ.

less the distance must be retained between them. For the practitioner, decisions of major international judicial organs cannot be subsidiary sources of the law, and frequently a decision of the ICJ can be the primary if not the only source for the definition of a rule. The reason is that courts and arbitrations always deal with cases that have actually occurred. Their reasoning is not directed at making a theoretical point or at promoting any particular school of international law. The practitioner has to be pragmatic, and judicial decisions are applied pragmatism. Likewise, resolutions especially of the Security Council are not abstractions, but are political statements directly related to a concrete international situation or need. They too are pragmatic. The practitioner sees them not as precedents in any legal sense, and certainly not as binding precedents, but as signposts pointing in the direction of what can be expected on the political level and what will then require professional legal treatment.

I must here emphasize what is the golden rule of international law and diplomacy, the principle of good faith. Article 2 (2) of the UN Charter requires all members to 'fulfil in good faith the obligations assumed by them in accordance with' the Charter. Good faith is mentioned five times in the Vienna Conventions on the Law of Treaties, in the preamble and in Articles 26, 31, 46 and 69. In its Commentary on what was then Article 23 of the draft articles on the law of treaties the ILC stressed that there is much authority in the jurisprudence of international tribunals for the proposition that in the context 'the principle of good faith is a legal principle which forms part of the rule p*acta sunt servanda*'. Striking is Article 300 of the UN Convention on the Law of the Sea of 1982, on good faith and abuse of rights: 'States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right'. The reference there to abuse of rights gives concrete meaning to the abstraction of good faith. In the recently adopted draft articles on responsibility of States for internationally wrongful acts, Article 52, on conditions relating to resort to countermeasures, requires the responsible State to implement dispute settlement procedures 'in good faith' if it wishes to invoke one of the grounds requiring the suspension of countermeasures.

At the same time we must keep in mind that 'good faith' is a human emotion, and human emotions are not easily transferred to an incorporeal body such as a State, which is impersonal and emotionless. The principle of good faith thus applies to all persons who represent the State, who act in its name or on its behalf. It applies particularly to its leaders, and to its diplomatic and foreign service in their dealings with other countries, and to its legal advisers. If good

faith is an abstract concept tied to the human conscience, abuse of rights is tangible and recognizable. Conduct is its manifestation.

In this context, I would like to repeat and slightly modify what I first wrote in 1989.[4] The primary legal function of good faith, and perhaps its sole function, is, as a matter of positive law, to allow the decision-making authorities a fair degree of freedom of action in interpreting and applying the terms of a treaty-obligation or other rule of international law in a concrete case. In the first instance, the decision-making authorities will be the parties themselves, and in the event of their inability to reach agreement, or of actual disagreement between them, a duly authorized dispute-prevention or dispute-settlement organ. This freedom of action, frequently signalled by words such as 'reasonable' or 'fair', has particular relevance when the circumstances and situations are unforeseen and perhaps even unforeseeable, calling for improvisation and innovation. I would go further. The introduction of the expression 'good faith' in black letter texts of modern treaty law runs in parallel to imprecise qualifications such as 'equitable'. It allows equitable considerations to smooth the application of the strict letter of the law when that would produce an unreasonable result.

Since in principle international law is law made by States for themselves, it is self-policing and good faith demands that each State loyally performs what it has undertaken to do. There is no standing impartial machinery to ensure that this is done. To make the matter more complicated, today, with the appearance of other entities on the international scene, the problem of enforcement is no longer a matter exclusively for States as between themselves. It can also present itself as enforcement in a situation in which a non-state entity or entities may be involved, and whose subjection to international law is problematic. We are often told that 95 per cent of the rules of international law are applied as a matter of course, and I do not doubt that. But this does not answer the question and may even be misleading. If States apply some 95 per cent of the rules of international law, whether treaty rules or customary rules, that is because compliance with those rules is in their national interest. States make treaties because they need them. States develop rules of customary law because they need them. The problem lies with that obstinate 5 per cent where compliance is missing or incomplete or otherwise unsatisfactory, and the issue of enforcement arises. That obstinate area where voluntary and automatic compliance is problematical is the central part of international law, core issues dealing with national security, when the use of armed force is permitted and when it is not

