International Courts and the Development of International Law

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Essays in Honour of Tullio Treves

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Preface

Under Article 38 of its Statute, the International Court of Justice can apply judicial decisions only as a "subsidiary means for the determination of rules of law". However, there are many reasons to believe that international courts and tribunals do play quite an important role in the progressive development of international law. There are a number of decisions which are inevitably recalled as the first step, or a decisive step, in the process of the formation of a new rule of customary international law. Can, in these cases, the judge be considered as a subsidiary of others? Are these cases compatible with the common belief that a judge cannot create law? Is this a peculiarity of international law, which is characterized by the existence of several courts but the lack of a legislator? Do decisions by different courts lead to the consequence of a fragmented international law? This volume aims to provide the reader with an elaboration of various questions linked to the legislative or, depending on the preferences, quasi-legislative role of courts.

In their choices of subjects, the contributors have taken into account both the general aspects of the development of international rules through court decisions and the instances of specific sectors of international law, such as human rights, international crimes, international economic law, environmental law, and the law of the sea. Others have chosen the subject of rules on jurisdiction and the procedure of international courts. The question of the courts' role, *mutatis mutandis*, in the development of areas of law different from public international law, namely private international law and European Union law, has also been considered.

* * *

The subject of this collection of essays is also linked to the outstanding characteristics of the scholar in honour of whom it is published at the time of his retirement from the University of Milan. Tullio Treves combines an academic background with the experiences of a negotiator of international treaties and a judge of an international tribunal.[1] He has been professor of international law

[1] For more details see the *curriculum vitae* included in this volume.

in the Italian Universities of Sassari, Turin, and Milan and has given and will deliver lectures and courses in many and prestigious academies all around the world, including the Hague Academy of International Law. His bibliography is impressive for the quality and number of works, as well as for the variety of the subjects and languages.[2] His first diplomatic experience, as a legal expert of the Italian delegation at the Third Conference of codification of international law of the sea (1973–1982), has been followed by several others. In 1996 he was elected judge of the International Tribunal for the Law of Sea where he sat until 2011. He was subsequently also elected by his colleagues as President of the Seabed Disputes Chamber of the Tribunal and largely contributed to the seminal advisory opinion rendered by it in 2011 on *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*.

It is also because he has a great deal to say on how international law develops that the editors of this collection are certain that Tullio Treves will appreciate the contributions written by friends and colleagues and collected in this volume.

* * *

The two original editors Nerina Boschiero and Tullio Scovazzi, owe a great debt of gratitude to Tullio Treves under the supervision of whom they have begun their legal studies and with whom they have subsequently shared many unforgettable experiences. They have taken the initiative of promoting this collection of essays also as the less young[3] among those who have the privilege to consider Tullio Treves as their mentor.

In their task, while having the benefit of reading in advance the contributions and learning a great deal from them, the editors had to address two inevitable questions

The first question was the drawing of the list of contributors. It was evident that it would have been impossible to include all those who were willing to participate for well justified reasons of friendship and collaboration and that a difficult and perhaps questionable choice had to be made. The editors finally decided to invite a number of lawyers who have participated with Tullio Treves in diplomatic negotiations or have been judges at the International Tribunal for the Law of the Sea. They have also included his colleagues at the Department of International Law of the University of Milan and on the board of editors of the *Rivista di Diritto Internazionale Privato e Processuale*. Finally, they have invited some young scholars who have benefited from academic advice and supervision by Tullio Treves during the development of their legal research.

The second question was the dimension of the contributions in order not to exceed what could be contained in one volume. The editors started by prescribing a precise limit of space and continued by strictly enforcing it. Most contributors

[2] See the bibliography included in this volume.

[3] To be precise, Tullio Scovazzi is much older than Nerina Boschiero.

have complied with this imposition and the editors are sincerely grateful to them because they have facilitated their task. Other contributors have not[4] and the editors are equally grateful to them, because they have understood the deeply rooted Mediterranean culture of the editors, according to which every rule has its exceptions.

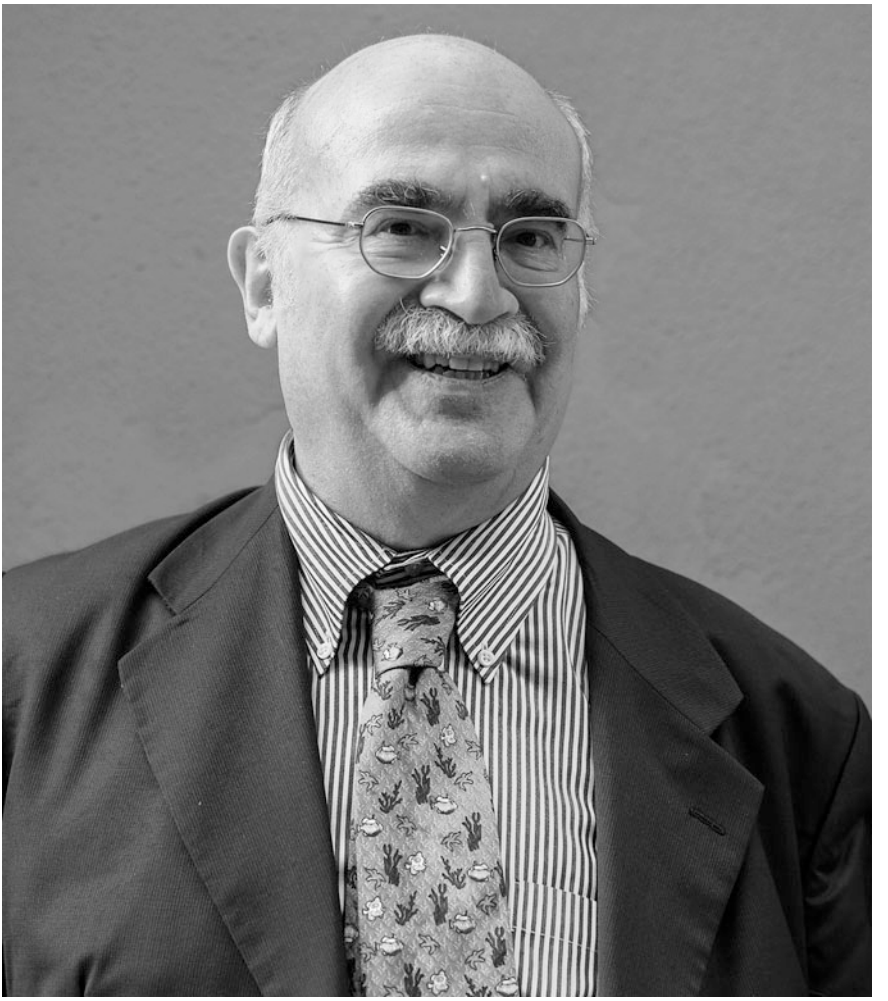
* * *

The editors wish to thank all those people who in one way or another have helped to bring this collection of essays to its conclusion. In particular the editors are indebted to Chiara Ragni and Cesare Pitea, who with a lot of competence and goodwill took much of the burden of the editorial effort on their shoulders and were finally appointed editors, together with the two original ones. They are also grateful to Angelica Bonfanti, Benedetta Cappiello, Chiara Sisler, Elena Fasoli, Francesca Romanin Jacur, Giorgia Sosio De Rosa, Giulia Bigi, Luigi Crema, Maria Chiara Noto, Michele Potest, Sabrina Urbinati, Seline Trevisanut, and Stefano Brugnatelli who acted as 'stylists' in ensuring that each paper was written in a uniform style as for abbreviations, quotations, and other details. Special thanks are due to Peter Morris who supervised most of the papers written by non-English native language contributors, to Seline Trevisanut, who did a similar work for texts in French, as well as to Philip van Tongeren and Marjolijn Bastiaans who provided the highly professional publishing services of T.M.C. Asser Press. It is also appropriate to thank the Universities of Brescia, Cagliari, Milan, Milano-Bicocca, Parma, and Trento which financed the publication of this book. Above all the editors wish to express their gratitude to the group of friends, colleagues and followers of Tullio Treves who generously contributed their intellectual resources and valuable time to make possible the completion of this collective effort.

Milan, June 2012

Nerina Boschiero
Tullio Scovazzi

[4] Regrettably one of the editors is among them.



Tullio Treves: A Biographical Note

Tullio Treves was born in Tucumán, Argentina, on 20 September 1942. His father, Renato Treves, an eminent philosopher and sociologist of law, and his mother, Fiammetta Lattes, had fled to Argentina to escape the anti-semitic laws of Fascist Italy.

He studied in the Italian school system from elementary school until he graduated at Milan University Faculty of Law in 1964. He then started a scholarly and academic career under Professor Mario Giuliano who taught Private International Law and later International Law at the University of Milan's Faculty of Law. He held the position of Assistant to Professor Giuliano after 1967; from 1969 onwards he gave courses as *chargé de cours* at the Universities of Pavia and Sassari. In 1972, he became a full professor (*straordinario*, tenured as *ordinario in 1975) teaching at the University of Sassari's Faculty of Law from 1972 to 1974 (as dean in 1973–1974) and at the University of Turin's Faculty of Political Sciences from 1974 to 1980. From 1980 until his retirement in 2012 he taught at the University of Milan's Faculty of Law. In Milan he gave courses on Private International Law, General International Law, and he inaugurated the teaching, which he continued for many years, of Advanced International Law, promoting an interactive method focusing on specific subjects and international case law. In Milan he also gave informal seminars on new developments on international law involving his pupils, young colleagues, and graduate students.*

In his scholarly writing Tullio Treves started with private international law, publishing books on exchange controls in the conflict of laws (1967) and on jurisdiction in international criminal law (1973) and he wrote numerous articles and notes stimulated by his participation in the *Rivista di diritto internazionale privato e processuale.* In these writings, while following the technical methodology of the Italian approach to private international law, he also devoted a great deal of attention to comparative law and to the connections between private and public international law, as well as to the political implications of cases and doctrinal trends.

His interests soon moved toward public international law. He published a long essay on the topical issue of the continuity of treaties and new independent States

in 1969, and, stimulated by his involvement in the Italian Delegation to the Preparatory Committee to the Third UN Conference on the Law of the Sea, and to the Conference itself, he started writing on the law of the sea, dispute settlement, international environmental law, and general questions of international law. He continued and still continues to focus on these issues. Among the books published, the following should be mentioned: *Diritto Internazionale. Problemi fondamentali* (2005), the 1991 Hague lectures (in French) on State practice and the codification of the Law of the Sea, the book (in Italian) on International disputes, new trends and new tribunals (1999), and the 2006 Castellòn General Course in English on International Law: Achievements and Challenges, in which he sets out his personal views on customary law and international law-making, the fragmentation of international law, the settlement of disputes, and other general topics.

He conceived and directed with enthusiasm collective research endeavours on topical issues which actively involved young researchers in scholarly and organizational tasks, affording them the opportunity to interact with recognized international scholars. Among them are those whose results appear, or are to appear in book form, on Civil Society and International Courts and Tribunals, on Non-Compliance Mechanisms and the Effectiveness of International Environmental Law, and on Common Concerns and the Protection of International Investment.

Tullio Treves has been involved in international activities since the early 1970s. First, as a member of the Italian Delegation to the Third UN Conference on the Law of the Sea (1973–1992), where he chaired the French Language Group of the Drafting Committee, and at other conferences. Between 1984 and 1992, he was the Legal Adviser to the Permanent Mission of Italy at the United Nations in New York. In this capacity he chaired various working groups of the Sixth Committee and was a member of the Italian delegation to the Security Council. In 1996, he was elected as a Judge of the International Tribunal for the Law of the Sea, a position which, after having been re-elected in 2002, he left in 2012. At the Tribunal he was twice President of the Seabed Disputes Chamber, including the proceedings for the delivery, on 1 February 2011, of an Advisory Opinion upon the request of the Council of the International Seabed Authority. He chaired the Tribunal's Committee of the Whole for the drafting of the Rules of the Tribunal. Apart from his involvement in the International Tribunal for the Law of the Sea, Tullio Treves is an active participant in international litigation: counsel for France in the Arbitration with Canada on the delimitation of maritime zones in the area of Saint-Pierre-et-Miquelon; counsel for Finland in the Great Belt case before the International Court of Justice; counsel for Peru in the Peru v. Chile maritime dispute before the ICJ; an arbitrator in the Bangladesh v. India maritime delimitation case. A consultant to various Governments, International Organizations and private entities; and Chairman of an Arbitration Tribunal for the Cairo Regional Centre for International Commercial Arbitration.

He has given courses and lectured at many distinguished learning institutions, including the Universities of Paris I and II, the Institute for Advanced Legal Studies of Geneva, the Hague Academy of International Law, the Castellon

Bancaja Euromediterranean Courses of International Law (1997 and in 2007 the general course), the Rhodes Academy for Maritime Law and Policy (every year since its inception in 1995), the Instituto Ortega y Gasset in Madrid, the University of California at Berkeley School of Law, the Cursos de Invierno de dereito internacional (Belo Horizonte, Brazil, 2010), the UNITAR and later UN Courses on International Law (The Hague, Quito, Yaoundé); the UN Regional Courses on International Law (Addis Abeba 2011 and 2012), and the OAS Courses on International Law (Rio de Janeiro, 2012).

A Member of the "Curatorium" of the Hague Academy of International Law since 2010, he taught at the Academy in 1991, and at the external sessions in Cairo in 2000 and Abu Dhabi in 2010. He is invited to deliver the General Course in 2015.

He is a member of numerous learned societies, including the *Institut de droit international (*since 1999); the *Società italiana di diritto internazionale* (as member of the Board 1998–2003); the *American Society of International law, Société française de droit international*; the *Law of the Sea Institute* (a member of the Board 1984–1990); the *European Council for Environmental Law* (as president since 2006); and the *Monetary Law Committee* of the International Law Association.

He is editor of the *Rivista di diritto internazionale privato e processuale*, a co-editor of the *Italian Yearbook of International Law, the editor of Comunicazioni e studi, a member of the Boards of the Max-Planck Encyclopedia of Public International Law, The Law and Practice of International Courts and Tribunals, the Ocean Development and International Law Journal, Il diritto marittimo, Rivista di diritto della navigazione, Revue belge de droit international, Revista Española de derecho internacional, as well as being a correspondent for Italy of the Journal du droit international.*

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Contents

Part I
Personal Perspectives

Homage to Judge Tullio Treves

Bernard H. Oxman

There can be no doubt that the contributions of Tullio Treves to international law in general, and to the rule of law at sea in particular, are worthy of celebration. Professor Treves is an international law scholar of extraordinary distinction. In that capacity he has published many books and articles, including outstanding contributions to the American Journal of International Law. He is a member of the *Institut de Droit international* and several national societies of international law, including the American Society of International Law.

Professor Treves served as chair of the French Language Group of the Drafting Committee of the Third UN Conference on the Law of the Sea. As chair of the English Language Group, it was my great privilege to work with him as we tried to achieve a coherent text of the UN Convention on the Law of the Sea within each language as well as across six different languages. Our work together at the Law of the Sea Conference, in the Law of the Sea Institute, during my service as judge *ad hoc* of the International Tribunal for the Law of the Sea, and on other occasions has yielded a stash of stories that could certainly enlighten and entertain—on the right occasion.

In considering other possible approaches to this essay, I had the pleasure of reviewing a vast wealth of material that Tullio Treves has written. Would that I were able to discuss all of the subtle and profound insights that I encountered there. The problem is that such an attempt could easily consume countless pages

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merely rehearsing the superlative professional biography and bibliography of Tullio Treves.

I decided therefore to pick a discreet aspect of his work that, while very rich, is of sufficiently limited scope to make it a plausible object of this homage. I refer here to the known contributions of Tullio Treves as judge of the International Tribunal for the Law of the Sea.[1]

The operative words here are "as judge" and "known."

The focus is on the contributions of Tullio Treves *as judge*: Professor Treves continued to write and teach while serving on the Tribunal, but he did not purport to speak as judge when not on the bench. To his great credit, he has been punctilious in observing that distinction.

The focus is on the *known* contributions of Judge Treves: While many of us can enjoy speculating on the nature of Judge Treves' contributions, those who are not members of the Tribunal do not know precisely what contribution Judge Treves made to the deliberations and opinions of the tribunal. Those who served on the Tribunal may know, but they cannot say.

The only hard data we have available are the opinions that Judge Treves wrote for himself. In this regard, I might assure Judge Treves that I plan to honor the Continental tradition pursuant to which judges tell us what the law is and law professors tell them what they meant.

Since it was constituted, the International Tribunal for the Law of the Sea has rendered thirteen judgments and provisional measures orders, and its Seabed Disputes Chamber one advisory opinion. Judge Treves participated in all of them.[2] Six of the decisions were unanimous. Judge Treves was in the majority in all but two cases—although, as one might expect, the appraisal here requires somewhat more nuance to which I will advert presently. Judge Treves wrote two dissenting opinions and four separate opinions. All are concise and to the point. He also participated in a brief joint declaration of seven judges in one case and wrote a similarly brief individual declaration in another.

These facts in themselves tell us a good deal about Judge Treves' role on the Tribunal.

First, these facts tell us that Judge Treves has been in the majority almost all of the time. Those who know him would agree that the most plausible inference is that Judge Treves enjoys the respect and confidence of his colleagues.

Second, these facts tell us that although he came to the bench as a distinguished professor of law with extensive diplomatic experience, Judge Treves understands the difference between scholarly discourse and diplomatic dialog and judicial opinions.

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[1] For information regarding the International Tribunal for the Law of the Sea and the text of decisions and opinions cited herein, *see* www.itlos.org.

[2] *See* Appendix A for a chart detailing Judge Treves' role in the Tribunal's decisions.

Third, these facts tell us that Judge Treves is a man of integrity and humility.

Judge Treves has written both dissenting and separate opinions. As we all know, the distinction between dissent and concurrence relates in a formal sense to a distinction in voting on the dispositif or operative provisions of the decision set forth at the end. While the parties to the case and their advocates are doubtless greatly interested in the dispositif, students of the law are often less interested in the formal outcome than in the underlying reasoning. From that perspective, the distinction between a separate opinion and a dissenting opinion is more subtle.

Nowhere is this more apparent than in Judge Treves' opinions.

The first opinion styled a dissent by Judge Treves is merely a partial dissent on only one issue in the *Camouco* case[3] decided in 2000: the difference between Judge Treves and the majority was largely a matter of degree on the question of the amount of bond that would be reasonable. Judge Treves characteristically engaged in an exacting examination of the relevant facts as well as the potential penalties under the law of the detaining state.

The second dissent came a decade later in a provisional measures order in the *Louisa* case[4] issued in late 2010. Although Judge Treves first noted that he agrees with the result of the Tribunal's decision not to grant provisional relief, he went on to disagree with the Tribunal on the admissibility of the application. Judge Treves found three grounds for inadmissibility; the majority instead reserved those issues for proceedings on the merits. Judge Treves explained that the Tribunal should not hear the case because the Applicant, Saint Vincent and the Grenadines, had not met the requirements of the Convention, from which the Tribunal derives jurisdiction. This dissent is consistent with Judge Treves' separate opinions, discussed below, in which he carefully analyzes the role of the Tribunal and the Convention in the broader context of international law.

The joint declaration made in 1999 by Judge Treves and six colleagues in the *Saiga* case[5] explained their negative votes, not as to the merits, but on the question of whether costs should have been awarded to the victorious applicant. But the disagreement was not trivial: the brief declaration makes clear that the question of reimbursement for litigation costs is not unrelated to the merits in a case in which compensation is awarded in respect of serious personal injury and property damage.

The individual declaration by Judge Treves in the *Hoshinmaru*[6] case of 2007 came among three other individual declarations and one separate opinion. The other Judges' separate writings discuss the operative portion of the Tribunal's decision. Judge Treves' declaration was written to clarify the placement and

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[3] *See* ITLOS: "Camouco" (Panama v. France), Judgment (7 February 2000).

[4] *See* ITLOS: M/V "Louisa" (Saint Vincent and the Grenadines v. Spain), Order (23 December 2010).

[5] *See* ITLOS: M/V "Saiga" (no. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment (1 July 1999).

[6] *See* ITLOS: "Hoshinmaru" (Japan v. Russia), Judgment (6 August 2007).

purpose of language used in the opinion about a secondary disagreement between the parties that the Tribunal declined to decide specifically. This declaration demonstrates Judge Treves' precision with words and mindfulness of the impact of the Tribunal's decisions.

His remaining opinions are called separate opinions by Judge Treves. They share some interesting characteristics. They are disciplined by a distinctive style: They are concise. The opinion of the tribunal is the formal object of the separate opinion. The formal purpose of the separate opinion is to explain more fully the actual or potential implications of the tribunal's conclusions on one point or a very few particular points.

In referring to this style as distinctive, I of course run the risk that Professor Treves will demur and harrumph, not so *soto voce*, that this is what separate opinions are supposed to be. Indeed. Professor Treves may well be right in some Platonic sense. And he doubtless has both the extraordinary ability to conceive of the form coherently, and the admirable discipline to adhere to it. My lame reply to his imagined harrumph is haplessly empirical: most separate opinions that I have read do not seem to fit this mold. For that matter, they do not seem to fit any mold at all.

It can of course be noted that all of Judge Treves' separate opinions were written in the context of urgent proceedings regarding provisional measures or prompt release of vessels and crews. Accordingly, it can be argued that there was not enough time for Judge Treves to run on endlessly. The response to this argument is of course a classic: everyone who has tried knows that it is harder and takes more work to be concise and to the point.

None of this of course explains: Why the separate opinions? If a distinctive Treves style is the vessel, is there a distinctive Treves jurisprudence that informs the content? What can we say about the points that Judge Treves may have been unable to persuade his colleagues to include in the majority opinion, and that he felt nevertheless required articulation from the bench?

In my view, the common thread of the separate opinions is that they reflect a deep interest in the coherence of the relationship between the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; hereinafter Law of the Sea Convention)[7] and its dispute settlement procedures with substantive and institutional developments in international law outside the Convention. While Judge Treves' accomplishments as an expert not merely in the law of the sea but in international law as a whole are doubtless an indispensable predicate for approaching these questions with the level of sophistication evident in his opinions, they do not in themselves account for the insightful connections that he identifies. Rather I would proffer the hypothesis that Tullio Treves believes

[7] Entered into force on 16 November 1994.

that the ultimate vocation of the judge is the coherent management of the legal system itself.

One example involves the interesting parallels between the separate opinion of Judge Treves in the *Grand Prince* case[8] in 2001 and the work of the International Law Commission on diplomatic protection, which began in 1997 and was finally completed in 2006.[9] In his separate opinion in 2001, Judge Treves described the prompt release procedure under Article 292 of the Law of the Sea Convention as a form of diplomatic protection.[10] He then assumed a requirement of continuous nationality between the time of the breach of obligation with respect to the vessel and the time of the application for its release under Article 292, making clear that it is the breach of the duty of prompt release on reasonable bond, rather than the detention itself, that is the relevant triggering event under that article. Judge Treves then went on to consider the consequences of a lapse in registration of the ship in Belize in that case, stating, "The impression one gathers is that the only concern of the shipowner was to be authorized to submit to the Tribunal an application on behalf of Belize, while its mind was already set on registering the vessel in Brazil." Accordingly, Judge Treves concurred in the Tribunal's dismissal of the case *proprio motu* on the grounds that Belize was not the flag state. His analysis not only reflects the difficult issues surrounding the general question of continuous nationality examined by the International Law Commission, but in effect adumbrates the Commission's solution to the problem of manipulation of nationality for purposes of diplomatic protection. The 2006 Report of the ILC contains the following comment on the final articles on diplomatic protection forwarded to the UN General Assembly (p. 40): "[I]f the injured person has in bad faith retained the nationality of the claimant State until the date of presentation and thereafter acquired the nationality of a third State, equity would require that the claim be terminated."[11]

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[8] *See* ITLOS: Grand Prince (Belize v. France), Judgment (20 April 2001).

[9] For the text of the 2006 ILC report on diplomatic protection submitted to the United Nations General Assembly see Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10).

[10] Article 292 provides in pertinent part: "1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under Article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree."; "2. The application for release may be made only by or on behalf of the flag State of the vessel."

[11] *See* note 9, *supra*.

Another example concerns the relationship between the Law of the Sea Convention's dispute settlement procedures and the increasing attention being paid to the question of a precautionary approach to environmental issues, including fisheries management. In his separate opinion in the *Southern Bluefin Tuna* case[12] in 1999, Judge Treves attempted to avoid the larger issue of whether the precautionary approach is mandated by international law, and instead argued that it is inherent in the very idea of provisional measures, especially as applied in situations where there may be incremental increases in risk. He stated,

> In my opinion, in order to resort to the precautionary approach for assessing the urgency of the measures to be prescribed in the present case, it is not necessary to hold the view that this approach is dictated by a rule of customary international law. The precautionary approach can be seen as a logical consequence of the need to ensure that, when the arbitral tribunal decides on the merits, the factual situation has not changed. In other words, a precautionary approach seems to me inherent in the very notion of provisional measures. It is not by chance that in some languages the very concept of "caution" can be found in the terms used to designate provisional measures: for instance, in Italian, *misure cautelari,* in Portuguese, *medidas cautelares*, in Spanish, *medidas cautelares* or *medidas precautorias.*

In his separate opinion in the *MOX Plant* case[13] in 2001, Judge Treves set forth a coherent understanding of the relationship between the binding third-party dispute settlement procedures of the Law of the Sea Convention and those of other treaties where the legal obligations overlap. In so doing, he accepted the majority's view that similar legal obligations arising under different treaties are severable for dispute settlement purposes, so that the plaintiff has a choice of forum. What he added however is that this may give rise to a situation of lis pendens if two tribunals are seised of similar questions. He presciently predicted that in such a situation "considerations of economy of legal activity and of comity between courts and tribunals" would arise. That of course is precisely what subsequently happened in that very case when the arbitral tribunal constituted under Annex VII of the Law of the Sea Convention, expressly invoking comity, suspended proceedings pending a determination of jurisdiction by the European Court of Justice.[14] The ECJ subsequently decided that Ireland had breached its obligations under European law by initiating proceedings against the United Kingdom under the dispute settlement provisions of the Law of the Sea Convention.[15]

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[12] *See* ITLOS: Southern Bluefin Tuna (New Zealand v. Japanand Australia v. Japan), Order (27 August 1999).

[13] *See* ITLOS: MOX Plant (Ireland v. United Kingdom), Order (3 December 2001).

[14] PCA/UNCLOS Arbitral Tribunal: MOX Plant (Ireland v. United Kingdom), Order no. 3 (24 June 2003).

[15] ECJ: Commission of the European Communities v. Ireland, C-459/03, Judgment (30 May 2006).

The relationship between the prompt release remedy under Article 292 of the Law of the Sea Convention and international human rights law is the great theme of Judge Treves' separate opinion in 2004 in the *Juno Trader* case.[16] He wrote,

> [L]ack of due process, when it consists in late communication of charges, in delay and uncertainty as to the procedure followed by the authorities, [or] in lack of action by the authorities, may justify a claim that the obligation of prompt release has been violated even when the time elapsed might not be seen as excessive had it been employed in orderly proceedings with full respect of due process requirements.

He added that the same reasoning may apply when lack of due process arises from efforts to quickly conclude domestic proceedings "without seriously affording a possibility to consider arguments in favor of the detained vessel and crew."

The Tribunal's Seabed Disputes Chamber rendered its first advisory opinion during Judge Treves' presidency of the chamber.[17] The opinion represents a major synthesis of the provisions of the Law of the Sea Convention regarding the role of the sponsoring state in deep seabed mining with the international law of state responsibility. It is a significant contribution to our understanding of both. While it is of course difficult to attribute any part of the unanimous opinion to the contributions of any particular judge, it is clear that the opinion bears the earmarks of Judge Treves' abiding interest in the role of the Convention within the larger corpus of international law and his profound understanding of both.

So long as there are judges like Tullio Treves, those who fret and fuss about the dangers of a supposed fragmentation of international law and proliferation of international tribunals will be proven wrong. Municipal legal systems have brought forth great judges capable of understanding and managing substantive complexity and procedural diversity. As its maturation increases its own substantive complexity and procedural diversity, the international legal system will do no less. Tullio Treves proves it.

For this, we are all in his debt.

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[16] *See* ITLOS: Juno Trader (Saint Vincent and the Grenadines v. Guinea-Bissau), Judgment (18 December 2004).

[17] *See* ITLOS: Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Seabed Disputes Chamber, Advisory Op. (1 February 2011).

Appendix A: Participation of Judge Treves in ITLOS Decisions

No.	Case	Date	Type	Nature	Treves in majority	Treves opinion
1	SAIGA	4 Dec. 1997	J	Prompt release	Yes	
2	SAIGA	11 Mar. 1998	O	Prov. meas.	Yes (U)	
2	SAIGA	1 July 1999	J	Merits	Yes[18]	J Dec[19]
3/4	Southern Bluefin Tuna	27 Aug. 1999	O	Prov. meas. pending constitution of arb. trib.	Yes	S
5	Camouco	7 Feb. 2000	J	Prompt release	No[20]	D
6	Monte Confurco	18 Dec. 2000	J	Prompt release	Yes	
8	Grand Prince	20 Apr. 2001	J	Prompt release	Yes	S
10	MOX plant	3 Dec. 2001	O	Prov. meas. pending constitution of arb. trib.	Yes (U)	S
11	Volga	23 Dec.2002	J	Prompt release	Yes	
12	Land reclamation	8 Oct. 2003	O	Prov. meas. pending constitution of arb. trib.	Yes (U)	
13	Juno trader	18 Dec. 2004	J	Prompt release	Yes (U)	S
14	Hoshinmaru	6 Aug. 2007	J	Prompt release	Yes (U)	Dec
15	Tomimaru	6 Aug. 2007	J	Prompt release	Yes	
17	Responsibilities of sponsoring States	1 Feb. 2011	A	Advisory opinion	Yes (U)	
18	Louisa	23 Dec. 2010	O	Prov. meas.	No	D

A advisory opinion, *Arb. trib.* arbitral tribunal to which dispute has been submitted under Part XV, Sec. 2, of the LOS Convention, *D* dissenting opinion, *Dec* declaration, *J* judgment, *j Dec* joint declaration, *O* order, *Prov. meas.* provisional measures, *S* separate opinion (concurrence), *U* Unanimous vote on all of the dispositif

[18] Except on question of costs.

[19] Seven judges participated in the declaration.

[20] Votes "no" on amount of bond.

L'Équation de Salomon

Pierre-Marie Dupuy

cette idée de frontières et de nations.
me paraît absurde….
Jorge Luis Borges, 1975.

Il était très tard lorsque l'illustre professeur rentra chez lui. Il s'en voulait d'avoir accepté de donner à l'autre bout du pays cette conférence trop classique sur "les principes équitables dans la délimitation maritime". Comme d'habitude, l'avion du retour avait eu du retard. Alors que minuit sonnait à l'église voisine, il tourna lentement la clé dans la serrure pour ne pas réveiller les siens. Il allait regagner silencieusement sa chambre lorsqu'il se ravisa, pensant devoir passer par son bureau pour lire le courrier sans doute arrivé la veille. Il pénétra ainsi dans son repère aux murs tapissés de livres. Ayant allumé la lampe posée sur un vaste bureau, il prit les quelques enveloppes qui s'y trouvaient puis s'affala dans le vieux fauteuil de cuir qui lui tendait ses bras débonnaires. Après un œil sur ces dépêches sans intérêt, il regarda vaguement les livres qui semblaient l'attendre, comme rassemblés amicalement en face de lui. Rassuré par le spectacle familier des rayonnages sur lesquels reposaient sagement les vieilles encyclopédies, les dictionnaires universels, les recueils de jurisprudence, les annuaires juridiques et les collections de cartes, atlas et portulans dont il aimait s'entourer, vaincu aussi par la fatigue, il ne sut bientôt plus s'il rêvait.

Il était toujours bien dans son bureau. Pourtant, le volume comme les apparences de ce dernier avaient changé: la salle était octogonale. Les murs étaient là aussi couverts de livres mais ces derniers étaient rangés différemment. Tous de même taille, sur des étagères identiques, ils s'élevaient régulièrement vers des plafonds sans doute très hauts dont on distinguait mal les contours; cela lui fit sereinement penser qu'il se trouvait probablement dans l'une des salles de la "bibliothèque de Babel", du nom de l'une des nouvelles de Borges. À la fois argentin et européen comme lui, il affectionnait ses histoires brèves dont il venait précisément de relire certaines dans l'avion du retour.

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S'étant levé pour aller examiner d'un peu plus près les ouvrages qui l'entouraient, il découvrit que le centre de la pièce était entièrement occupé par une grande table dont il avait jusque là ignoré l'importance. Elle était entièrement recouverte de cartes. Un premier examen suffit à le persuader qu'elles étaient, toutes, relatives à la détermination des frontières maritimes ayant donné lieu à des différends portés devant la Cour internationale de Justice avant que le Tribunal du droit de la Mer dont il était l'un des juges éminents ne connût lui-même son premier contentieux en la matière.

Ainsi pouvait-on voir dans un coin sur sa gauche une carte figurant le littoral profondément édenté du Skjaergaard ayant autorisé la Norvège à tracer des lignes de base droites opposables aux États tiers; sur une autre carte, il reconnut la position désavantageuse des côtes de l'Allemagne, coincées au fond d'une concavité entre le surplomb du littoral danois et le retour des côtes hollandaises. Là, c'était la structure convexe du littoral tunisien, prolongé sur ses hauts fonds découvrants par l'archipel des Kerkhenna et, plus au sud, l'île imposante de Djerba, si proche de Raz Ajdir, point d'aboutissement de la frontière terrestre avec la Libye. Plus loin encore, on distinguait sur une autre carte l'opposition du rivage des Syrtes avec celui de Malte, flanqués l'un et l'autre à l'ouest par les îles Pélagiennes de l'Italie. Sur un autre document encore, il reconnut les contours du Golfe du Maine que s'étaient jadis disputé le Canada et les États-Unis pour le tracé de leur frontière maritime.

Non, décidément, aucune représentation cartographique ne semblait manquer sur cette immense table. Ni celle du Golfe de Fonseca, seule baie historique partagée par trois États, avec en son centre les îles de Meanguera et Meanguerita; ni celle du Groenland et de Jan Mayen, pomme de discorde entre le Danemark et la Norvège. Plus loin, comme prolongeant une saga scandinave, l'illustre professeur identifia d'autant plus aisément la carte du Grand Belt qu'il avait lui-même été conseil de la Finlande face au Danemark dans cette affaire un peu frustrante pour les avocats des deux parties puisqu'elle avait été interrompue par un règlement à l'amiable. Son regard redescendit pourtant sous d'autres latitudes brûlées par le soleil en identifiant, sur un autre document, les îles Hawar et les hauts-fonds de Dibal et de Quit'al Jaradah à propos desquels le Qatar et Barhein s'étaient si farouchement opposés.

Qui avait pu ainsi disposer sur cette table tant de croquis et de cartes sans omettre aucun des arrêts rendus par la Cour, par exemple à propos de la presqu'île de Bakassi disputée entre le Cameroun et la Nigeria dans le contexte de l'accord anglo-allemand de 1913, ou de la souveraineté effective sur les diverses et minuscules *Pulau* entre l'Indonésie et la Malaisie ou la Malaisie et Singapour; ou bien encore la ligne de délimitation dite "traditionnelle" par Tegucigalpa en suivant le parallèle partant du Cabo de Gracias a Dios pour séparer les espaces caraïbes entre le Honduras et le Nicaragua au-delà desquels la Colombie était à présent elle aussi en litige…

Tout était là! Jusqu'à des configurations intéressant des contentieux encore non résolus, tels celui porté devant la Cour par le Pérou à l'égard du Chili. Tout. Pourquoi cet étalage? Et, décidément, qui avait pu l'inspirer?

L'éminent professeur en était arrivé là de ses réflexions lorsqu'il perçut à ses cotés la présence de Marco, son assistant, resté semble t'il jusqu'alors dans la pénombre. À peine étonné, il lui adressa immédiatement la parole:

– Marco, tu tombes bien. Tu vas m'aider à démêler tout ce fatras de croquis et de cartes. Il faut ranger tout ça. On n'y comprend plus rien.
– Au contraire, professeur, au contraire. Excusez-moi. C'est moi qui ai déballé tous ces documents. Je travaille là-dessus depuis le début de l'après-midi. Je cherche en vain une logique unifiant le tout. Un élément de réponse permettant de comprendre comment la Cour a, chaque fois, pu considérer qu'elle avait effectivement résolu le litige. Quel est, au-delà des mots, le principe unificateur, en somme, qui serait révélé moins par le discours des juges que par la représentation cartographique de son résultat?
– Mais pourquoi perdre ton temps à ça, Marco ? Tu sais bien que, sans aller jusqu'à dire, comme la Chambre le fit dans "Golfe du Maine", que chaque cas est un *unicum*, il reste vrai que chaque affaire traite, par définition, d'une configuration singulière. La Cour, certes, nous dit presque candidement qu'"il n'est jamais question de refaire la nature entièrement". Mais enfin, elle la refait tout de même assez souvent! On ne peut d'ailleurs pas en vouloir au juge, confronté à tant d'éléments à prendre en considération: la direction générale des côtes, leur longueur par rapport à la zone à délimiter, la présence d'îles, ou de hauts fonds découvrants; l'implantation de pêcheries traditionnelles; l'acquiescement d'une partie à l'occupation par l'autre d'une formation insulaire à proximité de ses côtes… Alors, elle fait ce qu'elle peut, la Cour. Elle trace tant bien que mal, et non sans risque d'arbitraire, ce qu'elle juge être, à partir de ce que lui en ont dit les parties au litige, une solution adéquate "en fonction de toutes les circonstances pertinentes et compte tenu des principes équitables". Ce n'est pas nécessairement du bricolage! Mais c'est bien souvent, encore une fois à partir du matériau présenté par les Parties, une recherche empirique de la solution juste, enchâssée dans une rhétorique judiciaire habilement formulée selon laquelle il s'agit non d'*ex aequo et bono* mais d'équité "selon les textes et dans ce domaine, c'est précisément une règle de droit qui appelle l'application de principes équitables". Tu sais bien que c'est ce qu'a déjà dit la Cour en 1969, dans l'affaire du plateau continental de la mer du Nord!
– Oui, répond Marco d'une voix lasse. Je le sais bien. C'est même au fameux paragraphe 88 de cet arrêt qu'elle dit cela! Elle dit aussi un peu plus loin qu' "en réalité, il n'y a pas de limites juridiques aux considérations que les États peuvent examiner afin de s'assurer qu'ils vont appliquer des procédés équitables". C'est bien pratique, ça…

Pourtant, comment persuader un garçon d'encore presque vingt ans que la justice internationale se satisfait de tant d'incertitude? Marco est encore à l'âge où la passion du droit international qu'ont su lui insuffler ses maîtres ne souffre pas de compromis. Il lit la jurisprudence en y traquant les majuscules. Il croit aux principes universels comme à l'unité de la jurisprudence. Il veut découvrir l'esprit des lois, non l'empirisme des prétoires!

Touché par tant de foi et d'ardeur candide, l'illustre professeur accepte alors de se remettre au travail avec lui sans plus regarder la pendule qui bât dans un coin de la salle. Ensemble, le maître et l'élève tentent de reclasser les affaires, de comparer les documents, d'établir des catégories et de retrouver les fondements d'un droit sous l'accumulation des cas d'espèce. Ils tournent l'un et l'autre autour de la table dont les proportions semblent s'être encore agrandies. À force de mettre en rapports les tracés littoraux, les lignes de bases qui les bordent, les îles qui bien souvent viennent dévier la ligne médiane, ils constatent que tous ces cas relèvent au fond d'une problématique commune. Il leur semble progressivement, les ayant juxtaposés puis comparés inlassablement qu'en définitive, c'est toujours le même processus qui se déroule.

D'ailleurs, la Cour n'a-t-elle pas défini elle-même, dès Jan Mayen, une méthode qu'il convient de suivre en toute circonstance? Que l'on soit en présence de côtes se faisant face ou placées l'une dans le prolongement de l'autre, on commence par tracer la médiane entre les points extrêmes des deux configurations; puis on s'attache à voir dans quelle mesure on doit s'en éloigner pour tenir compte des circonstances pertinentes.

À y regarder de plus près, plus l'heure s'avance au milieu de cette nuit de recherche fiévreuse, plus ils sont confirmés dans l'idée qu'en définitive, il n'y a pas dix ou quinze affaires de délimitation maritime, qu'il s'agisse de séparer les plateaux continentaux, les zones économiques exclusives et les eaux territoriales, mais bel et bien une seule et même affaire! Toujours la même, mais présentée sous un angle ou des perspectives différentes! Toujours une affaire dans laquelle, au-delà des apparences immédiates, on reconnaît les mêmes ingrédients, les mêmes repères pour parvenir à définir la solution équitable.

La solution équitable! C'est-à-dire l'équité. La justice. L'essence du droit. *Dass Wesen der Reinen Rechtslehre*!

C'est maintenant évident! La diversité des contours de la géographie n'était que l'habit d'Arlequin sinon le masque derrière lequel se retrouve toujours la quête unique du Juste. À ce stade de leur quête, et sans prendre le temps de la moindre pose, les deux investigateurs disposent les cartes les unes à coté des autres. Ils constatent alors qu'elles concordent; les unes prolongent les autres; elles s'articulent telles les pièces d'un puzzle planétaire. À la fin, la table entière n'est plus couverte que par une seule carte, gigantesque. Celle de l' affaire; la grande; l'unique. Celle de la justice, norme fondamentale…

Alors, Marco saisit le grand compas dont les branches de bois sont terminées par deux pointes sèches. Tournant à nouveau autour de la table comme si elle figurait l'univers tout entier, il déplace le compas sur la carte qui la couvre et lui fait accomplir des enjambées précises, des bords d'un continent à l'autre; il semble agir selon un rite mystérieux mais qui n'a pourtant rien d'inconnu pour l'illustre professeur, lequel ne dit rien mais acquiesce en silence à l'étrange ballet de son assistant, accomplissant sur la carte une équipée au long cours qui rappelle celle des grands découvreurs de jadis, Verrazzano, Bouguainville, Cook ou La Pérouse … Marco s'arrête de temps en temps pour noter sur un carnet des chiffres et des lettres dont il paraît tirer l'indication des parallèles et longitudes qui quadrillent cet

immense espace. L'illustre professeur le suit, corrige une donnée, en souligne une autre, note à son tour sur son propre cahier une coordonnée supplémentaire.

Au bout d'un temps bien difficile à mesurer, l'un et l'autre lèvent les yeux de la carte. Marco pose le gigantesque compas de bois sur la carte, entre la Terre de feu et le Cap de Bonne Espérance. Le professeur et son élève comparent leurs données, échangent comme à voix basse des calculs et des constats, réduisent au même dénominateur, simplifient en unifiant, éliminent progressivement toutes les inconnues.

Il revient alors au Maître d'achever la démarche qui, synthétisant tous les relevés antérieurs, tient dans une seule et même formule qu'il présente en silence mais avec émotion à son élève, lequel dit d'une voix sourde et presque tremblante:

– L'abbiamo trovata, Professore, la formula!

La formule, en effet. L'équivalent juridique du fameux $E = mc^2$ d'Albert Einstein, dont l'exactitude et l'identité peuvent se vérifier d'un bout à l'autre d'un univers lui-même en expansion! Ils l'ont trouvée, la formule, dans laquelle "E" n'est plus l'Energie mais l'Equité. Théorie non de la relativité restreinte mais de la justice absolue. La formule qui permettra de substituer aux approximations prétoriennes la rigueur indiscutable du juste. La formule qu'ils décident ensemble d'appeler "l'équation de Salomon". L'équation qui évitera les à peu près; celle qui empêchera que l'arbitre n'accorde qu'un "demi effet" aux îles Sorlingues dans la Mer d'Iroise ou que le juge n'oublie tout simplement l'île de Djerba dans le tracé divisoire des plateaux continentaux entre la Tunisie et la Libye. L'équation qui stabilise une fois pour toutes les plateaux de la balance.

L'illustre professeur n'est pas seulement ravi. Il est exalté par cette découverte. Il veut la recopier une nouvelle fois sur son cahier, la prononcer à haute voix pour s'en pénétrer et la graver une fois pour toutes dans sa mémoire…

C'est alors qu'il se retrouva dans son fauteuil, avec son courrier sur les genoux et le jour qui commençait à filtrer par la fenêtre d'où montaient les premiers bruits de la rue qui s'éveillait. L'esprit encore embrumé, il crût encore pouvoir garder jalousement la joie de sa découverte fabuleuse. Pourtant, lorsqu'il voulut à nouveau prononcer la formule de l'équation, impossible de la retrouver. Elle avait irrémédiablement disparu.

Plus tard, dans la journée, le professeur partit à l'université. Il y rencontra son élève mais rien n'y fut dit des travaux de la nuit, auxquels il repensa pourtant souvent, non sans nostalgie. Longtemps, il eut d'ailleurs quelque mal à se persuader que l'équation de Salomon n'existait pas …

Part II
General Aspects

Le juge et la codification du droit de la responsabilité

Quelques remarques concernant l'application judiciaire des articles de la CDI sur la responsabilité de l'État pour fait internationalement illicite

Maurizio Arcari

1 Introduction

Plus de dix ans après l'adoption par la Commission de droit international des Nations Unies (ci-après CDI) du Projet d'articles sur la responsabilité de l'État pour fait internationalement illicite (ci-après le Projet),[1] le sort de ce texte reste encore incertain. Assez nettement divisée entre les États membres prônant la transposition du Projet dans un texte conventionnel et ceux envisageant son adoption sous la forme d'une recommandation,[2] l'Assemblée générale (AG) n'a pas encore réussi à dénouer le nœud, s'étant jusqu'ici limitée à prendre note des articles de la CDI, à en affirmer l'importance, à les recommander à l'attention des États, mais toujours «sans préjuger de leur future adoption ni de toute autre suite qui pourra leur être donnée».[3]

Face à cette approche très réservée, la démarche la plus significative de l'AG en matière de codification du droit de la responsabilité étatique semble avoir été la demande, adressée en 2004 au Secrétaire général (SG), d'établir une compilation

[1] Voir le texte du Projet annexé à la résolution de l'AG sur la Responsabilité de l'État pour fait internationalement illicite, NU Doc. A/RES/56/83 (12 décembre 2001). Les articles avec les commentaires de la CDI sont reproduits dans Crawford 2003.

[2] Pour un aperçu des différentes positions des États sur la question voir le compte rendu des débats à la Sixième Commission de l'AG (Compte rendu analytique de la 15ème séance), NU Doc. A/C.6/65/SR.15 (19 octobre 2010) (ci-après Compte rendu analytique de la 15ème séance). En doctrine, sur la question voir Zemanek 2004, p. 897.

[3] Voir ces différentes formules dans les résolutions de l'AG sur la Responsabilité de l'État pour fait internationalement illicite, NU Doc. A/RES/59/35 (2 décembre 2004) (ci-après Résolution 59/35), NU Doc. A/RES/62/61 (6 décembre 2007) (ci-après Résolution 62/61) et dernièrement NU Doc. A/RES/65/19 (6 décembre 2010) (ci-après Résolution 65/19).

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de décisions de juridictions internationales et d'autres organes internationaux se rapportant aux articles de la CDI.[4] L'AG a pris note avec satisfaction[5] de la compilation présentée par le SG en 2007 et depuis actualisée en 2010, qui dénombre au total 93 affaires, dans lesquelles 182 références aux articles de la CDI ont été formulées par des juridictions internationales.[6] Une vue d'ensemble de la compilation du SG permet de confirmer l'influence croissante déployée par les articles de la CDI sur le contentieux de la responsabilité et paraîtrait aussi encourager les conclusions positives formulées par certains États quant à la portée de droit coutumier des principes codifiés dans le Projet.[7]

Par ailleurs, la compilation du SG offre aussi des indications qui mériteraient d'être mesurées plus exactement aux fins d'évaluer l'impact de la pratique judiciaire sur la codification du droit de la responsabilité internationale. Il en est ainsi, premièrement, du décalage quantitatif qui existe dans l'utilisation jurisprudentielle des différents articles de la CDI, qui s'avère fort inégale et paraît indiquer que seulement certaines dispositions du Projet ont passé l'épreuve de l'application judiciaire.[8] Une deuxième indication intéressante, qui n'est pas complètement déconnectée de la précédente, concerne l'«origine» des décisions relevant de l'application des articles de la CDI, lesquelles très souvent proviennent de juridictions opérant dans le cadre de secteurs «spécialisés» du droit international, ce qui pose le problème de l'interaction entre les dispositions du Projet et les éventuelles règles spéciales de responsabilité présentes dans ces sous-systèmes.

2 Une application inégale des articles de la CDI

La plupart des décisions répertoriées dans la compilation du SG portent sur les dispositions comprises dans la première partie du Projet de la CDI, concernant les conditions d'existence et d'attribution du fait internationalement illicite, ainsi que les circonstances d'exonération de la responsabilité (s'agissant notamment de 115

[4] Voir Résolution 59/35, par. 3.

[5] Voir préambule des Résolutions 62/61 et 65/19.

[6] Compilation de décisions de juridictions internationales et d'autres organes internationaux. Rapport du Secrétaire général, NU Doc. A/62/62 (1 février 2007), NU Doc. A/62/62/Add.1 (17 avril 2007) et NU Doc. A/65/76 (30 avril 2010) (ci-après compilation du SG).

[7] Voir, par exemple, les interventions de la Finlande et de l'Allemagne à la Sixième Commission de l'AG en 2010, Compte rendu de la 15ème séance, supra n. 2, respectivement par. 4 et 8.

[8] Voir les remarques de l'Italie à la Sixième Commission de l'AG dans Compte rendu analytique de la 13ème séance, NU Doc. A/C.6/62/SR.13 (23 octobre 2007) (ci-après Compte rendu 13ème séance), par. 18.

références sur le total de 182).[9] Par contre, un nombre relativement réduit d'exemples (36 références) intéresse les articles de la deuxième partie du Projet, relatifs au contenu de la responsabilité internationale et aux conséquences du fait internationalement illicite.[10] Une quantité encore inférieure de citations (26 références) se réfère aux articles de la troisième partie du Projet, concernant la mise en œuvre de la responsabilité et les questions de l'invocation de la responsabilité et des contre-mesures.[11] Enfin, 5 entrées seulement relèvent de la quatrième partie du Projet, dédiée aux dispositions générales. Il peut être intéressant de s'interroger sur les raisons du décalage révélé par cet aperçu statistique de l'application judiciaire des articles de la CDI.

À ce sujet, il paraît pertinente la considération, par ailleurs largement partagée par les États intervenants à l'AG,[12] que dans le Projet coexistent à la fois des dispositions vouées à la pure codification du droit de la responsabilité internationale et des dispositions inspirées du développement progressif de la matière. Par conséquent, il serait normal que les juges internationaux se réfèrent plus souvent dans leurs décisions aux dispositions du Projet sensés réfléchir des normes coutumières établies du droit de la responsabilité, et se montrent par contre plus prudents dans l'utilisation des articles donnant corps à des exigences *de lege ferenda*. À la lumière des indications quantitatives issues de la compilation du SG, il paraîtrait raisonnable de ranger dans la catégorie de la pure codification, les articles de la première partie du Projet, dont l'élaboration remonte aux phases plus anciennes des travaux de codification de la CDI et qui correspondent à une pratique et une *opinio iuris* consolidées. Par contre, on devrait considérer comme relevant du développement progressif certaines dispositions du Projet – notamment celles de la troisième partie en matière d'invocation de la responsabilité – qui ont vu le jour lors des phases plus récentes des travaux de codification sous l'impulsion d'exigences nouvelles ou émergentes du droit de la responsabilité internationale. Une telle conclusion, qui n'est pas dépourvue d'une certaine valeur de principe, demande de toute manière certaines mises au point.

i) À propos des règles comprises dans la première partie du Projet, il est assurément vrai qu'il y a un nombre important de décisions judiciaires dans lesquelles notamment les dispositions en matière d'attribution du fait illicite ou de circonstances d'exclusion de l'illicéité se trouvent citées et qualifiées comme

[9] Dont 15 se réfèrent aux profils généraux de la responsabilité internationale, 59 au problème de l'attribution du comportement illicite à l'État, 18 aux dispositions relatives à la violation d'une obligation internationale, 2 à la responsabilité de l'État à raison de la responsabilité d'un autre État et 21 aux circonstances excluant l'illicéité.

[10] Dont 12 concernent les principes généraux sur les conséquences du fait illicite, 23 les articles en matière de réparation du préjudice, une seulement les dispositions relatives aux violations graves d'obligations découlant de normes impératives du droit international général.

[11] Dont 8 relèvent de la problématique de l'invocation de la responsabilité, 18 du régime des contremesures.

[12] Voir par exemple les remarques du Chili et des États-Unis à la Sixième Commission de l'AG en 2010, Compte rendu de la 15ème séance, supra n. 2, respectivement par. 3 et 18.

correspondant à des normes coutumières du droit international. Cependant, il serait trompeur de s'arrêter à cette simple constatation, car le risque est toujours présent que, derrière une pétition de principe en faveur du statut de droit coutumier d'une certaine disposition du Projet,[13] se cachent des évaluations fort différentes de la part des juridictions concernées quant à la portée de la règle évoquée. Dans la mesure où la divergence d'appréciation entre les différentes juridictions est liée aux circonstances matérielles caractérisant chaque cas d'espèce et ne touche pas au fond de la règle en question, la valeur de principe de celle-ci ne saurait être entachée. Il en serait autrement, toutefois, quand la divergence porte sur le fond de la règle de responsabilité en jeu. Un cas de figure à cet égard est donné par la querelle bien connue qui a opposé la Cour internationale de Justice (CIJ) et le Tribunal pénal international pour l'ex-Yougoslavie (TPI) à propos de l'intensité du «contrôle» (effectif selon la première juridiction, global selon la seconde) demandée par l'Art. 8 du Projet aux fins de l'attribution à l'État des actes illicites des personnes privées.[14] L'«impérieuse» mise au point apportée en 2007 par la CIJ dans l'affaire de l'*Application de la Convention sur la prévention et la répression du crime de génocide*, dans le sens de la nécessité d'un degré de contrôle plus pénétrant, ne semble pas avoir apaisé toutes les incertitudes concernant l'interprétation de la règle.[15] Dans sa décision de 2009 dans l'affaire *Bayandir c. Pakistan*, le Tribunal arbitral institué dans le cadre du Centre international pour le règlement des différends relatifs aux investissements (CIRDI), tout en retenant dans le cas d'espèce une interprétation restrictive de la notion de contrôle prévue par l'Art. 8 du Projet, s'est déclaré conscient de la possibilité que des solutions diverses s'appliquent dans des contextes différents (« the Tribunal is aware that the levels of control required for a finding of attribution under Article 8 [du Projet] in other factual contexts, such as foreign armed intervention or international criminal responsibility, may be different ») et il a aussi préconisé que les critères d'attribution puissent s'adapter aux exigences des divers domaines du droit international (« It believes, however, that the approach developed in such areas of international law is not always adapted to the realities of international economic law and that they should not prevent a finding of attribution if the specific facts of an investment dispute so warrant »).[16] Dans ces conditions, il n'est pas surprenant que

[13] De telles pétitions de principe pourraient au surplus se présenter comme le produit de la déférence des juges internationaux aux articles de la CDI, qui risqueraient parfois d'être acceptés comme une source de droit faisant autorité dans le domaine de la responsabilité sans une analyse critique: voir à ce sujet Caron 2002, pp. 867-868.

[14] Voir le résumé de la question dans le commentaire de la CDI à l'Art. 8, dans Crawford 2003, pp. 131-133.

[15] CIJ : Application de la Convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt (26 février 2007), par. 398-406.

[16] CIRDI : Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. c. Pakistan, ARB/03/29, arrêt (27 août 2009), par. 130. Pour une approche «possibiliste» à la question de l'interprétation de l'Art. 8 du Projet voir aussi CIRDI : Gustav FW Hamester GmbH & Co KG c. Ghana, ARB/07/24, arrêt (18 juin 2010), par. 178-179.

certains États, intervenant à la Sixième Commission de l'AG, aient relevé « des incertitudes d'interprétation concernant divers aspects relatifs à l'attribution ».[17] Il est également clair que les différences d'orientations des juges internationaux quant à la portée d'une règle particulière de responsabilité risquent d'infirmer, plus que de confirmer, la valeur générale de la disposition correspondante du Projet.[18]
ii) Concernant les dispositions de la deuxième et troisième partie du Projet, une explication plausible de leur utilisation quantitativement limitée dans la pratique judiciaire pourrait se ramener à l'existence d'une pluralité de règles spéciales de responsabilité d'origine conventionnelle lesquelles, portant sur la détermination de la réparation due pour la violation d'une obligation primaire ou des mécanismes de mise en œuvre de la responsabilité, auront l'effet d'exclure l'application des principes généraux du Projet (sur la question, *infra*). Cette considération mise à part, il reste que, justement en vertu de la généralité des principes qu'elles expriment, certaines dispositions du Projet – comme celles concernant la notion de réparation et ses formes (Articles 31-36) ou l'objet, les limites des contremesures et la condition de la proportionnalité (Articles 49-50) – ont incontestablement acquis le statut de normes coutumières du droit international. D'emblée, un tel statut se trouve réaffirmé aussi dans des décisions de juridictions internationales postérieures à la compilation du SG.[19] Cependant, à côté de ces normes dotées de portée générale, il y a aussi d'autres dispositions du Projet qui concernent des aspects de détails, mais également importants, du régime des conséquences de l'illicite ou de la mise en œuvre de la responsabilité et pour lesquelles il n'y a pas (ou presque pas) de contre-épreuve au niveau de l'application judiciaire. Que l'on songe par exemple à l'Art. 52 du Projet, qui traite des conditions du recours aux contre-mesures en établissant que celles-ci ne peuvent être prises, ou doivent être suspendues si déjà prises, dans le cas où le différend est en instance devant un tribunal habilité à rendre des décisions obligatoires pour les parties:[20] on ne trouve de cette disposition qu'une seule mention, et seulement indirecte, dans le contexte d'une affaire présentée devant les organes du système de règlement des différends de l'Organisation Mondiale du Commerce (ci-après OMC).[21] Cela ne saurait pas surprendre davantage, s'il on considère qu'à la Sixième Commission de l'AG les

[17] Voir en ce sens l'intervention du Royaume-Uni en 2010, Compte rendu de la 15ème séance, supra n. 2, par. 12.

[18] Cela sans mentionner les problèmes que les divergences entre les différentes juridictions internationales peuvent entraîner sur le plan de la «fragmentation» des règles de responsabilité applicables: sur la question voir Treves 2005, pp. 596-605; Treves 2006, pp. 149-187.

[19] Voir, par exemple, TIDM : Responsabilité et obligations des États qui patronnent des personnes et entités dans le cadre d'activités menées dans la Zone, Chambre pour le règlement des différends relatifs aux fonds marins du Tribunal international du droit de la mer, avis consultatif (1er février 2011), par. 194-196 (concernant les articles 31-34 du Projet en matière de réparation).

[20] Texte et commentaire de l'Art. 52 dans Crawford 2003, pp. 352-356.

[21] OMC : États-Unis – Maintien de la suspension d'obligations dans le différend CE-Hormones, WT/DS320/AB/R, Rapport de l'Organe d'appel (16 octobre 2008), par. 382.

critiques adressées au régime des contre-mesures établi dans le Projet se sont concentrées exactement sur le déséquilibre du rapport entre celles-ci et les mécanismes de règlement pacifique des différends.[22] Ce serait donc le caractère controversé de la discipline arrêtée dans certaines dispositions du Projet qui expliquerait l'accueil réservé, sinon l'ignorance, de la part de la jurisprudence internationale et légitimerait ainsi les doutes concernant le statut de droit coutumier de ces dispositions.

iii) Il reste, finalement, les dispositions du Projet dont la très rare mention dans la jurisprudence internationale s'explique directement en raison de leur relative «nouveauté», induite par la circonstance qu'elles visent à traduire des exigences de développement progressif du droit de la responsabilité internationale. Comme déjà signalé, on peut sans difficulté ranger dans cette catégorie les articles du Projet concernant la question de l'invocation de la responsabilité, et tout particulièrement l'Art. 48 dont le trait remarquable est d'élargir le nombre des États qui, face à la violation d'obligations destinées à la protection d'intérêts collectifs, ont un titre à demander la mise en œuvre des conséquences du fait illicite.[23] Le statut controversé de cette disposition du point de vue du droit coutumier a été mis en exergue par quelques États dans leurs interventions à l'AG.[24] Que la prudence soit de mise en la matière paraît confirmé par l'avis de 2011 de la Chambre du Tribunal international du droit de la mer (TIDM) dans l'affaire des *Responsabilités des États qui patronnent des personnes et des entités dans le cadre d'activités menés dans la Zone*, seul précédent judiciaire où, pour l'heure, il paraît possible de repérer une référence directe à l'Art. 48 de la CDI.[25] De manière significative, cette disposition est citée dans l'avis en tant qu'exemple à « l'appui de l'opinion » selon laquelle tout État partie à la Convention des Nations Unies sur le droit de la mer (Montego Bay, 10 décembre 1982)[26] – mais aussi implicitement l'Autorité des fonds marins agissant « pour le compte » de l'humanité en vertu de l'Art. 137.2 de la Convention – serait légitimé à invoquer la responsabilité et à prétendre à réparation en cas de violation d'obligations ayant trait à la préservation de l'environnement en haute mer et dans la Zone, au vu du caractère *erga omnes* de ces dernières.[27] Malgré son caractère circonstancié, la pétition de principe de la

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[22] Voir, par exemple, les remarques de la Grèce à la Sixième Commission de l'AG du 23 octobre 2007, Compte rendu de la 13ème séance, supra n. 8, par. 3.

[23] Voir texte et commentaire de l'Art. 48 dans Crawford, 2003, pp. 329-334.

[24] Voir notamment l'intervention de la Chine à la Sixième Commission de l'AG dans le Compte rendu de la 12ème séance, NU Doc. A/C.6/62/SR.12 (23 octobre 2007), par. 87.

[25] Il est d'autant plus significatif que la CIJ (CIJ : Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif (9 juillet 2004), pp. 199-200), tout en se penchant sur les conséquences juridiques résultant pour les États autres qu'Israël des violations d'obligations *erga omnes* entrainées par le mur de séparation, n'ait pas ressenti l'exigence de se référer à la question de l'invocation de la responsabilité objet de l'Art. 48 du Projet.

[26] Entrée en vigueur le 16 novembre 1994.

[27] TIDM : Activités menées dans la Zone, supra n. 19, par. 180.

Chambre du TIDM en faveur du régime établi par l'Art. 48 est révélatrice du rôle constructif que les juges internationaux pourraient déployer aux fins de favoriser la consolidation sur le plan du droit positif de certains principes du Projet qui, au moment de leur adoption, étaient sensés exprimer des exigences *de lege ferenda*.

3 Une application «systémique» des articles de la CDI

Une partie importante des décisions cataloguées dans la compilation du SG a été rendue par des juridictions opérant dans des secteurs «spécialisés» du droit international, notamment dans les domaines du droit des investissements et du droit du commerce international. En effet, plus de la moitié des entrées présentes dans la compilation est occupée par les décisions des tribunaux arbitraux ou des comités *ad hoc* institués dans le cadre du CIRDI et – dans une proportion moindre mais également sensible – des organes du système de règlement des différends de l'OMC.[28] De prime abord, une telle donnée pourrait paraître d'autant plus étrange, si l'on considère que les domaines susmentionnés représentent des cas exemplaires de «régimes spéciaux» ou «autonomes» de responsabilité, c'est-à-dire de régimes conventionnels dotés de leurs propres règles secondaires régissant les conditions d'existence ou les conséquences du fait internationalement illicite, appelés à s'appliquer à l'exclusion des règles générales codifiées dans le Projet.[29] La CDI elle-même a envisagé la problématique de la *lex specialis* dans une disposition spécifique du Projet, l'Art. 55, établissant que les articles s'appliquent seulement « dans le cas et dans la mesure où » les conditions d'existence d'un fait internationalement illicite ou le contenu ou la mise en œuvre de la responsabilité internationale d'un État ne sont pas régies par d'autres règles spéciales de droit international.[30] Par ailleurs, la CDI s'est aussi empressée de préciser dans son commentaire de l'Art. 55 que le recours au principe de spécialité ne saurait être ni mécanique ni rigide et que la question de savoir si la règle générale ou spéciale de responsabilité doit s'appliquer dans un cas d'espèce est essentiellement « une affaire d'interprétation ».[31] Il n'est alors pas surprenant de trouver dans la pratique un certain nombre d'exemples de juridictions qui ont été prêtes à reconnaître le caractère coutumier des articles de la CDI et à en faire application dans leurs décisions, aux fins de résoudre des questions de responsabilité qui se posaient dans

[28] Sur un total de 182, 74 références aux articles de la CDI figurent dans des décisions de juridictions établies dans le cadre du CIRDI (ou du mécanisme mixte ALENA/CIRDI), 20 références dans des décisions des organes de règlement des différends de l'OMC.

[29] En général sur la question voir Simma and Pulkowski 2010, p. 139. Pour l'OMC en tant que système spécial de responsabilité voir Gomula 2010, p. 791; pour le CIRDI, Douglas 2010, p. 815.

[30] Voir texte et commentaire de l'Art. 55 dans Crawford 2003, pp. 363-366.

[31] Voir par. 4 du commentaire à l'Art. 55, *ibidem*, p. 365.

le cadre des soi-disant régimes autonomes et par rapport auxquelles il existait des règles secondaires applicables. Face à cette constatation, il est intéressant de voir de plus près comment les juridictions compétentes ont interprété le principe de spécialité et ont concrètement utilisé dans leurs décisions les articles de la CDI. À cet égard, on peut décerner deux tendances principales.

Une première tendance consiste à exploiter les articles de la CDI aux fins d'*interpréter* les règles secondaires présentes dans le sous-système de responsabilité. Bien qu'elle ne soit pas exclusive de ce domaine,[32] une telle approche se retrouve souvent dans la jurisprudence des organes de règlement des différends de l'OMC. Ces organes, une fois reconnu le caractère coutumier des principes généraux de responsabilité codifiés dans le Projet, utilisent les articles de la CDI en tant que « règle[s] pertinente[s] de droit international applicable[s] dans les relations entre les parties » (au sens de l'Art. 31.3.*c* de la Convention de Vienne sur les droit des traités) aux fins d'interpréter les règles secondaires de responsabilité présentes dans les accords du système OMC. Présente dans certaines décisions relevant du régime des contre-mesures,[33] l'orientation susmentionnée a été tout récemment confirmée dans le rapport rendu en 2011 par l'Organe d'appel de l'OMC dans l'affaire *États-Unis – Droits antidumping et droits compensateurs*, portant sur des questions d'attribution du fait illicite.[34] S'agissant de définir le sens de l'expression «organisme public» figurant à l'Art. 1.1.*a*.1 de l'Accord sur les subventions et mesures compensatoires (ci-après Accord SMC), qui s'occupe d'établir des critères d'attribution en matière de subventions interdites, l'Organe d'appel a relevé les « similitudes dans les principes et fonctions essentiels » existant entre la disposition controversée et les Articles 4, 5 et 8 du Projet de la CDI, mais il a exclu la pertinence du principe de la *lex specialis* dans le cas d'espèce, en concluant que « le traité *appliqué* est l'*Accord SMC* et il doit être *tenu compte* des règles d'attribution des articles de la CDI pour interpréter le sens des termes de ce traité».[35] À la lumière de ces précisions, l'Organe d'appel a infirmé la constatation du Groupe spécial selon laquelle l'expression «organisme public» figurant dans l'Accord SMC désignerait « toute entité contrôlée par les pouvoirs publics » et

[32] Pour un exemple, voir CIRDI : Sempra Energy International c. Argentine, ARB/02/16, arrêt (28 septembre 2007), par. 374-378, concernant le recours à l'Art. 25 du Projet aux fins d'interpréter les conditions d'invocation de l'état de nécessité prévues dans un traité bilatéral d'investissement. Par ailleurs, cet arrêt a été annulé par une décision ultérieure prononcé par un Comité *ad hoc* en 2010 (CIRDI : Sempra Energy International c. Argentine, ARB/02/16, arrêt (29 juin 2010)).

[33] Voir, par exemple, pour ce qui est de l'interprétation du terme «contre-mesures» et de leur objet, OMC : États-Unis – Subventions concernant le coton Upland. Recours des États-Unis à l'arbitrage au titre de l'article 22:6 du Mémorandum d'accord sur le règlement des différends et de l'article 4.11 de l'Accord SMC, WT/DS267/ARB/1, Décision de l'Arbitre (31 août 2009), par. 4.40-4.43, 4.113.

[34] OMC : États-Unis – Droit antidumping et droits compensateurs définitifs visant certains produits en provenance de Chine, WT/DS379/AB/R, Rapport de l'Organe d'appel (11 mars 2011), par. 282-322.

[35] *Ibidem*, par. 311-316 (italiques dans l'original).

s'est aligné sur une interprétation plus flexible de cette notion,[36] conforme aux indications du commentaire de la CDI à l'Art. 5 du Projet, en vertu duquel le fait que l'État détienne une part plus ou moins grande du capital ou des actifs d'une entité n'est pas un critère décisif pour établir l'attribution du comportement de cette entité à l'État.[37]

Une deuxième tendance détectable dans la pratique judiciaire consiste à utiliser les articles de la CDI de manière complémentaire aux règles spéciales de responsabilité, aux fins d'*intégrer* la discipline posée par celles-ci. Une manifestation plus «modérée» de cette approche se trouve, par exemple, dans l'arrêt rendu en 2007 par le Tribunal arbitral institué dans le cadre du CIRDI relativement à l'affaire *Archer Daniels Midland Company c. Mexique*.[38] Face à la question de savoir si les règles spéciales de responsabilité issues de l'Accord de libre échange nord-américain (ci-après ALENA) excluaient le droit du défendeur de recourir à des contre-mesures en vertu du droit coutumier – et le recours aux articles pertinents de la CDI –, le Tribunal a d'abord évoqué le principe de la *lex specialis*, selon lequel « le droit coutumier est (…) sans effet sur les conditions d'existence d'une violation des obligations de protection des investissements en vertu de l'ALENA, car il s'agit d'une question régie expressément par le chapitre 11 [de l'ALENA] ».[39] Cependant, le Tribunal a considéré que le droit international coutumier de la responsabilité, tel que codifié dans les articles de la CDI, continue de s'appliquer « de façon résiduelle » pour toutes les questions non spécifiquement régies par l'ALENA.[40] Notant que les dispositions pertinentes de l'ALENA ne prévoyaient ni interdisaient expressément le recours aux contre-mesures, le Tribunal a fait application du « régime par défaut » institué par les articles de la CDI en la matière, aux fins d'évaluer (et puis rejeter) la prétention du défendeur.[41] À bien regarder, la solution retenue dans l'affaire *Archer* est tout à fait conforme à l'esprit de l'Art. 55 du Projet, dont l'intention est de mettre en exergue le caractère supplétif des articles de la CDI vis-à-vis des règles spéciales de responsabilité. Dans l'espèce, en effet, les règles spéciales et les règles générales en jeu portaient sur des aspects différents du rapport de responsabilité et, de ce fait, l'application

[36] *Ibidem*, par. 310, 320-322.

[37] Voir texte et commentaire de l'Art. 5 du Projet (qui porte sur le «Comportement d'une personne ou d'une entité exerçant des prérogatives de puissance publique») dans Crawford 2003, pp. 119-122 (notamment par. 3 du commentaire, p. 120).

[38] CIRDI : Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. c. The Mexique, ARB(AF)/04/05, arrêt (21 novembre 2007) (la traduction française est traite de la compilation du SG, et notamment du NU Doc. A/65/76, par. 54).

[39] *Ibidem*, par. 116. Voir aussi par. 118: « Les règles de droit international coutumier que les articles de la CDI codifient ne s'appliquent pas à des questions régies expressément par des règles spéciales, en l'occurrence le chapitre 11 de l'ALENA en l'espèce ».

[40] *Ibidem*, par. 119.

[41] *Ibidem*, par. 120-122, 124-160 (pour l'application des principes du Projet en matière de contre-mesures) et par. 304.3 (pour la conclusion du Tribunal sur la non-conformité au droit international des contre-mesures adoptées par le Mexique).

des secondes n'empiétait pas sur l'efficacité des premières. Toutefois, le raisonnement développé dans l'arrêt *Archer* est remarquable dans la mesure où il invite à la plus grande prudence quant à la possibilité d'envisager des régimes «fermés» ou «exclusifs» de responsabilité, en tant que tels complètement imperméables à l'action des principes généraux de responsabilité codifiés dans le Projet.

Un pas supplémentaire semble avoir été franchi par la Chambre du TIDM dans l'avis consultatif de 2011 relatif à l'affaire des *Responsabilités des États qui patronnent des activités dans la Zone*. Un des problèmes en jeu était de définir le régime de responsabilité établi par l'Art. 139.2, première phrase, de la Convention des Nations Unies sur le droit de la mer, aux termes duquel « [s]ans préjudice des règles du droit international (…) un État Partie (…) est responsable des dommages résultant d'un manquement de sa part des obligations qui lui incombent en vertu de la présente partie [partie XI, relative à la Zone] ». La Chambre du TIDM a correctement vu dans cette disposition une règle spéciale de responsabilité dans la mesure où celle-ci, en prévoyant comme condition de la responsabilité de l'État Partie le fait qu'un dommage résulte du manquement à ses obligations, constituerait une exception au droit international coutumier, qui veut que la responsabilité de l'État se trouve d'ordinaire engagée même en l'absence de tout dommage.[42] En même temps, la Chambre n'a pas exclu que, en vertu de la clause de non préjudice esquissée dans la première partie de l'Art. 139.2, les règles coutumières codifiées dans les articles de la CDI puissent *compléter* celles relatives à la responsabilité énoncées dans la Convention du droit de la mer.[43] Une telle possibilité a été exploitée par la Chambre aux fins de « combler toute lacune qui pourrait exister dans le régime de la responsabilité établi par la partie XI de la Convention », et notamment pour envisager le cas où le manquement à ses obligations par un État qui patronne une activité, n'a pas entraîné de dommage matériel: un tel cas, selon la Chambre, serait « couvert par le droit international coutumier ».[44] On peut supposer que cette reconstruction déploie ses effets aux fins d'établir le contenu du régime de responsabilité applicable aux grands fonds marins. Étant donné le lien de causalité établi par l'Art. 139.2 de la Convention du droit de la mer entre le manquement aux obligations et le dommage causé par ce manquement, il est raisonnable d'imaginer que la conséquence typique découlant de la violation de cette disposition consistera dans l'obligation de réparation, dont la forme et le montant « sera fonction du dommage effectif et de la faisabilité technique d'un retour au *statu quo ante* ».[45] Toutefois, la référence au droit international coutumier de la responsabilité n'empêcherait pas que d'*autres conséquences*, prévues par les articles de la CDI (cessation, garanties de non-répétition, satisfaction), puissent s'appliquer dans l'hypothèse d'infractions aux obligations de la partie XI

[42] TIDM : Activités menées dans la Zone, Chambre des fonds marins, supra n. 19, par. 178.

[43] *Ibidem*, par. 169 et 171.

[44] *Ibidem*, par. 208 et 210.

[45] *Ibidem*, par. 197.

de la Convention du droit de la mer n'entraînant pas de dommages matériels. Le raisonnement développé dans l'avis est remarquable non seulement en raison de la vision dynamique des rapports entre règles spéciales et règles générales de responsabilité qu'il révèle, mais aussi pour le fait de rappeler que le devoir des juges agissant dans le cadre des soi-disant régimes autonomes est de rechercher dans tous les cas une application coordonnée des deux corps de règles.

Tout en présentant des nuances et des implications différentes, les trois décisions considérées confirment l'inclination des juges internationaux vers une utilisation «systémique» des articles de la CDI aux fins du traitement des problèmes qui se posent dans le contentieux de la responsabilité. Une telle approche contribuerait bien évidemment à renforcer la valeur de principe des règles codifiées dans le Projet.

4 Conclusion

Ce bref aperçu de l'application judiciaire des articles de la CDI laisse finalement des impressions assez contradictoires. D'une part, il y a la constatation d'une réception fort inégale des articles dans la pratique judiciaire, dont les raisons peuvent être ramenées au caractère controversé du contenu de certains des principes codifiés dans le Projet, aussi bien qu'à leur statut incertain sur le plan du droit positif. D'autre part, on assiste à une tendance de plus en plus marquée, même de la part des juridictions agissant dans le cadre de domaines «spécialisés» du droit international, à utiliser les articles de la CDI en tant que termes de référence pour l'encadrement des questions de responsabilité soulevées dans le contentieux international. Face à ces indications contradictoires, on devrait saluer comme opportun le fait que l'AG en 2010 ait demandé au SG de procéder à une nouvelle actualisation de la compilation des décisions judiciaires et de soumettre des informations à cet égard « bien avant » la soixante-huitième session de 2013.[46] La démarche de l'AG est bien évidemment liée au choix de renvoyer à cette date la prise de décision sur « la question de l'adoption d'une convention internationale sur la responsabilité de l'État pour fait internationalement illicite ou toute autre mesure appropriée sur la base des articles ».[47] La perspective suivie par l'AG a donc été, une fois encore, de laisser «sédimenter» dans la pratique les articles de la CDI et d'attendre des confirmations ultérieures de leur accueil par la jurisprudence internationale. Cependant, pour important que puisse être l'apport des décisions judiciaires dans le processus de consolidation et de codification des principes de la matière, on ne devrait pas trop en attendre de la part des juges internationaux. Comme le dédicataire de ces lignes l'a très justement remarqué, « [w]hile it is true that judgments are an important element of international practice in the

[46] Voir Résolution 65/19, par. 3.

[47] *Ibidem*, par. 4.

development of international law, it is also true that their immediate function, the reason why they are established, is that of settling disputes ».[48] Dans l'accomplissement de cette fonction, consistant à répondre aux questions controversées soumises par les parties à un différend, le juge ne saurait certainement pas endosser la tâche de « formuler avec plus de précision et de systématiser les règles du droit international »,[49] qui est typique de la codification. C'est donc aux États, maîtres ultimes du processus de codification, qu'incombe en dernier ressort la solution des problèmes les plus épineux qui affectent encore le droit de la responsabilité, tel que reflété dans le Projet de la CDI.

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[48] Treves 2006, p. 161.

[49] Voir Art. 15 du Statut de la Commission du droit international, Résolution 174 (II) de l'AG (21 novembre 1947 et modifications suivantes).

The Effect of Armed Conflict on Treaties: A Stocktaking

Lucius Caflisch

1 Introduction

The issue of the survival, termination or suspension of international treaties in the event of armed conflict, or withdrawal from them, must be almost as old as the conclusion of treaties itself. It mainly arises because the bulk of international agreements are concluded in times of peace and contain no provisions on what will be their fate if one or several States Parties participate in armed conflicts. This is the case, for example, for the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)[1] or for the agreements on the peaceful settlement of disputes, both of which Tullio Treves knows so well.

Discussions on the problem, and on possible solutions, reach back to the early nineteenth century,[2] and three main *theories* have emerged:

(i) Armed conflict is an extralegal phenomenon which terminates the operation of treaties. According to this natural-law theory, war was the expression of a breaking away from the existing social compact (*contrat social*) on the international level.

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[1] Entered into force on 16 November 1994.

[2] For an abundant bibliography on the subject, see The Effect of Armed Conflict on Treaties: An Examination of Practice and Doctrine. Memorandum by the Secretariat, UN Doc. A/CN.4/550 (1 February 2005), pp. 88–95.

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(ii) According to a second conception, armed conflict is a factual as well as a legal phenomenon. Rights and duties established by treaty will survive, such as those relating to boundaries and territorial regimes, or rights of third parties, i.e. individuals, as long as their continuation is compatible with the policies pursued by the belligerent. The basic idea is that of survival rather than of termination or suspension.

(iii) As is often the case in international law, there is an intermediary view according to which there *is* no clear rule and there is no likelihood of there being one on account of the diverging interests of States.[3]

Regarding the existing *practice*, two tendencies may be noted. The first is that followed by the continental State, according to which treaties *lapse* if there is an armed conflict between States Parties to them. According to the second tendency, mainly represented by Anglo-American case law, at least some categories of treaties or treaty provisions will survive.

Among the cases following the second tendency, there are a number of decisions by the United States Supreme Court and other tribunals.[4] These decisions pertain to the 1794 Jay Treaty,[5] to other treaties of friendship, commerce and navigation (FCN), and to treaties establishing boundaries and territorial regimes. Regarding the former, one will note, however, that they will not necessarily continue to operate in full, for some of their provisions can be separated from the rest of the treaties without affecting the continued validity of the remaining provisions. Among the treaties which do not survive, one finds the "political" treaties, that is, those whose operation depends "on the existence of normal political and social relations between States",[6] such as peace treaties, treaties of friendship and alliance,[7] non-aggression pacts and status-of-force agreements (SOFA).

European practice and case law gradually began to follow the same tendency and have not since World War II.

2 Some Particular Issues

As pointed out already, the existence of an armed conflict does not always entail the outright and complete termination of treaties. First, *some rules* of an extinct treaty may survive. Second, the agreement, or a part thereof, may only be *suspended*. Such is the case for a number of multilateral treaties, the obligations of

[3] Delbrück 2000, p. 1369.

[4] See infra, para 4.3. lett. e).

[5] Treaty of Amity, Commerce and Navigation (London, 19 November 1794), entered into force on 19 February 1856.

[6] Delbrück 2000, p. 1371.

[7] Except those containing provisions on individuals' private rights which are separable from the rest of the treaty. See infra, para 4.3. lett. e).

which belligerent States may be temporarily unable to meet; the issue, here, is closely related to that of the impossibility of performance (Article 61 of the Convention on the Law of Treaties (Vienna, 23 May 1969; hereinafter VCLT).[8] Another problem arising in this connection is that of the *effect* of suspension: Do suspended agreements, or provisions thereof, automatically bounce back into operation at the end of the armed conflict, or is an agreement between the Parties or a decision of an independent third person required?

A further issue is that of the defining "armed conflict". As is well known, riots and similar forms of violence are not armed conflicts,[9] nor are forms of a limited use of force such as "limited actions of self-defence", "humanitarian interventions" and "limited use of force on the high seas". For treaties to be terminated or suspended, the situation must qualify as an "armed conflict". It may well be, however, that events, even though they have not reached the threshold of armed conflict, make the performance of the treaty or of some of its provisions temporarily or permanently impossible, or bring about a fundamental change of circumstances (Articles 61 and 62 of the VCLT).

A connected issue is the characterisation of sanctions taken pursuant to Chapter VII of the United Nations Charter. Lawful recourse to such measures is not regarded as amounting to "armed conflict" but as a lawful move, within the framework of collective security, to restore the lawful order. In such situations there will be no extinction or suspension of treaties, nor withdrawal from them, except if an impossibility of performance or a fundamental change of circumstances materialises or if termination, suspension or withdrawal forms part of the sanctions taken under Chapter VII.

The next question to be examined under the present heading is whether the rules determining the fate of treaties should only apply to *international* armed conflicts or also cover non-international conflicts. There is little State practice—if any—regarding the latter, although at present non-international conflicts outnumber international conflicts. This suggests that the exclusion of internal conflicts—or at least of those which have been instigated or fomented by external elements—would considerably diminish the relevance of any codification or progressive development of the rules governing the effects of armed conflict on treaties. Conversely, one may well ask whether the issues relating to non-international

[8] Entered into force on 27 January 1980.

[9] See: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea; Geneva Convention relative to the Treatment of Prisoners of War; and Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), entered into force on 21 October 1950; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II) (Geneva, 8 June 1977), entered into force on 7 December 1978.

conflict could and should not be disposed of by the rules of Articles 61 (impossibility of performance) and 62 (fundamental change of circumstances).

Which are the hypotheses in which the fate of treaties in the event of armed conflict has to be determined? The classical situation is, of course, that of a treaty between two or more States participating in an international armed conflict. A second relevant situation is that of a belligerent State Party to a treaty vis-à-vis a third, non-belligerent State. The third hypothesis would be that of States involved in non-international conflicts.[10]

A question which must be addressed as well is that of how to deal with conventions to which international organisations are Parties concurrently with some of their member States. There seems to be little known practice on this point if one disregards that provided by the representatives of Iraq and Iran sitting peacefully next to each other in plenary organs of the United Nations during the war opposing the two countries. Rules will eventually have to be devised to take care of such situations.

3 The Question of the Effect of Armed Conflict Before the International Law Commission

Much of what has been said on the effects of armed conflict on treaties is contradictory or uncertain, as is shown by part of the diplomatic and judicial practice. So much so, as is shown by Article 73 of the VCLT,[11] that in the late 1960s the International Law Commission (ILC) and the community of States shied away from tackling the issue. At the same time the state of flux of the relevant law made a codification desirable—even if it was to include a part of *lex ferenda*—as it would inject some stability and order into a somewhat uncertain part of international law.

Despite the reminder inserted in Article 73 of the VCLT, it was not the ILC that started the codification process, however, but the Institute of International Law which, in 1985, adopted a resolution on "The Effect of War on Treaties" (Rapporteur: Mr. B. Broms).[12] While this text is of excellent quality, it is characterised by the fact that it only covers *international* armed conflict—a limitation due to the fact that, at the time, the tendency to engage in non-international conflicts was less pointed than today.

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[10] Report of the International Law Commission, 63rd Session, UN Doc. A/63/10 (2011), p. 173, at p. 179, commentary (2) on Article 1.

[11] The Article prescribes: "The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the responsibility of a State or from the outbreak of hostilities between States."

[12] Resolution of 28 August 1985. 1986 Yearbook of the Institute of International Law 61-II, p. 278.

The topic appeared on the ILC's agenda in 2004, and Mr. I. Brownlie was appointed Special Rapporteur. Between 2005 and 2008, Mr. Brownlie presented four reports,[13] while the Secretariat submitted a memorandum entitled: "The Effects of Armed Conflicts on Treaties: An Examination of Practice and Doctrine".[14] In the course of its debates on the subject, the Commission established a working group to assist it in its consideration of the draft articles prepared by the Special Rapporteur. That Group put forward a number of proposals on controversial issues. The suggestions made by it were subsequently accepted by the Commission and transmitted to its Drafting Committee. The efficiency displayed by the Special Rapporteur and the organs of the Commission made it possible for the latter to examine 18 draft articles completed by an annex, and the commentaries thereon, in 2008, only four years after the start of the ILC's work on the topic. At that time, Mr. Brownlie resigned from the Commission. The Draft Articles approved by the ILC in a first reading were then submitted to member States for comments.

In 2009, the Commission appointed a new Special Rapporteur in the person of the present author who, in 2010, prepared a first (and only) report in which he analysed Member States' reactions to the Draft and proposed some changes in it.[15]

After a discussion of that Report by the full Commission, the new version of the Draft Articles presented by the Special Rapporteur was transmitted to the ILC's Drafting Committee and then subjected to a second reading by the Commission. That exercise led to the definitive adoption of the Draft Articles and the accompanying commentaries on 17 May and 5 August 2011, respectively.[16] The ILC also recommended to the United Nations General Assembly: (a) to take note of the Draft Articles and to annex them to its resolution; and (b) to consider, at a later stage, the elaboration of a convention on the basis of these Articles.[17] The Commission's somewhat reserved appraisal of its own work was probably due to the difficulty of

[13] First Report on the Effects of Armed Conflicts on Treaties by Mr. Ian Brownlie, Special Rapporteur, UN Doc. A/CN.4/552 (21 April 2005); Second Report on the Effects of Armed Conflicts on Treaties by Mr. Ian Brownlie, Special Rapporteur, UN Docs A/CN.4/570 (16 June 2006) and A/CN.4/570/Corr.1 (12 July 2006); Third Report on the Effects of Armed Conflicts on Treaties by Mr. Ian Brownlie, Special Rapporteur, UN Docs A/CN.4/578 (1 March 2007) and A/CN.4/578/Corr.1 (24 July 2007); and Fourth Report on the Effects of Armed Conflicts on Treaties by Mr. Ian Brownlie, Special Rapporteur, UN docs A/CN.4/589 (14 November 2007) and A/CN.4/589/Corr.1 (16 April 2008).

[14] UN Docs A/CN.4/550 (1 February 2005) and A/CN.4/550/Corr.1 (3 June 2005).

[15] Effects of Armed Conflicts on Treaties: Comments and Information Received from Governments, UN Docs A/CN.4/622 (15 March 2010) and A/CN.4/622/Add.1 (12 May 2010).

[16] First Report on Effects of Armed Conflicts on Treaties, by Mr. Lucius Caflisch, Special Rapporteur, UN Doc. A/CN.4/627 (22 March 2010) and A/CN.4/627/Add.1 (21 April 2010).

[17] Effects of armed conflicts on treaties: Note on the recommendation to be made to the General Assembly about the draft articles on the Effects of armed conflicts on treaties, by Mr. Lucius Caflisch, Special Rapporteur, UN Doc. A/CN.4/644 (18 May 2011).

identifying the precise state of the law in the matter, to the fear of the possible consequences of a failed codification conference or of insufficient ratification of its result, and to the probable unwillingness of States to adopt a set of firm rules in this vital and delicate matter, despite the fact that the presence of such rules would be a welcome contribution to the stability of the international order.

4 The Content of the Draft Articles

4.1 Scope and Definitions (Articles 1 and 2)[18]

Article 1 makes it clear that the Draft Articles only cover treaty relations between States, to the exclusion of those between one or several States and another subject of international law, such as an international organisation, for example in the framework of the United Nations Convention on the Law of the Sea of 10 December 1982. The ILC thought that the fate of treaties involving international organisations as Parties should not be dealt with in the present Articles because this would mean a foray into hitherto uncharted territory; but it also thought that treaties such as the Law of the Sea Convention should be covered insofar as the relations between *States* regarding that Convention were concerned. The formula "relations between *States* under a treaty" elegantly reflects this idea.

The armed conflict does not have to involve *all* States Parties to a treaty; the Draft Articles will also apply when only one State Party to a treaty participates in the conflict. Accordingly, they cover two possible objects: (i) treaty relations between States Parties to the conflict; and (ii) treaty relations between a State Party to the conflict and a State which is not.

Article 2 defines "treaties" in the same manner as Article 2.1.a of the VCLT.[19] Accordingly, the scope of the Draft Articles is limited to written agreements and, as pointed out already, to treaty relations between States.

Far more delicate was the question of how to define "armed conflict". Originally that notion had been given a definition *sui generis*, i.e. one limited in its effect to the

[18] Article 1: "*Scope*. The present draft articles apply to the effects of armed conflict on the relations of States under a treaty". Article 2: "*Definitions*. For the purposes of the present draft articles: (a) 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation, and includes treaties between States to which international organisations are also parties; (b) 'armed conflict' means a situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organised armed groups."

[19] According to this provision, "'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

Draft Articles and, perhaps most importantly, to conflicts between *States*.[20] Therefore, a new definition had to be elaborated. This could have been done by drawing from the definitions in the Geneva Conventions on the Protection of War Victims and the Additional Protocols, but such an operation would have resulted in a complex solution. A simpler approach was that offered by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor* v. *Tadić*:

> an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.[21]

This formula calls for two comments. First, the *Tadić* definition was a broad one as, owing to the nature of the specific situation to which it was to apply, it also covered conflicts opposing organised armed groups within a State. Second, it only applied to *protracted* violence within the framework of non-international conflicts. In the end, the ILC adopted the *Tadić* definition but amputated it of its last element—violence between organised armed groups—maintained the word "protracted" in order not unduly to extend the concept of non-international armed conflict, and explained, in the commentary, that the formula included belligerent occupation as an integral part of armed conflict.[22] This was how the final version of Article 2.1.b came about.[23]

4.2 Core Provisions (Articles 3–7)[24]

Article 3, which is patterned on Article 2 of the 1985 Resolution of the Institute of International Law, proclaims the basic principle governing the matter: the

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[20] "'Armed conflict' means a state of war or a conflict which involves armed operations which by their nature or extent are likely to affect the application of treaties between States parties to the armed conflict or between a State party to the armed conflict and a third State, regardless of a formal declaration of war or any declaration by any or all of the parties to the armed conflict" (Report of the International Law Commission, 60th Session, UN Doc. A/63/10 (2008), p. 83). The above definition, which was limited to international armed conflicts, corresponded to Article 1 of the 1985 Resolution of the Institute of International Law.

[21] ICTY, Prosecutor v. Dusko Tadić, IT-94-1-A, Appeals Chamber, Decision (2 October 1995), para 70.

[22] For another limitation, see infra, p. 39.

[23] This provision now reads as follows: "'armed conflict' means a situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organised armed groups."

[24] These provisions prescribe: Article 3: "*General principle*. The existence of an armed conflict does not ipso facto terminate or suspend the operation of treaties: (a) as between States parties to the conflict; (b) as between a State party to the conflict and a State that is not." Article 4: "Provisions on the operation of treaties. Where a treaty itself contains provisions on its operation in situations of armed conflict, those provisions shall apply." Article 5: "Application of rules on treaty interpretation. The rules of international law on treaty interpretation shall be applied

existence of an armed conflict, as defined above, does not *ipso facto* terminate or suspend a treaty. Nor is there a presumption of continued operation. All that Article 3 says is that extinction or suspension is not to be presumed. Despite some views to the contrary—favouring a presumption of continued operation—, the Commission's majority decided not to alter the text proposed by the first Special Rapporteur, undoubtedly because it considered that a more far-reaching rule, creating a general presumption of continuity, would not be justified by international practice.