4 *Developments* 135, 176.

permitted. International crises occur when a powerful stream of political activism demands changes in the status quo, that means changes in the existing law. The name given to this process in terms of legal categorization is not significant. Once it was called 'peaceful change', important in the conception of the League of Nations. Today, under the influence of the Charter of the United Nations it goes under the name of the maintenance of international peace and security, when the use of force is permitted and when not, and how much when it is permitted. It is here that the United Nations performs a central role, especially through the Security Council, that is when its powerful permanent members can agree. The United Nations is not constructed to promulgate changes in the status quo. It is not an organization for peace making and in fact its contribution to peace making, as opposed to peace-keeping, is not great. It can indicate directions which it thinks could lead to a peaceful settlement of a situation of crisis and it has done this on many occasions. But the solution to that crisis is left to the parties to negotiate and formulate, and here, if the parties so wish, the United Nations can make available facilities such as monitoring machinery for peace-keeping. Peace making as it has developed is not a listed function of the United Nations in the Charter. It has been born in necessity.

The major rule of post-1945 international law is the non-use of force against the territorial integrity or political independence of another State, and its principal means of enforcement is either the exercise of the right of self-defence or evocation of the rules of collective security. Articles 43 to 47 of the Charter are central to this. But as we have seen, they have never been applied according to their terms. The Security Council has never had the advice of a Military Staff Committee at its disposal, to assist it on all questions relating to its military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments and possible disarmament. This has deprived the international community as a whole and its individual members of what could have been a prime instrument for the enforcement of international law.

The reader who has reached this stage will have noticed that I have repeatedly stressed the close interaction between politics and law, and that a 'precedent' of international law cannot be fully understood except in its political and historical context. The lawyer must keep the two distinct. In a way, the referral procedure for instituting proceedings before the new International Criminal Court can serve as an illustration. If the Security Council is dealing with a 'situation' and it decides, acting under Chapter VII, to refer that situation to the Prosecutor because one or more of the crimes within the jurisdiction of that Court appears to have been committed, the implication is that it wants not political but legal

action, as part of its efforts to restore international peace and security. There is here a clear differential between political and legal action. Referral by the Security Council does not mean that the Prosecutor *must* issue an indictment. What it does is to set in motion the standard legal procedure that the Prosecutor must follow whenever faced with a referral, from whatever source. Article 36 (3) of the Charter is similar, even if less forcefully worded. The Security Council, when dealing with a dispute or situation under Chapter VI, may recommend the parties to refer that dispute to the ICJ in accordance with its Statute. That too means that the political treatment gives way to the legal. These two provisions illustrate how the political treatment of a matter and the relevant legal treatment are sharply differentiated, and can exist side by side.

I first read the Charter shortly after it was drawn up, as a soldier in Egypt, getting ready to be sent to Burma after the War in Europe had come to its bitter end. The vision of those who had negotiated it was impressive. Determined to save succeeding generations from the scourge of war, it gave hope to a war-weary world for a better future. When I read the Charter today, and come to Articles 43 to 47, I ask myself whether those who drafted them in the conditions of 1945 really thought that they would be applied. Their disuse has deprived the international community of what could have been a prime instrument for the enforcement of international law. It has thrown the issues of compliance into the framework of national policy. But at the same time it indicates the direction that future development, especially in the sphere of enforcement of all the rules of international law, should take.

* * *

The core of international law today as it always has been since the Peace of Westphalia is the independent sovereign State, and the heart of that is *sovereignty*. While on the one hand concepts of national sovereignty raise national emotions to a high level and render more difficult the solution of international differences, it is in relation to sovereignty that the greatest changes are taking place. These lines are being written as twelve nation-States in Europe, members of the European Union, have surrendered one of the most cherished popular manifestations of national sovereignty and national identity, their national currency, in favour of a new unified currency. This is the most concrete illustration of pooled sovereignty that the world has seen. It is satisfactory to know that the idea is being examined in other parts of the world, and no doubt more instances of this will be seen in the coming century. Pooled sovereignty in the form of common markets and economic communities, with much aligned law, is a noteworthy development of the second half of the twentieth century, but