However, the Article 3 rule certainly sounds the death knell for the old theory of a conventional *tabula rasa* in the event of armed conflict. The evolution of the judicial practice toward the idea that treaties do not necessarily cease to operate as a consequence of armed conflict is described at some length in commentary (2) on Article 3. Perhaps the most authoritative statement on the contemporary practice can be found in the judgment of the Supreme Court of the United States in *Karnuth* v. *United States* (1929), where the Court had this to say:

> [t]he law of the subject is still in the making, and, in attempting to formulate principles at all approaching generality, courts must proceed with a good deal of caution. But there seems to be fairly common agreement that, at least, the following treaty obligations remain in force: stipulations in respect of what shall be done in a state of war; treaties of cession, boundary, and the like; provisions giving the right to citizens or subject of one of the high contracting powers to continue to hold and transmit land in the territory of the other; and, generally, provisions which represent completed acts. On the other hand, treaties of amity, of alliance, and the like, having a political character, the object of which 'is to promote

(Footnote 24 continued)
to establish whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict." Article 6: "*Factors indicating whether a treaty is susceptible to termination, withdrawal or suspension*. In order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, regard shall be had to all relevant factors, including: (a) the nature of the treaty, in particular its subject-matter, its object and purpose, its content and the number of parties to the treaty; and (b) the characteristics of the armed conflict, such as its territorial extent, its scale and intensity, its duration and, in the case of non-international armed conflict, also the degree of outside involvement." Article 7: "*Continued operation of treaties resulting from their subject-matter*. An indicative list of treaties the subject-matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict, is to be found in the annex to the present draft articles." Annex: "Indicative list of treaties referred to in Article 7: (a) Treaties on the law of armed conflict, including treaties on international humanitarian law. (b) Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries. (c) Multilateral law-making treaties. (d) Treaties on international criminal justice. (e) Treaties of friendship, commerce and navigation and agreements concerning private rights. (f) Treaties for the international protection of human rights. (g) Treaties relating to the international protection of the environment. (h) Treaties relating to international watercourses and related installations and facilities. (i) Treaties relating to aquifers and related installations and facilities. (j) Treaties which are constituent instruments of international organisations. (k) Treaties relating to the international settlement of disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement. (l) Treaties relating to diplomatic and consular relations."

> relations of harmony between nation and nation', are generally regarded as belonging to the class of treaty stipulations that are absolutely annulled by war.[25]

The above extract suggests that treaties of cession, on boundaries and the like, as well as agreements attributing rights to individuals (who could be considered "third parties" in respect of the armed conflict) shall continue in operation, while so-called political treaties (treaties of friendship, of alliance and of military cooperation) would lapse. This viewpoint may, today, be considered as being universally accepted. The days of "war ends everything" are over and have been replaced by "armed conflict does not end everything". This finding prompts the question of how to determine what survives and what does not. Articles 4–6 provide three successive means for solving the issue.

A first means are the provisions of the treaty itself, says *Article 4*. Indeed, some treaties do contain provisions on this point.

A second means, according to *Article 5*, are the rules on treaty interpretation. Indeed, the provisions of the treaty at issue may reveal whether the treaty was intended to continue or not. While the Article takes no position on the content of the existing rules on treaty interpretation, the ILC clearly had Articles 31 and 32 of the VCLT in mind. The Commission did not, however, expressly refer to these provisions, first on account of its policy not to make cross-references to other legal instruments and, second, because not all States are Parties to the VCLT.[26]

In many cases, neither Article 4 nor Article 5 will lead to results, which is where *Article 6* comes into play: Whenever the application of Articles 4 and 5 is inconclusive, the factors listed in that provision may be resorted to. Some of these factors relate to the *nature of the treaty* and include the treaty's subject-matter, its object and purpose, its content, and the number of Parties to it. Others concern the *nature of the armed conflict*: its territorial extent, its scale and intensity, its duration, and, in the event of a non-international armed conflict, "the degree of outside involvement". As explained in the commentary, this last element

> establishes an additional threshold intended to limit the possibility for States to assert the termination or suspension of the operation of a treaty, or a right of withdrawal, on the basis of their participation in such types of conflicts. In other words, this element serves as a factor of control to favour the stability of treaties: the greater the involvement of third States in a non-international armed conflict, the greater the possibility that treaties will be affected, and vice versa.[27]

In other words, the definition of the second leg of the *Tadić* formula found in Article 2 is being limited and refined here: the Draft Articles cover non-international conflicts only if there is a "degree of outside involvement". But the Commission does not specify the necessary degree of such involvement.

The subject-matter is an essential element when it comes to determining the fate of a treaty, as is pointed out in *Article 7* of the Draft Articles: the continued

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[25] American International Law Cases (AILC), 1783–1968, Vol. 19, p. 49, at pp. 52–53.

[26] Report cited in note 10, p. 186, commentary (2) on Article 5.

[27] Ibidem, pp. 187–188, commentary (4) on Article 6.

operation of a treaty or parts of it may be implied by its subject-matter. To show what kinds of agreements may carry such an implication, the ILC has established a list which is attached to the Draft Articles but must be considered as *purely indicative*. On the one hand, this means that there may be other categories of treaties carrying the same implication of continuity; it also means, on the other hand, that the implication may be offset, e.g., by one or several of the factors mentioned by Article 6, for instance the absence of a significant degree of outside involvement in a non-international conflict. Inclusion in the list does carry a presumption, but a rebuttable one.

4.3 The Annex

Despite its inclusion at the end of the Draft Articles, it is most convenient to examine the *Annex* here.[28] At the time of the first reading of the Draft, the Annex as it then was had been criticised as being insufficiently rooted in practice, especially case law. While the content of the list did not change dramatically later on, an effort was made to complete the examination of the practice through additional research, especially into the decisions of national tribunals, and to enlarge the commentary on the Annex. Presently that commentary is almost as long as that on the Draft Articles themselves. There are now twelve categories of treaties on the indicative list:

(a) Treaties on the Law of Armed Conflict Including Treaties on International Humanitarian Law

These are agreements that are meant to apply, not in times of peace, but in situations of armed conflict. It stands to reason that agreements such as the Hague and Geneva Conventions on the laws of war and on international humanitarian law must continue in operation, as otherwise they would remain useless.

(b) Treaties Creating Permanent Regimes, Including Treaties Establishing Land and Maritime Boundaries

The grandfather of territorial treaties having survived armed conflict is, of course, the Definitive Treaty of Peace and Friendship concluded between the United States and Great Britain (Paris, 3 September 1783),[29] for which the latter contended, and the former contested, that the fisheries rights stipulated in it in favour of the United States had been abrogated by the War of 1812. The Court of Arbitration found, in its award of 1910, that "international law in its modern

[28] Indeed, the Special Rapporteur would have preferred its insertion after Article 7 rather than at the end of the Draft.

[29] Entered into force on 12 May 1784.

development recognises that a great number of treaty obligations are not annulled by war, but at most suspended by it."[30]

There are a number of treaties of the same type which have been considered as having withstood the vicissitudes of war. In the case of *Meyer's Estate*, an appellate court of the United States, referring to the issue of the permanence of territory-related conventions or "dispositive treaties or dispositive parts of treaties", found that such provisions were "compatible with, and not abrogated by, a state of war".[31] The same rule applies to treaties establishing or guaranteeing territorial regimes or rights. Similarly, the situations created by the implementation of treaties of cession or by boundary agreements are not affected by armed conflict. And indeed, the survival of boundary treaties is equally ensured by other rules, such as Article 62.2.a of the VCLT according to which the termination or suspension of treaties on account of a fundamental change of circumstances is not possible for treaties drawing a boundary; or by the 1978 Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978), Article 11 of which prescribes that a succession of States does not as such affect boundaries established by a treaty, or rights and duties stipulated in a treaty and relating to the regime of a boundary.[32]

The basic reasons for the resilience of agreements related to territory seem to be that they go with the territory, just as charges on land go with ownership, and the proposition that merely occupied territory continues to belong to its sovereign and cannot be annexed by an occupant as long as there has been no permanent change of sovereign.

(c) Multilateral Law-Making Treaties

Multilateral treaties generally do not collapse *in toto* just because one or several of their States Parties happen to participate in an armed conflict. This is particularly true for conventions establishing relatively general and abstract rules in a given field (health, drugs, protection of industrial and intellectual property, railway traffic, civil procedure, and so forth), and even more so for codifications in the field of international law. This principle has been accepted by a number of governments, as well as by national tribunals, witness the case of *Masinimport* v. *Scottish Mechanical Light Industries, Inc*. (1976), in which a Scottish court concluded that the Protocol on Arbitration Clauses (Geneva, 24 September 1923)[33] and the Convention on the Execution of Foreign Arbitral Awards (Geneva, 26 September 1927)[34] qualified as "multipartite law-making treaties" and had survived World War II, even though they may have been suspended. It is of course possible that a

[30] Arbitral Tribunal: The North Atlantic Coast Fisheries Case (Great Britain/United States), Award (7 September 1910).

[31] AILC 1783–1968, Vol. 19, p. 133, at p. 138.

[32] Entered into force on 6 November 1996.

[33] Entered into force on 28 July 1924.

[34] Entered into force on 25 July 1929.

State Party to such a convention is, on account of the armed conflict, not in a position to meet its treaty obligations owing to an impossibility of performance under Article 61 of the VCLT.

(d) Treaties on International Criminal Justice

One feature characterising contemporary international law is the establishment of international judicial organs to prosecute and try individuals accused of having committed international crimes. Some of these organs have been created by treaty, in particular the International Criminal Court (ICC) set up by the Rome Statute of 17 July 1998,[35] while others are the products of Security Council resolutions. It is the former that must be considered here.

Obviously treaties instituting the organs in question must survive armed conflicts since part of their objective is the repression of war crimes under international law; it will also be noted that part of the treaties falling into this category contain rules of *jus cogens* which are bound to survive. Although the kind of agreements considered here are relatively recent and have generated little practice, they must be put on the list, if only on a *lex ferenda* basis. It will be noted that the inclusion of these originated from a Swiss proposal which, however, had suggested the incorporation of the whole body of international criminal law,[36] whereas the present text is confined to treaties establishing international mechanisms to apply that law.

(e) Treaties of Friendship, Commerce and Navigation (FCN), and Treaties Concerning Private Rights

This is, quantitatively speaking, the largest category of agreements to be considered. These agreements may be subdivided into FCN treaties and treaties protecting the rights of individuals.

FCN treaties have been analysed in some detail by the Commission.[37] The bulk of cases—or at least of those bearing on individuals' rights—were decided by United States and British courts and related to the Jay Treaty of 1794. In addition to *Karnuth*, mentioned earlier, one should cite a *dictum* of the United States Supreme Court in the early case of *Society for the Propagation of the Gospel* v. *Town of New Haven* (1823), where the Court pointed out that

> [t]reaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.[38]

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[35] Rome Statute of the International Criminal Court (Rome, 17 July 1998), entered into force on 1st July 2002.

[36] See Report cited in note 10, p. 205, commentaries (23) and (24).

[37] Ibidem, paras 27–38, pp. 206–208.

[38] AILC 1783–1968, Vol. 19, p. 49, at p. 54.

There are also numerous cases about treaties which protected individuals' rights but did not wear the FCN label. One may mention as examples *State ex rel. Miner* v. *Reardon* (1929) and *Goos* v. *Brocks*,[39] which pertained to Article XIV of the Treaty of Commerce and Navigation between the United States and Prussia (Washington, 1 May 1828).[40] That provision protected the right of the nationals of one Party to inherit property on the territory of the other. The courts involved upheld the continued validity of that Article despite World War I.

A similar trend is observable on the European continent, as is shown by a decision of the Civil Tribunal of Grasse (France), which states the following:

> Treaties concluded between States who subsequently become belligerents are not necessarily suspended by war. In particular, the conduct of the war [must allow for] the economic life and commercial activities to continue in the common interest. [Hence] the Court of Cassation, reverting … to the doctrine which it has laid down during the past century (…), now holds that treaties of a purely private law nature, not involving any intercourse between the belligerent Powers, and having no connection with the conduct of hostilities, are not suspended in their operation merely by the existence of a state of war.[41]

Regarding other *agreements concerning the private rights* of individuals, one can mention the numerous bilateral investment treaties (BITs) protecting investments made by the nationals of one Party on the territory of the other. These private rights, in principle, survive armed conflicts, together with the attendant procedural right of the individual to act against the State on the international level. The rule of survival would seem to extend even to agreements dealing with *procedural rights in general*, as is shown by the *Masinimport* case cited earlier.

In conclusion, the survival rate of the provisions granting and protecting private rights and the attendant procedural rights seems to be high, regardless of the label carried by the treaty in question: FCN, commerce, establishment, investment protection or other; what matters is whether the agreement confers rights on "third" (private) parties and whether the relevant provisions are separable from the rest of the agreement.

(f) Treaties for the International Protection of Human Rights

The principle governing this category of treaties is expressed in Article 4 of the 1985 Resolution of the Institute of International Law:

> The existence of an armed conflict does not entitle a party [to the treaty] unilaterally to terminate or to suspend the operation of treaty provisions relating to the protection of the human person, unless the treaty otherwise provides.

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[39] Ibidem, p. 117, at p. 122; *Goos v. Brocks*, Supreme Court of Nebraska, 10 January 1929, ibidem, p. 124.

[40] Entered into force on 14 March 1829.

[41] Decision of 22 June 1949, Annual Digest of Public International Law Cases 1949, No. 130.

The latter is the case of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)[42] Article 15 of which allows States Parties, in time of war or other public emergency, to take measures derogating from the Convention except from its core provisions (Articles 2, 3, 4, para 1, and 7),[43] provided that certain conditions are met. In addition, the well-foundedness of such derogations may be scrutinised, in specific cases, by the European Court of Human Rights. This does not mean that provisions other than core articles may be derogated from; all it says is that there may be no derogations from core provisions. The issue considered here must be distinguished from the question of the applicability of international human rights law in situations where the international law on armed conflict serves as *lex specialis*.[44]

(g) Treaties Relating to the International Protection of the Environment

As in categories (d) and (f), the international legislator, here, moves into largely uncharted territory, characterised by some degree of controversy. One cannot but recall, in this connection, that in its advisory opinion on the *Legality of the Threat or the Use of Nuclear Weapons*,[45] the International Court of Justice (ICJ), while denying that treaties relating to the protection of the environment could be intended to deprive a State of its right of self-defence, held that respect for the environment was one of the elements serving to assess whether a given action conformed to the principles of necessity and proportionality. The advisory opinion also drew attention to Articles 35.3 and 55 of Additional Protocol I to the Geneva Convention of 1949 on the Protection of War Victims, which relate to the environment.[46] The ILC notes, in its commentary, that the Court's observations "are, of course, significant" and that they provide "general and indirect support for the use of a presumption that environmental treaties apply in case of armed conflict".[47] It cannot be denied, however, that the presumption in favour of the survival of such treaties belongs, at least partly, to the realm of *lex ferenda*.

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[42] Entered into force on 3 September 1953, as amended by Protocol No. 11 (Strasbourg, 11 May 1994), entered into force on 1 November 1998, and Protocol No. 14 (Strasbourg, 13 May 2004), entered into force on 1 June 2010.

[43] These provisions deal, respectively, with the right to life, the prohibition of torture and of inhuman or degrading treatment, and the principle "No punishment without law".

[44] On this issue, cf. for example Pastor Ridruejo 2007, pp. 399–407.

[45] ICJ: Legality of the Threat or Use of Nuclear Weapons, Advisory Op. (8 July 1996).

[46] Article 35.3 of the Protocol prohibits the use of methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. According to Article 55, care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage; this protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

[47] Report cited in note 10, p. 212, commentary (56).

(h) Treaties on International Watercourses and Related Installations and Facilities

Here the presumption of continued applicability rests mainly on the fact that rules contained in multilateral treaties, such as the Treaty Respecting the Free Navigation of the Suez Canal (Constantinople, 29 October 1888)[48] (Article I), the Convention and Statute on the Regime of Navigable Waterways of International Concern (Barcelona, 20 April 1922)[49] (Article 15), and the Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997; hereinafter 1997 Convention on Watercourses)[50] (Article 29) provide for such a presumption in more or less veiled terms. A similar situation prevails in the category of

(i) Treaties on Aquifers and Related Installations and Facilities

The rules of the ILC's Draft Articles on the Law of Transboundary Aquifers[51] are similar to those of the 1997 Convention on Watercourses. The latter being presumed to continue in time of armed conflict, and the law of armed conflict providing for the protection of international watercourses, the Commission's commentary concludes that

> transboundary aquifers or aquifer systems and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflicts and shall not be used in violation of those principles and rules.[52]

In essence this means that, despite the absence of much practice, aquifer treaties, on account of their similitude with watercourse agreements, will be treated in the same way.

(j) Treaties Establishing International Organisations

In general the constituent instruments of international organisations are not, as practice shows, affected by the existence of armed conflicts involving Contracting Parties. This is the essence of what Article 6 of the 1985 Resolution of the Institute of International Law asserts, and the ILC agrees by establishing a presumption in that sense, adding that "there is scant practice to the contrary".[53]

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[48] Entered into force on 22 December 1888.

[49] Entered into force on 31 October 1922.

[50] Not yet in force.

[51] Report of the International Law Commission, 60th Session, UN Doc. A/63/10, para 53; and UN General Assembly Resolution 63/124 of 11 December 2008, UN Doc. A/RES/63/124 (15 January 2009), Annex.

[52] Report cited in note 10, p. 216, commentary (72). See also Article 18 of the Draft Articles on the Law of Transboundary Aquifers, supra n. 51, p. 27.

[53] Report cited in note 10, p. 214, commentary (67).

(k) Treaties Relating to the International Settlement of Disputes by Peaceful Means, Including Resort to Conciliation, Mediation, Arbitration and Judicial Settlement

This category of agreements may overlap, to some extent, with that of multilateral treaties establishing an international regime (category (b)). There is evidence of the survival of such agreements, and it will be seen later on, when dealing with Article 9.5 of the Draft Articles,[54] that a presumption of survival is desirable. It will also be noted, however, that the Commission's commentary defines this category of treaties fairly narrowly by limiting it to agreements on dispute settlement between *full subjects* of international law, thus excluding international mechanisms for the protection of human rights and the international protection of private investments; but instruments of that kind may be covered by categories (f) (treaties for the international protection of human rights) or (e) (agreements concerning private rights).

(l) Treaties Relating to Diplomatic and Consular Relations

The Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)[55] contains a series of provisions—Articles 24, 44 and 45—suggesting that treaties on this matter should survive armed conflicts. In its commentary,[56] the Commission quotes a long passage from the case concerning *United States Diplomatic and Consular Staff in Tehran* which suggests that treaty provisions protecting diplomatic representatives survive.[57]

The same can be said of treaty rules protecting consular agents and personnel, such as Articles 26 and 27 of the Vienna Convention on Consular Relations (Vienna, 24 April 1963),[58] and of what the ICJ declared in the *Diplomatic and Consular Staff* case. On the level of national practice, attention is being drawn by the ILC[59] to the decision of a California court in *Brownell* v. *City and County of San Francisco*.[60] Under the Treaty of Friendship, Commerce and Consular Rights (Washington, 8 December 1923) concluded between Germany and the United States,[61] land and buildings used by one Contracting State on the territory of the other were exempted from taxation. Taxes were claimed, however, when Switzerland, as a caretaker, and later on the United States Government, took over the premises of the German Consulate General in San Francisco. The local authorities,

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[54] See infra, p. 49.

[55] Entered into force on 24 April 1964.

[56] Report cited in note 10, p. 216, commentary (72).

[57] ICJ: United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment (24 May 1980), para 86.

[58] Entered into force on 19 March 1967.

[59] Report cited in note 10, p. 217, commentary (77).

[60] California Court of Appeal (21 June 1954), International Law Reports 1954, p. 432, especially at p. 433.

[61] Entered into force on 14 October 1925.

which claimed the taxes, argued that the 1923 Treaty had lapsed as a result of the Second World War; the United States Government contended that it had not. The Court of Appeal espoused the latter view, arguing that the exemption stipulated by the Treaty was not abrogated "since the immunity from taxation therein provided was not incompatible with the existence of a state of war". While this case primarily supports the continued operation of treaties of FCN, as is noted in the ILC's commentary, the 1923 Treaty dealt with consular issues as well; hence the case may also serve as evidence for the survival of agreements on consular matters.

(m) Conclusion

The above description suggests that the "survival" rate in the above categories of agreements is fairly high, the essential reason being the distinction drawn between "political" treaties, on the one hand, and, on the other, treaties establishing boundaries and territorial regimes, or agreements securing the "personal" rights of individuals, i.e. "third parties" not concerned by the armed conflict—unless, of course, their specific behaviour suggests otherwise. The idea was and is that, at least in this particular area, continuity should prevail as much as possible.

It must be kept in mind that the notion of FCN treaties is not a rigid and finite category. Individual rights may or may not be secured by treaties bearing that label. They may equally be found in other categories of agreements, "treaties of commerce" or "treaties of establishment" for instance.

Finally, treaties may contain a mix of provisions only few of which establish or guarantee personal rights. In such cases, the question of the separability of treaties arises—an issue which is addressed in the next subdivision of this paper.

4.4 Other Provisions Relevant to the Operation of Treaties (Articles 8–12)[62]

Article 8 allows States involved in an armed conflict to conclude treaties. A.D. McNair points out that there is no inherent impossibility for belligerent States to

[62] Article 8: *"Conclusion of treaties during armed conflict*. 1. The existence of an armed conflict does not affect the capacity of a State party to that conflict to conclude treaties in accordance with international law. 2. States may conclude agreements involving termination or suspension of a treaty or part of a treaty that is operative between them during situations of armed conflict, or may agree to amend or modify the treaty." Article 9: *"Notification of intention to terminate or withdraw from a treaty or to suspend its operation*. 1. A State intending to terminate or withdraw from a treaty to which it is a party, or to suspend the operation of that treaty, as a consequence of an armed conflict shall notify the other State party or States parties to the treaty, or its depositary, of such intention. 2. The notification takes effect upon receipt by the other State party or States parties, unless it provides for a subsequent date. 3. Nothing in the preceding paragraphs shall affect the right of a party to object within a reasonable time, in accordance with the terms of the treaty or other applicable rules of international law, to the termination of or withdrawal from the treaty, or suspension of its operation. 4. If an objection has been raised in accordance with para 3,

enter into treaties.[63] As examples G.G. Fitzmaurice mentions armistice agreements and agreements on the exchange of personnel and of safe conduct through enemy territory.[64] According to the ILC's commentary,[65] enemy States can also agree on the amendment or modification (cf. Part IV of the VLCT) of treaties.[66] The upshot is that States, though involved in armed conflict, retain their treaty-making power.

An important provision of the Draft Articles is *Article 9* on the notification of the intention to terminate or suspend treaties, or to withdraw from them. The question of how a State is to act, on the procedural level, when it holds that a given agreement has lapsed or should be suspended, has always been shrouded in mystery. Generally, the issue was settled at the end of the conflict.

Borrowing from Article 65 of the VCLT, *Article 9* of the Draft Articles establishes a notification procedure. A State intending to terminate or suspend a treaty, or to withdraw from it, on account of an armed conflict may notify the other

(Footnote 62 continued)
the States concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations. 5. Nothing in the preceding paragraphs shall affect the rights or obligations of States with regard to the settlement of disputes insofar as they have remained applicable." Article 10: *"Obligations imposed by international law independently of a treaty.* The termination of or the withdrawal from a treaty, or the suspension of its operation, as a consequence of an armed conflict, shall not impair in any way the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of that treaty." Article 11: *"Separability of treaty provisions*. Termination, withdrawal from or suspension of the operation of a treaty as a consequence of an armed conflict shall, unless the treaty otherwise provides or the parties otherwise agree, take effect with respect to the whole treaty except where: (a) the treaty contains clauses that are separable from the remainder of the treaty with regard to their application; (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and (c) continued performance of the remainder of the treaty would not be unjust." Article 12: *"Loss of the right to terminate or withdraw from a treaty or to suspend its operation*. A State may no longer terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict if, after becoming aware of the facts: (a) it shall have expressly agreed that the treaty remains in force or continues in operation; or (b) it must by reason of its conduct be considered as having acquiesced in the continued operation of the treaty or in its maintenance in force." Article 13: *"Revival or resumption of treaty relations subsequent to an armed conflict*. 1. Subsequent to an armed conflict, the States parties may regulate, on the basis of agreement, the revival of treaties terminated or suspended as a consequence of the armed conflict. 2. The resumption of the operation of a treaty suspended as a consequence of an armed conflict shall be determined in accordance with the factors referred to in draft article 6."

[63] McNair 1961, p. 696.

[64] Fitzmaurice 1948, p. 309.

[65] Report cited in note 10, p. 189, commentary (6) on Article 8.

[66] Article 43 VCLT provides: "The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, 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."

State Party or States Parties, or the depositary, of its intention (para 1). The notification takes effect upon its receipt by the other State Party or States Parties (para 2). If the latter omit to react, the notifying State is entitled to go ahead. If they object—within a reasonable time-span (para 3)—, all the States concerned shall seek a solution to their disagreement through the means indicated by Article 33.1 of the United Nations Charter (para 4). Nothing of what precedes affects the recourse to means of peaceful settlement that have remained applicable between the Parties (para 5).

The essential feature of Article 9 is that a procedure is provided which should bring some order into the chaos caused by armed conflict, that that procedure must be followed by the State wishing to end or suspend a treaty, or to withdraw from it, and that the procedure is not set in motion automatically. Another important feature is that the procedure may end either during the conflict or even thereafter. Finally, in connection with Article 9.5, the obligations of States in matters of dispute settlement would seem to survive in principle owing to their inclusion in the indicative list of the Annex to the Draft Articles (letter (k)).

Even where treaty rights have disappeared as a consequence of armed conflicts, this will not impair the duty of contracting States to meet obligations embodied in the treaty which they are subject to also independently of the treaty. This provision—*Article 10*—is modelled on Article 43 of the VCLT.[67]

The next provision, which has been alluded to already, is *Article 11*. It is based on Article 44 of the VCLT (and prefigured in Article 7 of the Draft Articles, which refers to the continuation of operation "in whole or in part"). It creates a presumption of non-separability which can be rebutted by showing: (i) that the treaty contains clauses that are separable from the remainder of its provisions with regard to their application; (ii) that the acceptance of those clauses was not an essential basis of the consent given by the other Party or Parties to be bound by the treaty as a whole; and (iii) that the "continued performance of the remainder would not be unjust". As pointed out in the commentary,[68] this passage is taken *verbatim* from Article 44.3.c of the VCLT, which originated from a proposal made at the Vienna Conference by the United States. What it means is that the separation of treaty provisions should not create a significant imbalance to the detriment of the other Party or Parties.

Article 12 is a near-perfect replica of Article 45 of the VCLT. It deals with the loss of the right, in the event of an armed conflict, to terminate or suspend a treaty, or to withdraw from it: a State may forego its right to terminate, to suspend or to withdraw—if there is such a right—if it has indicated, expressly or by its conduct, that it wishes the treaty to continue. The commentary notes that, when an armed

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[67] "The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, 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."

[68] Report cited in note 10, pp. 192–193, commentary (3) on Article 11.

conflict arises, the States concerned may not always be aware of the dimension that conflict may attain subsequently; their behaviour must therefore be appreciated at the moment when the conflict has attained its peak.[69] This is why the words "after becoming aware of the facts" have been inserted in the chapeau of Article 12.

Article 13, finally, deals with the post-war revival and resumption of treaty relations. The term "revival" applies to treaties that have lapsed or been suspended as a consequence of armed conflict. According to Article 13.1, positive action is required to bring them back to life, and such action will result in a *novation*. This was the device used by the Allies under Article 44 of the Peace Treaty with Italy (Paris, 10 February 1947).[70] The word "resumption" used in Article 13.2 can only apply to treaties *suspended* in the course of armed conflict, for what has lapsed cannot be "resumed". "Resumption" is not the result of a common decision by the Contracting Parties but of objective elements, i.e. those referred to in Article 6 of the Draft.

4.5 "No-prejudice" Clauses (Articles 14–18)[71]

The remainder of the rules examined here—Articles 14–18—are intended to show that the Draft Articles do not prejudice the application of other rules of international law. The first three provisions relate to the system of collective security established by the United Nations Charter.

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[69] Ibidem, p. 193, commentary (3) on Article 12.

[70] Entered into force on 15 September 1947. Article 44 of the Peace Treaty runs as follows: "1. Each Allied or Associated Power will notify Italy, within a period of six months from the coming into force of the present Treaty, which of its pre-war bilateral treaties with Italy it desires to keep in force or to revive. Any provision not in conformity with the present Treaty shall, however, be deleted from the above-mentioned treaties. 2. All such treaties so notified shall be registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations. 3. All such treaties not so notified shall be regarded as abrogated."

[71] Article 14: "*Effect of the exercise of the right to self-defence on a treaty*. A State exercising its inherent right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty to which it is a party insofar as that operation is incompatible with the exercise of that right". Article 15: "*Prohibition of benefit to an aggressor State*. A State committing aggression within the meaning of the Charter of the United Nations and Resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict that results from the act of aggression if the effect would be to the benefit of that State." Article 16: *"Decisions of the Security Council*. The present draft articles are without prejudice to relevant decisions taken by the Security Council in accordance with the Charter of the United Nations." Article 17: *"Rights and duties arising from the laws of neutrality*. The present draft articles are without prejudice to the rights and duties of States arising from the laws of neutrality." Article 18: *"Other cases of termination, withdrawal or suspension*. The present draft articles are without prejudice to the termination, withdrawal or suspension of treaties as a consequence of, *inter alia*: (a) a material breach; (b) supervening impossibility of performance; or (c) a fundamental change of circumstances."

Under *Article 14* a State wishing to exercise its natural right of self-defence in accordance with the United Nations Charter will not be prevented from doing so and, to this end, may suspend—only suspend—the treaty that would impede its exercise. In doing so, the State in question will, in particular, prevent the imbalance that would ensue if the aggressor State could require its victim to meet all the treaty obligations it owes to its aggressor. In addition, the provisions of Articles 6 and 7 on the continued operation of certain treaties remain applicable: "a consequence that would not be tolerated in the context of armed conflict", says the Commission, "can equally not be accepted in the context of self-defence". Thus "the right provided for will not prevail over treaty provisions that are designed to apply in armed conflict", including the provisions of the international humanitarian law treaties of 1949.[72] A similar provision can be found in Article 7 of the Resolution of the Institute of International Law.[73]

Article 15 bears a mysterious title: "Prohibition of benefit to an aggressor State". Its origins can be traced back to the aforesaid Resolution as well.[74] It prescribes that an aggressor State within the meaning of the United Nations Charter and of Resolution 3314 (XXIX) of the General Assembly[75] cannot terminate or suspend a treaty, or withdraw from it, as a consequence of an armed conflict provoked by itself. If the Security Council does find that a State wishing to do so *is* an aggressor, that State cannot cancel or suspend a treaty, or withdraw from it, except if it derives no benefit from that action[76], the latter issue being determined either by the Council itself or by a judge or arbitrator. If the Council has made no determination, the State concerned may cancel or suspend a treaty or withdraw from it. It may no longer do so, however, from the moment at which it is stigmatised as an aggressor by the Security Council. The issue therefore remains suspended as long as there is no determination. The characterisation by the Council will condition what is to follow. If the State initially believed to be an aggressor turns out not to be one, or if termination, suspension or withdrawal is determined not to be beneficial to the aggressor State, the notification that may have been made under Article 9 will be appreciated from the angle of the ordinary

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[72] Report cited in note 10, p. 195, commentary (2) on Article 14.

[73] Article 7 of the Institute's Resolution reads as follows: "A State exercising its right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right, subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor."

[74] Article 9, which provides: "A State committing aggression within the meaning of the Charter of the United Nations and Resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or suspend the operation of a treaty if the effect would be to benefit that State."

[75] U.N. Doc. A/RES/*29*/3314 (14 December 1974), Annex.

[76] The text of Article 15 sparked animated discussions on whether that provision should apply across the board, to all aggressor States, regardless of whether they would benefit from the aggression or not, or only to those aggressor States which would draw a benefit from the termination, suspension or withdrawal. The latter view, finally, prevailed.

rules contained in the Draft Articles. By contrast, if the State concerned is confirmed to be an aggressor, or to be benefiting from the termination, suspension or withdrawal, the ordinary rules no longer apply and the notification under Article 9 will have no effect.[77]

The words "as a consequence of an armed conflict that results from the act of aggression" serve to ensure that the characterisation of a State as an aggressor only relates to the specific conflict under consideration. The words in question were added to prevent an interpretation under which a State would retain a characterisation as an aggressor made in the context of entirely different conflicts with the same or even with another opposing State.[78]

Finally, despite contrary views, the Commission refused to go beyond a formula referring to the use of force in violation of Article 2.4 of the United Nations Charter.[79]

Article 16, the last of the clauses safeguarding the Organisation's system of collective security, gives priority to relevant decisions taken by the Security Council. This clause may partly overlap with Articles 14 and 15 described previously. The main decisions to be respected are, of course, those taken in the framework of Chapter VII of the Charter, but other decisions—such as those adopted pursuant to Article 94 of the Charter—may also be relevant.

The priority attributed to Security Council decisions is based on Article 103 of the Charter.[80] Article 8 of the Resolution of the Institute of International Law served as a model.[81]

Article 17 is another "no-prejudice" clause, but not one specifically connected with the United Nations system. The clause, for which no model exists in the Resolution of the Institute of International Law, has been inserted at the request of Commission members from neutral countries.

As a status derived from treaty, neutrality comes alive at the outbreak of armed conflicts between third States; therefore, the treaty status of neutrality must survive during such conflicts; if it did not, the treaty would be useless. A status of neutrality can also result from rules of general international law, in which case the problem is not that of the survival of a treaty, but that of the scope of a customary rule. At any rate, under Article 17 the rules on neutrality will apply in time of armed conflict regardless of the present Draft Articles.

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[77] Report cited in note 10, p. 196, commentary (2) on Article 15.

[78] Ibidem, commentary (4) on Article 15.

[79] Ibidem, commentary (5) on Article 15.

[80] Article 103 provides: "In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

[81] According to Article 8 of that Resolution, "[a] State complying with a resolution by the Security Council of the United Nations concerning action with respect to threats to the peace, breaches of the peace or acts of aggression shall either terminate or suspend the operation of a treaty which would be incompatible with such resolution."

Article 18, the final provision of the Draft to be examined here, declares that the Draft Articles are without prejudice to the other rules of international law on the termination or suspension of treaties, or on the withdrawal therefrom, in particular to Articles 55–62 of the VCLT. Article 18 is intended to prevent the assumption that the Draft Articles have the character of a *lex specialis* which would, in time of armed conflict, prevail over the "normal" causes of termination, suspension or withdrawal.

5 Conclusions

The preceding examination of the Draft Articles on the Effect of Armed Conflict on Treaties adopted by the ILC yields the following conclusions:

(i) The ILC's Draft unquestionably closes a gap in the existing rules on the Law of Treaties and answers a question discussed for decades by practice and by writers.

(ii) While some of the Draft's provisions reflect existing law, other rules have the character of *lex ferenda*. The latter is true, in particular, of some categories of agreements included in the indicative list of the Annex to the Draft Articles: treaties for the protection of human rights and of the environment, conventions relating to international criminal justice, treaties on aquifers, and constituent instruments of international organisations. All these new categories result from contemporary developments of international law.

(iii) The most important innovation brought by the Draft Articles is the extension of their scope to non-international armed conflicts, currently the dominant form of armed strife. That extension is, however, relativised by Article 6.b which limits its effect to conflicts with a certain degree of outside involvement.

(iv) One may wonder whether the extension of the scope of the Draft Articles was really necessary, and whether this issue could not have been solved by making use of the existing law of treaties, i.e. by assuming that non-international armed conflicts always represent a devastating blow for the States concerned and, therefore, are likely to bring about a fundamental change of circumstances (Article 62 of the VCLT), often resulting in a temporary or definitive impossibility of performance (Article 61 of the VCLT). While this may well be true, it will be recalled that, under Article 6.b, the scope of the ILC's Draft is in fact limited to non-international armed conflicts with at least some degree of outside involvement. If the problem had been addressed along the lines suggested above, this nuance would have been lost.

(v) The authors of the Draft Articles have attempted to strike a reasonable balance between often contradictory views. In this the members of the Commission have received guidance from the 1985 Resolution of the Institute of International Law whose scope was, however, confined to armed conflicts of an international character.

(vi) In some areas, the ILC had to tread on treacherous ground. The case law of national courts, which is of central importance, did not always provide the clear and reliable guidance one could have wished: some domestic courts found it difficult fully to grasp the issues; and sometimes their decisions remained unclear. What can be concluded, e.g., from decisions asserting that treaties are not terminated but suspended? And what is meant by "suspension": do "suspended" treaties automatically bounce back into operation at the end of the armed struggle, or must there be an agreement to that effect?

(vii) In the field covered by the Commission's Draft Articles, it is usual to speak of the survival or otherwise of *treaties as such*. Such language disregards the fact that treaties often do not survive or lapse *en bloc*. The issue of the separability of treaty provisions thus assumes critical importance. Treaties of commerce, for example, may not survive *in toto*, but some of their provisions—those securing private rights—may continue in operation. This is why the title given to the Draft may appear misleading; "The Effects of Armed Conflicts on Treaty *Provisions*" might have been more accurate.[82]

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[82] In its Resolution 66/99 of 9 December 2011, the United Nations General Assembly welcomed the conclusion of the ILC'S work on The Effects of Armed Conflicts on Treaties, expressed its appreciation to the Commission, took note of the Articles elaborated on the subject and commended them to the attention of governments, without prejudging the question of their future adoption or other appropriate action. It also decided to include the topic "The Effects of Armed Conflicts on Treaties" in the agenda of its 69th session so as to examine, in particular, the form to be given to the Articles. The highly contentious nature of the topic makes it unlikely that the Articles will receive much further official consecration, e.g., by the convocation of a codification conference. This is not to say, however, that the work of the Commission has been in vain. The Articles will be considered by international agencies and governments as being the state-of-the art expression of the principles governing the effects of armed conflicts, international or internal, on international agreements.

The Growth of Specialized International Tribunals and the Fears of Fragmentation of International Law

Hugo Caminos

1 The Creation of the International Tribunal of the Law of the Sea as a Specialized Tribunal and the Concern of Some Members of the ICJ

Probably the most important innovation in the United Nations Convention on the Law of the Sea (UNCLOS)'s regime for the compulsory settlement of disputes is the creation of the International Tribunal for the Law of the Sea (ITLOS) with a broad *ratione materiae* and *ratione personae* jurisdiction. This has served as a model for the establishment of other specialized courts or quasijudicial bodies in response to the transformation of the international society as a result of globalization: the participation of individual and non-State actors in the international system; the creation of new international institutions; and the expansion of the norms of international law to areas formerly regulated exclusively by domestic law, among other factors.

There are a number of disputes on the law of the sea in respect of which an overlap of jurisdiction between the International Court of Justice (ICJ) and the ITLOS is unlikely to occur. Concerning jurisdiction *ratione materiae,* the Seabed Disputes Chamber of the ITLOS is almost exclusively competent to hear disputes arising in connection with activities in the Area and to give advisory opinions at

Member, *Institut de Droit International*. It is indeed a great honour and pleasure to contribute to this collection of studies in honour of Tullio Treves, an eminent international legal scholar and a distinguished representative of the Italian school of international law.

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the Assembly or the Council of the Authority. Furthermore, the Tribunal has the authority, subject to certain conditions, to prescribe, modify or revoke binding provisional measures in a dispute submitted by the parties to an arbitral tribunal. Lastly, it also has a somewhat exclusive jurisdiction in the prompt release of vessels and their crews. Regarding jurisdiction *ratione personae,* non-State parties have access to the ITLOS, whereas under Article 34.1 of the Statute of the ICJ, only States may be parties in cases before the Court. In accordance with Articles 291.1 and 305 UNCLOS, self-governing associated States and territories enjoying full internal self-government, in addition to international organizations, provided that they have ratified or formally confirmed their adherence to the Convention, also have *locus standi* before the Tribunal. In addition, in cases under Part XI, these may include State enterprises, natural or juridical persons sponsored by a State Party or consortia composed of such enterprises or persons. In cases submitted on the basis of other agreements, it may include corporations, international organizations and other entities.

The case law on maritime delimitation—the area of the law of the sea where the ICJ has decided a number of cases—"demonstrates how the ICJ and *ad hoc* arbitration tribunals can engage in a symbiotic relationship."[1] In fact, "a consistent jurisprudence on this international law subject has been developed by the ICJ and several *ad hoc* tribunals, which, unlike the ITLOS and the ICJ, are not standing universal judicial bodies and whose composition reflect the diversity of the international community."[2]

The creation of specialized international judicial bodies prompted two successive Presidents of the ICJ—Stephen M. Schwebel and Gilbert Guillaume—to state their apprehension that the "proliferation" of international tribunals would lead to cases of overlapping jurisdictions, opening the way to "forum shopping", giving rise to a serious risk of conflicting jurisprudence and to the fragmentation of international law. This view is shared by Judge Shigeru Oda.

In his course at the Hague Academy of International Law in 1993, Judge Oda was critical of the creation of ITLOS. He stated: "The Convention is so misguided as to deprive the ICJ of its role as the sole organ for the judicial settlement of ocean disputes by setting up a new judicial institution, ITLOS, in parallel with the long established Court." In his opinion, because the law of the sea is an integral part of international law, "if the development of the law of the sea were to be separated from the genuine rules of international law and placed under the jurisdiction of a separate judicial authority, this could lead to the destruction of the very foundation of international law."[3]

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[1] Charney 1998, p. 345.

[2] This argument was raised by Prof. Oxman at the 96th Annual Meeting of the ASIL in the Panel on "The 'Horizontal' Growth of International Law and Tribunals: Challenges or Opportunities?", Washington, D.C., 16 March 2002.

[3] Oda 1993, pp. 13–55.

In his address before the UN General Assembly in 1999 President Schwebel affirmed "[C]oncerns that the proliferation of international tribunals might produce substantial conflict among them, and evisceration of the docket of the International Court of Justice, have not materialized, at any rate as yet". However, "in order to minimize such possibility as may occur of significant conflicting interpretations of international law, there might be virtue in enabling other international tribunals to request advisory opinions of the ICJ on issues of international law that arise in cases before these tribunals that are of importance to the unity of international law."

In his address to the UN General Assembly in 2000, his successor, President Guillaume, referred to "the problem raised for international law and the international community by the proliferation of international courts". He alluded to overlapping jurisdiction, forum shopping, the risks of conflicting jurisprudence and the cohesiveness of international law. He endorsed the suggestion put forward by his predecessor in 1999 to allow other international tribunals to request advisory opinions from The Hague.[4]

The legal basis for the creation of new international tribunals is set forth in Article 95 of the UN Charter. As Judge Yankov stated, "more than fifty years ago the drafters of the Charter in its Chapter XIV on the International Court of Justice with clear sightedness anticipated the need for States to make use of the plurality of options in choosing the appropriate means of dispute settlement."[5]

Commenting on Article 95 of the UN Charter, Kelsen observes: "Hence the Members (…) may establish a special court with compulsory jurisdiction, excluding the jurisdiction of any other tribunal, even the jurisdiction of the International Court of Justice established by the Charter."[6]

Therefore, the ICJ, and the Permanent Court of International Justice, were not created with the "object and purpose" of establishing a centralized international judicial system.

1.1 Positive Responses to the Cause and Effect of the Outgrowth of Specialized International Tribunals

In her analysis of the question of the multiplication of international legal institutions, Judge Rosalyn Higgins mentions among the main features of the present state of affairs with regard to international litigation, the vast corpus of norms of international law, the indefinite expansion of the subject matter, and the effects of globalization that "have encouraged the realization that at least in certain (…)

[4] The speeches of Presidents Schwebel and Guillaume can be found on the website of the ICJ: http://www.icj-cij.org.

[5] Yankov 1997, p. 365.

[6] Kelsen 1950, p. 477.

areas of international law, actors other than States have access to the legal procedures".[7] As a result,

> we have today a certain decentralization of some of the topics with which the ICJ *can* in principle deal to new highly specialized bodies, whose members are experts in a subject matter which becomes even more complex, which are open to non-state actors, and which can respond rapidly. I think this is an inevitable consequence of the busy and complex world in which we live and not a cause of regret.[8]

In respect of the suggestions by Presidents Schwebel and Guillaume, she further states:

> I do not agree with the call of successive Presidents, made at the UN General Assembly, for the ICJ to provide advisory opinions to the other tribunals on points of international law. This seeks to reestablish the old order of things and ignores the very reasons that have occasioned the new decentralization.[9]

The late Professor Jonathan I. Charney, in his Course at The Hague Academy in 1998, entitled "Is International Law Threatened by Multiple International Tribunals?", examined this issue exhaustively.[10]

In concluding his study, Charney stated,

> that in several core areas of international law the different tribunals of the late twentieth century do share a coherent understanding of that law. Although differences exist, these tribunals are clearly engaged in the same dialectic. The fundamentals of general international law remain the same regardless of which tribunal is deciding this issue (…) the views of the ICJ, when on point, are given considerable weight (…). In my opinion, an increase in the number of international tribunals appears to pose no threat to international legal system (…). It is hard to argue that other tribunals have taken cases away from the ICJ (…). Nor does it appear likely that a decline of the ICJ is on the horizon (…). Rather, the overall increase in the role of international law in third party settlement of international disputes through law based forums seems to reflect an increase in the role of international law in third party settlements of international disputes (…) in recent years, the ICJ has had the heaviest caseload in history.[11]

Another risk mentioned by the critics of the multiplicity of specialized international tribunals is "forum shopping". However, this is—as Treves observes—"the perfect legitimate search by parties and their counsel of the forum that appears most favorable to their interest".[12] It also encourages acceptance by States of the judicial or arbitral settlement of international disputes, thereby increasing the role of international law.

Finally, it is argued that the multiplicity of tribunals in a decentralized judicial system will result in the fragmentation of international law. However, the

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[7] Higgins 2001, p. 121.

[8] Ibidem, p. 122.

[9] Ibidem.

[10] Charney 1998, pp. 101–382.

[11] Ibidem, pp. 347, 349 and 359.

[12] Treves 2000, p. 74.

existence of different international fora for the settlement of disputes goes back to the beginning of international arbitration. A number of arbitral tribunals coexisted with the Permanent Court of International Justice and continue to coexist today with its successor. The study by Charney reveals that "while differently, the variations do not loom so large that they could possibly undermine the legitimacy of international law or the importance of the International Court itself".[13]

In quite similar terms, Brownlie stated:

> In fact, I think the multiplicity of tribunals reflects the multiplicity of relations between states, the complexities of regional customs and the way of doing things. It gives a wide range of preferences so you may have a State that is quite happy to use one mechanism but not another, there is a choice. There is competition between the international courts of arbitration, not an antagonistic competition but a simple competition. If everybody used arbitration, the people in The Hague would get less business and they would not be too happy about that. But it is not an antagonistic competition, it is a set of options of procedural options and I see no great harm in it… it reflects the complexity of the world.[14]

In discussing the establishment of the ITLOS, Rosenne stated that

> [T]here is no evidence to support the view that a multiplicity of international judicial institutions for the settlement of disputes seriously impairs the unity of jurisprudence (a difficult proposition at the best of times). The Convention requires ITLOS to perform tasks that are beyond the competence of the International Court under its present Statute. If only for that reason, the cautious observer will hesitate before crying redundant.[15]

In stating his singular view on the multiplication of international tribunals, Sir Robert Jennings takes all the factors into account. For instance, he brings up the jurisdictional restriction contained in Article 34.1 of the Statute of the ICJ by which "[O]nly States may be parties in cases before the Court", which today is in important senses a juridical anachronism. The new kind of international law, he observes

> which directly concerns individuals and entities other than States is, moreover, a rapidly growing part of the whole system of international law. There is accordingly a considerable and growing area of international law which does not find its way to the world Court (…). Thus, The Hague Court finds itself increasingly cut off from a growing and very important part of international law.

One possible remedy to this situation, Jennings states, would be to somehow change or adapt Article 34.1 of the Statute.

However, he concludes that this

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[13] Charney 1998, p. 355.

[14] Brownlie 1995, p. 276.

[15] Rosenne 1996, p. 814.

> "would probably produce a flow of cases with which the Court, with its present staff, organization and recourses could not possible cope". Then, realistically, he puts forward a question: Is the international community ready to finance such a radical change in the nature and function of the ICJ?[16]

Another possible remedy, according to the former President of the ICJ, is

> the creation of other kinds of international tribunals and courts. This route has already been followed to the extent that there is some concern at what is sometimes called the problem of proliferation of new and permanent tribunals and courts (…) *the development, even the proliferation, of new and permanent tribunals is probably a good thing*. None of them share the ICJ's global jurisdiction in matters involving general international law.[17]

In his conclusion, Jennings expresses his concern about the future: the organization of the Court and its relationship with the other organs of the United Nations and with the many other courts and tribunals. "The present proliferation of tribunals may do well for a time; (…) but the price eventually to be paid is the danger of the gradual fragmentation of the substantive and procedural international law". He refers to the *system* of tribunals found in most States where there is usually one court at the top of a hierarchy.

> The ICJ, being the principal judicial organ of the United Nations (…) would seem apt to fill this role (…)" But, he admits, "there is the difficulty of article 34(1) of the Statute, the separate histories of the specialized tribunals, and not least the regional character of them and (…) many problems of legal policy.

No doubt a mountain of problems to which we could add that of Article 95 of the Charter.[18]

Jennings recognizes that "there is probably at least for the time being no question of any kind of a general new law-making reform of the situation". However, he suggests,

> there is no reason why the present chaotic jumble of acronyms should not be subjected to a searching academic exposition and analysis, and perhaps some suggestions made for the creation out of it all, of a recognizable judicial system for the international community as a whole.[19]

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[16] Jennings 1998, pp. 57–59. According to Jennings, "[T]he new Law of the Sea Tribunal of Hamburg was set up partly as a result of political opposition to the Hague Court in the 1970s: nevertheless, although these is a considerable overlap with the remit of the World Court in law of the sea matters, the Hamburg Court can also deal with some important classes of cases that probably could not get before the Hague Court". Considering the WTO, he expresses that its "subject matter and indeed the procedure, is probably better dealt with by persons with specialized knowledge or experience of the kind of practical problems involved".

[17] Ibidem, p. 59 (emphasis added).

[18] Ibidem, pp. 62–63.

[19] Ibidem.

In a comprehensive article on the fragmentation of international law, Marttii Koskenniemi and Päivi Leino refer to the above-mentioned speeches of the Presidents of the ICJ.[20] They begin by stating that

> [i]t would seem natural to assume that when the President of the International Court of Justice chooses to express his concern about a matter in three consecutive speeches before the United Nations General Assembly on proliferation of international tribunals, one may feel puzzled that among all aspects of global transformation, it is *this* they should have enlisted their high office to express anxiety over.[21]

With reference to the allegations by Judges Schwebel and Guillaume, the authors affirm that

> the statements (…) are to be seen as defensive moves in a changing political environment. 'Specialized courts (…) are inclined to favor their own disciplines', Judge Guillaume stated in 2000. This is true—but it applies equally to his own Court. If the Presidents argue that other tribunals should request advisory opinions from their Court, then surely this should be read as an effort to ensure position at the top of the institutional hierarchy. But if the conflict has to do with preferences for future development, then it is unsurprising that not one body has expressed interest in submitting its jurisdiction to scrutiny by the ICJ.[22]

In another comment the Finnish scholars state

> [w]hat is remarkable about the statements by the Presidents of the International Court of Justice in 1999–2001 is not only their anxiety about what at first sight seems a rather theoretical, even esoteric problem—'proliferation of courts,' 'unity' of international law—but also the narrow platform from which the critiques have emerged. In reading through the academic debates, the Presidents stand almost alone in expressing such anxiety (in addition to a small number of suspected war criminals waiting for trial at The Hague)—sometimes joined by colleagues such as Judge Oda (…) For most commentators, however, proliferation is either an unavoidable minor problem in a rapidly transforming international system or even a rather positive demonstration of the responsiveness of legal imagination to social change.[23]

Koskenniemi and Leino observe that

> [e]ven as the analysis of fragmentation is largely held to be correct, most lawyers express confidence in the ability of existing bodies to deal with it. In fact, Jonathan Charney expresses (…) alternative forums complement the work of the ICJ and strengthen the system of international law, notwithstanding some loss of uniformity… different approaches adopted in relation to the same subject may only represent a healthy level of experimentation to find the best rule to serve the international community as a whole.[24]

Based on the information available at this time, the authors state that "a serious problem does not appear to exist."

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[20] Koskenniemi and Leino 2002, pp. 553–579.

[21] Ibidem, p. 553.

[22] Ibidem, p. 562.

[23] Ibidem, pp. 574–75 (footnotes omitted).

[24] Ibidem, p. 575 (footnotes omitted).

Regarding the concerns of Judge Guillaume about the way special regimes might be breaking up international law in such a manner as to jeopardize its unity, Koskenniemi and Leino state:

> [B]ut it is doubtful if any such 'unity' ever existed. The ICJ never stood at the apex of some universal judicial hierarchy. Its judgments have been binding only as *res judicata*, and other subjects have remained free to accept or reject them (…). As Charney puts the main view on this matter: I do not doubt, however, that a hierarchical system for deciding international legal questions would contribute to a more orderly and coherent legal system. One should understand, nevertheless, that this has not been the case for as long as international law has existed.[25]

Finally, the authors observe that

> to construe the debate about fragmentation as if it had only to do with coherence in the abstract is to be mistaken about what is actually at stake. Special regimes and new organs are parts of an attempt to advance beyond the political present that in one way or another has been revealed unsatisfactory. The jurisdictional tensions, they state, express deviating preferences held by influential players in the international arena. Each institution speaks its own professional language and seeks (…) to have its special interests appear as the natural interests of everybody. Here neither anxiety nor complacency are in place (…). To avoid cynical professionalism will require facing the institutional tensions on their merits. Here no overall solution—a single hierarchy—is available (…). The universalist voices of humanitarianism, human rights, trade or the environment should be (…) heard. But they may also echo imperial concerns (…) at that point, the protective veil of sovereign equality, and the consensual formalism of the ICJ will appear in a new light: as a politics of tolerance and pluralism, not only compatible with institutional fragmentation, but its best justification.[26]

According to Bruno Simma, "until present, and only with only few exceptions, the various judicial institutions dealing with questions of international law have displayed utmost caution in avoiding to contradict each other". He would go as far as to claim "that if there are international institutions that are constantly and painstakingly aware of the necessity to preserve the coherence of the international law, it is the international courts and tribunals (…)."[27]

1.2 The ILC and the Topic of the Fragmentation of International Law: a Brief Reference

In 2002, the International Law Commission (ILC) included the topic "Risk ensuing from the fragmentation of international law" in its long-term program of work. In the following year, the General Assembly requested the Commission to give further consideration to the topics in that long-term program. In 2002, the

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[25] Ibidem, pp. 576–77.

[26] Ibidem, pp. 578–79.

[27] Ibidem, p. 553.

Commission decided to include the topic renamed "Fragmentation of international law: difficulties arising from the diversification and expansion of international law" in its program and to establish a Study Group chaired by Mr. Bruno Simma. In 2003, Simma was elected Judge of the ICJ and Mr. M. Koskenniemi was appointed Chairman of the Study Group.

As Simma explains

> when start[ing] its actual debate (…), its members soon agreed that the emphasis on risks in the original title of the topic was not adequate because it depicted the phenomena described by the term 'fragmentation' in a negative light. Thus, the title of the topic was changed". As he further clarifies: "the Commission move, while retaining the term 'fragmentation' with its rather negative connotations, the risks following from it were downgraded to 'difficulties', such difficulties now been regarded as arising from two developments that are described in decidedly positive terms, namely diversification and expansion of international law.[28]

A study of the Report of the Study Group of the ILC on the renamed topic of "Fragmentation of international law" would transcend the range of this tribute. For our purposes suffice it to say that the Report does not agree with what Simma calls the "initial and exaggerated fears" arising from the creation of specialized tribunals. It declares that, on the

> [o]ne hand fragmentation does create the danger of conflicting and incompatible rules, principles, rules-systems and institutional practices, [o]n the other hand, it reflects the rapid expansion of international legal activity into various new fields and the diversification of its objects and techniques (…). Although there are 'problems', they are neither altogether new nor of such a nature that they could not be dealt with through techniques international lawyers have used to deal with the normative conflicts that have arisen in the past.[29]

What can be further stated on the alleged risk of fragmentation of international law? As Judge Treves rightly says, "[d]ivergent decisions of different judicial bodies may not always be synonymous of fragmentation of international law." In support of the opinion that the existence of different views has always been fuel for the development of international law, he recalls "the harmonious coexistence in the field of delimitation of maritime areas of the jurisprudence of the Hague Court and of arbitral tribunals" and asks: "why should not the reciprocal influence of the perhaps sometimes divergent decisions of the Hague Court and the Hamburg Tribunal yield a similar positive result?" After stating that the function of international judicial bodies is mainly to prevent and settle disputes, and if it happened that, because of the presence of ITLOS, a lesser number of conflicts were to arise and that those which arose were settled as legal disputes, he asks, "wouldn't this

[28] Simma 2003–2004, p. 845.

[29] ILC Report, p. 14.

mark a progress for international law and the international community? Wouldn't this dwarf the disadvantages represented by some differences in the contents of the achievement of the various tribunals?"[30]

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[30] Treves 2000, pp. 85–86. So far, ITLOS jurisprudence shows no indication of any threat to the unity of international law.

The "Right Mix" and "Ambiguities" in Particular Customs: A Few Remarks on the *Navigational and Related Rights* Case

Luigi Crema

1 Introduction

In *Customary International Law* recently published in the Max Planck Encyclopedia of International Law, Professor Treves describes the assessment of a custom as the delicate operation of "determining the right mix of what States say and do, want and believe".[1] Treves, in describing what *practice* is and is not for the purposes of ascertaining customary law, strongly stressed the need to be cautious, avoiding stiff *black-or-white* assertions, and to be "aware of the ambiguities with which many elements of practice are fraught".[2] The *Navigational and Related Rights* decision illustrates certain interesting facets of the practice in customary law, and once again confirms the need for such caution.

On the 13th of July 2009 the International Court of Justice upheld a decision between Costa Rica and Nicaragua regarding certain rights in the *San Juan river*.[3] At the very end of its reasoning, the Court found that "fishing by the inhabitants of the Costa Rican bank of the San Juan river for subsistence purposes from that bank is to be respected by Nicaragua as a customary right."[4] The Court was rather thrifty in detailing the description of the formation of that right; thus, this finding

[1] Treves 2008, para 28.
[2] Ibidem.
[3] ICJ: Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment (13 July 2009).
[4] Ibidem, para 144.

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represents a good occasion to reconsider particular customs, their existence in international law, and to face certain questions that arise in attempting to unravel the formation of customary rules.

2 On Particular Customs

Customary rules in international law can be general or particular, that is, not binding on all states: they may be regional, local, plurilateral, or bilateral.[5] Article 38 of the PCIJ, and later the ICJ Statute—the *biblia pauperum* of international law[6]—in saying "The Court (…) shall apply (…) b. international custom, as evidence of a *general* practice accepted as law", appears to include only general customs, and to exclude particular customs. However, already in the 1930s the prevailing interpretation of Article 38.1.*b* proposed by eminent scholars was that the generality of a practice was not a fundamental requisite for a custom to come into being.[7] The debate on this issue lasted a few decades: during the second post-war period, a few commentators still insisted that international law recognizes only *general*, that is *worldwide* customs,[8] while others proposed to read the term *general* as *uniform*, thereby including particular customs.[9] The different proposals discussed by the Advisory Committee of Jurists in the preparation of the PCIJ Statute confirms the latter interpretation.[10] Today the question of understanding the meaning of that expression is no longer at issue, and among scholars it is undisputed that international law also admits particular customs.[11]

Custom, indeed, is one way in which a rule may come into being, through evidence of repetition rather than through a written agreement. There is no reason why it should regard only the collective of states, and not also smaller groupings: its generality and its particularity, that is, its effects *ratione personae*, depend on the actual subjects involved in the formation process. Moreover, they also depend on

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[5] RightIy Mendelson 1998, p. 215, prefers the term *particular* to *regional*, as the second is contained within the first. For the same reason Akehurst 1975, p. 29; van Hoof 1983, pp. 96–97, used the term *special*.

[6] *Biblia pauperum* referred to the frescos in churches that explained, in a synthetic way, doctrines of faith; this expression was often used by Bruno Simma to describe Article 38 in 2009, during his general course on public international law at The Hague Academy of International Law (the *Course* has still to be published).

[7] See already Basdevant 1936, p. 486. On the theoretical disputes over the admissibility of local customs under Article 38 during the PCIJ period see Cohen-Jonathan 1961, pp. 121–127, with additional references.

[8] Guggenheim 1953, p. 47; Kunz 1953, p. 666; Tunkin 1974, p. 118.

[9] Meijers 1978, p. 21; Wolfke 1993a, p. 7.

[10] They are briefly summarized in Danilenko 1993, pp. 76–77.

[11] Treves 2008, para 40; Kolb 2003, pp. 136–137, Gamio 1994, pp. 84 and 92, highlights that the letter of Article 38.1.*b* is clear in excluding particular customs, but that the ICJ decisions have overridden it; similarly Pellet 2006, p. 762.

the nature of the process itself: a small number of particularly interested subjects, together with a handful of representatives of the generality of states, can originate a general custom,[12] which, when circumscribed within a specific scope, can result in a particular custom. In short, the outcome of the process relies as much upon who is involved and how the process is structured, as it does upon claims of generality.

International jurisprudence has recognized the possibility that a custom can arise in a particular, local, even bilateral, context. Examples of such a dynamic can already be found in the jurisprudence of the Permanent Court of International Justice (PCIJ); however, all the decisions related to treaties, and more closely resembled *subsequent practice which is modificative of a treaty* rather than a *particular custom*.[13] It was the International Court of Justice (ICJ) that explicitly accepted particular customs: in its 1950 *Asylum* decision, it explicitly accepted the existence of regional customs, and gave a detailed explication of how they are to be appraised. According to the Court:

> The Party which relies on a [regional custom] must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.[14]

The Court acknowledged the admissibility of regional customs in international law, but did not find that the conditions to establish it had been satisfied. Similarly, in the *Rights of American Nationals in Morocco* case the Court admitted the possibility of bilateral customs, again without finding their conditions fulfilled.[15]

A few years later, in the 1960 *Right of passage* judgment between India and Portugal, the Court returned to the question of particular customs, this time dealing with a bilateral custom. India relied on the *Asylum* case to argue that international law admits regional customs, but not bilateral ones. The Court rejected this

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[12] Treves 2008, paras 35–6; see also ICJ: North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/the Netherlands), Judgment (20 February 1969), para 75, and the observations by Lachs in his Dissenting Opinion, pp. 227–230.

[13] In 1927 the Court spoke about a local usage: "[T]he pre-war usage in the Galatz-Braila sector was that jurisdictional powers were exercised there by the European Commission. In this usage the Roumanian delegate tacitly but formally acquiesced, in the sense that a modus vivendi was observed on both sides according to which the sphere of action of the Commission in fact extended in all respects as far as above Braila", PCIJ: Jurisdiction of the European Commission of the Danube, Advisory Op. (8 December 1927), p. 17. A few years later, in the City of Danzig advisory opinion, the Permanent Court analogously did not talk about a local custom, but assessed a common practice: "[M]any differences of opinion as to foreign affairs arose between Poland and the Free City, but a practice, which seems now to be well understood by both Parties, has gradually emerged from the decisions of the High Commissioner and from the subsequent understandings", PCIJ: Free City of Danzig and ILO, Advisory Op. (26 August 1930), p. 13.

[14] ICJ: Asylum (Colombia/Peru), Judgment (20 November 1950), pp. 276–277.

[15] ICJ: Rights of Nationals of the United States of America in Morocco (France v. United States of America), Judgment (27 August 1952), pp. 199–201.

argument, instead considering the actual way India and Portugal had reciprocally behaved.[16] The Court concluded:

> This practice having continued over a period extending beyond a century and a quarter (…) the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the Parties and has given rise to a right and a correlative obligation.[17]

For the first time the Court recognized a particular custom: it gave force of law to attitudes, voluntary or spontaneous, followed as binding by only two states.[18]

3 The Navigational and Related Rights Case

For several decades after those decisions, the ICJ did not again face the question of particular customs. The Court often addressed general custom, drawing clear and specific doctrines such as in the *North Continental Shelf case*.[19] Only relatively recently, in 2009, did the ICJ again address the question of particular customs, in the case between Costa Rica and Nicaragua on the *Navigational and Related Rights in the San Juan river*.[20] This river is a section of the border between the two States, according to a treaty signed in 1858.[21] The treaty fixed the boundary along the Costa Rican bank, and established "Nicaragua's dominion and sovereign jurisdiction" over the waters of the river.[22] In its memorial Costa Rica maintained that the riparian people of the two sides of the San Juan river (a very small number: around 450 people),[23] had the right to fish for subsistence purposes.[24] The Court observed that:

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[16] ICJ: Right of Passage over Indian Territory (Portugal v. India), Judgment (12 April 1960), p. 39: « [I]t is objected on behalf of India that no local custom could be established between only two States. It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States».

[17] Ibidem, p. 40. On this Case, see the comments of Buss 2010, pp. 111–126

[18] On spontaneous customary law see Bobbio 1942, p. 19 ff.; Ago 1950, pp. 78–108; Giuliano 1950, p. 161 ff.; Barile 1953, pp. 150–229; Treves 2008, paras 17–18; Dupuy 2000, pp. 157–179, with further references. See also the critics of Arangio-Ruiz 2007, pp. 97–124.

[19] North Sea Continental Shelf, supra n. 12, paras 75–78.

[20] ICJ: Navigational and Related Rights, supra n. 3.

[21] Tratado de límites entre Nicaragua y Costa Rica Cañas-Jerez (San José, 15 April 1858).

[22] Article VI reproduced in Navigational and Related Rights, supra n. 3, para 19.

[23] Ibidem, para 98.

[24] Ibidem, paras 4.124–4.128.

> Costa Rica requests the Court to declare that Nicaragua has the obligation to permit riparians of the Costa Rican bank to fish in the river for subsistence purposes. (…) Subsistence fishing has without doubt occurred over a very long period. (…) [T]he failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period, is particularly significant. The Court accordingly concludes that Costa Rica has a customary right.[25]

The Court thus found a customary right allowing local fishermen of both the Nicaraguan and the Costa Rican banks to fish for subsistence purposes. This finding raises a number of interesting points that will now be considered.

4 A Few Reflections

4.1 Which Custom Is It?

The first interesting point concerns the nature of that particular customary right. The description thereof given by the Court is not entirely clear and explicit: it considers, on the one side, the practice of the local inhabitants of the banks of the river; and on the other side the lack of any reaction by the Nicaraguan state.[26] Given the fact that the *active* practice considered by the Court had been carried out only by private individuals on both sides of the river (the attitude of the Government of Nicaragua was the absence of any reaction), is it more appropriate to consider it as an *international* customary right among two nations, or a *transnational* right among private individuals, recognized and accepted by Nicaragua?[27]

A similar problem emerged in the first of the two decisions on the *Hanish Islands in the Red Sea*, in which an Arbitral Tribunal dealt with a local system of justice, with its own customs and judges, between Eritrean and Yemenite fishermen.[28] In this case, the arbitrators maintained that those customs were a matter of private law (*Lex Pescatoria*), and the fact that Yemen was aware of them did not transform them into a public international law custom.[29] Also the reference to the customary

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[25] Ibidem, paras 134 and 141.

[26] Ibidem, para 141.

[27] Ibidem, para 144.

[28] PCA Arbitral Tribunal: Eritrea/Yemen, Award in the First Stage (9 October 1998).

[29] Ibidem, para 340: "In the Tribunal's understanding, the rules applied in the *aq 'il* system do not find their origin in Yemeni law, but are elements of private justice derived from and applicable to the conduct of the trade of fishing. They are a *lex pescatoria* maintained on a regional basis by those participating in fishing. (…) The fact that this system is recognized or supported by Yemen does not alter its essentially private character".

rights of the inhabitants along a river made in the *Eritrea-Ethiopia Boundary Commission* award seems to point to customs among private individuals.[30]

Lathrop, on the *American Journal of International Law*, reads the *Navigational and Related Rights* decision as dealing with this kind of private right,[31] while Weckel has expressed disappointment that the Court was not explicit in stating that the right is private in nature.[32] These explanations and these precedents, however, are incompatible with the attitude maintained by Costa Rica during the proceedings,[33] and with the final part of the decision, in which the Court attributed the right deriving from local practice to Costa Rica, and not to the fishermen.[34] Thus, the Court established a particular custom of public international law.[35]

In his separate opinion Sepúlveda-Amor, the only judge voting against this finding of the Court, regretted the position taken by the majority: [36] he recalled the traditional *principle of acquired or vested rights* as a better description of such an issue, arguing that recourse to international custom was unnecessary.[37]

In conclusion, the first notable point emerging from this decision regards the existence of particular customs in themselves: after many years in which the ICJ did not touch upon the topic, the *Navigational and Related Rights* decision confirms the weight of particular customs in general international law.

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[30] PCA/Eritrea-Ethiopia Boundary Commission: Delimitation of the Border between Eritrea and Ethiopia (Eritrea/Ethiopia), Decision (13 April 2002), para 7.3: "Regard should be paid to the customary rights of the local people to have access to the river".

[31] Lathrop 2010, p. 460.

[32] Weckel 2009, p. 938.

[33] As described at para 132 of the judgment. However, during the proceedings Costa Rica itself was very generic in sustaining the existence of fishing rights: "Peu importe au fond que l'on parle de coutume locale, d'acquiescement, d'accord tacite, de régime territorial ou encore de subsistance d'un droit traditionnel datant de l'époque coloniale auquel il n'a jamais été dérogé. Le résultat est le même: les résidents de la rive costa-ricienne ont un droit de pêche à des fins de subsistance dans les eaux du San Juan", ICJ: Navigational and Related Rights, CR 2009/3, p. 62, para 41 (Kohen), internal footnote omitted.

[34] Navigational and Related Rights, supra n. 3, paras 140–1, 156 (3).

[35] In this sense also Tanaka 2009, p. 8.

[36] Navigational and Related Rights, supra n. 3, Separate Opinion of Judge Sepúlveda-Amor, para 20: "The Court's reasoning in the present case is not in accordance with its previous findings on the recognition of rules of customary international law. It will be difficult to find a precedent which corresponds with what the Court has determined in the present case. (…) These are the grounds on which the Court concludes that there is a customary right. An undocumented practice by a community of fishermen in a remote area".

[37] Navigational and Related Rights, supra n. 3, Separate Opinion of Judge Sepúlveda-Amor, paras 28–31. Also Judge Skotnikov in his Separate Opinion, para 20, affirms that a construction of a bilateral custom is superfluous, because those rights pre-exist the relations between the two states: "the 1858 Treaty, as in the case of the practice of riparians traveling on the river to meet the requirements of their daily life (see para 13 above), left unaffected the practice of subsistence fishing by riparians from the Costa Rican bank of the San Juan River".

4.2 The Role of Private Individuals

Given the fact that it was an international custom of public international law, the fact that the Court referred to the conduct of private individuals in assessing it is problematic: the inclusion of private entities' action in the development of international custom has been controversial in the past. This is probably why certain comments in the decision were criticisms or were careful concerning this point. Although there are some notable exceptions,[38] in general this possibility has been categorically excluded.[39] However, this decision does not seem to intervene in this question; it rather considers to which extent it is possible to consider private individuals' practice in the assessment of state conduct. The Court did not consider the practice of non-state actors *per se*; rather, it considered the practice of a state *through* an analysis of the practice of private individuals.

It is important as a matter of good order to give pre-eminence to practice of state officials when assessing a customary rule,[40] the proper progression should begin with the practice of the state and of its officials, an analysis which will resolve the vast majority of cases. Only in exceptional and residual cases and when the circumstances thereby allow, should the analysis have recourse also to the practice of private individuals. This also seems to be the position taken by Guillaume in its declaration attached to the *Navigational and Related Rights* decision: on the point in question, he agrees with the Court, but he marks the exceptional uniqueness of such a rationale.[41] Thus, the position of the Court seems to be that lacking any clear evidence of the consistent conduct of Costa Rica, it has looked at the behavior of private individuals, and the corresponding lack of any reaction by the State that maintained sovereignty over the river.

This gradual approach of the attribution of a certain conduct is consistent with another decision in which the Court has decided on the sovereignty of a territory. In the *Kasikili/Sedudu Island* case the Court's analysis moved in steps beginning with the declarations of the states' most prominent officials, and gradually reaching the conduct of private individuals on the ground.[42] There is a sort of scale

[38] Wolfke 1993b, p. 4; Ochoa 2007, pp. 119–186.

[39] For Akehurst 1976, p. 11, the acts of private individuals only count through the reaction of the states. Dinstein 2006, pp. 267–268 and 271, contemplates just a role in forming the *opinio iuris* of states; similarly Treves 2008, paras 33–34.

[40] A critical reflection on the role of personality can be read in Byers 1999, pp. 75–87.

[41] Navigational and Related Rights, supra n. 3, Declaration of Judge Guillaume, para 22.

[42] The ICJ, in order to assess sovereignty over an island, considered the habits of a local tribe, the conduct of low-ranked officials on the ground and the declarations made by representatives of the two Governments, ICJ: Kasikili/Sedudu Island (Botswana/Namibia), Judgment (13 December 1999), para 71 ff; see also the interesting reflections on the point made by Rezek and Parra-Aranguren in their Dissenting Opinions, respectively at paras 12–16 and para 88.

of strength in the necessary evidence: from the practice closest to State power (i.e. declarations of the highest ranked officials), to the conduct of private individuals.[43]

4.3 The Peculiarities of a Particular Custom

Apart from the number of subjects, a particular custom entails certain further differences from general customs. In contrast to the principle *iura novit curia*, which applies to general customs,[44] in the *Asylum* case the ICJ explained that the burden of proof for demonstrating a local custom lies on the party invoking it.[45] Scholars have suggested that general customs must be proved less rigorously than particular customs, given the fact that the former resemble a sanctification of general rules not explicitly accepted by the totality of states through the voice of the World Court.[46] In the *Navigational and Related Rights* case, however, the Court was satisfied without absolute proof being provided by Costa Rica, observing that the Costa Rican fishing practice "by its very nature, especially given the remoteness of the area and the small, thinly spread population, is not likely to be documented in any formal way in any official record".[47] Rather than requiring any clear proof from the Costa Rican state, the Court relied on Costa Rica's general claims.[48]

Thus, the ICJ seems to digress from its previous orientation. However, this point must not be emphasized for two reasons. First, the rough analysis employed by the Court,[49] especially compared to certain rigorous and structured analyses of the past, confirms its more liberal way of assessing customary rules nowadays.[50] Second, and more importantly, the provision of evidence by the parties was not

[43] Also this problem can entail further difficulties: public statements and effective deeds can be contradictory, and it is not always the former, even if emanating from a Government, that should always prevail over the latter. In general, in analysing practice, it is not possible to set a hard and fast rule that provides guidance, cf. Treves 2008, para 28.

[44] PCIJ: Payment in Gold of Brazilian Federal Loans Contracted in France (France/USA), Judgment (12 July 1929), p. 124.

[45] Asylum, supra n. 14, p. 276: "The Party which relies on a [special custom] must prove that this custom is established in such a manner that it has become binding on the other Party".

[46] D'Amato 1969, pp. 212 and 216; Shaw 2008, pp. 92–93, requires greater flexibility in assessing general customs; *contra* see Cassella 2009, p. 274.

[47] Navigational and Related Rights, supra n. 3, para 141.

[48] Ibidem, para 140.

[49] On this point see the strong criticism by Sepúlveda-Amor in his Separate Opinion to Navigational and Related Rights, supra n. 3, paras 20–24.

[50] See Treves 2008, para 20. See also ICJ: Ahmadou Sadio Diallo (Guinea v. Democratic Republic of Congo), Judgment (24 May 2007), para 39.

controversial because both had agreed during the trial on the practice forming the basis of the local custom.[51] Thus, even if the Court stressed the truly customary nature of the phenomenon analysed, through an express reference to inveterate practices among the parties, the fact that both parties recognized the practice at issue during the trial shows the close attention of the Court to the element of the parties' consent.[52] Also in the *Right of passage* case, the only other decision in which the ICJ has found a particular custom, the parties did not contest the parties' conduct forming the basis of the bilateral custom, but only their legal effects.[53]

However, as briefly demonstrated in the previous sub-section, this decision shows a specific characteristic of *bilateral* customs: the practice considered by the Court in this kind of custom can be different from a general one. The practice looked at is broader than a general one: that is why the Court could consider the practice of private individuals in order to assess a custom. Such an operation is not likely to be possible in the case of general customs, where a matter of order obliges only practice of state officials to be considered. Otherwise it would either create a duty too burdensome, or a situation in which those invoking the existence of a custom can pick and choose whatever practice is closer to their own interests or convictions. In the assessment of such a local custom, in the context of a close bilateral relationship concerning a particular border, this precaution is no longer present, and the survey by the Court can and should have been broader.

5 Conclusions and Some Further Reflections

Many years after its first pronouncements on particular customs the ICJ again discussed this issue. The question whether or not particular customs are accepted in international law was not even addressed either by the Parties or by the Court: it

[51] Navigational and Related Rights, supra n. 3, paras 140–141; see also the comments by Sepúlveda-Amor in his Separate Opinion, cit., para 36. The importance of the attitude of Nicaragua before the bench in the establishment of the local custom has also been stressed by Cassella 2009, pp. 275–276, and Palchetti 2009, p. 313. Indeed, not only concerning its attitude, but also in the written proceedings Nicaragua admitted that it had always allowed the very minor activity of fishing for subsistence purposes, cf. ICJ: Navigational and Related Rights, Rejoinder of Nicaragua (15 July 2008), pp. 200–201, para 4.67.

[52] On a special custom being non-existent, but as a tacit agreement, see already Gianni 1931, p. 123; Haemmerlé 1936, p. 170; more recently certain authors have stressed the consensual nature of special customs, Condorelli 1991, pp. 206–7; Cassese 2005, pp. 164–165 (referring to both Asylum and Right of Passage cases as describing a tacit agreement); Shaw 2008, p. 93. On the contrary, Thirlway 1972, pp. 135–141, criticises the strict consent theory of local custom: if many states follow a customary rule within a region, also the other few states not explicitly accepting the rule have to conform to it.

[53] ICJ: Right of Passage, supra n. 16, p. 40: "It is common ground between the Parties that the passage of private personas and civil officials was not subject to any restrictions, beyond routine control during these periods. There is nothing on the record to indicate the contrary".

is now simply taken for granted. Certain questions once typical of particular customs, such as the need for clear proof in order to establish it, were not dealt with; on the contrary, in the *Navigational and Related Rights* case the proof required by the Court was very thin. However, this point cannot be pushed too far because of the position taken by the parties during the trial. The necessity of clear evidence in the case of particular customs is therefore still valid.

The *Navigational and Related Rights* case demonstrated another difference that can be drawn between general and particular, namely bilateral, customs, and it regard the extent of the state practice that can be considered. The limited and restricted area in which the survey of practice is carried out in bilateral customs allows for a broader definition thereof, also including private individuals' activities.

Of course, the relative weight of such a finding has to be considered in light of many questions. First, the relatively minor interest at stake: the number of people involved in this decision was very small, around 450 inhabitants living on the two banks; second, such a minor economic activity does not touch upon any interest of the two States; lastly, Nicaragua, both in its written proceedings and before the bench, was conciliatory concerning this point. However, this decision, and the way in which a state's conduct has been assessed, deserves attention: it represents another brush stroke on the already colorful canvas of custom.

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State Immunity: A Swedish Perspective

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1 Introduction

State immunity is one of the oldest and at the same time most complex issues in international law. In contradistinction to the rules relating to diplomatic immunity, which are relatively clear and well defined, the content and scope of State immunity have been the subject of diverging and often conflicting interpretations by States. This is one reason why the codification of customary international law relating to State immunity has not been as easy and successful as that of the rules concerning diplomatic and consular immunities.[1] Nevertheless, despite the difficulties, two international conventions on State immunity have been adopted. The European Convention on State Immunity (Basel, 16 May 1972; hereinafter European Convention on State Immunity)[2] was adopted by the Council of Europe in 1972 but only has eight State parties. It entered into force in 1976. The other agreement is the United Nations Convention on Jurisdictional Immunity of States and their Property (New York, 2 December 2004; hereinafter Convention on Jurisdictional Immunities).[3] This convention has 32 signatories and 13 State Parties, most of them European countries.

[1] The work of the International Law Commission on the codification of diplomatic and consular immunities has led to two conventions. The Convention on Diplomatic Relations (Vienna, 18 April 1961; hereinafter Convention on Diplomatic Relations), entered into force on 24 April 1964, has 187 parties. The Convention on Consular Relations (Vienna, 24 April 1963), entered into force on 19 March 1967, has 173 parties.

[2] Entered into force on 11 June 1976.

[3] Not yet in force. See General Assembly resolution 59/38, annex, Official Records of the General Assembly, Fifty-nineth Session, Supplement No. 49 (A/59/49).

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The difference in the views on State immunity has led to diverging State practice. In this context, the practice of Sweden is worthy of closer study. Compared to many other Western countries, Sweden has had a conservative and outmoded approach to State immunity, although this has changed in the past two years because of two developments. On the one hand, Sweden has ratified the Convention on Jurisdictional Immunities and has also incorporated the content of the Convention on Jurisdictional Immunities into its national law.[4] On the other hand, the Swedish Supreme Court has departed, in two important decisions relating to State immunity, from its well-established earlier practice in this area. In the following, the content of this change is briefly commented upon.

2 Development of State Immunity in General

The International Court of Justice delivered its judgment in an important case concerning State immunity on 3 February 2012.[5] The case, which was instituted by Germany in December 2008, has its origin in a number of judgments rendered by Italian courts in favor of persons who, during World War II, had been deported to Germany to carry out forced labor in the German armaments industry. Germany is of the view that Italy lacks jurisdiction in respect of State acts performed by the authorities of the Third Reich for which present-day Germany has to assume international responsibility. The core issue in the German argument is that what happened during World War II was an act of State *stricto sensu*. Such an act is governed by State immunity and cannot be subject to the jurisdiction of another State.

As expected, the Court made a very traditional interpretation of State immunity in general and refused the Italian argument that the gravity of the violations of the law of armed conflicts by Germany during World War II and the *jus cogens* nature of the violated rules deprived that State from jurisdictional immunity before the Italian courts. However, as regard measures of constraint taken by Italy against property belonging to Germany located on Italian territory, the Court stated that the property was being used for governmental purposes that were entirely non-commercial. Thus, the property enjoyed immunity. This finding of the Court should be compared with a judgment of the Swedish Supreme Court in a similar case that was delivered on 1 July 2011 and has been one of the main reasons for this essay.[6]

The development of principles of sovereignty and the immunity of foreign States is characterized by the distinction normally made in international law

[4] Lag 2009:1514 om immunitet för stater och deras egendom. The law will enter into effect when the Convention enters into force. According to its Article 30, this will take place 30 days after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

[5] ICJ: Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment (3 February 2012).

[6] See the discussion on the Sedelmayer case, infra Section 4.

between absolute and restrictive sovereignty and immunity. Up to the end of the nineteenth century, it was unquestionable that immunity was absolute. One State could under no circumstances be subject to the jurisdiction or executive measures of another State. Between the two World Wars States became intensively involved in activities of a private-law nature and the necessity of absolute immunity for such activities was seriously questioned. The idea of restrictive immunity was thus introduced in the doctrine of international law and a distinction was made between acts of a sovereign nature, *acta jure imperii*, that enjoyed complete immunity, and *acta jure gestionis*, i.e. commercial or private acts, in respect of which the State is subject to the jurisdiction of the territorial sovereign. Developments after World War II have led toward a strengthening of restrictive/relative immunity.

The application of the theory of restrictive immunity is dependent on the establishment of whether a certain act is of a sovereign nature or has a commercial/private character. Courts normally consider the nature and/or the purpose of an act to decide on its qualification as a sovereign or private act. However, this decision is not always an easy one. There are considerable differences in court practice on how to distinguish between Sovereign and other acts and how far immunity from one act or another can be permitted. More importantly, there are significant differences with regard to immunity from jurisdiction and immunity from execution. Some States make no distinction whatsoever in this regard. According to them, once a State lacks immunity from another State's jurisdiction, it lacks immunity from that State's executive measures that are decided by a court.[7] But State practice in this regard is far from unanimous.

3 Swedish Practice: The First Period

Decisions by the Swedish courts concerning State immunity are relatively limited in number. They relate to e.g. compensation for damage, indemnity, default in making payments, the nullification of a purchase agreement, and the attachment of property. Of about 30 immunity-related cases decided by the higher Swedish judicial instances since the 1930s, only 10 percent are cases where a foreign State's claim to immunity has been rejected.[8] However, with the exception of one case that was decided by the Supreme Administrative Court in 1986,[9] in all cases decided before 2004 the claimed immunity has been upheld. As regards the attitude of the Swedish Courts toward immunity as an absolute or limited right for a

[7] Switzerland is usually mentioned as an example of this category of States. See Lalive 1979, p. 154.

[8] A comprehensive summary of these cases is provided in Government Official Reports SOU 2008:2 on the immunity of States and their Property.

[9] Yearbook of the Supreme Administrative Court, 1986, reference 66 (RÅ 1986 ref 66).

foreign State, the practice can be divided into two major periods, namely from the mid-1930s up to early 2000 and the period since then.

During the first period, some 20 cases were decided by higher judicial instances. Common to these judgments is that although the courts usually explained in their decisions the differences between *acta jure imperii* and *acta jure gestionis* in order to demonstrate their awareness of the theory of restrictive immunity, they nevertheless concluded that the foreign State enjoyed immunity even when the dispute concerned a *prima facie* commercial act or an act of a private-law nature.

One example is a case from 1949 between a Swedish company and the Bulgarian legation in Stockholm.[10] According to a written contract between the two parties, the Swedish company had undertaken to build a pavilion for Bulgaria at an international trade fair in Stockholm. In the course of the work, the company was forced to undertake extra tasks for which the Bulgarian legation had orally promised to pay compensation. However, the legation later refused to pay for the extra work and only compensated the company for the contracted amount. The company lodged a case against the legation, which invoked immunity. The Court of First Instance decided that the disputed transaction did not have a sovereign nature and Bulgaria could not invoke immunity. The Svea Court of Appeal came to the opposite conclusion without discussing the nature of the transaction. It decided that Bulgaria enjoyed jurisdictional immunity in this case. The company chose not to appeal to the Supreme Court against this decision.

In December 1999, the Supreme Court of Sweden decided a case concerning compensation for completed work. The parties were the Local Authority of the City of Västerås and the Republic of Iceland.[11] The dispute concerned a contract from 1992 between the Icelandic Ministry of Education and Culture and the Local Authority of Västerås (on behalf of schools in Västerås). The contract concerned the provision of flight technician training to Icelandic students at a specific school in Västerås. The Icelandic Ministry had undertaken, according to the same contract, to defray any costs of training for Icelandic students which were not covered by the Swedish Government according to the Agreement on Nordic Educational Community at Upper Secondary School Level (1992).[12] According to this convention, the Nordic countries have a reciprocal obligation to provide applicants from other Nordic countries with places in general or professional schools under the same conditions as their own citizens. In Sweden, each local authority is responsible for financing education for all students domiciled in that community. When a student from a community chooses to pursue studies in another

[10] A summary of the case is provided in Svensk Juristtidning, 1950, p. 202.

[11] The judgment can be found in NJA (Collection of the Judgments of Sweden's Supreme Court), No. 1999: 112.

[12] The text of the Convention is available in Sveriges internationella överenskommelser (SÖ) [Collection of Swedish International Agreements], No. 1999:8.

community, his/her community should transfer the necessary budget to the community which offers the education.

When 33 Icelandic students received their training in Västerås, the Local Authority requested the Swedish Government to cover the costs. The Government only paid some 35 percent of the total costs. The Västerås Local Authority then requested the Icelandic Ministry to pay the remainder according to the contract. The Ministry referred to the above-mentioned 1992 Nordic Convention and declined to defray the costs. According to the contract between the Local Authority and the Icelandic Ministry, disputes relating to the application of the Nordic Convention were to be settled according to Swedish law. The Local Authority thus brought a case against the Republic of Iceland before the Court of First Instance in Västerås. The court first established that both the Local Authority and the Republic of Iceland were subjects of public law. It then found that the undertaking by the Local Authority to provide training had, to some extent, a private-law nature. However, since training at upper-secondary-school level was within the Local Authority's competence (a public entity) and was regulated, in detail, by an ordinance, the contract also had a public-law nature. This led the court to conclude that the dispute concerned a public act and that there was a procedural hindrance to entertaining the case since the Republic of Iceland enjoyed immunity. The Local Authority appealed to the Svea Court of Appeal, which in its 1997 decision simply confirmed the conclusions of the Court of First Instance.

In its judgment of 30 December 1999, the Supreme Court first underlined the general principle that immunity can only be invoked in disputes relating to sovereign acts in the real sense of the term. It does not apply to disputes concerning measures of a commercial or private-law nature. The Court then underlined that establishing a rule of distinction which is applicable in all circumstances is a difficult task. It further emphasized that it is difficult to speak of a general State practice in this respect. The practical solution, in the view of the Court, was to assess all the circumstances that in each specific case speak for or against granting immunity. The Court concluded that the contract between the Local Authority of Västerås and the Republic of Iceland concerned a subject that was typically of a public-law nature. The very act of concluding the contract must, according to the Court, be considered as a Sovereign act that gives the Republic of Iceland the right to invoke immunity. The Court also emphasized that any reference to Swedish laws in the contract should not be considered as a declaration by the Republic of Iceland that it has subjected itself to the jurisdiction of the Swedish courts with respect to such disputes.

The Supreme Court decision in this case shows that although the Court was well aware of the distinction between *acta jure imperii* and *acta jure gestionis* and of the criteria used to distinguish such acts from each other, it chose to disregard the contract's commercial character and purpose (to purchase services against

payment).[13] It instead confined itself to the fact that both parties were public entities, and it therefore granted immunity to Iceland. This is an implicit application of the outmoded principle of absolute immunity.[14]

These two cases, like almost all the other immunity-related cases decided by the higher judicial instances up to the early 2000s, show that the Swedish courts' respect for foreign States' immunity was almost unlimited: even in disputes relating to acts of a purely commercial character, the courts did not hesitate to grant immunity to the foreign State.

4 Swedish Contemporary Practice

The Swedish courts have had additional opportunities during the past ten years to deal with cases relating to State immunity. Their practice during this period seems to indicate a change of attitude, perhaps because of the criticism formerly directed at court decisions relating to immunity and also in view of the increasing number of new categories of cases such as those relating to employment conditions for the local staff of foreign representations in Sweden. This change is best demonstrated by two decisions of the Supreme Court in 2009 and 2011, which clearly show a move toward the application of restrictive immunity.

The first decision concerns a housing cooperative in Stockholm which in 2005 lodged a case before the Stockholm Court of First Instance against the Belgian Embassy in Sweden.[15] The Cooperative requested the Court to order the Embassy to fulfil its obligation according to a rental agreement under which the Embassy had undertaken to renovate a rented flat in the Cooperative's building, which was used as mission premises. Belgium was of the view that since the rental agreement concerned the premises of its Embassy in Sweden, the issue entitled that country to invoke immunity. The Court had to decide whether it had jurisdiction to entertain the case despite Belgium's claim of immunity. Its answer was that disputes concerning the renting of premises of a foreign mission should be considered as relating to sovereign acts in the real sense of the term. On this basis, the Court decided on October 2006 that the Belgian Embassy had the right to invoke immunity. The Svea Court of Appeal approved this conclusion in a brief decision on 15 June 2007.[16]

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[13] The Court seems to have disregarded information that could support the claim of the commercial purpose of the contract. One such piece of information is that Iceland lacks an air force and the flight technicians who trained in Sweden would probably work, at least partly, in the private sector. It is also incomprehensible that the Court directly considered Iceland's decision to conclude the contract as a sovereign act.

[14] For a critique of this judgment, see Mahmoudi 2001, pp. 192–197.

[15] Case No. T 30186-05.

[16] Case No. Ö 9054-06.

The Supreme Court took up the case in 2009.[17] The Cooperative argued before the Court that the lower judicial instances had given too much weight to the purpose of the rental agreement, namely the renting of a flat to be used by an embassy. Such emphasis on this purpose was understandable, the Cooperative conceded, in terms of the inviolability of the embassy against the receiving State's intrusion into the diplomatic function. But this case was about the establishment of a specific undertaking in a normal agreement. The Cooperative further opined that it was useless to conclude agreements with foreign States if they could invoke immunity as soon as they were accused of any breach of their obligations. Besides, the renovation of the flat in question had nothing to do with the normal functions of the embassy. According to the Cooperative, immunity could not be invoked in this case since the rental agreement had a clear private-law nature.

The Supreme Court first underlined that the development of international law in the past 50 years had been in the direction of restrictive immunity. It argued that regarding the method for making a distinction between *acta jure imperri* and *acta jure gestionis*, the Convention on Jurisdictional Immunities should be considered as reflecting the view that is shared by Sweden with countries that are normally compared with Sweden in such contexts. The Court took note of the discussions in the UN System before the adoption of the Convention on Jurisdictional Immunities, stating that these discussions show that agreements relating to mission premises should be considered as commercial agreements in the sense of Articles 2 and 10 of the Convention on Jurisdictional Immunities. The Court concluded that the fact that the agreement in question concerned the premises of the Belgian Embassy should not be a ground for the Embassy to invoke immunity with respect to the Cooperative's claim.