it has not touched the general citizenry. Currency reaches into everyone's pocket or purse. This pooling of national sovereignty in Europe (and elsewhere) has so far been limited to economic matters. In Europe it is parallelled to some extent by a common social policy. Important instruments in welding this commonalty together have been the two Courts – the European Court of Justice for the European Community and the European Court of Human Rights for the Council of Europe. The Court of Justice is supranational, and is an outcome of pooled sovereignty in economic matters. The Human Rights Court is international and reflects the European heritage of personal rights and liberties and the system of social organization. Together they challenge the ICJ, the principal judicial organ of the United Nations, to pick up the gauntlet and assume a like role for the world international community. The ICJ has made a start in that direction, especially since 1966. The test will lie in the ability of this reorganization of the European continent to resolve pacifically all its international disputes. The pooled sovereignty has not yet reached the heart of things – common foreign and defence policy.

* * *

With these major reflections on the limits of today's international law, what has my survey brought out?

Here I would like to go back to the basic qualification made by the ILC in its work on State responsibility between what it calls the primary rules and the secondary rules. The matters discussed in chapters IV to X and XII belong to major regimes of primary rules. Most of these regimes, as I have explained them, today have a basis in customary international law or an international treaty or (to take Outer Space as an illustration) a series of international treaties flowing out of a broad based declaration of agreed policy. So it is with the system of international intergovernmental organizations, the law relating to armed conflict, with humanitarian law and the law of human rights, with air and sea spaces, with the protection of the environment, and one could continue with other regimes that I have not touched. At the same time, none of these regimes is self-contained, insulated and isolated from any other. Much to the contrary. They are all interconnected and overlap, and sometimes it is difficult to determine which regime is dominant, or which has to have priority. We have seen how a major international arbitration has emphasized that it is a commonplace of international law and State practice for more than one treaty to bear upon a dispute. I would go further. It is a commonplace of international relations generally that any situation may come within the scope of more than one set of primary international legal rules, and that a State or other international entity

may at one and the same time be under obligations arising under more than one set of rules. Using the language of that arbitral award, there is frequently a parallelism of treaties and of sets of international rules, both in their substantive content and in their provisions for the settlement of disputes. There is a parallelism of regimes and any international situation can easily be brought within the scope of one or more of those regimes. The so-called secondary rules, the law of treaties and the law of responsibility, supply the unifying, consolidating and co-ordinating element, and meld the regimes into a single unified international law. They are the template. Any breach of any rule of international law, that is of any of the primary rules, gives rise to objective responsibility.

So that is the international law as I see it in this period of transition in a world which itself is in a period of transition. The dilemmas of international law today are as complex and as comprehensive as the thesaurus of the law itself. Law develops slowly and over-hasty legal formulations can in the end be unproductive.

I commenced these lectures by remarking that I had no particular theory to propound, no general philosophy of international law. May I therefore end with another quotation from Judge Charles De Visscher:

> In making the manifested will of States the sole criterion of validity for norms, voluntarist positivism has bled the law white. Dominated by a too exclusive concern for technique, it had frozen international law in narrow, rigid patterns, ill-adapted to the profound and rapid changes which in the last fifty years have marked the development of international relations. As for the normative monism of the pure-law school, it explains neither the State's obligation to law, nor the primacy of international law over municipal law.
>
> The ambition to make international law the subject of a rigorously autonomous scientific discipline and the fear of contaminating it by contact with political facts have contributed much to the abuse of abstract reasoning at the cost of the observant spirit. This has dangerously obscured the bearing of power on the perspective of international law. Most of all, it has made men lose sight of the final justification for all law, namely the human ends of power which alone can impose upon the State, by the universal assent which they command, a moderating conception of power . . . Any return to the real holds promise of efficacity. Norms and institutions take on more social substance, become richer in human meaning, as they are set again in the milieu where they were born and where they find daily application.[5]

That is the lesson that I want to present.

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5 Ch. De Visscher. above note 2, author's preface. vii.

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