Given the long practice of the Swedish courts relating to State immunity, the Supreme Court decision in this case should be considered as epoch-making. In contrast to its previous immunity-related judgments, the Court completely based the Belgian Embassy decision on the nature of the disputed transaction, i.e. that Belgium had undertaken to renovate a building and to pay a part of the costs, a matter which was undoubtedly of a private-law character. What occurred before or after the completion of the renovation (whether the building was used as embassy premises or for other purposes) had no impact on the Court's assessment. In this way, the Supreme Court changed its practice on State immunity: it not only stated its awareness of restrictive immunity but also actually applied it.[18]

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[17] NJA (Collection of the Judgments of Sweden's Supreme Court), 2009, p. 905.

[18] It should be added that the Supreme Court's decision in this case cannot automatically be extended to other types of claims that may arise in relations between a landlord and a foreign embassy. The renovation of the rented flat in this case had *prima facie* nothing to do with the normal functions of the embassy. In this case, the Belgian Embassy had consciously accepted this condition in the agreement with the landlord. The fact that the Belgian Embassy was requested to pay compensation for a non-accomplished obligation also did not have any impact on the normal functions of the Embassy. This should be compared with overdue rental payments. Under certain circumstances immunity can be invoked in connection with executive measures that a court has

The second important decision by the Swedish Supreme Court, delivered on 1 July 2011, concerned the attachment of real estate belonging to a foreign State and allegedly used for sovereign purposes. The case was lodged by a German entrepreneur against the Russian Federation.

There is a more or less general understanding in the doctrine of international law supported by State practice that foreign State property not used for sovereign purposes can, under certain conditions, be subjected to executive measures. However, it is equally generally accepted that bank accounts or other financial assets of a diplomatic mission may not normally be subjected to such measures. The immunity of foreign State property, particularly real estate, from the jurisdiction or executive measures of the receiving State occupies a significant place in the practice of Western countries.

An early initiative to codify rules on this subject was a draft convention by a working group at Harvard University in 1932.[19] Article 23 of this draft provides that it is permitted to take executive measures against a foreign State's property if it concerns real estate used for commercial or industrial purposes. The same view found expression in another draft convention, which was adopted in 1957 by the Institut de Droit International. According to Article 5 of this draft, no executive measures should be taken against the property of a foreign State if the property is used for sovereign purposes with no economic character.[20]

During the 1970 and 1980s the proposition that immunity from executive measures applies only to foreign State property used for sovereign purposes received more support in State practice. Despite the increased application of restrictive immunity both in legislation and in the court practice of Western countries, the European Convention on State Immunity distinguished between immunity from legal process, which is relative, and immunity from executive measures, which is absolute. According to Article 23 of this convention, no executive measures may be taken against a State Party's property without the written consent of that party.

Compared with the European Convention on State Immunity, the Convention on Jurisdictional Immunity contains far more detailed rules in this respect. Article 19 refers to a number of situations when an executive measure can be taken against foreign State property. The background to this provision is Article 18 of the 1991 International Law Commission draft on the same subject. In this text as well as in texts discussed later in the sixth committee of the General Assembly, the consent of the foreign State was a precondition for taking executive measures against it. However, such consent was not necessary if the property was used or intended to be used for purposes other than sovereign and non-commercial use. A prerequisite for

(Footnote 18 continued)
decided upon as a result of unpaid rent. The reason for this is that in order for an embassy to function normally it must have access to its premises. If an embassy refuses to pay its due rental payments, this is normally settled through diplomatic channels.

[19] Draft Convention and Comment on Competence of Courts in Regard to Foreign States, reprinted in (1932) American Journal of International Law, Supplement, p. 450.

[20] Condorelli and Sbolci 1979, p. 200.

executive measures was that the property was situated in the territory of the forum State and there was a link between the claim before the court and the property. The requirement of a link was advocated by Eastern European countries and some developing countries. Western countries opposed such a requirement. The compromise in Article 19.C of the Convention on Jurisdictional Immunity is that it is sufficient that a link is established between the property and the legal person against whom the process is instituted. As part of the same compromise, it is also required that the use of the property for commercial purposes should be established.

An important decision by the Swedish Supreme Court in July 2011 was initiated by the German citizen Franz J. Sedelmayer. This dispute originated in a decision by the Russian authorities in 1994 to confiscate a security firm in St. Petersburg belonging to Sedelmayer. Sedelmayer considered the decision to be unjustified. After the rejection of his request to settle the dispute through arbitration in Russia, he brought the matter to the Stockholm Chamber of Commerce Arbitration Institute. His request for arbitration was based on the 1989 Treaty between the Federal Republic of Germany and the Union of the Soviet Socialist Republics concerning the Promotion and Reciprocal Protection of Investments. Arbitration proceedings found in Sedelmayer's favor on 7 July 1998.[21] The Russian Federation commenced an action before the Stockholm Court of First Instance requesting the vacation of the arbitral award. The Court dismissed the request and obliged the Russian Federation to defray Sedelmayer's litigation expenses. The Federation appealed unsuccessfully against the judgment, both to the Svea Court of Appeal and to the Supreme Court.

At the same time, Sedelmayer requested the Swedish Enforcement Authority to execute the judgment of the Court of First Instance with respect to litigation expenses through the attachment of Russian Federation property in Sweden. The request concerned more specifically the attachment of a building (Kostern 5) in Lidingö outside Stockholm. The building had been registered as the premises of the Trade Mission of the Russian Federation. Sedelmayer's request also concerned the rental payments that the tenants of that building had allegedly paid to the Russian Federation. The Swedish Enforcement Authority decided on 12 September 2003 to enforce the Court's judgment. However, an investigation by the said Authority showed that the Russian Federation was the registered owner of the building, at which some 60 persons had their registered addresses. These persons were not employed by the Russian Embassy or the Trade Mission. In addition, two companies, a real estate agency and a travel agency, had their official addresses in the same building. Further to communications with the Russian Federation in which it was explained that part of the building was used for diplomatic purposes and two statements from the Swedish Ministry for Foreign Affairs, the Enforcement Authority decided on 9 May 2005 that the attachment could not take place due to immunity.

[21] Stockholm Chamber of Commerce: Franz Sedelmayer v. Russia, Award (7 July 1998).

Sedelmayer appealed against the Enforcement Authority's decision to the Stockholm Court of First Instance. In a judgment rendered on 25 April 2008[22] the Court referred to the Supreme Court judgment in Local Authority of Västerås vs. Republic of Iceland[23] and the authoritative statement by that court as to how to decide whether immunity applies, namely to assess all the circumstances that in each specific case point to or against granting immunity. The Court of First Instance attached a great deal of weight to the Russian Federation's claim that a part of the building was used for diplomatic purposes, and concluded that even a limited use for such purposes was sufficient to exempt the whole building from executive measures both as regards the building itself and the rental payments paid to the Russian Federation.

The decision of the Court of First Instance was appealed against to the Svea Court of Appeal. Probably the most significant point in the Court of Appeal's decision of 17 December 2009[24] was the distinction the Court made between immunity and inviolability. The Court referred to an agreement from 1927 between the Union of the Soviet Socialist Republics and Sweden concerning the rights and obligations of the Soviet Trade Mission in Sweden.[25] The Russian Federation had invoked this agreement, which had recognized the Mission's immunity. However, the Court concluded that the Agreement was not relevant to the question of the possible immunity of the building from executive measures. What was relevant and important, according to the Court, was that a place used for the Trade Mission's activities should be inviolable. The Court opined that there was no legal obstacle to a change in the ownership of a building which was only partly used for such purposes that entitled it to protection against executive measures.

In contrast to the Court of First Instance, the Court of Appeal's assessment of the actual use of the building was that letting out flats and offices to Russian students and others, as well as to companies, could not be considered as an official use of the building. In this way the Court established that the building at the relevant time for this case, i.e. 2004, was predominantly used for non-official purposes. It could therefore not enjoy immunity from executive measures and could thus be subject to attachment. However, the Court emphasized that those

[22] Case No. Ä 1283-07.

[23] See note 11 and the accompanying text.

[24] Case No. ÖÄ 4239-08.

[25] SÖ 1928:8 (Collection of Sweden's International Agreements No. 1928:8). This agreement and the immunity of the Trade Delegation against executive measures was the subject of another case before the Swedish Supreme Court in 1946. That case was also between a German company and the Soviet Union. The Supreme Court decided in that case that such agreement was applicable and the Soviet Union enjoyed immunity. For the text of that judgment, see NJA (Collection of the Judgments of Sweden's Supreme Court), 1946, p. 719.

parts of the building that were used as diplomatic premises or archives of the Mission remained inviolable.

The Svea Court of Appeal's decision was appealed against to the Supreme Court, which rendered its decision on 1 July 2011.[26] The Court first referred to its previous practice on the issue of State immunity, including the Republic of Iceland (1999) and the Belgian Embassy (2009) cases.[27] A significant part of this decision was devoted to the interpretation of Article 19.C of the Convention on Jurisdictional Immunity. The Court explained that there were various understandings of what ownership of a property for an official non-commercial purpose really entails. In the Court's view, this expression should mean that, at any rate, immunity from executive measures could be invoked with respect to property used for a State's official functions. More importantly, the Court clarified that this expression should not convey that property, just because it is owned and used by a State for non-commercial purposes, enjoys immunity from executive measures. According to the Court, State immunity from executive measures against property owned by a foreign State will only apply if the purpose of the ownership of the property has a qualified character. By the latter the Court meant, for instance, a property used for a State's exercise of its sovereign rights and other functions of a purely official character, or when the property is of a particular type as mentioned in Article 21 of the Convention on Jurisdictional Immunity. Compared with its earlier practice, the Supreme Court here demonstrates a complete change of attitude concerning the application of the principle of State immunity.

When real estate is used for several purposes it should enjoy, according to the Supreme Court, immunity from executive measures even if it is used to a considerable but not necessarily predominant extent for official purposes. After assessing the purpose of the ownership of the building in this case at the relevant point in time (2004), the Court established that the purpose was not of a qualified nature. The materials before the Supreme Court showed that the building was used in 2004 as a residence by 15 members of the Mission's staff as well as for housing the archives and the garage for the Mission's diplomatic cars. Such residences and premises enjoy inviolability according to the Convention on Diplomatic Relations. But the question, according to the Supreme Court, was whether this use was enough to constitute a legal obstacle to the attachment of the building. Given that the building was also used for a purpose which had a private-law (but probably non-commercial)[28] nature, and that it lacked an official character, the Court

[26] Case No. Ö 170-10.

[27] See notes 11 and 16 and the accompanying text.

[28] The Russian Federation had claimed that those students, researchers, visitors and other non-diplomatic staff who lived in the building did not pay any rent. What they paid, according to the Embassy, was only compensation for the actual costs of heating, electricity, water and waste management. Sedelmayer had argued that the rent included profits and was thereby commercial. The Supreme Court did not directly comment on the Russian Federation's claim but implied that, irrespective of whether the letting out of flats and obtaining rental payments was an act of a private-law or commercial nature, it was not entitled to immunity.

decided that the building was not used, to a considerable extent, for Russian official activities. The purpose, according to the Court, did not even have a qualified nature in other respects that could warrant the exemption of the building from attachment. The Court reached the same conclusion as regards the attachment of rent payments made by the tenants.

The Supreme Court's decision in this case is significant for several reasons. The message of the Court is that as regards the attachment of real estate the borderline between *acta jure imperii* and *acta jure gestionis* will be established by assessing how large a part of an act/transaction has actually an official character.[29] The Supreme Court also strengthened the change of attitude in favor of restrictive immunity that started in 2009 with the decision in the Belgian Embassy case. The decision to permit an attachment of a building owned by a foreign State and claimed to be used as the premises of its trade mission but which in reality had been used for non-official purposes is in harmony with the modern interpretation of the purpose and function of immunity.[30]

5 Conclusion

The practice of the Swedish Courts until the beginning of the twenty-first century as regards the immunity of foreign States from Swedish jurisdiction and executive measures can be described as outmoded, overcautious, and characterized by a great respect for absolute immunity. It is more or less similar to the practice of Eastern European and a number of developing countries. What distinguishes Swedish court practice relating to immunity during this period, with a couple of exceptions, is an almost unfettered respect for foreign States' immunity. A study of these cases gives the impression that when one of the parties to the case is a foreign State, the court makes a great effort to justify the immunity of that State.

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[29] The conclusions in the decisions of the Svea Court of Appeal and the Supreme Court in the present case are correct. However, both these decisions may imply that a foreign State can purchase real estate in Sweden and use a considerable part thereof for official purposes and at the same time carry out commercial activities in another part and still enjoy immunity from executive measures. In my view real estate must be used wholly for official (sovereign) purposes to be exempted from executive measures: any profit-gaining activity is in conflict with the notion of immunity.

A consequence of the two decisions is that had the Russian Federation limited itself to letting out office areas to the two commercial companies (the travel agency and the real estate agency) and had avoided letting out flats to private Russian citizens, it would have probably enjoyed immunity from executive measures.

[30] The attachment of the property may give rise to tension in diplomatic relations between the Russian Federation and Sweden. The Swedish Ministry for Foreign Affairs is well aware of such a risk. In a letter to the Enforcement Authority dated 1 September 2004, the Ministry wrote "the Ministry estimates that our relation with the Russian Federation would be affected if executive measures were taken against State property in Sweden. It is therefore important that if such a decision were adopted it would be in accordance with international law."

The 2009 Supreme Court decision in the Belgian Embassy case in Stockholm and its latest immunity-related decision in the case against the Russian Federation (2011) demonstrate that a new era concerning State immunity has started in Sweden. The dispute in the Belgian Embassy case was not so complicated and the outcome, despite the Supreme Court's previous old-fashioned and inflexible attitude, was somehow expected. The Court's decision with respect to the establishment of the transaction's private-law nature was not surprising. The Russian Federation decision, on the other hand, is rather complicated. Had the case been decided some ten years ago, there would have been a risk of the Court accepting the limited use of the building for official purposes as a ground for granting immunity. Given the actual use of the property, the Supreme Court made a correct assessment of the situation. The fact that the case was against a powerful neighbouring State had no impact on the Supreme Court's judgment.

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Interpreting "Generic Terms": Between Respect for the Parties' Original Intention and the Identification of the Ordinary Meaning

Paolo Palchetti

1 The Evolutive Interpretation of Generic Terms in the Case Law of International Courts

It is a truism that international treaties, as any sets of rules, are subject to erosion with the passing of time. Since treaties are based on the will of the parties, it is primarily for the parties to assess the effects on treaties of the passing of time and to decide whether to revise or terminate aging treaties. While only the parties may undertake the revision of a treaty, international courts may play a role in ensuring the adaptation of the normative regime established by a treaty to changing conditions. They can contribute to this, in particular, by interpreting a treaty in an evolutive manner in order to ensure, as the Arbitral Tribunal in the *Iron Rhine* case put it, "an application of the treaty that would be effective in terms of its object and purpose".[1]

As is well known, evolutive interpretation is a method which is not frequently used by international courts. The general rules on treaty interpretation set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; hereinafter Vienna Convention)[2] do not provide a clear indication as to when a judge is allowed to redefine the meaning of a treaty provision in the light of changing circumstances. By requiring that account can be taken of "any relevant rules of international law applicable in the relations between the parties", Article 31.3.c is often referred to as a rule which opens up the possibility of an evolutive

[1] PCA: Iron Rhine ("IJzeren Rijn") Railway (Belgium/Netherlands), Award (24 May 2005), para 80.

[2] Entered into force on 27 January 1980.

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interpretation of a treaty. It may be objected, however, that even this provision does not clarify whether the rules of international law to be taken into account for the purposes of interpretation are only the rules in force at the time of the conclusion of the treaty or also subsequent rules in force at the time of the interpretation of the treaty.[3] With some exceptions,[4] international judges appear to be attached to the idea that, in principle, a treaty must be interpreted by taking fully into account what was the intention of parties at the time of its conclusion. The International Court of Justice (ICJ) recently restated this idea in the following terms: "It is true that the terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention, which is, *by definition*, contemporaneous with the treaty's conclusion".[5] The emphasis generally placed on the need to give effect to the intention of the parties is evidently a deterrent to the use of an evolutive interpretation. Resort to this method may potentially be perceived as leading to an interpretation which is not in accordance with the parties' intentions.

Confronted with these two different demands—to preserve the effectiveness of a treaty in the face of evolving circumstances, on the one hand, and to respect the intention of the parties as manifested at the time of the conclusion of the treaty, on the other—international courts have devised a solution which aims at reconciling this tension between change and stability. This solution consists of identifying, in the will of the parties, the possibility of reasons as to why under certain circumstances an evolutive interpretation may be justified. Thus, it has been held that there are situations in which it must be presumed that it was the parties' intention that a term or a provision be interpreted according to the meaning *acquired* by that term or provision at the time in which the treaty is to be applied. To determine when such a presumption arises, international courts have identified certain elements which serve the purpose of establishing whether the parties' intention allows for a dynamic interpretation of the treaty. Prominent among these indicators is the fact that the parties have used "generic terms" in a treaty. In the words of the ICJ,

> where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.[6]

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[3] For this observation see Thirlway 1991, p. 58.

[4] See, for instance, the frequent use of the method of evolutive interpretation in the case law of the European Court of Human Rights. On this issue, see Bernhardt 1999, pp. 17–24, and Gaja 1999, pp. 219–222. When considering the attitude of international courts, account must be taken of the fact that, as observed by Dupuy 2011, p. 125, they "are not always in the same legal and political position to undertake a dynamic reading of the agreement before them".

[5] ICJ: Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment (13 July 2009), para 63 (italics added).

[6] Ibidem, para 66.

The role which generic terms play in treaty interpretation has long been recognized in the case law of the ICJ. In its advisory opinion in the *Namibia* case, while taking care to stress that it was mindful of "the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion",[7] the Court recognized that certain concepts embodied in Article 22 of the Covenant of the League of Nations, such as that of a sacred trust of civilization, "were not static, but were by definition evolutionary".[8] In the Court's view, "[t]he parties to the Covenant must consequently be deemed to have accepted them as such".[9] A similar approach was later taken by the Court in its judgments in the *Aegean Sea Continental Shelf* case[10] and, more recently, in the case concerning the *Dispute Regarding Navigational and Related Rights*. In the former case, the question concerned the interpretation of the term "territorial status" in Greece's reservation to the General Act of 1929. Once it was established that this expression was used as a generic term, the Court found that "the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time".[11] In the *Dispute Regarding Navigational and Related Rights* case, the Court applied the same reasoning with regard to the interpretation of the term "*comercio*" as used in the 1858 Treaty of Limits between Costa Rica and Nicaragua.[12]

The role assigned to generic terms in treaty interpretation is by no means a feature which characterizes only the case law of the ICJ. In its well-known decision in the *US—Shrimp* case, the WTO Appellate Body established that the term "exhaustible natural resources" in Article XX.g of GATT also covered living species on the ground that "the generic term 'natural resources' in Article XX (g) is not 'static' in its content or reference but is rather 'by definition evolutionary'".[13] In its more recent report in the *China—Measures Affecting Trading Rights and Distribution Services* case, the Appellate Body found that "the terms used in China's GATS Schedule ('sound recording' and 'distribution') are sufficiently generic that what they apply to may change over time".[14] As to the case law of

[7] ICJ: Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Op. (21 June 1971), para 53.

[8] Ibidem.

[9] Ibidem.

[10] ICJ: Aegean Sea Continental Shelf (Greece v. Turkey), Judgment (19 December 1978).

[11] Ibidem, para 77.

[12] Navigational and Related Rights, supra n. 5, para 67. On this judgment see Bjorge 2011, p. 271.

[13] WTO: United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, Appellate Body Report (12 October 1998), para 129.

[14] WTO: China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/AB/R, Appellate Body Report (21 December 2009), para 396.

arbitral tribunals, reference may be made to the arbitral award in the *Iron Rhine* case, where the Tribunal expressly admitted that, when a term can be classified as generic, the presumption arises that the term must be interpreted according to its meaning at the time in which the treaty is to be applied.[15]

Since the use of generic terms creates a presumption in favor of a dynamic interpretation of their meaning, the classification of a term as 'generic' is an element which may impact considerably on the outcome of the interpretative process. Then the following question arises: can it be held that, whenever the parties to a treaty have used terms susceptible of evolutive interpretation, the presumption *necessarily* arises that they intended to give to such terms a meaning that would change over time? And, if this is not the case, when can the use of a certain term give rise to a presumption that the term must be interpreted in an evolutive manner? Behind these questions lies a more general problem: what role, if any, do the general rules set forth in Articles 31 and 32 of the Vienna Convention play with regard to the interpretation of generic terms?

2 What Terms Can Be Classified as Generic for the Purposes of Treaty Interpretation?

In her declaration attached to the ICJ's judgment in the *Kasikili/Sedudu Islands* case, Judge Higgins provided the following definition of what is a generic term: "a known legal term, whose content the parties expected would change through time".[16] The view that the notion of generic terms (as elaborated in the case law of the ICJ) only applies to legal terms whose meaning changes with the development of the law finds significant support in the legal literature.[17] That view appears to have been buttressed by the fact that, in its judgment in the *Aegean Sea Continental Shelf* case, where the idea of the evolutive interpretation of generic terms was first articulated in clear terms, the Court had in fact approached the problem as one of determining the impact of the evolution of the law on the interpretation of a generic term that referred to a legal concept. As the Court put it, since the expression "territorial status of Greece" was to be regarded "as a generic term denoting any matters comprised within the concept of territorial status under general international law", there was the presumption that the term "was intended to follow the evolution of the law".[18]

If one accepts that the interpretative problem raised in connection with the use of generic terms only concerns the interpretation of legal terms whose meaning

[15] Iron Rhine, supra n. 1, para 79.

[16] ICJ: Kasikili/Sedudu Island (Botswana v. Namibia), Judgement (13 December 1999), Declaration of Judge Higgins.

[17] See for instance Jiménez de Aréchaga 1978, p. 49; Jennings and Watts 1992, p. 1282.

[18] Aegean Sea Continental Shelf, supra n. 10, p. 32, para 77.

may change with the evolution of the rules of international law, then it is quite logical to consider that this problem must be assessed in the light of the rule set forth in Article 31.3.c of the Vienna Convention. In particular, it may be held that the presumption in favor of an evolutive interpretation of generic terms reflects the fact that Article 31.3.c permits a treaty to be interpreted in the light of the rules of international law in force at the time when the treaty is to be applied. Significantly, the view that the interpretation of generic terms involves an application of the rule set forth in Article 31.3.c appears to find support in the work on the International Law Commission on the fragmentation of international law. When assessing the scope of application of this provision, the Study Group on Fragmentation established by the International Law Commission also addressed the question of intertemporality, i.e. the question of whether the "rules of international law applicable in the relations between the parties" are the rules in force at the time of the conclusion of the treaty in question or the rules in force at the time of its application. In this context, the Study Group referred also to the question concerning the interpretation of "open or evolving concepts". The conclusion of the Study Group specifically dedicated to the interpretation of open concepts provides that "[r]ules of international law subsequent to the treaty to be interpreted may be taken into account where the concepts used in the treaty are open or evolving".[19]

However, this distinction between legal terms—or, more broadly, between terms whose meaning change with the development of international law—and other "open" terms whose content is capable of evolving appears to be unwarranted. If the presumption of evolutive interpretation relies on the idea that when the parties have used a generic term in a treaty, they must necessarily be aware that the meaning of that term may evolve over time, then there is no reason why such a presumption should only arise when legal terms are used. What is relevant is not so much the fact that the term used by the parties refers to a legal concept as the fact that the term was sufficiently generic to warrant the conclusion that its meaning was presumably intended by the parties to evolve over time. In the same vein, and contrary to the restrictive view apparently taken by the Study Group of the International Law Commission with respect to the interpretation of "open concepts", the development of international law is not the only element which must be taken into account in order to address problems of inter-temporality in treaty interpretation. Changes in conventional language are also relevant and may give rise to the presumption of an evolutive interpretation.[20]

Recent decisions dealing with the question of the interpretation of generic terms lends support to this view. Terms such as "*comercio*" and "sound recording" can hardly be qualified as legal terms. When determining the meaning of the word "*comercio*" the Court did not find it necessary to refer to a development in international law in order to demonstrate that the meaning of the term nowadays is

[19] Conclusions of the Work of the Study Group, in Report of the International Law Commission on the work of its sixty-first session (2006), UN doc. A/61/10, p. 415.

[20] In the same vein, Simma and Kill 2008, p. 684, note 25, and Linderfalk 2008, p. 121.

different from the meaning it had at the time of the conclusion of the 1858 Treaty of Limits; it simply observed that "this is a generic term, referring to a class of activity".[21] At the same time, however, the Court observed that the terms used in a treaty can have a meaning capable of evolving "so as to make allowance for, among other things, developments in international law".[22] Thus, the Court expressly acknowledged that developments in international law constitute only one element, among others, which the interpreter may take into account to adapt the meaning of a term to changed circumstances.[23]

If the presumption of evolutive interpretation does not only concern legal terms whose meaning has changed with the development of international law but also applies to generic terms whose meaning has changed as a consequence of an evolution in language, it would hardly be conceivable to rely on Article 31.3.c to justify the operation of this presumption. Since the interpretation of generic terms has to do with the determination of the ordinary meaning of a term in cases in which the meaning of this term has evolved over time, the rule of interpretation which comes into play is the general rule set forth in Article 31.1, according to which a treaty must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[24] Here, eventually, the question which may be raised concerns the application of this rule to the problem of determining when a term must be interpreted according to the meaning acquired at the time in which the treaty is intended to be applied. The question is essentially the following: for a presumption in favor of evolutive interpretation to arise, is it sufficient to refer to the fact that the term used by the parties has a meaning capable of evolving, or should one instead consider that such a presumption is necessarily the result of an interpretative process in which all three components of Article 31.1—the ordinary meaning of the term, its context and the treaty's object and purpose—are to be used?[25]

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[21] Navigational and Related Rights, supra n. 5, para 67.

[22] Ibidem, para 64.

[23] Ibidem. According to Arato 2010, p. 472, in order to interpret the term "*comercio*" the Court "took into account evolving *factual* circumstances in interpreting an evolutive term, in other words what it deemed to be a development in the ordinary meaning of the expression '*comercio*'". In the *Namibia* case, the Court also took into account "the political history of mandated territories in general" in order to justify its evolutive interpretation of the term "sacred trust of civilization". Namibia, supra note 7, p. 31, para 52. See Linderfalk 2008, p. 125.

[24] It may be held that, for purposes of determining the meaning of a legal term, it makes substantially no difference if one applies the general criterion stated in Article 31.1, or that in Article 31.3.c. One can share this view, the only possible difference lying in the fact that, according to a certain reading of Article 31.3.c, this criterion requires the interpreter to take into account only the rules of international law which are applicable in the relations between the parties to the treaty to be interpreted. It would be unreasonable to apply a similar restriction with regard to the problem of determining whether an evolution in the meaning of a legal term has taken place.

[25] On this point see Van Damme 2006, p. 31.

3 Determining the Meaning of Generic Terms in the Light of Their Context and the Treaty's Object and Purpose

At first glance, when considering the approach of international courts to the interpretation of generic terms, one might have the impression that the focus is essentially, if not exclusively, on the generic character of the terms used by the parties. This may lead one to believe that what matters for the purposes of establishing a presumption of evolutive interpretation is that the terms used in the treaty were "not static but were, by definition, evolutionary". Thus, the real interpretative problem would be that of determining when a term can be classified as generic. Once it is established that a certain term may be so classified, this would automatically give rise to a presumption of evolutive interpretation.[26] From this perspective, the establishment of such a presumption appears to be the result of an interpretative process which centers exclusively around the determination of the natural and ordinary meaning of the terms employed at the time of the treaty's application.

However, on a more careful analysis it emerges that, together with the particular nature of the terms used, international courts take into account other elements which they consider to be relevant when deciding whether a presumption of evolutive interpretation arises. In its Advisory Opinion in the *Namibia* case the Court, while placing particular emphasis on the fact that a concept such as that of the "sacred trust of civilization" was "by definition evolutionary", also referred to the specific object and purpose of the mandate institution provided by Article 22 of the Covenant of the League of Nations. As the Court observed, "[i]t cannot tenably be argued that the clear meaning of the mandate institution could be ignored by placing upon the explicit provisions embodying its principles a construction at variance with its object and purpose".[27] As one can deduce from the Court's reasoning, the consideration of the object and purpose of this institution was regarded as being an element which, in conjunction with the particular content of the terms employed, justified an evolutive interpretation of the relevant provision. The importance assigned to elements other than the "generic" character of the terms used emerges even more clearly from the Court's judgment in the *Aegean Sea Continental Shelf* case. In this case, the Court took care to stress that the presumption of evolutive interpretation was "even more compelling when it is recalled that the 1928 Act was a convention for the pacific settlement of disputes

[26] See in this respect the criticism by Thirlway 1989, p. 137, according to whom the thrust of the Court's reasoning in *Namibia* was that, "because the concepts were, in the Court's view, 'by definition evolutionary', they [the parties] 'must consequently be deemed to have accepted them as such'".

[27] Namibia, supra n. 6, para 50. The Court concludes its reasoning over the meaning to be given to the generic terms at issue by observing that "the Court is unable to accept any construction which would attach to 'C' mandates an object and purpose different from those of 'A' or 'B'". Ibidem, para 54.

designed to be of the most general kind and of continuing duration, for it hardly seems conceivable that in such a convention terms like 'domestic jurisdiction' and 'territorial status' were intended to have a fixed content regardless of the subsequent evolution of international law".[28] What is here implied is that the consideration of a treaty's object and purpose has a role to play when it comes to determining whether a term must be interpreted according to its meaning at the time when the treaty is applied. The same position was subsequently taken by the Court in its judgment in the *Dispute Regarding Navigational and Related Rights* case, where, for the purposes of justifying an evolutive interpretation of the term "*comercio*", relevance was given to the fact that the 1858 Treaty of Limits "was intended to create a legal regime characterized by its perpetuity".[29]

Thus, the Court's approach to the interpretation of generic terms is based on a combination of different elements. While in the Court's reasoning it is the kind of terminology employed by the parties that is generally considered as the key element which gives rise to the presumption of evolutive interpretation, the Court is also careful to buttress the existence of such a presumption by referring to other elements which relate to the context in which a generic term is used and to the treaty's object and purpose. In this respect, the method employed by the Court appears to reflect the integrated operation envisaged by the general rule of interpretation set forth in Article 31.1. The Court may perhaps be criticized for its tendency to rely on certain objective characteristics of a treaty—such as, for instance, its unlimited duration and the perpetuity of the regime established by it—instead of conducting a fuller assessment of the context in which a term is used and of the treaty's object and purpose. It remains, however, that the operation put in place by the Court, to the extent that it involves an inquiry into whether a certain term, read in its context and in the light of the treaty's object and purpose, may be interpreted according to its current meaning, appears to conform to the criterion set forth in Article 31.1.

Other international courts have adopted the same approach that was followed by the Court. In its report in the *US—Shrimp* case, the WTO Appellate Body, when addressing the question of the meaning to be attached to the generic term "natural resources" in Article XX.g of the GATT, placed particular emphasis on the fact that "[t]he preamble of the WTO Agreement—which informs not only the GATT 1994, but also the other covered agreements—explicitly acknowledges 'the objective of sustainable development'".[30] The finding that term included living species was justified by reference to both the recent attitude taken by the international community with regard to the protection of living natural resources and

[28] Aegean Sea Continental Shelf, supra n. 10, para 37.

[29] Navigational and Related Rights, supra n. 5, para 67. See also ibidem, paras 68–69.

[30] US—Shrimp, supra n. 13, para 129.

"the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the WTO Agreement".[31] In its report in the case concerning *China—Publications and Audiovisual Products*, the Appellate Body took into account the object and purpose of GATS for the purposes of determining whether the entry "Sound recording distribution services" had to be interpreted according to meaning of this entry at the time of interpretation.[32]

Since, for a presumption of evolutive interpretation to arise, account should be taken of the context in which generic terms are used and of the object and purpose of the treaty, the same generic term may be given different meanings depending on the treaty in which it is used. While in the context of a treaty a generic term can be interpreted according to the meaning it had at the time of the conclusion of that treaty, when used in a different treaty it can be interpreted according to the meaning it has at the time of the interpretation. This point was made by the ICJ in the *Aegean Sea* case. The Court rejected a parallel which Greece had sought to establish between the interpretation to be given to the terms used in its reservation to the 1928 General Act and the interpretation of similar terms which had been given by an arbitral award concerning the grant of a mineral oil concession.[33] In the Court's view,

> [w]hile there may well be a presumption that a person transferring valuable property rights to another intends only to transfer the rights which he possesses at that time, the case appears to the Court to be quite otherwise when a State, in agreeing to subject itself to compulsory procedures of pacific settlement, excepts from that agreement a category of disputes which, though covering clearly specified subject-matters, is of a generic kind.[34]

According to this line of reasoning, the fact that a term has been classified as generic by a tribunal in the context of the interpretation of a certain treaty is an element which, *per se*, can hardly be considered as decisive for the interpretation to be given to the same or a similar term when it is used in a different treaty. Whether this term is to be interpreted according to its contemporary meaning or not is a question which must be assessed in the light of the specific circumstances of each treaty.[35]

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[31] Ibidem, para 131.

[32] China—Publications and Audiovisual Products, supra n. 14, para 395.

[33] Greece referred to the arbitral award in the *Petroleum Development Ltd.* versus *Sheikh of Abu Dhabi* case, where the arbitrator held that the grant of an oil concession in 1939 was to be interpreted as not including the continental shelf.

[34] Aegean Sea Continental Shelf, supra n. 10, para 77.

[35] But see Arato 2010, pp. 491–492, who held the view that it "is not unrealistic to imagine tribunals relying on one another's judgments about the evolutive nature of terms, even when interpreting different treaties—the statement that a treaty is evolutive by virtue of its terminology is an imputation on the basis of language, not necessarily in consideration of subject-matter, context, or object and purpose".

4 A Rebuttable Presumption? The Role of the Subsequent Practice of the Parties and of Preparatory Works

As we have seen, the effect of the use of generic terms in a treaty is to give rise to a presumption that these terms are to be interpreted according to their meaning at the time of the application of the treaty. While international courts have never addressed this issue explicitly, it may be held that this is a rebuttable presumption. The question which then arises is what elements must be taken into account for purposes of confirming or rebutting the interpretative presumption stemming from the use of generic terms. Put differently, what other means of interpretation come into play for the determination of whether or not the meaning of a treaty term has to be interpreted in an evolutive manner, and what is the relation between these different means of interpretation?

In its judgment in the *Dispute Regarding Navigational and Related Rights* case, the ICJ referred to the subsequent practice of the parties within the meaning of Article 31.3.b as a means of interpretation by which the meaning of a treaty term or treaty provision may change over time.[36] In that case, the interpretation based on the subsequent practice of the parties and the evolutive interpretation based on the use of generic terms were presented as two alternative means of interpretation by which one may justify the taking into account of an evolution in the meaning of a term. No reference was made to the possibility of applying both techniques at the same time for the purpose of determining the solution to be given to the interpretative problem at issue. However, such a possibility can hardly be denied. The contemporaneous application of both techniques is a solution which conforms best with the rule of interpretation set forth in Article 31 of the Vienna Convention. In certain cases, the subsequent practice of the parties may provide a confirmation of the interpretative presumption which arises in connection with the use of generic terms. Indeed, in the *Dispute Regarding Navigational and Related Rights* case, the interpretation based on the evolutive character of the term "*comercio*" and the interpretation based on the subsequent practice of Costa Rica and Nicaragua pointed to the same result.[37] It may happen, however, that the application of these two techniques leads to different results as to the meaning to be given to a treaty term. This raises the problem of which of these two elements must be regarded as the most relevant for purposes of determining whether or not a term is to be interpreted according to the meaning it has at the time of the interpretation. An answer to this question cannot be found in Article 31 of the Vienna Convention. However, since the subsequent practice reflects the actual agreement of the parties,

[36] Navigational and Related Rights, supra n. 5, para 64.

[37] In his declaration attached to the Court's judgment, Judge Skotnikov, while contesting the correctness of the methods of interpretation applied by the Court, agreed with the Court's conclusion that the term "*comercio*" had to be interpreted according to its meaning at the present time. In his view such an interpretation found support in the subsequent practice of the parties.

it seems that in principle this element provides a more solid ground for justifying the interpretation of treaty terms than the reference to their evolutive character.[38]

A more complex issue concerns the role to be given to preparatory works. As we have seen, the approach followed by the Court to justify an evolutive interpretation of generic terms is based on the assessment of the parties' common intention at the time the treaty was concluded. The emphasis thus placed on the parties' original intent seems to imply that the preparatory works of a treaty and the other circumstances of its conclusion should be given relevant weight for the purposes of confirming or rejecting the interpretative presumption which arises in connection with the use of generic terms. It might be held that the preparatory works are an indispensable means for assessing the parties' original intention. Indeed, the main criticism levelled against the Court's approach is that the Court failed to provide historical evidence to buttress the presumption that it was the parties' intention at the time of the conclusion of the treaty to give the terms used a meaning capable of evolving.[39]

As is well known, under the general rules of treaty interpretation codified in the Vienna Convention, preparatory works and the other circumstances surrounding the conclusion of a treaty have been given the role of supplementary means of interpretation to which recourse must be had in order to confirm the interpretation resulting from the application of the criteria stated in Article 31 or when the application of these criteria leads to an unsatisfactory result. Even assuming that preparatory works should have a greater role in situations in which one is confronted with a question of inter-temporal nature, such a role must not be exaggerated. Thus, it would be excessive to suggest that a term cannot be given an evolutive meaning unless one is able to find evidence to that effect in the preparatory works.[40] This would substantially mean that preparatory works are to be regarded as the main, if not the only, element to be taken into account for the purpose of determining whether a term can be given an evolutive meaning. As provided by Article 32 of the Vienna Convention, reference to preparatory works is most useful in order to confirm the interpretative presumption arising as a consequence of the use of generic terms in a treaty.[41] When the preparatory works provide clear evidence that the parties did not intend to give to a term a meaning which changed over time, this evidence should generally lead to a rejection of the presumption in favor of an evolutive interpretation. While in this case the

[38] For the view that "the agreement of the parties, as evidenced by their subsequent practice, can sometimes provide a higher legitimacy than the invocation of an inherently evolutionary meaning", see Nolte 2011, p. 143.

[39] See Thirlway 1989, p. 137; Dawidowicz 2011, p. 221.

[40] This seems to be the view of Judge Skotnikov. See his declaration attached to the Court's judgment in Navigational and Related Rights, supra n. 5.

[41] In its US—Shrimps report, the Appellate Body referred incidentally to the preparatory works of the GATT by observing that "the drafting history does not demonstrate an intent on the part of the framers of the GATT 1947 to exclude 'living' natural resources from the scope of application of Article XX(g)". Supra n. 13, note 114.

preparatory works appear to have a greater role than the determination of the ordinary meaning of a term in its context and in the light of the treaty's object and purpose, the Vienna Convention seems to contemplate this possibility, as it provides that "[a] special meaning shall be given to a term if it is established that the parties so intended".[42] Moreover, it may be suggested that under certain circumstances it could be justified to resort to an evolutive interpretation of generic terms despite the indication to the contrary flowing from the preparatory works. Thus, for instance, in the context of multilateral treaties, particularly when several parties did not participate in the works leading to the adoption of the text of the treaty but only acceded to that treaty at a later stage, it may be doubted that indications drawn from the preparatory works can be regarded as reflecting the parties' common intention at the time of the conclusion of the treaty.[43] In this scenario, in so far as preparatory works may not be indicative of the parties' common intention, the weight to be given to this element may correspondingly be reduced.

The supplementary means of interpretation referred to in Article 32 appear to play a greater role when the problem of interpreting generic terms arises with regard to the interpretation of international acts other than treaties. The ICJ has recognized that the rules of interpretation set forth in the Vienna Convention apply by analogy to the interpretation of unilateral acts of States, such as the unilateral declaration of acceptance of the jurisdiction of the Court,[44] and of acts of international organizations, such as UN Security Council resolutions.[45] Most recently, the Seabed Disputes Chamber of the International Tribunal of the Law of the Sea, under the presidency of Tullio Treves, has taken the same view with respect to the interpretation of certain regulations adopted by the International Seabed Authority.[46] While international courts accept that the criteria of interpretation stated in the Vienna Convention provide guidance as to the interpretation of these other acts, they also appear to suggest that certain elements, which in the context of treaty interpretation rank among the supplementary means of interpretation, have a greater weight in the context of the interpretation of unilateral acts of States or of acts of international organizations. Thus, for instance, in its judgment in the *Fisheries Jurisdiction* case, the ICJ took care to stress that, when interpreting a State's declaration of acceptance of the Court's jurisdiction, "due regard" must be had "to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court", adding that

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[42] See Article 31.4 of the Vienna Convention.

[43] On this point see Fitzmaurice 1957, p. 205, who found that in cases such as this "the very expression 'the intentions of the parties' is unsatisfactory".

[44] ICJ: Fisheries Jurisdiction (Spain v. Canada), Judgment (4 December 1998), para 46.

[45] ICJ: Accordance with International Law of the Unilateral Declaration of Independence with Respect to Kosovo, Advisory Op. (22 July 2010), para 94.

[46] ITLOS: Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Seabed Disputes Chamber, Advisory Op. (1 February 2011), para 60.

> [t]he intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served.[47]

Given the importance attached, as a rule, to evidence pertaining to the circumstances of the preparation of the unilateral act, it may be expected that evidence of this kind must be given an even greater role, particularly if compared to what happens in the context of treaty interpretation, when it comes to determining whether a generic term used in such an act must be interpreted in an evolutive manner. It must be noted, however, that in the only case where such a question arose, the Court paid little attention to the differences between the interpretation of treaties and the interpretation of unilateral acts. In the *Aegean Sea Continental Shelf* case, while accepting in principle that "in interpreting reservation (b) regard must be paid to the intention of the Greek Government at the time when it deposited its instrument of accession to the General Act", the Court relied on the evolutionary character of the term "territorial statute" without attaching particular significance to the specific features of the act to be interpreted.[48]

5 Conclusions

It can hardly be said that the general rule of interpretation stated in Article 31.1 of the Vienna Convention gives a clear indication in favor of an evolutive interpretation of generic terms. However, Article 31.1 clearly indicates that, when interpreting a treaty term or a treaty provision, emphasis must be placed primarily on certain objective factors such as the ordinary meaning of a term, the context in which it is used and the treaty's object and purpose. When interpreting generic terms, international courts appear to stick to this indication in so far as they seek to link the evolutive interpretation of these terms to objective factors, in particular the fact that the meaning of the term used has changed over time and the consideration of the context and of the treaty's object and purpose. Admittedly, they do not refer to the general rule of interpretation stated in the Vienna Convention in order to

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[47] Fisheries Jurisdiction (Spain v. Canada), supra n. 44, para 49. In the advisory opinion on *Kosovo*, the Court noted that "[t]he interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions". Kosovo, supra n. 45, para 94.

[48] Aegean Sea Continental Shelf, supra n. 10, p. 29, para 69. In its judgment in the *Dispute Regarding Navigational and Related Rights* case, the Court took care to note that the Court's reasoning in the *Aegean Sea* case with regard the interpretation of generic terms, "[t]hough adopted in connection with the interpretation of a reservation to a treaty", was "fully transposable for purposes of interpreting the terms themselves of a treaty". Navigational and Related Rights, supra n. 5, para 66.

justify their solution, preferring, instead, to rely on an argument which is based on the identification of the presumed intention of the parties at the time of the conclusion of the treaty. Yet this reference to the presumed intention of the parties appears to amount to no more than a *fictio juris*. Historical evidence showing what the intention of the parties was upon the conclusion of a treaty is rarely taken into consideration. The presumed intention is deduced from objective factors which are substantially the same factors on which one should rely when interpreting a treaty according to the general criterion stated in the Vienna Convention.

The solution adopted by international courts with regard to the interpretation of generic terms may be regarded as providing a further indication of the tendency to interpret treaties in an objective manner.[49] It might be objected that this solution may lead to an interpretation of a treaty beyond the actual consent of the parties and, in turn, may undermine the predictability of the legal commitments which the parties intended to assume with the conclusion of the treaty. But this risk should not be overstated. Moreover, the opposite presumption—according to which a term would have to be interpreted according to its meaning at the time of the conclusion of the treaty—might also risk undermining the predictability of treaty commitments. This point was convincingly made by the WTO Appellate Body with regard to the interpretation of GATS and GATS Schedules. In a passage which deserves to be reported in its entirety, the Appellate Body observed:

> (…) interpreting the terms of GATS specific commitments based on the notion that the ordinary meaning to be attributed to those terms can only be the meaning that they had at the time the Schedule was concluded would mean that very similar or identically worded commitments could be given different meanings, content, and coverage depending on the date of their adoption or the date of a Member's accession to the treaty. Such interpretation would undermine the predictability, security, and clarity of GATS specific commitments, which are undertaken through successive rounds of negotiations, and which must be interpreted in accordance with customary rules of interpretation of public international law.[50]

Once it is realized that the problem of interpreting generic terms cannot be addressed simply on the basis of one presumption or another but, like any interpretative problem, must be assessed in the light of the means of interpretation set forth in the Vienna Convention, it becomes important to ensure that these means of interpretation are effectively and adequately used. International courts should make clear in the reasoning presented in their judgments that when they interpret a generic term in an evolutive manner, this is the result of an operation which involves a full assessment of the elements indicated in the general rules of interpretation. It is submitted that the reference to these rules provides greater legitimacy than the invocation of the presumed intention of the parties.

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[49] On this tendency see, among others, the report prepared by Mr. Nolte on "Treaties over time, in particular: Subsequent Agreement and Practice", in Report of the International Law Commission on the work of its sixty-third session, UN doc. A/63/10, p. 370, para 15.

[50] US—Shrimp, supra n. 13, p. 161, para 397.

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Part III
International Courts: Jurisdiction and Procedure

Dispute Settlement Procedures and Fresh Water: Multiplicity and Diversity at Stake

Laurence Boisson de Chazournes

The resolution of water disputes has greatly benefited over time from the progressive erosion of States' traditional reluctance to commit themselves in advance to judicial and quasi-judicial dispute settlement mechanisms, as well as the considerable progress made toward the institutionalization of dispute settlement facilities. As in many other areas of international law, Tullio Treves has very aptly and subtly analyzed these trends and their consequences for the international legal order.[1]

The protection and management of fresh water offer an interesting lens to analyze these trends. Disputes concerning fresh water are varied. They reflect the many values of water: social, ecological, cultural, and economic. They concern quantity and quality aspects, involve the delivery of goods and services, and can be linked to investment activities. To date, major causes of disputes have included navigation, dams, diversions, and water quality issues. The case law of the Permanent Court of International Justice (PCIJ),[2] the International Court of Justice (ICJ), and the Permanent Court of Arbitration (PCA)[3] is illustrative of this varied nature. Water and sewage concession agreements have presented core questions

[1] On these trends, see, inter alia, Treves 1997, 2007.

[2] See, for example, ICJ: Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment (25 September 1997); PCA: Application of the Convention on the Protection of the Rhine against Pollution by Chlorides (3 December 1976) and its Additional Protocol (25 September 1991) (Netherlands v. France), Award (12 March 2004).

[3] See, among others, ICSID: Compañía de Aguas del Aconquija S.A. (formerly Compagnie Générale des Eaux) and Vivendi Universal S.A. v. Argentina, ARB/97/3, Award (21 November 2001); Aguas del Tunari S.A. v. Bolivia, ARB/02/3, Decision (21 October 2005).

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for arbitral tribunals constituted under the aegis of the International Centre for Settlement of Investment Disputes (ICSID). Several requests brought to the World Bank Inspection Panel and other compliance mechanisms established by international financial institutions have concerned the construction of large-scale water infrastructure.[4]

The available dispute settlement procedures are diverse. They may be strictly diplomatic or judicial, but may alternatively form a hybrid of both archetypes. Non-state actors increasingly submit claims concerning access to water, health protection, and environmental issues to international dispute settlement mechanisms.[5] The multiplication of these dispute settlement procedures has aided the clarification of norms and principles applicable to fresh water. In addition, this multiplication stresses the variety of dispute settlement procedures, notably those accessible to non-State actors. However, while water disputes have been brought before almost all existing mechanisms,[6] these procedures differ in their broader contributions to the resolution of such disputes.

1 Multiplication of Dispute Settlement Procedures: Issues of Interpretation and the Development of the Law Applicable to Fresh Water

Both the multiplication of dispute settlement mechanisms and procedures and their institutionalization have an impact on the development of the principles, norms, and rules applicable to fresh water. Although jurisdictions tend to refer to their previous decisions for the sake of predictability and consistency, cross-fertilization has intertwined them. These institutions refer to decisions of other bodies in their own reasoning and holdings. In this context, the International Court of Justice plays a leading role. For example, the ICJ has gradually clarified the legal contours of important notions and principles, such as its predecessor's reference to the concept of a community of interests in the 1929 *Oder* case.[7] In the *Gabčíkovo-Nagymaros* case, the Court raised this explicitly, thereby stating:

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[4] World Bank Inspection Panel: Yacyretà Hydroelectric Project (Argentina), Eligibility Report (24 December 1996); Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretà), Investigation Report (24 February 2004); Private Power Generation Project (Uganda), Investigation Report (29 August 2008). African Development Bank Independent Review Mechanism: Uganda: Bujagali Hydropower Project and Bujagali Interconnection Project, Investigation Report (20 June 2008).

[5] Tanzi and Pitea 2003.

[6] Boisson de Chazournes and Tignino 2010.

[7] PCIJ: Territorial Jurisdiction of the International Commission of the River Oder (United Kingdom et al. v. Poland), Judgment (10 September 1929), p. 27.

> [I]n 1929, the Permanent Court of International Justice, with regard to navigation in the River Oder, stated as follows: '[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others' (*Territorial Jurisdiction of the International Commission of the River Oder,* Judgment No. 16, 1929, P.C.I.J., Series A, No. 23, p.27).[8]

Thereafter, in the context of water pollution and the allocation of costs, an arbitration tribunal relied on the decision of the PCIJ when it embraced the notion of a community of interests. The tribunal stated:

> [W]hen the States bordering an international waterway decide to create a joint regime for the use of its waters, they are acknowledging a 'community of interests' which leads to a 'community of law' (to quote the notions used by the Permanent Court of International Justice in 1929 in the *Case concerning Territorial Jurisdiction of the International Commission of the Oder* (P.C.I.J. Series A, No. 23, p.27). Solidarity between the bordering States is undoubtedly a factor in their community of interests.[9]

In the *Pulp Mills on the River Uruguay* case concerning transboundary environmental harm, the ICJ recognized that institutional joint mechanisms such as the Administrative Commission of the River Uruguay (CARU) are part of "a real community of interests and rights in the management of the River Uruguay and in the protection of its environment."[10]

In the same judgment, the ICJ echoed its decision in the *Dispute Regarding Navigational and Related Rights* case, interpreting the obligation to protect the aquatic environment as encompassing the requirement to carry out an environmental impact assessment. The Court noted:

> As the Court has observed in the case concerning the *Dispute Regarding Navigational and Related Rights*, "there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used – or some of them – a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law" (*Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, para 64). In this sense, the obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.[11]

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[8] Gabčíkovo-Nagymaros, supra n. 2, para 85.

[9] Rhine Chlorides, supra n. 2, para 97. Boisson de Chazournes 2008, pp. 10, 57.

[10] ICJ: Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment (20 April 2010), para 281. The Court stated: "By acting jointly through CARU, the Parties have established a real community of interests and rights in the management of the River Uruguay and in the protection of its environment."

[11] Ibidem, para 204.

The risks of incoherent jurisprudence and conflicting interpretations of applicable norms (in international water law or related fields such as the environment and trade) have yet to arise in practice. However, these risks should not be discarded. Consideration of choice of forum is a means to prevent such situations. Many dispute settlement mechanisms do not contain choice of forum provisions ("fork in the road" clauses). However, the North America Free Trade Agreement (San Antonio, 17 December 1992, hereinafter NAFTA)[12] does contain such a possibility. Disputes falling within both the NAFTA and World Trade Organization (WTO) regimes may be settled in either forum at the discretion of the complaining party; upon selection, the chosen forum retains exclusive jurisdiction.[13] However, even when disputes fall within both regimes, there has been a notable reluctance among concerned NAFTA States to utilize such choice of forum provisions.

In addition, certain disputes between NAFTA members concerning the environment and health are subject to a special regime. In these situations, the respondent State may insist that the dispute be adjudicated before NAFTA dispute settlement bodies. The applicant is then prevented from seizing the WTO procedure and must withdraw from any initiated WTO proceedings.[14]

Despite the scarcity of choice of forum provisions or other specific mechanisms, courts, and tribunals have in general become noticeably aware of decisions rendered by other courts and tribunals. Tullio Treves has even noted "a constructive dialogue" between some of these institutions.[15] Such an approach mitigates the risk of diverging interpretations. An arbitral tribunal deciding a dispute concerning the law of the sea went a step further in referring to "considerations of mutual respect and comity which should prevail between judicial institutions",[16] underlying the responsibility of courts and tribunals to prevent conflicting interpretations, and thus the need for their proactive attitude.[17] This tribunal noted that "a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the parties".[18]

Moreover, principles and techniques, such as *lis pendens*, *res judicata,* and *forum non conveniens* could also play a role.[19] Notably, the argument of *res*

[12] Entered into force on 1st January 1994.

[13] Article 2005.5 NAFTA, stating "[o]nce dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other, unless a Party makes a request pursuant to para 3 or 4." For further information on procedural exceptions under paras 3 and 4 of the Article, see Kuijper 2010, pp. 28–29.

[14] NAFTA, Article 2005.3–5. See Kuijper, ibidem, Sect. 1.

[15] In this sense, Treves 2007, pp. 838–839.

[16] PCA/UNCLOS Arbitral Tribunal: MOX Plant (Ireland v. United Kingdom), Order no. 3 (24 June 2003), para 29.

[17] On this issue, see Boisson de Chazournes 2011.

[18] MOX Plant, supra n. 16, para 28.

[19] See Shany 2004, p. 418.

judicata has been raised in a water dispute: the *Pulp Mills* case. Following a Mercosur arbitral decision,[20] Argentina claimed that it had settled one of the issues raised by Uruguay in its request for provisional measures. However, the ICJ considered that this legal argument could not find concrete application in the case before it, stating:

> [T]he rights invoked by Uruguay before the Mercosur *ad hoc* arbitral tribunal are different from those that it seeks to have protected in the present case (…).[21]

2 Water Disputes and the Resort to the Varied Dispute Settlement Procedures

The multifaceted nature of fresh water is reflected in both the types of disputes that have arisen and the diversity of the dispute settlement procedures that have been seized. These may be State-to-State or accessible to non-State actors. They can be of a diplomatic or a judicial nature. Numerous water agreements provide for the resort to both types of mechanisms. Most often, the jurisdictional avenue is only through a specific agreement, rather than unilateral recourse. Both arbitration and resorting to the ICJ can be promoted in this context. Disputes may also be brought before judicial dispute settlement procedures established within specialized international organizations, including the European Court of Justice.[22] Trade-related water disputes may be brought to the WTO, NAFTA, or MERCOSUR mechanisms, although they have not yet been utilized in a water dispute context.

Dispute settlement mechanisms' increasing openness attracts a wide array of actors, including States, international organizations, and non-State actors. The opening of dispute settlement mechanisms to several actors and the emergence of specialized universal and regional dispute settlement bodies represent key elements in the development of a corpus of norms and principles concerning water protection and management. Non-State actors (such as individuals, NGOs, and private companies) have brought water-related claims after gaining *locus standi* before various dispute settlement mechanisms. At the same time, the existence of the various sets of rules adopted at the bilateral, regional, and universal levels

[20] MERCOSUR Arbitral Tribunal: Omisión del Estado Argentino en Adoptar Medidas Apropiadas para Prevenir y/o Hacer Cesar los Impedimentos a la Libre Circulación Derivados de los Cortes en Territorio Argentino de vías de Acceso a los Puentes Internacionales Gral. San Martín y Gral. Artigas que unen la República Argentina con la República Oriental del Uruguay (Uruguay v. Argentina), Award (6 September 2006).

[21] ICJ: Pulp Mills on the River Uruguay (Argentina v. Uruguay), Order (23 January 2007), para 30.

[22] See, e.g., ECJ: Commission v. France (Étang de Berre), C-239/03, Judgment (7 October 2004).

allows water disputes to be tackled in new ways. This is the case with investment law disputes[23] and with human rights disputes.[24]

Access to varied dispute settlement procedures has, in turn, made courts and tribunals more sensitive to each other's existence. By broadening the sources of persuasive case law, this has led to decisions that include more diverse cross-references to other courts and tribunals, and has helped to strengthen the interpretation and application of law in water disputes. Human rights case law provides interesting examples of cross-references between regional human rights dispute settlement mechanisms.[25] One such example is the *Saramaka People v. Suriname* case brought before the Inter-American Court of Human Rights. The Court stated that it "takes notice" of the views of the African Commission on Human and People's Rights to support its interpretation that natural resources found on indigenous territories are subject to property rights under the American Convention. The Inter-American Court stated:

> [D]ue to the inextricable connection members of indigenous and tribal peoples have with their territory, the protection of their right to property over such territory, in accordance with Article 21 of the Convention, is necessary to guarantee their very survival. Accordingly, the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land.[26]

In the *Tătar v. Romania* case, the European Court of Human Rights (ECtHR) referred to the case law of the Court of Justice of the European Communities,[27] as well as the decision of the ICJ in the *Gabčíkovo-Nagymaros* case.[28] The ECtHR decision relied on these references to assert the customary nature of environmental law principles and their applicability to the water pollution case before it.

Water disputes have followed a trend favoring the creation of new international dispute settlement mechanisms and procedures. In practice, water disputes were brought before courts, tribunals, and other dispute settlement mechanisms soon after their respective establishment. States did not hesitate to bring them before the PCIJ, the ICJ, and various arbitral tribunals.[29] States and non-States actors continue to resolve their disputes in judicial and investment arbitration fora, as well as through compliance and inspection mechanisms. Almost all international dispute settlement bodies have dealt with water issues. This omnipresence can be explained by the complex nature of water disputes, which involve multiple factors. Indeed, in almost all cases, water disputes are embedded in wider disputes

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[23] See e.g., NAFTA (UNCITRAL): Methanex Corporation v. United States, Decision (15 January 2001).

[24] See, e.g., ECtHR: Tătar v. Romania, 67021/01, Judgment (27 January 2009).

[25] Boyle 2007, p. 475.

[26] IACtHR: Saramaka People v. Suriname, Judgment (28 November 2007), para 122.

[27] Tătar, supra n. 24, para 69.

[28] Ibidem, para 69.

[29] See Del Castillo-Laborde 2009.

involving issues of pollution abatement, investment protection, human rights, or trade policies. In this context, it is quite understandable that the use of specialized water tribunals has been limited to only a few examples.[30]

3 New Types of Dispute Settlement Procedures and Procedural Challenges

Some dispute settlement procedures may present unique contours. Such is the case with non-compliance procedures. Notably, the specificities of such procedures are not directly linked to water resources, but to characteristics that water can share with other natural resources. The protection of the environment is geared toward collective interest issues, rather than reciprocal commitments. It also focuses on the need to anticipate and prevent social and environmental impacts. In these areas, non-compliance procedures play an important role.[31]

Non-compliance procedures are often described as collective and non-contentious proceedings. Their diplomatic character is often highlighted. However, this qualification is in some cases too simple an analysis of the dynamics of the procedures for non-compliance. Rather, these procedures reveal an increasingly complex picture. Both diplomatic and judicial elements are at play within them.[32] Some present an increased diplomatic character, while others possess a more litigious character. Innovative non-compliance procedures, such as the facilitation and enforcement mechanisms of the Kyoto Protocol, forge a clear hybrid of both diplomatic and judicial elements in order to promote a collective interest as defined in the context of a multilateral treaty.[33] Due to the close interrelations between climate change and water management, water disputes could be brought before both the facilitative and enforcement branches of the Kyoto Protocol non-compliance procedure.

Additionally, another variant aspect among dispute settlement procedures is linked to their outcomes, as some such procedures do not produce a binding decision. For example, recommendations and mediation reports may require endorsement by the parties involved in a dispute. Non-compliance with recommendations may test the strength and credibility of the dispute settlement procedures concerned. In particular, the Bystroe Canal case (concerning the construction of a canal in the Ukrainian part of the Danube Delta) offers insightful perspectives on this issue.[34] The Danube Delta enjoys special protection as a World Heritage site, and falls under UNESCO's Programme on Man and the Biosphere (MAB

[30] See Hey and Nollkaemper 1992, pp. 82–87.

[31] Boisson de Chazournes 1995.

[32] See Treves et al. 2009, p. 634.

[33] See Boisson de Chazournes and Mbengue 2007.

[34] On this point, see Aurescu 2010.

Programme). The Delta is also covered by the Convention on Wetlands of International Importance (Ramsar, 2.2.1971, hereinafter Ramsar Convention)[35] especially as Waterfowl Habitat. At the invitation of the Ukrainian government, the Ramsar Convention Secretariat and the MAB Programme carried out a joint study in October 2003. In 2005, the MAB International Coordinating Council and the UNESCO World Heritage Committee called upon Ukraine to abide by its international obligations.[36] In 2008, the latter Committee noted that progress on the Bystroe Canal did not conform to obligations[37] under the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991, hereinafter Espoo Convention).[38]

The actions UNESCO has implemented have been complemented and strengthened by those of other institutional mechanisms, such as the decisions adopted by the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), the Espoo Convention, and the Parliamentary Assembly of the Council of Europe. In addition, other international organizations (such as the European Union and the International Commission for the Protection of the Danube River) have become actively involved in the system of monitoring and supervising the project by calling for lawful compliance with relevant obligations.

However, a persistent problem among organizational compliance procedures is the inherently soft character of the recommendations they produce. For example, after attempting to fulfil some of its commitments in the Bystroe Canal case, Ukraine resumed project implementation in breach of its obligations, meriting a warning from the Meeting of the Parties of the Espoo Convention.[39] The decision also requested Ukraine to report by the end of each year on steps taken to bring the Bystroe Canal Project into full compliance. The Meeting of the Parties to the Aarhus Convention also issued a caution lamenting Ukraine's pace of compliance with prior decisions of the Meeting, and urging Ukraine's immediate action while threatening suspension of its rights and privileges under the Convention.[40] It can be seen that collective monitoring, surveillance, and non-compliance procedures play a role in requesting the defaulting State to be accountable. They also present limits when the State resists compliance with its commitments, unless specific

[35] Entered into force on 21 December 1975, amended by the Protocol of 3 December 1982, entered into force 1 October 1986, and by the Amendments of 28 May 1987, entered into force 1 May 1994.

[36] UNESCO World Heritage Committee: Danube Delta (Romania), Decision 29 COM 7B.18, UN doc. WHC-05/29.COM/22 (9 September 2005), p. 50.

[37] UNESCO World Heritage Committee: Danube Delta (Romania), Decision 32 COM 7B.21, UN doc. WHC-08/32.COM/24Rev (31 March 2009), p. 59.

[38] Entered into force on 10 September 1997.

[39] Report of the Fifth Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context, UN doc. ECE/MP.EIA/15 (16 August 2011), pp. 19–20.

[40] Decision IV/9(h) on Compliance by Ukraine with its Obligations under the Convention, UN doc. ECE/MP.PP/2011/CRP.9 (1 July 2011), items 4–5.

sanctions can be exercised (as is the case in the framework of the Enforcement branch of the Kyoto Protocol non-compliance procedure). The threat of suspension or termination of membership is seen as a last resort, highlighting the diminished capacity of a collective framework to remedy a situation of non-compliance.

Procedural complexities also arise concerning cultural aspects of the preservation of lakes or rivers. A recent denunciation from the UNESCO World Heritage Committee illustrates this point. The Committee determined that Ethiopian dam construction projects on the Omo River would threaten tribal peoples living in the area of Lake Turkana shared between Ethiopia and Kenya. These impacts were detailed in African Development Bank reports that concluded that dam construction projects would result in significant harm to Lake Turkana without consideration of tribal communities' concerns.[41] Importantly, dam construction would impact the hydrological ecosystem that propelled Lake Turkana to the UNESCO World Heritage List. In July 2011, the UNESCO Committee requested that Ethiopia halt construction of the Gibe III dam (as per the UNESCO Convention's requirement that State Parties not take "any deliberate measures which might damage directly or indirectly the cultural and natural heritage located on the territory of another State Party"), and submit assessments regarding its construction to the World Heritage Centre.[42]

In addition, when a dispute concerns preventative measures, the parties may face difficulties linked to the inherent nature of the claim. Alleging the conjectural risk of a future injury may lead to evidentiary problems when demonstrating damages. A prime example is the *Pulp Mills* case. The central factual question of the likely future capacity of seasonally varying river flows to cope with pollutant discharges led to the parties' retention of experts, supplementary arguments as to expert credibility, and the production of reports with scientific and technical data to help the Court determine the risk of damage to water and biodiversity. The International Court of Justice noted "the volume and complexity of the factual information submitted to it".[43] In this context, it also indicated its willingness to evolve in its treatment of evidence and expertise, opening the door to the examination and cross-examination of witnesses and experts.[44] Some judges referred to Article 50 of the Statute of the Court to stress that the Court could have appointed its own experts.[45]

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[41] See African World Development Bank's: Studies of the GIBE III project on the Assessment of Hydrological Impacts of Ethiopia's Omo Basin on Kenya's Lake Turkana Water Levels (November 2010); Public Consultations and Socio-Economic Analysis of Lake Turkana Communities (December 2009).

[42] UNESCO World Heritage Committee: Lake Turkana National Parks (Kenya), Decision 35 COM 7B.3, UN doc. WHC-11/35.COM/20 (7 July 2011), p. 48.

[43] Pulp Mills Judgment, supra n. 10, para 168.

[44] On this point, see Sands 2010, p. 158.

[45] Pulp Mills Judgment, supra n. 10, Separate Opinion of Judges Al-Khasawneh and Simma, para 8.

Other valuable means include the conduct of a risk assessment procedure, such as the one developed in the context of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.[46] This procedure serves to identify and assess risks to determine whether a Member State public health measure is WTO compliant or disproportionately protectionist. When there is an insufficient scientific basis to determine the magnitude of the health risk associated with a regulated substance or product, Member States are likely to adopt or maintain such measures on the basis of the precautionary principle.[47] Such a procedure could be adjusted for other regulatory contexts, allowing interests to be weighed in light of data and information provided through a commonly agreed methodology.

4 Conclusion: The Contribution of Rule of Law-based Dispute Settlement Procedures to the Protection of Fresh Water

The large number and broad utilization of dispute settlement procedures should not obviate an inquiry into such procedures' contribution to the protection of water resources. These mechanisms' characteristics and applicable rules play a role in assessing their ultimate contribution to the protection of natural resources. In some circumstances, there may be a need to ensure that more adequate and comprehensive information is accessible to a tribunal. In others, there might be a need to complement the information that the parties to a dispute have provided. This argument has been raised in investment arbitrations through petitions to submit *amicus curiae* briefs. Such briefs stake their legitimacy on the public interest in these arbitrations. While Tribunals have considered water distribution and sewage concession disputes to be matters of public interest for this purpose,[48] *amici curiae* arguably have a greater role to play in those disputes where the ecological health and protection of water resources is at issue.[49]

[46] See WTO Agreement on the Application of Sanitary and Phytosanitary Measures (15 April 1994, entered into force on 1 January 1995), Article 5 ("Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection").

[47] On this point, see Boisson de Chazournes et al. 2009, p. 45.

[48] See, e.g., ICSID: Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina, ARB/03/19, Order (19 May 2005), para 3; Biwater Gauff (Tanzania) Limited v. Tanzania, ARB/05/22, Order no. 5 (2 February 2007), paras 51–53.

[49] See, e.g., Methanex, supra n. 23, Sect. 2, para 53; ICSID: Pac Rim Cayman LLC v. El Salvador, ARB/09/12, Order no. 8 (23 March 2011) (affirming a policy basis for public participation, as stated in Center for International Environmental Law, et. al: Application for Permission to Proceed as Amici Curiae (2 March 2011), pp. 1–2).

In this respect, an analogy may be drawn to the voice that *amicus* petitioners gave to environmental concerns in the WTO *Shrimp-Turtle* case.[50] Whereas the State parties focused on the potential justification of trade restrictions in the context of Article XX of the GATT, the *amici curiae* essentially pleaded on behalf of the environment, stressing the relevant effects and obligations of its protection for the Appellate Body's ultimate consideration.[51]

Multiplicity and diversity among dispute settlement mechanisms contribute to the improved protection of fresh water. They also create consequences that should be addressed (such as the risk of conflicting interpretations) through parties' specific commitments and the proactive attitude of courts and tribunals. At base, however, the variety and number of such mechanisms suggest States' compelling faith in dispute settlement based on the rule of law, whose necessity to the protection of fresh water remains gospel.

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[50] Center for International Environmental Law, et. Al: Amicus Brief to the Appellate Body on United States—Import Prohibition of Certain Shrimp and Shrimp Products (1999). www.ciel.org/Publications/shrimpturtlebrief.pdf. Accessed 10 April 2012.

[51] See, e.g., ibidem, p. 39 (raising principles of inter- and intra-generational equity to the sustainable development objectives incorporated in the Preamble to the Marrakesh Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994, entered into force on 1st January 1995); WTO: United States—Import Prohibition of certain Shrimp and Shrimp Products, WT/DS58/AB/R, Appellate Body Report (12 October 1998), note 147 (reflecting these *amici curiae* concerns by emphasizing its consideration of Principle 3 of the Rio Declaration on Environment and Development ("[T]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations")).

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Quelques observations sur les mesures conservatoires indiquées par la Cour de La Haye

Pierre Michel Eisemann

1 Introduction

Depuis quelques années se multiplient, notamment devant les juridictions de caractère universel, les demandes en indication de mesures conservatoires. Ainsi, alors qu'au cours de toute son existence la Cour Permanente de Justice Internationale (CPJI) n'a été saisie que de six demandes – et qu'elle n'en a indiquées que dans deux affaires –, la Cour internationale de Justice (CJI) en a, à ce jour, enregistré pas moins de quarante-deux (pour en indiquer dans dix-neuf affaires). D'abord relativement rares, ces demandes sont devenues très fréquentes depuis la décennie quatre-vingt-dix et il ne se passe pratiquement plus une année sans que la Cour ne soit ainsi sollicitée au moins une fois. Quant au Tribunal international du droit de la mer (TIDM), il participe au même mouvement, ayant été invité à prescrire des mesures conservatoires dans six des neuf affaires inscrites à son rôle depuis sa création[1] (non comprises les affaires de prompte mainlevée).

Cet engouement en faveur des mesures provisoires traduit une nouvelle politique procédurale des États et il s'est accompagné d'une intéressante novation de

[1] TIDM: Navire « Saiga » (n° 2) (Saint-Vincent-et-les-Grenadines c. Guinée), ordonnance (11 mars 1998), p. 24; Thon à nageoire bleue (Nouvelle-Zélande c. Japon; Australie c. Japon), ordonnance (27 août 1999), p. 280; Usine MOX (Irlande c. Royaume-Uni), ordonnance (3 décembre 2001), p. 95; Travaux de poldérisation par Singapour à l'intérieur et à proximité du détroit de Johor (Malaisie c. Singapour), ordonnance (8 octobre 2003), p. 10; Navire « Louisa » (Saint-Vincent-et-les-Grenadines c. Espagne), ordonnance (23 décembre 2010) (dans cette dernière affaire, le Tribunal n'en a pas indiquées).

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l'approche du juge. Pourtant la doctrine semble ne s'y être que fort modérément intéressée. Les grandes analyses demeurent antérieures au mouvement d'accélération contemporain et sont quelque peu obsolètes,[2] et seules deux thèses assez récentes ont pu prendre ce phénomène en considération.[3] Si l'on fait abstraction des commentaires des ordonnances prises individuellement, les études de synthèse sont peu nombreuses et déjà relativement anciennes ou cursives,[4] ou bien encore ne portent-elles que sur un aspect spécifique de la question,[5] la « concurrence » nouvelle entre la Cour internationale de Justice et le TIDM ayant toutefois suscité plusieurs travaux.[6] Reste que la question des mesures conservatoires semble avoir trouvé une place privilégiée au sein des *mélanges* et autres *Festchriften*,[7] le dédicataire du présent *liber amicorum* ayant lui-même retenu ce thème à deux reprises![8] On se permettra donc de se pencher à notre tour sur ce riche sujet, dans le cadre du présent ouvrage qui rend hommage à un cher et savant ami que sa brillante carrière a conduit de l'Université au Tribunal de Hambourg.

Compte tenu des limites assignées à cette contribution, on se bornera à évoquer ici la pratique de la Cour de La Haye au regard des mesures conservatoires. Bien des points pourraient être évoqués, tels la « découverte » par cette dernière du caractère obligatoire des mesures indiquées,[9] les conditions d'examen de la compétence *prima facie*, l'appréciation du caractère irréparable du préjudice allégué et de l'urgence, ou encore l'apparition du critère de « plausibilité » des droits allégués.[10] On a choisi de porter le regard sur la nature des mesures indiquées par la Cour.

2 L'indication de mesures conservatoires

Comme on le sait, l'Art. 41 du Statut de la Cour internationale de Justice dispose que « [l]a Cour a le pouvoir d'indiquer, si elle estime que les circonstances

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[2] Voir Guggenheim 1931, 1932; Dumbauld 1932; Elkind 1981; Sztucki 1983.

[3] Gaeta 2000; Le Floch 2008.

[4] Voir Thirlway 1994; Merrills 1995; Sorel 2001; Weckel 2005.

[5] Voir notamment Zyberi 2010.

[6] Voir Szabo 1997; Rosenne 2005; Manouvel 2002.

[7] Voir Gross 1989; Oda 1996.

[8] Treves 2003, 2009.

[9] Voir CIJ: LaGrand (Allemagne c. États-Unis), arrêt (27 juin 2001), pp. 501–506, par. 98-109. Voir également CIJ: Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Russie), ordonnance (15 octobre 2008), p. 397, par. 147.

[10] Depuis CIJ: Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), ordonnance (28 mai 2009), p. 151, par. 57. Trois ans auparavant, le Juge Abraham avait souhaité que fût recherché par la Cour un *fumus boni juris* avant que d'indiquer des mesures conservatoires (CIJ: Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), ordonannce (13 juillet 2006), opinion individuelle du Juge Abraham, pp. 140–141, par. 9-10).

l'exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire ». Le Règlement précise qu'elle « peut à tout moment décider d'examiner d'office si les circonstances de l'affaire exigent l'indication de mesures conservatoires que les parties ou l'une d'elles devraient prendre ou exécuter » (Art. 75.1)[11] et que,

> [l]orsqu'une demande en indication de mesures conservatoires lui est présentée, la Cour peut indiquer des mesures totalement ou partiellement différentes de celles qui sont sollicitées, ou des mesures à prendre ou à exécuter par la partie même dont émane la demande (Art. 75.2).[12]

La Cour n'a jamais pris l'initiative d'indiquer des mesures conservatoires *proprio motu*, mais elle s'est largement appuyée sur le corollaire de ce pouvoir pour ciseler des mesures différentes de celles qui lui avait été demandées par le requérant.

Si l'on s'en tient à la hiérarchie des textes, l'objectif de toute mesure conservatoire, qu'elle soit indiquée à la demande d'une partie ou bien prononcée d'office, doit être de préserver les droits des parties. Comme la Cour l'a déclaré en des termes particulièrement clairs à l'occasion de l'affaire des *Activités armées sur le territoire du Congo*:

> le pouvoir d'indiquer des mesures conservatoires que la Cour tient de l'article 41 de son Statut a pour objet de sauvegarder le droit de chacune des Parties en attendant qu'elle rende sa décision, et présuppose qu'un préjudice irréparable ne doit pas être causé aux droits en litige dans une procédure judiciaire; (…) il s'ensuit que la Cour doit se préoccuper de sauvegarder par de telles mesures les droits que l'arrêt qu'elle aura ultérieurement à rendre pourrait éventuellement reconnaître, soit au demandeur, soit au défendeur; et (…) de telles mesures ne sont justifiées que s'il y a urgence.[13]

En dehors de la question de la compétence, doivent être donc prises en considération l'existence de deux conditions cumulatives – à savoir le caractère irréparable du préjudice et l'urgence – dont l'appréciation laisse inévitablement place à une certaine subjectivité. On peut penser que, même si la Cour s'attache à distinguer ces deux éléments, son appréciation procède d'une subtile alchimie mêlant à la fois l'importance des droits en cause et la perception qu'elle peut avoir du comportement futur des parties, le tout formant les « circonstances » de l'affaire évoquées à l'Art. 41 du Statut. Ainsi la Cour s'abstient-elle d'indiquer des mesures conservatoires lorsque les déclarations faites par les parties (ou l'intervention du Conseil de sécurité) permettent d'escompter un climat apaisé pendant

[11] Cette précision a été introduite, en des termes quelque peu différents, dans le Règlement de 1931. Cf. Guyomar 1983, p. 486.

[12] L'origine de cette disposition se trouve, *mutatis mutandis*, dans le Règlement de 1936. Cf. Guyomar 1983, p. 486.

[13] CIJ: Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), ordonnance (1er juillet 2000), p. 127, par. 39.

le temps de la procédure ou le maintien du *statu quo,*[14] ou encore lorsque l'attitude même des parties revient à revenir soit explicitement[15] soit implicitement[16] sur la demande en indication de mesures conservatoires. Par ailleurs, il est bien évident que la Cour s'abstient de répondre à la demande du requérant lorsque ce dernier sollicite l'indication de mesures qui préjugeraient une décision au fond[17] ou qui excéderaient ce que permet l'Art. 41 du Statut,[18] ou encore lorsque fait défaut une base de compétence vraisemblable.[19]

L'objet de la présente contribution est de tenter de montrer comment la Cour exerce son pouvoir d'indiquer des mesures conservatoires lorsqu'elle a décidé de répondre à la demande qui lui a été présentée par l'une des parties. Ce faisant, nous

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[14] CPJI: Statut juridique du territoire du sud-est du Groënland (Danemark/Norvège), ordonnance (3 août 1932), série A/B n° 48, p. 277; Administration du prince von Pless (Allemagne c. Pologne), ordonnance (11 mai 1933), série A/B n° 54, p. 150. CIJ: Interhandel (Suisse c. États-Unis), ordonnance (24 octobre 1957), p. 105; Plateau continental de la mer Égée (Grèce c. Turquie), ordonnance (11 septembre 1976), p. 3; Passage par le Grand-Belt (Finlande c. Danemark), ordonnance (29 juillet 1991), p. 12; Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Royaume-Uni), ordonnance (14 avril 1992), p. 3; Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l' incident aérien de Lockerbie (Jamahiriya arabe libyenne c. États-Unis), ordonnance (14 avril 1992), p. 114; (Mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique), ordonnance (8 décembre 2000), p. 182; Certaines procédures pénales engagées en France (République du Congo c. France), ordonnance (17 juin 2003), p. 102; Usines de pâte à papier (13 juillet 2006), supra n. 10, p. 113; Obligation de poursuivre ou d'extrader, supra n. 10, p. 139.

[15] CIJ: Actions armées frontalières et transfrontalières (Nicaragua c. Honduras), ordonnance (31 mars 1988), p. 9.

[16] CIJ: Procès de prisonniers de guerre pakistanais (Pakistan c. Inde), ordonnance (13 juillet 1973), p. 328.

[17] CPJI: Usine de Chorzów (Allemagne c. Pologne), ordonnance (21 novembre 1927), série A n° 12, p. 9.

[18] CPJI: Réforme agraire polonaise et minorité allemande (Allemagne c. Pologne), ordonnance (29 juillet 1933), série A/B n° 58, p. 175; CIJ: Sentence arbitrale du 31 juillet 1989 (Guinée-Bissau c. Sénégal), ordonnance (2 mars 1990), p. 64.

[19] CIJ: Demande d'examen de la situation au titre du paragraphe 63 de l'arrêt rendu par la Cour le 20 décembre 1974 dans l'affaire des Essais nucléaires (Nouvelle-Zélande c. France), ordonnance (22 septembre 1995), p. 288; Licéité de l'emploi de la force (Yougoslavie c. Belgique), ordonnance (2 juin 1999), p. 124; Licéité de l'emploi de la force (Yougoslavie c. Canada), ordonnance (2 juin 1999), p. 259; Licéité de l'emploi de la force (Yougoslavie c. France), ordonnance (2 juin 1999), p. 363; Licéité de l'emploi de la force (Yougoslavie c. Allemagne), ordonnance (2 juin 1999), p. 422; Licéité de l'emploi de la force (Yougoslavie c. Italie), ordonnance (2 juin 1999), p. 481; Licéité de l'emploi de la force (Yougoslavie c. Pays-Bas), ordonnance (2 juin 1999), p. 542; Licéité de l'emploi de la force (Yougoslavie c. Portugal), ordonnance (2 juin 1999), p. 656; Licéité de l'emploi de la force (Yougoslavie c. Espagne), ordonnance (2 juin 1999), p. 761; Licéité de l'emploi de la force (Yougoslavie c. Royaume-Uni), ordonnance (2 juin 1999), p. 826; Licéité de l'emploi de la force (Yougoslavie c. États-Unis), ordonnance (2 juin 1999), p. 916; Activités armées sur le territoire du Congo (nouvelle requête : 2002) (République démocratique du Congo c. Rwanda), ordonnance (10 juillet 2002), p. 219.

souhaiterions évaluer la portée des mesures indiquées et, pour dire les choses autrement, tenter de déterminer si celles-ci créent des obligations nouvelles pour les parties par rapport à ce à quoi elles sont déjà tenues par le droit international général et leurs engagements spécifiques.

3 Le rappel de l'obligation de ne pas aggraver ou étendre le différend

Lors de la deuxième indication de mesures conservatoires dans l'histoire de la Cour de La Haye, la Cour Permanente de Justice Internationale indiquait, à titre provisoire, que

> l'État bulgare veille à ce qu'il ne soit procédé à aucun acte, de quelque nature qu'il soit, susceptible de préjuger des droits réclamés par le Gouvernement belge ou d'aggraver ou d'étendre le différend soumis à la Cour.[20]

Depuis, une formule analogue a été reprise de manière systématique[21] dans les ordonnances de la Cour portant mesures conservatoires, parfois en se limitant à inviter les parties à s'abstenir de tout acte qui risquerait d'aggraver ou d'étendre le différend dont la Cour est saisie ou d'en rendre la solution plus difficile,[22] mais le plus souvent en ajoutant que ces mêmes parties doivent veiller à ne pas prendre de mesures pouvant porter atteinte aux droits de l'autre partie touchant à l'exécution de toute décision que la Cour rendrait en l'affaire.[23] On peut également mentionner

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[20] CPJI: Compagnie d'électricité de Sofia et de Bulgarie (Belgique c. Bulgarie), ordonnance (5 décembre 1939), série A/B no. 79, p. 199.

[21] A l'exception des quatre affaires concernant des condamnés à mort aux États-Unis dont l'enjeu était très directement la suspension immédiate de la procédure d'exécution. Voir, infra n. 45.

[22] CIJ: Personnel diplomatique et consulaire des États-Unis à Téhéran (États-Unis c. Iran), ordonnance (15 décembre 1979), p. 21, par. 47.1.B; Application de la Convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie (Serbie et Monténégro)), ordonnance (8 avril 1993), p. 24, par. 52.B et ordonnance (13 septembre 1993), p. 350, par. 61.3; Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), ordonnance (8 mars 2011), par. 86.3; Demande en interprétation de l'arrêt du 15 juin 1962 en l'affaire du temple de Préah Vihéar (Cambodge c. Thaïlande) (Cambodge c. Thaïlande), ordonnance (18 juillet 2011), par. 69.B.4.

[23] CIJ: Anglo-Iranian Oil Co. (Royaume-Uni c. Iran), ordonnance (5 juillet 1951), p. 93; Compétence en matière de pêcheries (Royaume-Uni c. Islande), ordonnance (17 août 1972), p. 17 et ordonnance (12 juillet 1973), p. 304; Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande), ordonnance (17 août 1972), p. 35 et ordonnance (12 juillet 1973), p. 315; Essais nucléaires (Australie c. France), ordonnance (22 juin 1973), p. 106; Essais nucléaires (Nouvelle-Zélande c. France), ordonnance (22 juin 1973), p. 142; Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. États-Unis), ordonnance (10 mai 1984), p. 187, par. 41.B.3-4; Différend frontalier (Burkina Faso/Mali), ordonnance (10 janvier 1986), pp. 11–12, par. 32.1.A; Frontière terrestre et maritime entre le Cameroun et le Nigéria

ici les mesures visant à demander aux parties de s'abstenir de tout acte risquant d'entraver la réunion des éléments de preuve[24] ou de prendre toutes les mesures nécessaires pour préserver ces derniers dans la zone en litige,[25] ces mesures apparaissant comme corollaires aux précédentes.

On peut observer que, à l'exception de l'affaire de la *Compagnie d'électricité de Sofia et de Bulgarie,* la Cour a toujours pris soin d'imposer de telles mesures aux deux parties au différend, leur conférant ainsi un aspect égalitaire et pacificateur. Mais, ce faisant, exerce-t-elle le pouvoir qui est le sien de leur imposer une obligation nouvelle ou se contente-t-elle de rappeler une obligation existante? Dans l'ordonnance du 5 décembre 1939 relative à l'affaire susmentionnée, la Cour se réfère au « principe universellement admis devant les juridictions internationales et consacré d'ailleurs dans maintes conventions (…) d'après lequel les parties en cause doivent s'abstenir de toute mesure susceptible d'avoir une répercussion préjudiciable à l'exécution de la décision à intervenir et, en général, ne laisser procéder à aucun acte, de quelque nature qu'il soit, susceptible d'aggraver ou d'étendre le différend ».[26] Quelques années auparavant, dans l'affaire du *Statut juridique du territoire du sud-est du Groënland (Danemark/Norvège)*, elle s'était refusée à indiquer d'office des mesures conservatoires en relevant, notamment, que l'obligation était déjà inscrite dans l'Acte général d'arbitrage par lequel les deux parties étaient liées.[27] Plus tard, alors qu'elle s'abstint d'indiquer de telles mesures dans les neuf instances relatives à la *Licéité de l'emploi de la force*, la Cour n'en rappelait pas moins, au sein de la motivation de ses ordonnances, que « tout différend relatif à la licéité [des actes incriminés] doit être réglé par des moyens pacifiques dont le choix est laissé aux parties conformément à l'article 33 de la Charte » et que « dans ce cadre les parties doivent veiller à ne pas aggraver ni étendre le différend ».[28]

Bien que dans l'affaire des *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*, la Cour se fût contentée d' « *encourage[r]* (…) les Parties à s'abstenir de tout acte qui risquerait de rendre plus difficile le règlement du

(Footnote 23 continued)
(Cameroun c. Nigéria), ordonnance (15 mars 1996), p. 24, par. 49.1; Activités armées (Congo c. Ouganda), supra n. 13, p. 129, par. 47.1; Application de la CEDR, supra n. 9, p. 399, par. 149.C.

[24] Différend frontalier (Burkina Faso/Mali), supra n. 23, p. 12, par. 32.1.B.

[25] Frontière terrestre et maritime (Cameroun c. Nigéria), supra n. 23, p. 25, par. 49.4.

[26] Compagnie d'électricité de Sofia et de Bulgarie, supra n. 20, p. 199.

[27] Statut juridique du Groënland, supra n. 14, pp. 288-289.

[28] Licéité de l'emploi de la force (Belgique), supra n. 19, p. 140, par. 48-49. La même formule revient dans les neuf autres ordonnances du même jour relatives aux instances introduites par la Yougoslavie contre le Canada (p. 273, par. 44-45), la France (p. 374, par. 36-37), l'Allemagne (p. 433, par. 35-36), l'Italie (p. 492, par. 36-37), les Pays-Bas (p. 557, par. 48-49), le Portugal (p. 671, par. 47-48), l'Espagne (p. 773, par. 37-38), le Royaume-Uni (p. 839, par. 40-41) et les États-Unis (p. 925, par. 31-32).

présent différend »,[29] on peut raisonnablement avancer que l'obligation en cause s'impose à tous les États parties à une instance juridictionnelle en vertu d'un principe général de droit – lorsqu'elle ne découlerait pas d'une obligation conventionnelle – et que la Cour ne fait que rappeler solennellement ladite obligation lorsqu'elle l'inscrit dans une ordonnance indiquant des mesures conservatoires, sans pour autant imposer aux parties à l'instance une obligation inédite.

4 La répétition d'obligations préexistantes

Il est évident qu'il n'y a pas non plus d'obligation nouvelle mise à la charge des parties lorsque la Cour se borne à leur rappeler qu'elles sont tenues au respect du droit international général ou de règles trouvant leur source dans des instruments qui les lient.

Il en est ainsi lorsque la Cour dit que

> [l]e Gouvernement de la République fédérative de Yougoslavie (Serbie et Monténégro) doit immédiatement, conformément à l'engagement qu'il a assumé aux termes de la convention pour la prévention et la répression du crime de génocide du 9 décembre 1948, prendre toutes les mesures en son pouvoir afin de prévenir la commission du crime de génocide (…) [et] (…) en particulier veiller à ce qu'aucune des unités militaires, paramilitaires ou unités armées irrégulières qui pourraient relever de son autorité ou bénéficier de son appui, ni aucune organisation ou personne qui pourraient se trouver sous son pouvoir, son autorité, ou son influence ne commettent le crime de génocide, ne s'entendent en vue de commettre ce crime, n'incitent directement et publiquement à le commettre ou ne s'en rendent complices, qu'un tel crime soit dirigé contre la population musulmane de Bosnie-Herzégovine, ou contre tout autre groupe national, ethnique, racial ou religieux .[30]

Ou bien encore lorsqu'elle affirme que les deux parties devront « s'abstenir de tous actes de discrimination raciale contre des personnes, des groupes de personnes ou des institutions », « s'abstenir d'encourager, de défendre ou d'appuyer toute discrimination raciale pratiquée par une personne ou une organisation quelconque », « faire tout ce qui est en leur pouvoir, chaque fois que, et partout où cela est possible, afin de garantir, sans distinction d'origine nationale ou ethnique, i) la sûreté des personnes; ii) le droit de chacun de circuler librement et de choisir sa résidence à l'intérieur d'un État; iii) la protection des biens des personnes déplacées et des réfugiés », « faire tout ce qui est en leur pouvoir afin de garantir que les autorités et les institutions publiques se trouvant sous leur contrôle ou sous leur influence ne se livrent pas à des actes de discrimination raciale à l'encontre de personnes, groupes de personnes ou institutions », tout comme faciliter et

[29] Usines de pâte à papier (13 juillet 2006), supra n. 10, p. 134, par. 82. Nos italiques. Voir également CIJ: Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), ordonnance (23 janvier 2007), p. 17, par. 53, rejetant la demande en indication de mesures conservatoires présentée par l'Uruguay.

[30] Convention contre le génocide (8 avril 1993), supra n. 23, p. 24, par. 52.A.1-2.

s'abstenir « d'entraver d'une quelconque façon, l'aide humanitaire apportée au soutien des droits dont peut se prévaloir la population locale en vertu de la convention internationale sur l'élimination de toutes les formes de discrimination raciale ».[31]

Il en va de même lorsqu'il est dit que

> [l]es deux Parties doivent, immédiatement, prendre toutes mesures nécessaires pour se conformer à toutes leurs obligations en vertu du droit international, en particulier en vertu de la Charte des Nations Unies et de la Charte de l'Organisation de l'unité africaine, ainsi qu'à la résolution 1304 (2000) du Conseil de sécurité des Nations Unies en date du 16 juin 2000

et qu'elles

> doivent, immédiatement, prendre toutes mesures nécessaires pour assurer, dans la zone de conflit, le plein respect des droits fondamentaux de l'homme, ainsi que des règles applicables du droit humanitaire.[32]

Dans certains cas, la Cour vise non pas des obligations énoncées de manière abstraite mais des actes spécifiques. Reste que ces derniers constituent de manière tellement évidente une violation du droit international que l'on ne peut qu'y voir un rappel au respect de la règle internationale. On trouve deux exemples de cette situation. Dans l'affaire du *Personnel diplomatique et consulaire des États-Unis à Téhéran*, la Cour avait ainsi notamment indiqué que « [l]e Gouvernement de la République islamique d'Iran fasse immédiatement en sorte que les locaux de l'ambassade, de la chancellerie et des consulats des États-Unis soient remis en possession des autorités des États-Unis et placés sous leur contrôle exclusif et assure leur inviolabilité et leur protection effective conformément aux traités en vigueur entre les deux États et au droit international général ».[33] À l'occasion de l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci*, la Cour avait dit qu'il appartient aux États-Unis de mettre « immédiatement fin à toute action ayant pour effet de restreindre, de bloquer ou de rendre périlleuse l'entrée ou la sortie des ports nicaraguayens, en particulier la pose de mines, et [qu'ils] s'abstiennent désormais de toute action semblable »[34] et elle avait également indiqué une mesure visant à ce que

> le droit à la souveraineté et à l'indépendance politique que possède la République du Nicaragua, comme tout autre État de la région et du monde, soit pleinement respecté et ne soit compromis d'aucune manière par des activités militaires et paramilitaires qui sont interdites par les principes du droit international (…).[35]

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[31] Application de la CEDR, supra n. 9, p. 398, par. 149.A-B.

[32] Activités armées (Congo c. Ouganda), supra n. 13, p. 129, par. 47.2-3.

[33] Personnel diplomatique, supra n. 22, p. 21, par. 47.1.A.i. Au même paragraphe, sous les points ii et iii, la Cour évoque également, de la même manière, la libération des ressortissants américains et la reconnaissance de la protection, des privilèges et des immunités dus au personnel diplomatique et consulaire des États-Unis.

[34] Nicaragua, supra n. 23, p. 187, par. 41.B.1.

[35] *Ibidem*, p. 187, par. 41.B.2.

Dans l'ensemble de ces cas, la Cour n'a pas fait autre chose que de rappeler les obligations pesant déjà sur les parties en cause – ou, à l'inverse, les droits dont elles peuvent revendiquer le respect – sans aucunement leur imposer, à titre provisoire, des obligations originales. On notera qu'elle ne se prive pas de faire de même, alors même qu'elle se refuse à indiquer des mesures conservatoires. Ainsi a-t-elle déclaré, au fil de la motivation de l'ordonnance, dans les affaires relatives à la *Licéité de l'emploi de la force*, qu'elle « estime nécessaire de souligner que toutes les parties qui se présentent devant elle doivent agir conformément à leurs obligations en vertu de la Charte des Nations Unies et des autres règles du droit international, y compris le droit humanitaire ».[36] Elle a également rappelé, dans l'affaire des *Activités armées sur le territoire du Congo (nouvelle requête : 2002) (République démocratique du Congo c. Rwanda)*, que

> les États, qu'ils acceptent ou non la juridiction de la Cour, demeurent en tout état de cause responsables des actes contraires au droit international qui leur seraient imputables [et] qu'ils sont en particulier tenus de se conformer aux obligations qui sont les leurs en vertu de la Charte des Nations Unies.[37]

Se référant explicitement aux nombreuses résolutions par lesquelles le Conseil de sécurité avait exigé que toutes les parties au conflit mettent fin aux violations des droits de l'homme et du droit international humanitaire, et qu'elles assurent la sécurité des populations civiles conformément à la quatrième Convention de Genève relative à la protection des personnes civiles en temps de guerre (Genève, 12 août 1949),[38] la Cour a ajouté, pour sa part, qu'elle tenait « à souligner la nécessité pour les Parties à l'instance d'user de leur influence pour prévenir les violations graves et répétées des droits de l'homme et du droit international humanitaire encore constatées récemment ».[39]

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[36] Licéité de l'emploi de la force (Belgique), supra n. 19, p. 132, par. 19. La même formule revient dans les neuf autres ordonnances (Canada, p. 266, par. 18; France, p. 370, par. 18; Allemagne, p. 429, par. 18; Italie, p. 488, par. 18; Pays-Bas, p. 549, par. 19; Portugal, p. 664, par. 18; Espagne, p. 768, par. 18; Royaume-Uni, p. 833, par. 18; États-Unis, p. 923, par. 18).

[37] Activités armées (Congo c. Rwanda), supra n. 19, pp. 249–250, par. 93.

[38] Entrée en vigueur le 21 octobre 1950.

[39] Activités armées (Congo c. Rwanda), supra n. 19, p. 250, par. 93. On notera l'insistance de la Cour qui avait déjà déclaré, dans la même ordonnance qu'elle « estime nécessaire de souligner que toutes les parties à des instances devant elle doivent agir conformément à leurs obligations en vertu de la Charte des Nations Unies et des autres règles du droit international, y compris du droit humanitaire; qu'en l'espèce la Cour ne saurait trop insister sur l'obligation qu'ont le Congo et le Rwanda de respecter les dispositions des conventions de Genève du 12 août 1949 et du premier protocole additionnel à ces conventions, en date du 8 juin 1977, relatif à la protection des victimes des conflits armés internationaux, instruments auxquels ils sont tous deux parties » (ibidem, p. 241, par. 56).

5 L'édiction d'obligations nouvelles

Le pouvoir que possède la Cour d'indiquer des mesures provisoires ne prend sa pleine mesure que lorsque celle-ci l'exerce en faisant peser sur les parties une obligation qui ne préexiste pas à l'ordonnance en indication de mesures conservatoires de manière indubitable et qui entrave leur liberté d'action. Qu'il s'agisse de paralyser les effets de l'acte unilatéral qui se trouve à la source même du différend ou de guider le comportement futur des parties – ce en l'attente de la décision devant intervenir au fond –, la Cour exerce alors une véritable autorité, celle d'imposer à l'une ou à l'autre des parties à l'instance, lorsque ce n'est pas aux deux à la fois, une conduite donnée en allant ainsi à l'encontre de leur volonté souveraine.

Il en a été ainsi lorsque les mesures indiquées ont:

- établi un régime bilatéral provisoire s'inspirant du traité dont la dénonciation unilatérale faisait l'objet du différend[40];
- paralysé les effets de la rupture du contrat de concession et spécifié les modalités de gestion de l'entreprise concernée[41];
- demandé que ne soit pas appliqué entre les parties le règlement adopté par le défendeur et fixé des quotas de pêche pour le demandeur[42];
- invité le défendeur à s'abstenir de procéder à des essais nucléaires provoquant le dépôt de retombées radioactives sur le territoire du demandeur[43];
- prescrit un *statu quo* en ce qui concerne l'administration du territoire contesté[44]; ou encore
- bloqué l'exécution programmée de personnes condamnées à la peine capitale en enjoignant à l'État défendeur de prendre toutes mesures requises à cet égard.[45]

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[40] CPIJ: Dénonciation du traité sino-belge du 2 novembre 1865 (Belgique c. Chine), ordonnance (8 janvier 1927), série A n° 8, pp. 7-8. On notera le caractère exceptionnel de cette ordonnance qui est la seule à avoir été rendue par le Président agissant ès qualités (selon ce que prévoyait alors le Règlement). Les mesures seront rapportées le 15 février 1927, les parties s'étant entendues sur un régime provisoire (*ibid*., pp. 9-11).

[41] Anglo-Iranian Oil Co., supra n. 23, pp. 93-94.

[42] Compétence en matière de pêcheries (Royaume-Uni c. Islande) (17 août 1972), supra n. 23, p. 17 et (12 juillet 1973), supra n. 23, p. 304; Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande) (17 août 1972), supra n. 23, p. 35 et (12 juillet 1973), supra n. 23, p. 315.

[43] Essais nucléaires (Australie c. France), supra n. 23, p. 106; Essais nucléaires (Nouvelle-Zélande c. France), supra n. 23, p. 142.

[44] Différend frontalier (Burkina Faso/Mali), supra n. 23, p. 12, par. 32.1.E.

[45] CIJ : Convention de Vienne sur les relations consulaires (Paraguay c. États-Unis), ordonnance (9 avril 1998), p. 258, par. 41.I; LaGrand (Allemagne c. États-Unis), ordonnance (3 mars 1999), p. 16, par. 29.I.a; Avena et autres ressortissants mexicains (Mexique c. États-Unis), ordonnance (5 février 2003), pp. 91–92, par. 59.I.a; Demande en interprétation de l'arrêt du 31 mars 2004 en l'affaire Avena et autres ressortissants mexicains (Mexique c. États-Unis) (Mexique c. États-Unis), ordonnance (16 juillet 2008), p. 331, par. 80.II.a. Dans l'affaire LaGrand, la Cour avait, en

En présence d'affrontements armés ou de risque d'incidents de cette nature, la Cour n'hésite pas

– à appuyer un cessez-le-feu déjà conclu et à demander aux parties de retirer leurs troupes hors d'un certain périmètre, quitte à ne pas en définir elle-même les contours[46];
– à inviter les parties – à l'instar du président du Conseil de sécurité – à se conformer aux termes du cessez-le-feu convenu entre elles et à veiller à ce que la présence de leurs forces armées dans un secteur du territoire litigieux ne s'étende pas au-delà des positions occupées avant le déclenchement des hostilités ayant conduit au dépôt de la demande d'indication de mesures conservatoires[47];
– à demander aux parties de s'abstenir d'envoyer ou de maintenir des agents civils, de police ou de sécurité sur le territoire litigieux[48]; ou encore
– à définir une zone démilitarisée provisoire – incluant des espaces relevant sans contestation de la souveraineté territoriale de chacune des deux parties[49] – et à ordonner aux parties de retirer leur personnel militaire y stationnant, tout

(Footnote 45 continued)
outre, indiqué que le Gouvernement des États-Unis devait transmettre son ordonnance au gouverneur de l'État d'Arizona (p. 19, par. 29.I.b).

[46] Différend frontalier (Burkina Faso/Mali), supra n. 23, p. 12, par. 32.1.C-D. Les positions devaient être à brève échéance déterminées par voie d'accord entre les deux gouvernements dans le cadre d'une médiation de l'accord régional de non-agression et d'assistance (ANAD), la Chambre déclarant que le choix desdites positions « requerrait une connaissance du cadre géographique et stratégique du conflit [qu'elle] ne possède pas, et dont en toute probabilité elle ne pourrait disposer sans procéder à une expertise » (*ibid.*, p. 11, par. 27).

[47] Frontière terrestre et maritime (Cameroun c. Nigéria), supra n. 23, p. 24, par. 49.2-3.

[48] Activités dans la région frontalière, supra n. 22, par. 86.1. Toutefois, le demandeur est laissé libre d' « envoyer sur le territoire litigieux, y compris le *caño*, des agents civils chargés de la protection de l'environnement dans la stricte mesure où un tel envoi serait nécessaire pour éviter qu'un préjudice irréparable soit causé à la partie de la zone humide où ce territoire est situé », sous condition de consulter le Secrétariat de la convention de Ramsar, d'informer préalablement le défendeur et de faire de son mieux pour rechercher avec ce dernier des solutions communes à cet égard (*ibid.*, par. 86.2). La Cour déclare par ailleurs, hors du dispositif, que, pour éviter le développement d'activités criminelles dans le territoire litigieux, « chacune des Parties a la responsabilité de le surveiller à partir des territoires sur lesquels elles sont respectivement et incontestablement souveraines » et « qu'il appartient aux forces de police ou de sécurité des Parties de coopérer entre elles dans un esprit de bon voisinage, notamment afin de lutter contre la criminalité qui pourrait se développer sur le territoire litigieux » (*ibid.*, par. 78).

[49] Créée de toutes pièces par la Cour, la zone – de quelque 13 km^2 – entoure le temple de Préah Vihéar en s'étendant largement à l'est et au nord de celui-ci, empiétant ainsi sur des parties du territoire de l'un et l'autre litigant que ces derniers ne se contestent pas.

comme de s'abstenir de toute présence militaire dans ladite zone et de toute activité armée dirigée à l'encontre de celle-ci.[50]

On relèvera que, lorsque des entités politiques ou diplomatiques interviennent dans de telles circonstances en vue de contribuer au règlement du conflit, la Cour, non seulement tient compte de leur action,[51] mais s'efforce également de la conforter en indiquant des mesures conservatoires invitant les parties à la faciliter. Ainsi, dans l'affaire opposant le Cameroun et le Nigéria, la Cour a-t-elle demandé aux deux parties de « prête[r] toute l'assistance voulue à la mission d'enquête que le Secrétaire général de l'Organisation des Nations Unies a proposé de dépêcher dans la presqu'île de Bakassi »[52] et, dans celle de la demande en interprétation de l'arrêt de 1962 en l'affaire du temple de Préah Vihéar, elle a déclaré que « [l]es deux Parties doivent poursuivre la coopération qu'elles ont engagée dans le cadre de l'ANASE et permettre notamment aux observateurs mandatés par cette organisation d'accéder à la zone démilitarisée provisoire ».[53]

Cet inventaire des mesures créant une obligation nouvelle à la charge des parties ne serait pas complet si l'on ne mentionnait l'usage fait par la Cour du pouvoir que lui confère l'article 78 de son Règlement de « demander aux parties des renseignements sur toutes questions relatives à la mise en œuvre de mesures conservatoires indiquées par elle ». De fait, elle n'a, dans un premier temps, pas recouru à cette faculté. Il pouvait alors paraître assez exceptionnel que, dans les affaires relatives à la Compétence en matière de pêcheries, elle ait invité les demandeurs à « communique[r] au Gouvernement islandais *et au Greffe de la Cour* tous renseignements utiles, les décisions publiées et les arrangements adoptés en ce qui concerne le contrôle et la réglementation des prises de poisson dans la région »[54] (la Cour ayant établi des quotas de pêche). Il faudra attendre l'affaire *LaGrand* pour que la Cour dise que le défendeur doit « porter à la connaissance de la Cour toutes les mesures qui auront été prises en application de [son] ordonnance »,[55] formulation qui sera régulièrement reprise par la suite, à quelques

[50] Interprétation de l'arrêt du 15 juin 1962, supra n. 22, par. 69.B.1. La Cour précise cependant que le défendeur ne devra pas faire obstacle au libre accès du demandeur au temple de Préah Vihéar – dont l'appartenance au Cambodge n'est pas contestée (*ibid.*, par. 65) –, ni à la possibilité pour celui-ci d'y ravitailler son personnel non militaire (*ibid.*, par. 69.B.2).

[51] Comme dans l'affaire du Différend frontalier (Burkina Faso/Mali), supra n. 23, à propos de l'ANAD.

[52] CIJ: Frontière terrestre et maritime (Cameroun c. Nigéria), supra n. 23, p. 25, par. 49.5.

[53] Interprétation de l'arrêt du 15 juin 1962, supra n. 22, par. 69.B.3.

[54] Compétence en matière de pêcheries (Royaume-Uni c. Islande) (17 août 1972), supra n. 23, p. 18 et (12 juillet 1973), supra n. 23, p. 304; Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande) (17 août 1972), supra n. 23, p. 35 et (12 juillet 1973), supra n. 23, p. 315. Nos italiques.

[55] LaGrand (3 mars 1999), supra n. 45, p. 16, par. 29.I.a.

légères variantes près,[56] sans doute en conséquence de l'affirmation du caractère obligatoire des mesures conservatoires.

6 Quelques remarques conclusives

Cet inventaire des mesures conservatoires indiquées par la Cour permet d'éclairer quelque peu la politique de cette dernière en la matière.

On relèvera, en premier lieu, l'évolution de la Cour vers une extrême prudence, celle-ci se dégageant manifestement de sa pratique en dépit des apparences découlant de la multiplication récente des ordonnances. Le temps n'est sans doute plus où le juge oserait paralyser les effets d'une mesure de nationalisation, comme dans l'affaire de l'*Anglo-Iranian Oil Company,* ou demanderait à une partie de suspendre ses essais nucléaires sur la base d'une reconnaissance de compétence *prima facie* particulièrement audacieuse et d'une évaluation du risque de préjudice qui ne l'était pas moins.[57] La multiplication des affaires de même nature ne saurait, par ailleurs, masquer le caractère tout à fait exceptionnel des mesures indiquées lorsque fut en jeu le sort de personnes condamnées à la peine capitale et sur le point d'être exécutées. La nature irrémédiable et l'imminence de l'exécution avait placé le juge face à un dilemme humain qui ne pouvait, de manière bien compréhensible, qu'influer sur sa décision.[58] Également exceptionnel, le « risque grave que des actes de génocide soient commis »[59] qui a conduit la Cour à rappeler à la

[56] Avena, supra n. 45, p. 92, par. 59.I.b; Interprétation de l'arrêt du 31 mars 2004, supra n. 45, p. 332, par. 80.II.*b*; Application de la CEDR, supra n. 9, p. 399, par. 149.D; Interprétation de l'arrêt du 15 juin 1962, supra n. 22, par. 69.C.

[57] Dans les affaires des *Essais nucléaires* ayant opposé l'Australie, d'une part, et la Nouvelle-Zélande, de l'autre, à la France, la Cour avait estimé qu' « il suffit de noter que les renseignements soumis à la Cour, y compris les rapports du Comité scientifique des Nations Unies pour l'étude des effets des rayonnements ionisants présentés entre 1958 et 1973, *n'excluent pas* qu'on puisse démontrer que le dépôt en territoire australien [/néo-zélandais] de substances radioactives provenant de ces essais cause un préjudice irréparable à l'Australie [/la Nouvelle-Zélande] » (Essais nucléaires (Australie c. France), supra n. 23, p. 105, par. 29, et Essais nucléaires (Nouvelle-Zélande c. France), supra n. 23, p. 141, par. 30; nos italiques). N'en déplaise aux écologistes, la Cour ne fait pas preuve d'une sensibilité particulière face aux menaces contre l'environnement puisque, dans l'affaire relative aux Activités dans la région frontalière, supra n. 22, par. 74, elle s'est contentée des déclarations du défendeur sur l'état d'avancement des travaux entrepris pour s'abstenir d'indiquer des mesures relatives à la construction du canal, à l'abattage d'arbres, à l'arrachage de végétation, à l'extraction de terre, ou encore au déversement de sédiments.

[58] Il est symptomatique que, dans l'affaire *LaGrand*, le juge Oda, bien que très critique sur le plan du droit, se fût joint au vote unanime, expliquant qu'il a agi ainsi « uniquement pour des motifs humanitaires » (LaGrand (3 mars 1999), supra n. 45, déclaration du Juge Oda, p. 20).

[59] Convention contre le génocide (8 avril 1993), supra n. 23, p. 22, par. 45.

Yougoslavie les obligations pesant sur elle en vertu de la Convention pour la prévention et la répression du crime de génocide (New York, 9 décembre 1948).[60]

Ces mêmes considérations humanitaires valent également en présence d'affrontements armés qui ne peuvent que provoquer souffrances, pertes en vies humaines, blessés et disparus. En de telles circonstances, la Cour choisit toujours d'indiquer des mesures adressées simultanément aux deux parties, essentiellement dans le but de séparer les adversaires et de prévenir le risque d'hostilités.

En dehors de ces cas exceptionnels, la Cour se borne à inviter, de manière volontairement équilibrée, les deux parties à l'instance à ne pas aggraver le différend et à leur rappeler leurs obligations internationales préexistantes, effaçant parfois la distinction entre mesures conservatoires et absence d'indication de telles mesures puisqu'il lui arrive de procéder à un tel rappel au sein d'ordonnances concluant au rejet de la demande de mesures provisoires.

Ainsi, même si la Cour a affirmé que l'indication de mesures conservatoires « ne constitu[e] pas une simple exhortation »,[61] une telle indication, traitant de manière égale les deux parties, présente généralement un caractère plus incitatif – et pacificateur – que contraignant en s'en tenant au rappel de certaines obligations pesant d'ores et déjà sur les États concernés.

Il est dès lors délicat d'évaluer l'efficacité de ces mesures et il serait certainement imprudent de dresser trop rapidement un constat d'échec.[62] Lorsque la tension entre deux litigants monte jusqu'à l'emploi de la force, il n'est guère surprenant qu'une ordonnance de la Cour ne suffise pas à l'apaiser instantanément. Par ailleurs, dans un tel cas et d'une manière plus générale dans tout différend – que le défendeur conteste ou non la compétence de la Cour –, on ferait preuve d'angélisme en imaginant qu'un simple rappel général des obligations pesant sur les parties puisse conduire ces dernières à modifier leur comportement avant même que le juge ne rende sa décision sur le fond.

Mais, en fait, les mesures conservatoires sont-elles destinées à être « respectées »? Est-ce véritablement l'attente de la partie qui en sollicite l'indication? On peut en douter ou, à tout le moins, apporter une réponse nuancée. Une demande en indication de mesures conservatoires (qui accompagne désormais presque systématiquement le dépôt d'une requête) permet au demandeur de bousculer le calendrier de la Cour et de plaider sans délai une première fois sa cause. Il pourra ainsi la défendre publiquement et, dans le meilleur des cas, se prévaloir des mesures indiquées – dont on sait qu'elles ne seront le plus souvent pas celles qu'il aura demandées –, présentant l'ordonnance de la Cour comme une première victoire. C'est sur le terrain de la communication politique que cette procédure incidente trouve sa première utilité. Sous l'angle de vue de la Cour, les choses ne

[60] Entrée en vigueur le 12 janvier 1951.

[61] LaGrand (27 juin 2001), supra n. 9, p. 506, par. 110.

[62] Voir, par exemple, Le Floch, 2008, pp. 222-223, qui écrit que « [l]es mesures conservatoires indiquées par la C.I.J. ne sont presque jamais respectées », précisant que « [l]es faits parlent d'eux-mêmes: sur les quinze ordonnances indiquées par l'organe judiciaire principal des Nations Unies [fin 2007], seules deux ont été véritablement respectées ».

sont pas très différentes. Cette procédure lui donne l'opportunité de s'adresser aux parties, sans attendre le lointain prononcé de son arrêt au fond (à supposer établies les conditions de compétence et de recevabilité), pour leur lancer une solennelle invitation à respecter la règle de droit. Quand bien même cette invitation ne serait pas entendue, la Cour est parfaitement dans son rôle et il est bienvenu qu'elle puisse ainsi faire entendre sa voix.

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Evidence Before the International Court of Justice: Issues of Fact and Questions of Law in the Determination of International Custom

Luigi Fumagalli

1 Evidence and International Justice: Short Introductory Remarks

The relation between evidence and judicial adjudication[1] is critical in many aspects, in every legal context.

Since "evidence", in its broadest meaning, includes every source of information that is used to determine or prove the truth of an assertion, its relevance, and weight is directly linked to the degree in which the determination of truth is indeed a function and a purpose of court proceedings: the greater the importance of the search for truth, the larger the function played by evidence. In that framework, the respective roles performed by the parties and the court to collect, produce, and assess evidence is also immediately affected: truth, in fact, as an absolute value, should not be left to the parties' availability; therefore, the court, if its task is to ascertain the truth, should be free to take all necessary evidentiary measures suitable to discharge its duty.

At the same time, however, rules on evidence have an important "technical" role: if one of the immediate purposes of court proceedings is the settlement of disputes, evidence allows the court to make a determination on the diverging parties' contentions—and the evidentiary rules allocate between them the risk of missing the determination of an element of the dispute. In that context, evidence is not only an instrument for the assessment of truth, but also a tool which serves the

[1] International adjudication has indeed been the subject of important studies conducted by Professor Treves, also based on his important practical experience at the international level: Treves 1999, p. 3; Treves 2005, p. 601; Treves 2008, p. 169.

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interest of the party adducing it. Even in such a situation, however, the role of evidence is affected by general principles, enshrined in judicial proceedings, and satisfying fundamental needs: the possibility for a party to produce evidence and discuss the evidence submitted by the other party is an expression of the right to be heard, recognized to be a basic element of fair adjudication.[2]

The foregoing holds true also at the international level. Evidence in fact plays a key role before international courts and tribunals, in "judiciary" and arbitral proceedings; its relevance is strictly linked to the discharge of the tasks in which international adjudication is meant to perform.[3] As Judge Owada wrote in his separate opinion, attached to the judgment rendered by the International Court of Justice (the ICJ or the Court) in the Oil Platforms case:

> it (…) seems to me important that the Court, as a court of justice whose primary function is the proper administration of justice, should see to it that this problem relating to evidence be dealt with in such a way that utmost justice is brought to bear on the final finding of the Court and that the application of the rules of evidence should be administered in a fair and equitable manner to the parties, so that the Court may get at the whole truth as the basis for its final conclusion (…).[4]

The role of an international court, however, goes well beyond the important purposes mentioned above.

At the international law level, in fact, there is a relation between the court and the law it applies which largely differs from the one given in a domestic setting. The activity of an international court, in fact, is not a mere guarantee of the application of and respect for statutory rules adopted by the "legislative branch" of the system: an international court, by way of its activity, might indeed be seen to be contributing actively to the elaboration process of the applicable rules having a customary nature. In other words, the assessment of the law which is applicable

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[2] The right to an effective judicial remedy and the related fundamental principle of "fair trial" is recognized *inter alia* by the European Convention on Human Rights and Fundamental Freedoms (Rome, 4 November 1950), entered into force on 3 September 1953, Article 6. See ECtHR: Ruiz-Mateos v. Spain, 12952/87, Judgment (26 June 1993), para 63, for an indication of the principles of equality of arms and of the right to adversarial proceedings as elements of a fair trial.

[3] The identification of the purposes of international adjudication has been much debated in legal doctrine: see, e.g. Pellet 1989, p. 539; Santulli 2005, pp. 23, 500. On this point see also Cannizzaro 2011, p. 421. The link between the overall purpose of adjudication and the definition of evidentiary rules is highlighted, for instance, by some statements which can be found in the international case law, where it was underlined that, when the procedural rules are silent, a gap-filling function can be exercised having in mind the "proper administration of justice" (of which the equality of the parties is a constituent element) as a guiding principle. See for instance PCIJ: Mavrommatis Palestine Concessions (Greece v. United Kingdom), Judgment (30 August 1924), p. 16, stating that in such circumstances "the Court (…) is at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law". For a corresponding discussion with respect to international commercial arbitration see the contributions in Wirth et al. 2011.

[4] ICJ: Oil Platforms (Iran v. United States), Judgment (6 November 2003), Separate Opinion of Judge Owada, para 47.

might contribute to the determination of its existence and content.[5] As a result, the rules on evidence play a fundamental role before an international court, which transcends the settlement of an actual legal dispute.

The mentioned purposes are also served by the rules on evidence applicable before the ICJ,[6] which are meant to enable it to decide a legal dispute or to deliver an advisory opinion. They shall therefore be examined briefly, in order to give a general description of their system and to consider their application when the existence of a rule of customary international law is at issue.

2 The Legal Framework for Evidentiary Proceedings Before the ICJ

The provisions governing evidence before the ICJ[7] can be identified in a combination of instruments.

They are first contained in the ICJ Statute (the Statute), an annex to the Charter of the United Nations (the Charter), of which it forms an integral part (Article 92 of the Charter). The main objective of the Statute is in fact to organize the composition and the functioning of the ICJ. The Statute, therefore, contains rules governing the procedure to be followed in contentious cases (Chapter III: Articles 39–64); and sets some principles applicable when the ICJ is called to render an advisory opinion (Chapter IV: Articles 65–68).[8]

The provisions on evidence are then detailed in the Rules of Court (the Rules),[9] with respect to both proceedings in contentious cases (Part III, Section C: "Proceedings before the Court", Articles 38–72) and for advisory opinions (Part IV: Articles 102–109).

Finally, they are supplemented by the Practice Directions (the Directions), adopted by the ICJ in 2001, and subsequently amended, for use by the States appearing before it, as an addition to the Rules, on the basis of the ICJ's ongoing

[5] See on this point Barile 1953, p. 162. Decisions of international courts and tribunals are therefore more important than Article 38.1.d of the ICJ Statute might suggest.

[6] The ICJ is indeed taken as a paradigm of international adjudication, also bearing in mind that the rules on evidence applied before other international tribunals have a very similar content. See the Rules of the International Tribunal for the Law of the Sea: Treves 1998, p. 565; Chandrasekhara Rao and Gautier (eds) 2006. More in general Brower 1994, p. 47

[7] In general terms see Riddel and Plant 2009, p. 11; Rivier 2007, p. 9; Rosenne 2003, p. 67; Fitzmaurice 1986, p. 575; Sandifer 1975, p. 34; Dubisson 1964, p. 220.

[8] Zimmermann et al. (eds) 2006, pp. 977–1038, 1099–1108, 1109–1118.

[9] As adopted on 14 April 1978, in force since 1 July 1978, and subsequently amended, pursuant to Article 30.1 of the Statute, under which "The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure". Rosenne 1983, p. 11.

review of its working methods.[10] Directions IX, IX*bis,* and IX*ter* specifically deal with the presentation of documentary evidence.

In that legal framework, the evidentiary rules so set are based on the equality of the parties and they intend to guarantee respect for the parties' right to be heard. In fact, as the ICJ noted in the case of Military and Paramilitary Activities in and against Nicaragua:

> The provisions of the Statute and Rules of Court concerning the presentation of pleadings and evidence are designed to secure a proper administration of justice, and a fair and equal opportunity for each party to comment on its opponent's contentions.[11]

3 The Rules on Evidence as Contained in the Applicable Procedural Provisions

The evidentiary rules applicable before the ICJ in contentious proceedings[12] chiefly deal with the formalities concerning the production and the taking of evidence. A main distinction can be drawn in that respect, which is based on the division of the procedure before the ICJ into two parts: written and oral (Article 43.1 of the Statute). The procedural rules, in fact, deal with evidence according to the part of the procedure they concern, and in so doing they indicate the different forms of evidence that the ICJ can consider: documentary evidence, witness, and expert declarations; and the peculiar methods in which "information" can be obtained: requests to a "public international organization" and inquiries.

Documentary evidence is considered in Article 43 of the Statute, in Articles 50 and 56 of the Rules and in Directions IX to IX*ter*, chiefly with regard to the written part of the procedure. The main rule, in fact, is that all documents in support of the parties' contentions have to be annexed to their respective written pleadings (Article 43.2 of the Statute and Article 50 of the Rules). As a result, after the closure of the written proceedings, no further document may be submitted to the ICJ, except with the consent of the other party or upon the Court's authorization (Article 56).

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[10] Watts 2002, p. 247.

[11] ICJ: Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Judgment (27 June 1986), para 31.

[12] In advisory proceedings, in fact, different principles apply, in light of their peculiar structure, where no parties are technically involved. As it has been remarked (Riddell and Plant 2009, pp. 369, 391–393), therefore, the ICJ itself bears the responsibility of verifying the factual basis on which the opinion rests: States and organizations which participate in advisory proceedings do so on a voluntary basis and cannot therefore be held to be subject to a burden of proof. On the proceedings for advisory opinions see Luzzatto 1975, p. 479; Guyomar 1983, p. 641; Benvenuti 1984, p. 215.

Witnesses and experts, on the other hand, are heard in the oral part of the procedure. As indicated by Article 43.5 of the Statute, "the oral proceedings (…) consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates". In view of that, pursuant to Article 57 of the Rules, each party has to communicate to the Court's Registrar, in sufficient time before the opening of the oral proceedings, any evidence on which it intends to rely or which it intends to request the Court to obtain. The parties may then call any witness or expert appearing on the list communicated pursuant to Article 57. A witness or an expert not indicated on the list may only be called if the other party does not object or the Court so allows (Article 63). Finally, witnesses and experts, when heard, are examined by the agents, counsel, or advocates of the parties, under the control of the ICJ President; questions, however, may be put to the witness and the expert also by the members of the Court (Article 65).

In respect of the foregoing, as it has been remarked,[13] the procedure before the ICJ can be defined as being mainly adversarial in nature, in the sense that it is mainly the responsibility of the parties to provide the ICJ with the relevant factual material. The provisions on evidence, however, also contain elements allowing a more active role for the ICJ. Under Article 49 of the Statute, in fact, the ICJ may, even before the hearing begins, call upon the agents to produce any document or to supply any explanation, with a formal note being taken of any refusal. Article 50 then provides that at any time the ICJ may entrust any individual, body, bureau, commission, or other organization that it may select with the task of carrying out an inquiry or giving an expert opinion.[14] Such rules are then confirmed by Article 62.1 of the Rules: the Court may at any time call upon the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matter at issue, or may itself seek other information for this purpose. In this vein, Article 69 of the Rules empowers the ICJ to request, *motu proprio*, a public international organization[15] to furnish information relevant to the case before it.

As a result, the responsibility for the production of evidence does nor rest solely upon the parties. Indeed, the taking of evidence before the ICJ—as made clear by the applicable procedural provisions—is chiefly a matter of cooperation between the parties and the Court.

[13] Wolfrum 2010, p. 3.

[14] Article 67.1 of the Rules on this point specifies that "If the Court considers it necessary to arrange for an enquiry or an expert opinion, it shall, after hearing the parties, issue an order to this effect, defining the subject of the enquiry or expert opinion, stating the number and mode of appointment of the persons to hold the enquiry or of the experts, and laying down the procedure to be followed (…)". Guyomar 1983, p. 429; White 1965, p. 43.

[15] That is to say an international organization of States: Article 69.4. Rosenne 1983, p. 142.

4 Evidentiary Issues Considered by International Jurisprudence

Although the rules governing the procedure before the ICJ give indications in many respects on the taking or evidence, they are silent, or give very limited information, on a number of issues regarding the role, scope, weight, and effect of evidence. For instance, there is no indication as to the conditions for the admissibility of evidence.[16] Nor do the rules specify what is the evidentiary standard to be applied, or give detailed indications on the burden of proof,[17] on the relevance—if any—of presumptions,[18] and on an hypothetical hierarchy in the forms of evidence.

Those points have actually been addressed in the jurisprudence of the ICJ. For instance, as recently as in the Pulp Mills case, it was held that:

> (…) in accordance with the well-established principle of *onus probandi incumbit actori*, it is the duty of the party which asserts certain facts to establish the existence of such facts. This principle which has been consistently upheld by the Court (*Maritime delimitation in the Black Sea (Romania* v. *Ukraine)*, judgment of 3 February 2009, para 68; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, judgment of 23 May 2008, para 45; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 128, para 204; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para 101) applies to the assertions of fact both by the Applicant and the Respondent (…).
>
> It is (…) to be expected that the Applicant should, in the first instance, submit the relevant evidence to substantiate its claims. This does not, however, mean that the Respondent should not co-operate in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute submitted to it (…).
>
> (…) it is the responsibility of the Court, after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate. (…) the Court will make its own determination of the facts, on the basis of the evidence presented to it, and then it will apply the relevant rules of international law to those facts which it has found to have existed".[19]

In addition, in the Nicaragua judgment, it was stated that the Court "within the limits of its Statute and Rules, (…) has freedom in estimating the value of the various elements of evidence".[20]

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[16] Niyungeko 2005, p. 239, who underlines the liberal attitude toward the admissibility of evidence.

[17] On these issues: Kazazi 1996, pp. 221–235, 323–365.

[18] Grossen 1954, p. 53. More in general, Cansacchi 1939, p. 110.

[19] ICJ: Pulp Mills case on the River Uruguay (Argentina v. Uruguay), Judgment (20 April 2010), paras 162, 163, and 168.

[20] Nicaragua, supra n. 11, para 60.

In summary, the principle under which the party which alleges a fact bears the burden of proving it is relevant chiefly in the assessment phase: a failure to prove a fact should go against the party that was relying on it, and therefore had the burden of proving it. In the collection phase, on the other hand, there is tacit cooperation between the ICJ and the parties for the supply of evidence on all matters.

5 The Principle *Iura Novit Curia* and its Relevance for the Determination of International Customary Law

The ICJ procedural rules do not clarify, however, what is (or should be) the object of evidence.

This final point appears to be important, as it implies major consequences for the performance of the Court's functions. The traditional distinction in this respect is based upon the divide between points of fact and questions of law. While the parties are normally expected to adduce evidence relating to facts, the law needs no proof, as the court is meant to know and apply it: *iura novit curia*, as the traditional expression says. Therefore, questions of law need not be raised by the parties; and the court is not limited, in the assessment of the dispute before it, by the legal arguments submitted by the litigants.

Notwithstanding some opinions voiced to the contrary,[21] it is generally held that the principle *iura novit curia* also applies before international courts, and therefore also before the ICJ.[22]

Said principle poses specific problems, however, when customary international law is involved[23]: in its respect, in light of the "factual" element comprised therein, the distinction between facts and law is not as clear-cut as theory may suggest. Assuming that customary rules can be held to exist insofar as it is possible to determine that they are considered as binding by members of the international community and that they function as such in the relationship between the said members,[24] the question is whether the power of the Court to identify the applicable law implies the power to ascertain the existence of the "general practice"

[21] Ferrari Bravo 1958, p. 49.

[22] Benzing 2010, p. 356; Riddel and Plant 2009, p. 144; Brown 2007, p. 89; Venturini 1975, p. 969; Lalive 1950, p. 81; Witenberg 1936, p. 37.

[23] The need to prove international treaty law is however also discussed—chiefly by those authors who underline the contractual nature of an international agreement and therefore submit that the existence, scope, and (to some extent) interpretation of a treaty must be argued and proved by the parties.

[24] Treves 2006, p. 65.

accepted as law, a constituent element of international custom,[25] or whether the identification of such practice (a "fact)[26] is a matter of proof by the parties.

As a result of the factual connotation of one of the constituent elements of international custom, a party may indeed have to prove State practice, if it is disputed.[27] However, it is for the Court to establish which law is applicable to the subject-matter of the dispute. As a result, the ICJ[28] is not limited by the legal argument put forward by the parties, and might directly ascertain, by using the evidentiary powers it has, in cooperation with the parties, the practice evidencing the existence of a custom.

This line of reasoning has been followed, rather consistently, by the ICJ, and its predecessor, the Permanent Court of International Justice (PCIJ).

A landmark decision (also) in this respect was rendered by the Lotus case, where one can read that:

> the Court, having arrived at the conclusion that the arguments advanced by the French Government either are irrelevant to the issue or do not establish the existence of a principle of international law precluding Turkey from instituting the prosecution which was in fact brought against Lieutenant Demons, observes that in the fulfilment of its task of itself ascertaining what the international law is, it has not confined itself to a consideration of the arguments put forward, but has included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement. The result of these researches has not been to establish the existence of any such principle.[29]

In the same way, the PCIJ, in the Brazilian Loans case, confirmed that:

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[25] Pursuant to Article 38.1.b of the Statute. International courts, and chiefly the PCIJ and the ICJ, consistently held that two elements are required in order to determine that an international customary rule has come into existence. See: ICJ: North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/the Netherlands), Judgment (20 February 1969), para 77 and ICJ: Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States), Chamber, Judgment (12 October 1984), para 111.

[26] An issue is indeed the actual determination of the facts that need to be considered in order to come to the conclusion that a customary rule exists. Treves 2006, p. 73, indicates in this respect that practice in a broad notion is to be taken into account: the relevant practice is not only that of States, taken singularly or in groups, but also that of non-subjects of international law.

[27] As noted by Riddel and Plant 2009, p. 146, it is in any case normal for the parties to make submissions on the matter of the existence of customary rules—and therefore on international practice—as they are unlikely to be willing to leave the matter only to the court's determination.

[28] As a matter of principle, the above principle applies also to any international tribunal. However, specific consideration must be given by the tribunal to the powers it has been specifically granted by the parties. The parties, in fact, may limit the tribunal's scope of jurisdiction in many directions, including the power to determine the facts and the law relevant to its decision. Morelli 1940, p. 109.

[29] PCIJ: S.S. "Lotus" (France v. Turkey), Judgment (7 September 1927), p. 31.

> though bound to apply municipal law when circumstances so require, the Court, which is a tribunal of international law, and which, in this capacity, is deemed itself to know what this law is, is not obliged also to know the municipal law of the various countries.[30]

Such a principle was confirmed by the ICJ in the Fisheries Jurisdiction case, as follows:

> the Court (…), as an international judicial organ, is deemed to take judicial notice of international law and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the Parties, for the law lies within the judicial knowledge of the Court.[31]

In explicit terms Judge De Castro, in his separate opinion attached to the judgment in the Fisheries Jurisdiction case, indicated that:

> international customary law does not need to be proved; it is of a general nature and is based on a general conviction of its validity (*opinio iuris*). The Court must apply it ex officio; it is its duty to know it as *quaestio iuris*: *iura novit curia*. Only regional customs or practices, as well as special customs, have to be proved.[32]

In the Nicaragua case, the Court in that respect specified that:

> for the purpose of deciding whether the claim is well founded in law, the principle *jura novit curia* signifies that the Court is not solely dependent on the argument of the parties before it with respect to the applicable law. (…) Nevertheless the views of the parties to a case as to the law applicable to their dispute are very material, particularly (…) when those views are concordant.[33]

An exception to this attitude has only been expressed with respect to situations where State practice was limited to a particular region and the parties were arguing on the basis of regional customary law. In that situation, the ICJ in the well-known Asylum case stated that custom has to be proved by the party relying on it[34]:

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[30] PCIJ: Payment in Gold of Brazilian Federal Loans Contracted in France (France/United States), Judgment (12 July 1929), p. 124.

[31] ICJ: Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Judgment (25 July 1974), para 18.

[32] Ibidem, Separate Opinion Judge De Castro, pp. 78–79.

[33] Nicaragua, supra n. 11, para 60.

[34] The actual "customary" nature of regional custom is however disputed. Also as a result of the Court's holding as to the need for party adduced evidence to find its existence, doctrine suggests that it might be preferably characterized as a "tacit agreement": Cassese 2006, p. 223.

> the Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party (…) must prove that the rule invoked (…) is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.[35]

6 Concluding Remarks

The possibility for the ICJ to use its evidentiary powers in order to determine the existence of customary law, however, is not a mere solution to a purely technical problem, determined along the lines of a general principle (*iura novit curia*) dictated (mainly) for domestic adjudication.[36] In fact, it appears to be more properly linked to the specific features of international custom as a source of international law.

That no rule of international law describes what the facts are whose occurrence leads to the formation of a custom, in fact, makes a limitation to judicial activity impossible.

An international court, when called upon to determine whether a rule having a customary nature exists, is not in the same situation in which it is in when it applies any rule of (international) law. In the ordinary (syllogistic) structure of a rule, facts are described, and a peculiar consequence for their occurrence is indicated: in that respect, the distinction between facts and law come into play, meaning that the parties are bound to prove the facts, while the court has the duty and the freedom to assess the consequences linked to the occurrence of those facts. When the very existence of a customary rule is at stake, however, there is no rule of "constitutional" or other fundamental nature actually describing which facts have to occur in order to determine, as a legal consequence, the creation of a rule. Therefore, the determination and the consideration of the elements constituting an international custom has to be made also beyond any rules that impose on the court the obligation to adjudicate only on the basis of the factual elements adduced by the parties—since there are no specific factual elements whose only occurrence prove the existence of the rule.[37]

The foregoing is specifically submitted when the existence and application of peremptory international law rules is discussed. The very notion of rules "from which no derogation is permitted" (Articles 53 and 64 of the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969)[38] implies a specific power of the

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[35] ICJ: Asylum case (Colombia v. Peru), Judgment (20 November 1950), p. 14.

[36] This "domestic" origin of the principle, and the fact that the function it performs is specifically linked to the peculiar relation between the law and the court at the domestic level, has been underlined by Ferrari Bravo 1959, p. 54.

[37] On the point Barile 1953, p. 190.

[38] Entered into force on 27 January 1980.

court to make determinations thereon without being limited by the parties' factual allegations: once jurisdiction is given by the parties to the ICJ,[39] the special force of *ius cogens* directly excludes that its determination is left to the parties' evidentiary initiatives: the principle *iura novit curia*, therefore, forcefully applies.[40]

All the above, in summary, confirms the importance of evidentiary proceedings before the ICJ, as they allow the Court to discharge a very important function, when customary international law is at stake. The sapient use by the Court of the powers that the Statute and the Rules give it allows the ICJ, acting in cooperation with the parties, to make determinations which, in the very end, go beyond the fair and proper adjudication of the given case, and contribute to the very creation of an international legal order.

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[39] The need for a consensual basis to the ICJ's jurisdiction is not affected by the fact that peremptory norms of international law are at stake: the point has been confirmed by the ICJ in Armed Activities on the Territory of the Congo (New Application: 2002) (Congo v. Rwanda), Judgment (3 February 2006), paras 64 and 125.

[40] Venturini 1975, p. 977.

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Competence and Jurisdiction in Public International Law: International Courts in the Americas

Luis García-Corrochano Moyano

1 Introduction

In law, competence and jurisdiction are two inseparable terms. In public international law they are used, first, as attributes of the State, and, second, in the practice of the means of peaceful settlement of disputes, specifically for arbitration and in international courts. In this article our approach will be focused on the latter usage.

While jurisdiction is the power of a judge to speak the law; competence is the attribution to speak it, determined by criteria, such as personal (*ratione personae),* temporal *(ratione temporis),* territorial *(ratione loci)*, subject matter, or any other circumstances that enable the judge to act in exercise of his jurisdictional function. Although these terms are clearly differentiated in civil law systems, they are indistinguishable in public international law and thus are employed randomly. This state of affairs arose due to the traditional view of the International Court of Justice (ICJ) as the paradigm of international justice, even though it is not the only international tribunal.

Today, the proliferation of permanent and *ad hoc* international courts, the diversity of their competences, and their varied jurisprudence, serve as a warning about the dangers of this plurality and the threats that come with the fragmentation

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of international justice. Even so, plurality and fragmentation establish a distinction between competence and jurisdiction that is rather interesting.[1]

In fact, the plurality of tribunals does not question the notion of jurisdiction, but it does put in relative terms the notion of competence that was directly associated with jurisdiction when the analysis was centered on the ICJ. Nowadays, the plurality of international courts, both permanent and *ad hoc*, gives sense to the distinction and makes it current.

Due to the complexity in establishing a comprehensive comparison of every functioning international court, we will focus our attention on how international courts in the Americas define and assume the terms competence and jurisdiction.

We consider as international courts, the ones that satisfy the following requirements:

(a) Are created by a treaty;
(b) Have the character of a permanent court, whether or not their judges are permanent residents of the city or country which is the seat of the tribunal;
(c) Posses mechanisms that guarantee the independence and impartiality of their judges in their nomination, their election, and in the exercise of their functions;
(d) Apply international law, such as multilateral or bilateral treaties, treaties of integration, constitutive treaties of international organizations, international contracts, customary international law, and general principles of law;
(e) Apply these international norms to judge States, international organizations, or organizations that promote integration;
(f) Determine their own competence (*kompetenz–kompetenz*);
(g) Admit the *ius standi* of States, international or integration organisations, juridical persons under public and private law, and individuals;
(h) Are the final instance or the only instance;
(i) Are competent to revise or correct their rulings;
(j) Issue obligatory rulings to the parties in dispute; and
(k) Whose rulings cannot be corrected, revised, or modified by other tribunals or authorities of States or international organizations.

Currently, in America there are nine courts that meet these requirements: the Inter-American Court of Human Rights (IACtHR), the Andean Tribunal of Justice (ATJ), the Central American Court of Justice (CACJ), the Caribbean Court of

[1] Treves 1997, p. 427: The establishment of new international tribunals does not depend only on the need to create permanent specialized judicial bodies for special branches of international law. It depend also on the need, which has emerged clearly during the most recent decades, to extend the jurisdiction of judicial bodies international in their composition and legal basis, to subject-matters and parties which had remained excluded from the scope of jurisdiction of international judges. The establishment of new international tribunals meets the need to create international judges for international crimes of individuals and for disputes in which international organizations and natural or juridical persons are parties. It is well known that on these grounds the International Court of Justice cannot tread, and its jurisdiction is limited to disputes between States (ICJ Statute, Article 34.1).

Justice (CCJ), the Permanent Appeals Court of MERCOSUR (PAC–MERCOSUR), the Administrative Tribunal of the Organization of American States (ATOAS), the Administrative Tribunal of the Inter-American Development Bank (ATIADB), the Administrative Tribunal of the Latin American and Caribbean Economic System (ADSELA), and the Administrative Tribunal of the Latin American Integration Association (ATALADI). We do not take into account the Free Trade Commissions instituted by Free Trade Agreements because although they have competence, they do not have jurisdiction, and therefore do not comply with our requirements.

Though governments in the region have seldom resorted for the settlement of their disputes to tribunals with worldwide competence, such as the ICJ, the Permanent Court of Arbitration (PCA), arbitral tribunals or commissions, or the International Centre for the Settlement of Investment Disputes (ICSID); in this article we will concentrate solely on courts that have their seat within the Americas and where regional governments, and their nationals or residents, can bring an action.

2 International Courts in the Americas

In the Americas the usual method for the peaceful settlement of disputes during the nineteenth and early twentieth centuries was the submission of controversies to arbitration tribunals. It is only in the second half of the twentieth century that permanent international courts were institutionalized. In the Americas this process has led to the creation of specific courts for human rights issues (IACtHR), administrative affairs (ATOAS, ATIADB, ADSELA, and ATALADI), and integration (ATJ, CACJ, PAC-MERCOSUR, and CCJ). These nine international courts, all of them currently operational in the continent, have different ways on understanding and applying the notions of competence and jurisdiction that we are analysing here.

It is worth mentioning that because in America there is a confluence of the two European legal systems, i.e. civil law and common law, the regional international courts alternatively apply one or the other. For example, common law is applied in the CCJ, whereas civil law is preferred in the ATJ, the CACJ, the PAC-MERCOSUR, and the ATALADI. The ATOAS, the ATIADB, and the ADSELA employ both systems because their Member States come from those two judicial traditions.

The courts of the Americas usually consider jurisdiction as the submission of States or international organizations to their authority, which means that it extends to the territory of these States and the acts carried out by the entities of these States, and to the acts of international organizations and their subsidiary bodies and agents. In the case of the administrative courts of international organizations their natural jurisdiction is the same as the organization itself, but by agreement they can extend their jurisdiction to other organizations.

Competence is understood to be determined as a function of time, place, or persons to whom the norms of the court apply. Exceptionally, an international court determines its competence according to the monetary amount involved in the case, e.g. the CCJ.[2]

Although international jurisdiction can be established through objective criteria, there are problems of competence and eventually risks of conflict when courts assume competencies that go beyond a criterion of speciality, sometimes adopting competencies related to administrative and integration matters (ATJ, PAC–MERCOSUR), or original and appeal competencies (CCJ), or integration, appeal, and administrative competencies (CACJ). Some courts have expressly limited their competencies in order to exclude territorial or human rights matters like the CACJ, while others, like the IACtHR, try to establish their competence over related affairs that exceed the competencies agreed in its foundational treaty.

Some administrative tribunals, despite having been created by an organization, have extended their jurisdiction to other organizations through treaties, such as the ATOAS, competent to resolve appeals from the staff of the Inter-American Institute of Agricultural Sciences (AIAS), and the ATIADB, that has competence over the Inter-American Investment Corporation (IAIC).

2.1 The Inter-American Court of Human Rights

The IACtHR, created by the American Convention on Human Rights (San José, 22 November 1969),[3] has competence *ratione materiae* in human rights, and has *ius standi* in the participating States and the Inter-American Commission of Human Rights (Article 61 of the Convention). The competence of the Court in relation to States is based on their recognition of its competence, agreed through the "facultative clause of obligated jurisdiction"

> Article 62
>
> 1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.

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[2] Agreement establishing the Caribbean Court of Justice (2001), entered into force on 23 July 2002. Part III. Appellate jurisdiction of the Court. Article XXV Appellate jurisdiction of the Court.

2. Appeals shall lie to the Court from decisions of the Court of Appeal of a Contracting Party as of right in the following cases:

(a) final decisions in civil proceedings where the matter in dispute on appeal to the Court is of the value not less than twenty-five thousand dollars Eastern Caribbean currency (EC$25,000) or where the appeal involves directly or indirectly a claim or a question respecting property or a right of the aforesaid value.

[3] Entered into force on 18 July 1978.

2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other Member States of the Organization and to the Secretary of the Court.
3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

This article states that the Court has contentious competence and advisory competence concerning the interpretation and application of the ACHR. Its jurisdiction extends to facts occurred in the territory of the Signatory States on matters related to the ACHR, and its competence derives from the acceptance by the States Parties and within the restrictions expressed in their declarations of acceptance.

The Court is composed by seven judges, decides in plenary session by simple majority, and its rulings cannot be appealed. The only admissible revision is the interpretation of judgments, without any suspension of its execution. Even when the victim or his representatives request the suspension of the process, when there is a total or partial assumption of responsibility by the State concerned, or when the parties reach an amicable solution, the Court can still decide the value and effect of those acts and can continue to hear the case. This is the only Court in the region that may decide not to allow the parties to withdraw the suit, carrying on with the process until a decision is reached, even when the parties have agreed to an amicable solution.

The IACtHR judges are elected by the General Assembly of the OAS and it has its seat in San Jose, Costa Rica. The Court decides as a full court, based on facts and international law. A decision by the Court is not subject to an appeal and it marks the end of the legal process. The decisions of the Court are subject to a follow-up system that monitors the sentences to verify their execution.

Article 30 – Report to the OAS General Assembly

The Court shall submit a report on its work of the previous year to each regular session of the OAS General Assembly. It shall indicate those cases in which a State has failed to comply with the Court's ruling. It may also submit to the OAS General Assembly proposals or recommendations on ways to improve the inter-American system of human rights, insofar as they concern the work of the Court.

The IACtHR can only rule in two cases:

(a) When the Inter-American Commission of Human Rights or a State submits a demand, the IACtHR commences a contentious process that ends with a decision that is obligatory for the parties.
(b) At the request from a State Party, the Commission, or another organ of the OAS, the Court can issue an advisory opinion that has no binding effect.

2.2 The Andean Tribunal of Justice

The ATJ Treaty on the Establishment of the Andean Tribunal of Justice (Cartagena de Indias, 28 May 1979; hereinafter, the Treaty) is the jurisdictional organ of the Andean Community of Nations, responsible for the application of the legal order of the organization. It was originally composed of five judges, one for every Member State. As Venezuela has left the Community, it has now four magistrates. The ATJ decides as a full court, and establishes its own rules and procedures (Article 13 in fine).

The ATJ has a wide scope of competence. They include the declaration of nullity of "decisions of the Andean Council of Ministries of Foreign Affairs, decisions of the Commission of the Andean Community, resolutions of the Secretary General, and in regard to the Conventions referred to in literal e) of article 1" (Article 17 of the Treaty and Article 101 of the Statute); actions related to the breach of treaties and integration norms (Article 23 of the Treaty and Article 107 of the Statute); pre-judiciary interpretation of community norms (Article 32 of the Treaty and Article 121 of the Statute); omissions or inactivity by communitarian organs such as the Andean Council of Ministers of Foreign Affairs, the Commission of the Andean Community, or the Secretary General (Article 37 of the Treaty and Article 129 of the Statute); and has administrative competence in respect of the organs and institutions of the Andean Integration System,[4] inadequately defined as "labour jurisdiction" by Article 40 of the Treaty, and regulated by Article 136 of the Statute.

The ATJ only has jurisdiction over Member States of the Andean Community (Article 5 of the Statute), and it is a supranational and communitarian organ (Article 4 of the Statute) that, in compliance with Article 2 of its internal rules, "declare(s) the law of the Andean Community and assure(s) its application and uniform interpretation within the Member States." The ATJ is competent to determine, by a petition from any of the parties or ex officio, the partial or total nullity of the process (Article 64 of the Statute) before it pronounces a decision. Its decisions end the instance, are binding, and are subject to *res judicata* (Article 91 of the Statute). Still, there are four types of revision against its rulings: the amendment request (to correct a formal wrong); the extension, if the Court has not decided a point of controversy (Article 92 of the Statute); the clarification (Article 93 of the Statute); and the extraordinary revision (Article 95 of the Statute), with regard to actions concerning a breach of treaties, and upon the discovery of new facts.

[4] The Andean Integration System (SAI in Spanish) comprises the following: the Andean Presidential Council; the Andean Council of Foreign Affairs Ministers; the Andean Community Commission; the Andean Community General Secretariat; the Andean Community Court of Justice; the Andean Parliament; the Business Consultative Council; the Labor Consultative Council; the Andean Development Corporation; the Latin American Reserve Fund; Simón ARodríguez Agreement, Andean Health Organization—Hipólito Unanue Agreement; Andrés Bello Agreement and Andean University Simón Bolívar.

2.3 The Central American Court of Justice–CACJ

Originally created by the foundational treaty of the ODECA (San Salvador, 14 October 1951) as the Central American Court of Justice, and composed of the Presidents of the Judicial Systems of the Member States, it was reformed by the Tegucigalpa Protocol to Charter of the Organization of Central American States (Tegucigalpa, 13 December 1991, hereinafter TP). Based in Managua, after the reform it resembles a real union of the Supreme Courts of the Member States, composed of their principal judges. The CACJ is competent to hear disputes between Member States, especially matters related to the Central American integration process.

The CACJ was constituted as the principal judicial organ of the Central American Integration System (SICA, in Spanish), with regional jurisdiction, mandatory competence for the Member States (Article 1 of the Statute), and the capacity to interpret the TP of reforms to the ODECA agreements, as well as its complementary instruments and derived acts (Article 2 of the Statute). The CACJ has jurisdiction over the Member States of the SICA and is competent to resolve, as the final instance, requests from Member States and their organs, the organizations of the SICA, and private subjects (Article 3 of the Statute). The Court decides cases in plenary session, and can also establish chambers that serve as a sole instance (Article 7 of the Statute). In both cases the decisions have the effect of *res judicata* (Article 3 of the Statute), and thus are definitive and cannot be appealed (Article 38 of the Statute). The only reviews against its decisions are clarifications and extensions, resolved in both cases by the same Court (Article 38 of the Statute). In addition to its compulsory jurisdiction over Member States, it has original jurisdiction over the powers and organs of the Member States, the organs and organisms of the SICA, and natural persons or legal entities (Article 3 of the Order of proceedings), and other states can voluntarily submit to its jurisdiction. The CACJ has the capacity to decide its own competence (Article 4 of the Order of proceedings).

The competence of the CACJ as an integration tribunal is very wide. As such, the CACJ can resolve disputes between Member States at the request of any one of them; can declare nullities; can hear cases regarding breaches of treaties by organs of the SICA (Article 22.b of the Statute); can revise any legal provision by a Member State that affects integration norms (Article 22.c of the Statute); can give advisory opinions to the Supreme Courts of the Member States (Article 22.d of the Statute) and to the integration bodies of the SICA (Article 22.e of the Statute); can hear individual requests against the organs or bodies of the SICA (Article 22.g of the Statute); can hear disputes between a Central American State and an extra-regional State, if that State accepts the jurisdiction of the Court (Article 22.h of the Statute); and, finally, it can make preliminary rulings concerning the application or interpretation of integration norms (Article 22.k of the Statute). However, in the case of territorial disputes, the agreement of all the parties involved is required to grant jurisdiction to the Court (Article 22.a of the Statute).

In addition, the CACJ exercises administrative jurisdiction over the organs or bodies of the SICA (Article 22.j of the Statute); exercises constitutional jurisdiction concerning matters referring to conflicts of competence between the fundamental powers or organisms of the States (Article 22.f of the Statute), basing its decision on the "public law of the respective State" (Article 63 of the Order of proceedings); and it can exercise arbitral jurisdiction when a dispute is submitted in that capacity, and it can hand down decisions on an *ex aequo et bono* basis when it is expressly authorized to do so (Article 22.ch of the Statute and Article 6 of the Order of proceedings). The Statute of the CACJ expressly excludes competence concerning human rights issues, which are recognized as the exclusive competence of the IACtHR (Article 25 of the Statute).

2.4 The Caribbean Court of Justice

The Caribbean Court of Justice was established by agreement (St. Michael, Barbados, 14 February 2001, hereinafter CCJ) of the members of the Caribbean Community (hereinafter CARICOM), to which Dominica and St. Vincent and the Grenadines adhered in 2003. The Court has original jurisdiction concerning the interpretation and application of the CARICOM treaty (Chaguaramas, Trinidad and Tobago, 4 July 1973, hereinafter Chaguaramas Treaty), and it also has appellate jurisdiction over cases involving civil and criminal issues in the national jurisdiction of Member States, and, as such, it has Supreme Court competencies in the region. This makes it completely different from other international courts.

The jurisdiction of the CCJ extends to all the current Member States of the CARICOM, and other States might eventually be invited to adhere to the Chaguaramas Treaty. The decisions of the CCJ are final and are not subject to an appeal (Article III.2). The CCJ does not have a fixed number of judges. It has a President and can have up to nine other judges. The Court has original jurisdiction for the interpretation and application of the Chaguaramas Treaty, and the aforementioned appellate jurisdiction when it acts as Supreme Court of Appeals for the Member States. In addition, the CCJ has competence to deliver advisory opinions about the interpretation or application of the Chaguaramas Treaty, at the request of a Member State or the CARICOM itself (Article XIII). The CCJ is the top ranking tribunal in the CARICOM system judiciary, above the national courts and the Court of the Organization of Eastern Caribbean States, a regional appellate court itself.

The CCJ has very special characteristics. It does not have a fixed number of judges; they can be up to ten, including its President. When hearing of cases involving its original jurisdiction, the tribunal should be constituted by at least three judges. However, the bench can have more judges, but always in an odd number, and its decisions are final and not subject to an appeal (Article XI.1). In spite of this, a case can be brought before the Court and be heard by a single judge,

but his decision can be appealed to the CCJ itself, which may constitute a chamber with no more than five judges to revise the decision. The decision of the Chamber is final (Article XI.4 and 5), but it can be reviewed if a new fact emerges. In cases regarding its appellate competence, the President of the CCJ chooses another five judges and together they determine the procedural rules to be used as a Court of Appeals, which establishes the number of judges and the process for their selection before the constitution of the Court of Appeals.

On the basis of its original jurisdiction, the CCJ can rule on controversies between the States Parties to the CARICOM treaty, as well as requests for a preliminary ruling from national courts in respect of the CARICOM treaty, or requests for a preliminary ruling from nationals of the CARICOM countries regarding the application of the Chaguaramas Treaty (Article XII). When the CCJ exercises its original jurisdiction it must apply Public International Law (Article XVII). Its rulings have *res judicata* effects and are binding precedents for the parties (Article XXII), although its decisions can be reviewed if new facts emerge (Article XX).

In exercise of its appellate jurisdiction, the CCJ acts as a Supreme Court in accordance with the powers granted to it by the Treaty, the Constitution, or other laws of the Signatory States. The CCJ is competent to hear appeals concerning final decisions in civil proceedings when the value thereof is not less than 25,000 Eastern Caribbean dollars (Article XXV.2.a); about the dissolution or annulment of marriages (Article XXV.2.b); in cases involving the interpretation of the Constitution of a Member State (Article XXV.2.c); over constitutional provisions concerning the protection of human rights (Article XXV.2.d); issues concerning the right of access to the superior courts of the Member States (Article XXV.2.e); and other cases that the law of the Member States prescribes as falling within the competence of the CCJ (Article XXV.2.f). In addition, the CCJ can revise civil cases of general interest or public importance (Article XXV.3.a) and civil or criminal cases submitted by the Member States (Article XXV.4). When the CCJ exercises its appellate jurisdiction it applies Common Law.

2.5 The MERCOSUR Permanent Appeals Court

The Protocol for the Settlement of Disputes in MERCOSUR (Olivos, 18 February 2002; hereinafter Olivos Protocol),[5] which created the MERCOSUR Permanent Appeals Court (PAC), amounted to a milestone in the drive toward the integration project of Argentina, Brazil, Paraguay, and Uruguay, institutionalizing the organization's system of solution of disputes. Through its appellate jurisdiction over the rulings of the *ad hoc* arbitral panels (Article 22), the PAC is competent to

[5] Entered into force on 2 October 2004. An English translation of the Protocol is published in (2003) International Legal Materials 42: 2–18.

revise legal questions concerning the legal interpretation of the decisions, except in the case of *ex aequo et bono* awards, aiming at a consistent and systematic examination of the scope and enforcement of the integration agreements. The PAC, competent to confirm, modify, or revoke the arbitral awards, provides unity concerning all MERCOSUR agreements.

The PAC decides by majority (Article 25); its rulings are final (Article 22) and obligatory (Articles 23.2 and 27); they cannot be appealed and have *res judicata* effects (Article 26.2). The only revision provided in the Olivos Protocol is the clarification (Article 28). The PAC has jurisdiction over the four Signatory States and its jurisdiction is "obligatory, *ipso facto*, and without need of any special agreement" (Article 33).

The PAC has five members, one for each State Party, with the fifth being elected from a list of eight nominees submitted two-piece by each Signatory State (Article 18). The PAC requires full bench, with the exception of the revision of arbitral awards involving two Signatory States, where three judges compose the quorum. When the revision of an arbitral award involves more than two States, it also requires full bench (Articles 20 and 23).

The PAC also has advisory competence at the request of organs which have decision-making capacity within the structure of MERCOSUR, and of the national Supreme Courts of the Member States (Article 2 Olivos Protocol).

2.6 The Administrative Tribunal of the Organization of American States

The Administrative Tribunal of the OAS was the first of its type in the Americas, created by the April 22, 1971, General Assembly resolution GA/RES.35 (I-0/71). The Tribunal, governed by its Statute and Rules, has jurisdiction to apply the rules of the organization, composed of the Charter of the OAS, the General Assembly and General Council resolutions, and the rules adopted by the other organs created by the Charter (Article I). Its competence extends to disputes that may arise between the OAS General Secretary and his staff concerning labor issues, or similar controversies between other organs of the Inter-American System that have agreements with the OAS granting it competence (Article II, No. 1 to 4). The ATOAS can determine its own competence (Article II.5).

The ATOAS is composed of six members, divided in every period of sessions into two panels of three members. Each panel acts as the only instance for resolving cases (Article III), although it is possible to ask for a revision when the decision is considered to be *ultra vires*, in which case a revision panel is constituted (Article XII). The composition of the tribunal shall reflect the two legal systems of the States Parties of the organization: Common Law and Civil Law (Article III.7), and the tribunal employs any of the four official languages of the OAS: English, French, Spanish, and Portuguese (Article VI.6). Controversies

under its competence can be resolved by other means of peaceful solution, with the ATOAS granting those effects as final decisions. Nevertheless, the ATOAS is competent to amend arbitral awards or to revoke them either partially or totally (Article VII). The tribunal adopts its decisions by majority (Article X).

The ATOAS is also competent to hear and resolve complaints from the staff of the Inter-American Institute of Agricultural Sciences.[6]

2.7 The Administrative Tribunal of the Inter-American Development Bank

The Administrative Tribunal of the Inter-American Development Bank, created by the Board of Executive Directors (Washington D.C., 29 April 1981), has jurisdiction over the Bank and the Inter-American Investment Corporation (Article I),[7] and is competent to hear and rule at the request of the staff of both institutions cases regarding the compliance with the terms of their contracts or the conditions of their designation, but only after every internal proceeding at the institution has been exhausted (Article II). The ATIADB is composed of seven members (Article III); it decides by majority and its rulings are final and thus not subject to an appeal (Article VIII), although they can be revised if new facts emerge (Article 27 of the Rules). The tribunal decides by interpreting the constituent treaties of either the Bank or the Corporation and their respective rules (Article VI). The languages employed in the ATIADB proceedings are English and Spanish, but the tribunal can decide the use any of the official languages of the Bank and Corporation (Article 33 of the Rules).

2.8 The Administrative Tribunal of the Latin American and Caribbean Economic System

The Latin American and Caribbean Economic System (SELA) created its own Administrative Tribunal by its Decision N° 370; it gave the Tribunal jurisdiction over all administrative matters of the organization, with competence "to hear and decide on all claims of an employee of the Permanent Secretariat and its decisions are not subject to appeal" (Article 2). The ATSELA has three members (Article 3) and it adopts its rulings by majority (Article 5). It hears appeals to the decisions of the Permanent Secretary regarding the interpretation and application of the staff

[6] Special Agreement to extend the competence of the Administrative Tribunal to the Inter-American Institute for Cooperation on Agriculture, signed February 18, 1976.

[7] The Inter-American Investment Corporation submitted to the Tribunal's jurisdiction by resolution of its Board of Executive Directors of November 19, 1991.

rules (Articles 2 and 8). The ATSELA can hear requests to issue clarifications to its rulings (Article 10).

2.9 The Administrative Tribunal of the Latin American Free Trade Association

The Administrative Tribunal of the Latin American Free Trade Association (ALADI), created by resolution (ALADI/CR/Resolución 275, 18 June 2002) has jurisdiction to hear labor-related issues in that organization (Article 1). The AT-ALADI is composed of three members designated by the Representative's Committee of ALADI (Article 2), and has its seat in Montevideo, Uruguay (Article 4). All staff members of the Secretariat can appear before the tribunal, even after they have formally left their post. The heirs of a staff member can also do so (Article 6). The ATALADI can determine its own competence (Article 7) and its awards are final (Article 13) and not subject to an appeal (Article 21). It adopts its decisions by majority (Article 20). These can be a revision if facts or documents unknown at the time of the process, come to light and are judged to be of fundamental importance to the ruling already given (Article 24).

3 The American International Courts and Public International Law

3.1 Competence and Jurisdiction of the International Courts in the Americas

As a general rule, international tribunals in the Americas required a full court to be constituted. This is the case for the IACtHR, the ATJ, the ATIADB, the ATSELA, and the ATALADI. The CACJ can rule with either a full court or in chambers, but always without appeal. The PAC-MERCOSUR can hear cases with a three-member quorum when reviewing arbitral awards involving only two States; but if it acts as a final-decision tribunal, without appeal, or when reviewing arbitral awards involving more than two States, it will also require a full court. The ATOAS is composed of six members, divided in two panels, each of which acts independently and issues awards that cannot be appealed, with the only exception of the revision when the ruling is considered *ultra vires*.

The operation of the CCJ has special characteristics. It has no predetermined number of judges; the president and up to nine other judges can sit in any case. For cases under its original jurisdiction the tribunal is required to be composed of an odd number of judges, with three as a minimum. Its decisions are final. However, in some cases one judge can hear a case by himself, but his ruling can be appealed to the CCJ.

In that case, a chamber of five judges, members of the CCJ, revises the sentence, and their decision is final. CCJ rulings can also be appealed if new facts are brought to light. When acting under its appellate competence, the President of the CCJ and five other determine the procedural rules to be used as a Court of Appeals.

3.2 Field of Competence of International Courts in the Americas

In the case of the courts in the Americas no overlap or conflict of competence with extra-regional courts or tribunals with worldwide jurisdiction has been identified.

The courts of integration or of associations of States (the ATJ, the CACJ, the CCJ, and the PAC- MERCOSUR) have limited their jurisdiction to cases involving States Parties and certain international instruments; in no case do they act in territorial or maritime controversies where they can clash with the competencies of the International Court of Justice or the International Sea Tribunal. The administrative tribunals (ATOAS, ATIADB, ATSELA, and ATALADI) have limited their competence to their respective organizations and others that are associated with them.

The IACtHR is a regional tribunal dealing only with cases of human rights, a subject matter that usually has a regional scope because the protection systems of the United Nations are not jurisdictional. However, there is a certain degree of confusion regarding the competencies for hearing cases of human rights and of international humanitarian law, as the latter falls within the realm of international criminal tribunal with universal competence, such as the International Criminal Court, or specific tribunals that apply individual responsibility for the violation of humanitarian law. In some cases, certain rulings of the IACtHR have been based on institutions of international humanitarian law, applying those institutions out-of-context in human rights cases.[8]

3.3 The Arbitral Function of the International Courts in the Americas

The Statutes of all the international courts in the Americas allow them to act as an arbitration tribunal. For example, the ATJ can exercise this function in cases involving the organs and institutions of the Andean Integration System, in respect

[8] For example: IACtHR: Manuel Cepeda Vargas v. Colombia, Judgement (26 May 2010), para 42: When examining the merits in cases of serious human rights violations, the Court has taken into account that, if they were committed in the context of massive and systematic or generalized attacks against one sector of the population, such violations can be characterized or classified as crimes against humanity in order to explain clearly the extent of the State's responsibility under the Convention in the specific case, together with the juridical consequences.

of the application and interpretation of contracts, conventions, or agreements between them, or between them and third parties. The ATJ can also do so in controversies between individuals when Andean Community law is applicable to private contracts.[9] The CACJ can act as an arbitrator at the request of one of its Member States, and can even decide *ex aequo et bono*.[10]

3.4 Electing International Jurisdiction

Given the diverse specific competencies of the international courts in the Americas, it is highly improbable that other jurisdictions will be sought, with the exception of commercial disputes. Although, it is feasible to opt for other means of peaceful settlement of inter-state disputes, a possibility explicitly provided in the statutes or rules of some tribunals, thus revealing that these jurisdictions are non-exclusive. However, a process already brought before a regional tribunal cannot be effectively brought to another jurisdiction, because a *litis pendentia* exception would prevent the duplicity of proceedings, with the first one prevailing.

Commercial issues related to the integration process or other forms of State association can be submitted alternatively to more than one forum. The possible forums include a permanent tribunal, an *ad hoc* arbitral tribunal, and the panels provided in the World Trade Organization (WTO) regulations.[11] All of them are exclusive jurisdictions that original or acquired competence to provide a definitive solution to a dispute between States. For example, the Olivos Protocol accepts that a MERCOSUR commercial issue can be taken to a WTO forum.

These cases related with the integration process are a good example of the many possibilities available for settling disputes, especially commercial ones. This practice is known as *forum shopping*, the possibility to elect the jurisdiction that the parties consider more convenient or adequate for the resolution of their dispute.

3.5 The Process in the International Courts in the Americas

International courts can determine their own competence, and are entitled to decide on their own rules and processes, establishing the timelines of every phase, the timetable for their deliberations, the time-frames to pronounce their awards,

[9] Treaty on the creation the Andean Court of Justice, Article 38.

[10] Statute of the Central American Court of Justice, Article 22.ch.

[11] Treves 1997, p. 420: The coexistence of different procedures for the settlement of disputes raises problems of strategy for the parties and their counsel. They have to consider which of the available dispute settlement mechanism to utilize, and, in order to take this decision, they have to consider how to define their claim in the light of the different rules on the settlement of disputes and on the jurisdiction of the different bodies which could be resorted.

and the time limits to request interpretations, revisions, or the nullity of its awards. In the same way, every tribunal establishes the order of the process, generally beginning with the written phase and continuing with the oral phase, the produce of evidence, testifying by witnesses or experts, and inspections. Also, the international tribunals establish whether they can exercise their jurisdiction with or without appeal. As a general rule, the statute or treaty that creates a tribunal establishes the definitive and mandatory character of the award.

In the case of the courts in the Americas, as a general rule they are the only instance of the proceedings, and thus their rulings cannot be appealed. The only exceptions are the CCJ, under its original competence, where a single judge can hear a case and his award may be appealed before a chamber of magistrates acting as an appellate court; and the ATOAS, that admits revising a decision under a mechanism similar to that of an appellate court, but by way of an *ad hoc* panel. The American System of Human Rights acts first through a politic organ, the Commission of Human Rights, which is entitled to bring a demand before the IACtHR, but the tribunal acts as a binding court, whose decisions cannot be appealed, differing in that way from the European System of Human Rights.

4 Conclusion

Since the institutionalization of international justice through permanent courts and tribunals, and especially with the creation of the International Court of Justice, up to the current scenario of multiple jurisdictions of universal and regional character with a variety of competences, international justice has diversified and expanded. This is an advance for Public International Law, whose different disciplines are not only regulated by norms (treaties, custom), but are also enforced and supervised by international tribunals, assuring its effectiveness.

In the last few decades there have been voices regretting what they see as the "fragmentation" of public international law and the role played by international courts.[12] Some jurists, especially members of the International Court of Justice (Guillaume, Oda, Ranjeva, Dupuy), have been critical with regard to the apparition of new jurisdictions, warning about the risk of arriving at interpretations or applications of the norms of Public International Law that are discordant or contradictory. However, other jurists (Treves, Casanovas y La Rosa) believe that these new international tribunals do not necessarily bring such risks, and that concordant application of the principles and norms of public international law by different international courts strengthens the discipline, and with it, the international system as a whole.

All things considered, the practice of the diverse international tribunals whose jurisdiction and competence we have explored in this article does not seem to pose

[12] Treves 1997, p. 431.

a risk of fragmentation in the region. Thus, we may conclude that the growing jurisprudence of the international courts in the Americas seems to be favoring the greater development of public international law in the continent, especially with regard to interstate and regional relations.

Reference

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Procedural Aspects Concerning Jurisdiction and Admissibility in Cases of Maritime Delimitation Before the ICJ

Angel V. Horna

There are an increasing number of cases concerning maritime delimitation that have been submitted to the International Court of Justice (ICJ), to arbitral tribunals and, since recently, to the International Tribunal for the Law of the Sea (ITLOS). In fact, it is thought that maritime delimitation is one of the most frequent issues in international relations. It unavoidably creates tension[1] between geography, history, politics, and law, which, as rightly pointed out by the former ICJ President, Rosalyn Higgins, "[c]an create bitter political relations or be perceived as threatening ways of life that have existed for centuries".[2]

The present study aims to describe certain questions concerning jurisdiction and admissibility in maritime delimitation cases before the ICJ. In so doing only those maritime delimitation cases brought before the Court by means of an unilateral

[1] The expression "tension between geography and law" has been borrowed from Nuno Antunes. However, the terms "history" and "politics" have been added because, in the author's opinion, they also play a large role within the present topic, see: Antunes 2003, p. 109 and also: Weil 1989, p. 281.

[2] Statement by Judge Rosalyn Higgins, President of the International Court of Justice, on the occasion of the tenth anniversary of the International Tribunal for the Law of the Sea, see: www.icj-cij.org. See also: Treves 2000, pp. 726–746.

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application, in which the respondent challenged the Court's jurisdiction by entering preliminary objections, will be examined. Those cases amount to four,[3] namely: *Aegean Sea Continental Shelf (Greece* v. *Turkey)*; *Maritime Delimitation and Territorial Questions (Qatar* v. *Bahrain)*; *Land and Maritime Boundary (Cameroon* v. *Nigeria)*; and *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*. Each time, there is a description of the Application, including the basis of jurisdiction invoked by the Applicant, an analysis of the Court's task, the Parties' submissions, and the judgment of the Court.

1 Aegean Sea Continental Shelf Case[4]

On 10 August 1976, Greece filed an Application instituting proceedings against Turkey and requesting the Court to declare (i) that the so-called "Greek islands"[5] were part of Greek territory; (ii) what was the course of the boundary between the portions of continental shelf appertaining to Greece and Turkey in the Aegean Sea, etc.[6] Greece found the basis of the jurisdiction of the Court in Article 17 of the General Act for the Pacific Settlement of International Disputes, 1928; read together with Article 36.1 and Article 37 of the ICJ Statute, and a joint communiqué issued in Brussels on 31 May 1975.[7]

[3] The author is aware of other cases before standing international courts or tribunals in which such issues were discussed upon. However, they were not maritime delimitation cases. At ITLOS, for instance, one could refer to: M/V "Saiga" (no. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment (1 July 1999), paras 40–109, where the jurisdiction of the Tribunal was briefly discussed followed by a lengthier discussion on the admissibility of the claims put forward by the Applicant. For an appraisal of the first case of the ITLOS, see, e.g.: De la Fayette 2000, pp. 467–476. This list does not include the following cases in which the ICJ was seized by means of a unilateral application: Maritime Delimitation on the Area between Greenland and Jan Mayen (Denmark v. Norway), because Norway did not contest the jurisdiction of the Court; Maritime Delimitation between Guinea-Bissau and Senegal because the proceedings were discontinued following the agreement concluded between the Parties on 14 October 1993; Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), because Honduras contested neither the jurisdiction of the Court nor the admissibility of the claim; Maritime Delimitation in the Black Sea (Romania v. Ukraine), because Ukraine did not challenge the jurisdiction of the Court; and the Maritime Dispute (Peru v. Chile), because up to the date of this work's submission, no official objection to the jurisdiction of the Court has been entered by Chile.

[4] ICJ: Aegean Sea Continental Shelf (Greece v. Turkey), Judgment (19 December 1978). Further reading: Athanasopulos 2001, pp. 46–82; McDorman et al. 2000, pp. 225–239; and Özgür 1996, pp. 615–638.

[5] Such islands are: Samothrace, Limnos, Aghios Eustratios, Lesbos, Chios, Psara and Antipsara. See ICJ: Aegean Sea Continental Shelf (Greece v. Turkey), Application of Greece, p. 3.

[6] Ibidem, p. 11.

[7] Ibidem, p. 10.

In the same Application, Greece also requested the Court to indicate provisional measures pending the final decision. Such measures were not indicated by the Court, which in its Order of 11 September 1976 considered that it did not require the exercise of its power under Article 41 of the Statute, i.e., the indication of interim measures of protection.

By a communication of 25 August 1976, Turkey asserted that the Court had no jurisdiction to entertain Greek's Application. Similarly, on 24 April 1978, the date in which the deadline fixed by the Court for the filing of Turkey's Counter-Memorial expired, the Registry of the Court received a letter sent by the government of Turkey in which it stated, *inter alia*, that it was evident that the Court lacked jurisdiction to entertain the Application of Greece in the particular circumstances of the case and therefore that it did not intend to appoint an Agent or file any Counter-Memorial whatsoever.

In this sense, the Court, while regretting Turkey's failure to appear before it, in accordance with its Statute and its settled jurisprudence, proceeded to examine *proprio motu* the questions of its own jurisdiction. It made particular reference to Article 53 of its Statute, which prescribes that when one of the Parties does not appear before the Court, or fails to defend its case, the Court must satisfy itself that it has jurisdiction.[8]

On 19 December 1978, the Court ruled, by 12 votes to 2 (Judges de Castro and Judge *ad hoc* Stassinopoulos dissenting), that it was without jurisdiction to entertain the Application filed by the Greek Government,[9] on the basis that the Joint Communiqué issued in Brussels on 31 May 1975 did not furnish the basis for establishing the Court's jurisdiction.[10]

2 Maritime Delimitation and Territorial Questions Between Qatar and Bahrain

On 8 July 1991, Qatar filed an Application instituting proceedings against Bahrain and requesting the Court to determine that the State of Qatar had sovereignty over the Hawar Islands and sovereign rights over the shoals of Dibal and Qit'at Jaradah; and to draw, in accordance with international law, a single maritime boundary between the maritime areas of the two States.[11] Qatar founded the jurisdiction of

[8] Aegean Sea Continental Shelf, supra n. 4, para 15.

[9] Ibidem, para 109.

[10] Ibidem, para 108.

[11] For a general appraisal of the case, including the merits phase, see e.g.: Kwiatkowska 2002, p. 227. For the author this case is "the first major maritime delimitation dispute settled by the International Court of Justice" since the Jan Mayen case, ICJ: Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment (14 June 1993). To determine whether such statement is true or not go beyond the scope of this study; however, it is generally known that both Preliminary Objections Judgments as well as the one on the merits

the Court upon two agreements concluded between the Parties, namely an exchange of letters of December 1987 and the 1990 Doha Minutes, both falling within the scope of Article 36.1 of the ICJ Statute. Bahrain contested the basis of the jurisdiction invoked by Qatar by letters dated 14 July and 18 August 1991. It was later agreed that the written proceedings should first deal with the questions of jurisdiction and admissibility.

In that sense, the Government of Qatar requested the Court to adjudge and declare that it had jurisdiction to entertain the dispute referred to in its Application and that the said Application was admissible. The Government of Bahrain, in turn, requested the Court to adjudge and declare, rejecting all contrary claims and submissions, that it had no jurisdiction over the dispute brought before it by the Application filed by Qatar on 8 July 1991. Bahrain maintained that the Minutes signed at Doha in December 1990 did not constitute a legally binding instrument and therefore did not enable Qatar to seise the Court unilaterally. The text which was proposed by Bahrain on 26 October 1988, and accepted by Qatar in December 1990, the so-called "Bahraini formula", read:

> The Parties request the Court to decide any matter of territorial right or other title or interest which may be a matter of difference between them; and to draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters.[12]

2.1 First Judgment on Preliminary Objections (1994)

The Court found that the Minutes of 25 December 1990, like the exchange of letters between the King of Saudi Arabia and the Amirs of Qatar and Bahrain, dated 19 and 21 December 1987, together with the Doha minutes signed at Doha on 25 December 1990, by the Ministers for Foreign Affairs of Bahrain, Qatar and Saudi Arabia, constituted international agreements[13]; that according to such agreements the Parties had undertaken to submit to the Court the whole of the dispute between them ("Bahraini formula"); and decided to afford the Parties with a new deadline to submit the whole of the dispute.

It is interesting to quote a part of the judgment in which the Court decided, by way of an innovative device,[14] regarding the still outstanding question of the subject-matter of the dispute,

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(Footnote 11 continued)
have greatly contributed to the development of the law in general and the law of maritime delimitation in particular. See also: Reichel 1997, pp. 725–744.

[12] ICJ: Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment (1 July 1994), para 18.

[13] Ibidem, para 41.

[14] Salmon and Sinclair 2004, p. 1172.

> (…) to afford the Parties the opportunity to ensure the submission to the Court of the entire dispute as it is comprehended within the 1990 Minutes and the Bahraini formula, to which they have both agreed. Such submission of the entire dispute could be effected by a joint act by both Parties with, if need be, appropriate annexes, or by separate acts (…) This process must be completed within five months of the date of this judgment.[15]

In his Separate Opinion,[16] Judge Schwebel found that this first judgment failed to comply with the formula established in Article 79.9 of the Rules of Court, namely, to either uphold, reject, or declare that the objection did not possess an exclusively preliminary character. Instead, the Court reserved for the future a decision on whether it had jurisdiction or not.

In his dissenting opinion Judge Oda considered that there had not been a direct exchange of letters between Qatar and Bahrain, and therefore no international agreement could have been concluded between them.[17] Yet, Judge Oda apparently overlooked the fact that the 1987 agreement had been explicitly regarded as such by the Parties.[18]

Shabtai Rosenne, in turn, considered that the task of the Court, in the jurisdiction and admissibility phase, was a double one: (i) to determine whether there was a treaty or convention in force between the Parties referring the case to the Court; and (ii) to determine whether the reference to the Court was made in conformity with the requirements of that treaty or convention.[19] Hence, according to that author, in its first judgment, the Court answered the first question in the affirmative whereas it answered the second in the negative. The author then goes on to agree with the Court on the legally binding nature of the 1990 Doha Minutes.

For Rosenne, this Judgment constituted a timely innovation,[20] especially regarding cases where the jurisdiction is based upon a framework agreement, as opposed to a *compromise*. Thus, Rosenne considered the 1989 exchange of letters and the Doha Minutes of 1990 as a framework agreement.[21] A framework agreement for that author is one that recognizes that a dispute exists without defining it with necessary precision.[22] In other words, it is "a form of agreement covering disagreement", bringing about a case the development of which "takes its place

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[15] Delimitation between Qatar and Bahrain (1 July 1994), supra n. 12, para 38.

[16] Delimitation between Qatar and Bahrain (1 July 1994), supra n. 12, Separate Opinion of Vice-President Schwebel, pp. 130–131.

[17] Delimitation between Qatar and Bahrain (1 July 1994), supra n. 12, Dissenting Opinion of Judge Oda, para 10.

[18] Klabbers 1995, pp. 364–365.

[19] Rosenne 1995, p. 164.

[20] Ibidem, p. 182.

[21] Ibidem, pp. 171–176.

[22] Ibid, p. 173. In this vein, the author recalls that the first case brought before the ICJ on this basis was the Asylum case concerning an agreement called the Act of Lima of 31 August 1949. See ICJ: Asylum (Colombia/Peru), Judgment (20 November 1950), p. 266.

alongside" the doctrine of "*forum prorogatum* as another factor tending to free recourse to the Court from excessive formalism".[23]

Professor Christine Chinkin has claimed that the Court might have displaced the primacy of consent by presuming the existence of a legally binding agreement despite the intention of one of the Parties.[24] She went on to say that such a decision "[o]pens the way to holding states bound by commitments however informally given".[25] In this vein, Chinkin considered the question to be whether the ruling in this case had undermined the line dividing binding and non-binding agreements,[26] one that has always been blurred and that, regretfully, has not been clarified by the ICJ ruling in this case.[27]

Yet again, this argument is contended by Salmon and Sinclair who consider that Bahrain did express its consent when signing the Doha Minutes,[28] a criterion that was finally retained by the Court.

2.2 Second Judgment on Preliminary Objections (1995)

The Parties having failed to reach an agreement before 30 November 1994 under operative para 41 of the 1994 Judgment, Qatar decided to submit to the Court the text of an "Act to comply with paragraphs 3 and 4 of operative paragraph 41 of the Judgment of the Court dated 1 July 1994" whereby it presented the whole of the dispute with Bahrain,[29] as defined by the "Bahraini formula". Qatar contended that both States had made express commitments in the agreements of December 1987 and December 1990 to refer their potential disputes to the ICJ. It then claimed that since both Parties had given their consent through the above-mentioned international agreements, the Court was in a position to establish its jurisdiction to adjudicate upon such disputes.[30]

On the contrary, Bahrain claimed once again that the 1990 Minutes did not constitute a legally binding instrument and that neither alone nor combined with the provisions of the 1987 exchanges of letters could Qatar pretend to seise the

[23] Rosenne 1995, p. 181.

[24] Chinkin 1997, p. 224.

[25] Ibidem, p. 224.

[26] Ibidem, p. 225.

[27] Ibid, p. 247.

[28] Salmon and Sinclair 2004, p. 1175.

[29] Such subjects included, according to Qatar, the Hawar Islands, including the island of Janan; Fasht al Dibal and Qit' at Jaradah; the archipelagic baselines; Zubarah; the areas for fishing for pearls and for fishing for swimming fish and any other matters connected with maritime boundaries; see ICJ: Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment (15 February 1995), paras 9–14.

[30] Ibidem, para 16.

Court unilaterally. In other words, that the Court lacked jurisdiction to hear the case.[31]

Under these circumstances, the Court recalled that, in its Judgment of 1 July 1994, it had reserved for an ulterior decision all such matters that had not been decided in that Judgment and therefore realized that Bahrain maintained the objections it had raised with respect to Qatar's Application. Thus, the Court decided to deal with such objections.

The Court was also faced with a matter of treaty interpretation since there was a disagreement between the parties as to the meaning of the Arabic phrase "*al-tarafan*". The Court hence established:

> This conclusion [that the Bahraini formula entailed the possibility that each Party could submit distinct claims to the Court] accords with that drawn by the Court from the interpretation of the phrase "Once that period has elapsed, the two parties may submit the matter to the International Court of Justice." Consequently, it seems to the Court that the text of paragraph 2 of the Doha Minutes, interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of the object and purpose of the said Minutes, allowed the unilateral seisin of the Court (…).[32]

Summing up, the Court continued by saying:

> In its Judgment of 1 July 1994, the Court found that the exchanges of letters of December 1987 and the Minutes of December 1990 were international agreements creating rights and obligations for the Parties, and that by the terms of those agreements the Parties had undertaken to submit to it the whole of the dispute between them. In the present Judgment, the Court has noted that, at Doha, the Parties had reaffirmed their consent to its jurisdiction and determined the subject-matter of the dispute in accordance with the Bahraini formula; it has further noted that the Doha Minutes allowed unilateral seisin. The Court considers, consequently, that it has jurisdiction to adjudicate upon the dispute.[33]

It is therefore clear that in its second judgment on Preliminary Objections, the Court found that it had jurisdiction to adjudicate upon the dispute submitted to it by Qatar and that Qatar's Application was admissible. Hence, on 15 February 1995, the Court ruled, by 10 votes to 5 (Vice-President Schwebel, Judges Oda, Shahabudden, Koroma and Judge *ad hoc* Valticos dissenting), that it had jurisdiction and that Qatar's Application was admissible.[34]

In his dissenting opinion, Judge Oda considered that the unilateral method of seisin used by Qatar was inadequate and that the Court should have looked more closely at its previous decisions.[35]

All in all, it is interesting to note that the formal aspect concerning the creation of legal rights and obligations in international adjudication is not as important as it

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[31] Ibidem.

[32] Ibidem, para 40.

[33] Ibidem, para 44.

[34] Ibid., para 50.

[35] For example: Fisheries Jurisdiction case in which the UK proposed to insert: "at the request of either two Parties", see ICJ: Fisheries Jurisdiction (United Kingdom v. Iceland), Judgment (2 February 1973), para 19.

is in domestic legal proceedings. The Court has thus proved to be quite flexible concerning this point.[36] What is more, this hallmark decision set the threshold to be met so as to speak about a treaty, regardless of its form. In the words of Professor Klabbers: "[t]he Court for the first time gave a principled account of the essentials of treaty-formation. As such, the decision has all the characteristics of a *locus classicus*".[37]

3 Land and Maritime Boundary (Cameroon v. Nigeria)[38]

On 29 March 1994, Cameroon submitted an Application[39] instituting proceedings against Nigeria and requesting the Court (i) to declare that the sovereignty over the Peninsula of Bakassi was Cameroonian; and (ii) to order the immediate withdrawal of Nigerian troops from the alleged territory of Cameroon in the disputed areas. Cameroon considered the Court's jurisdiction to be founded on the declarations made by the two Parties under Article 36. 2, of the ICJ Statute.

Nigeria decided to enter preliminary objections against Cameroon's Application, thus becoming the first African State to do so.[40] Its objections included that Cameroon had acted prematurely and in disregard of the relevant procedural rules, that Cameroon had consented to an exclusive regional dispute settlement mechanism, that the dispute did not comprise the whole land boundary, that the absence of interested third states blocked the proceedings, and that it was not possible to effect any maritime delimitation without having conducted negotiations before.

Thus, Nigeria contended, as a first preliminary objection, that it had not received a copy of Cameroon's optional clause declaration deposited with the UN Secretary-General on 3 March 1994, that therefore it had no knowledge of that fact and that Cameroon had not acted in good faith. In this respect one author recalls, concerning a certain practice among African States with respect to the optional clause system (what the author calls "*ad hoc*" declarations), that Guinea-Bissau

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[36] See, e.g. PCIJ: Legal Status of Eastern Greenland (Denmark v. Norway), Judgment (5 April 1933); ICJ: Nuclear Tests (New Zealand v. France), Judgment (20 December 1974); Aegean Sea Continental Shelf, supra n. 4; United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Order (12 May 1981).

[37] Klabbers 1995, p. 376.

[38] Bekker 1998, pp. 751–755.

[39] On 6 June 1994, Cameroon filed in the Registry an Additional Application concerning the extension of the subject of the dispute to the question of sovereignty over a part of the territory of Cameroon in the area of Lake Chad; and the determination of the frontier between the two States from Lake Chad to the sea. This request was not objected to by either Nigeria or the Court which, by an order so indicated (ICJ: Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Order (16 June 1994).

[40] For an appraisal of the situation of the African States concerning proceedings before the ICJ, see e.g.: Perrin 1997, p. 185.

deposited its declaration only 16 days before seising the Court with an Application against Senegal while Cameroon did so only 26 days before filing its Application against Nigeria.[41]

Yet, the Court while invoking its previous decision in the *Right of Passage over Indian Territory* case[42] responded stating that under the optional clause system, any state party to the ICJ Statute when depositing a declaration is automatically subjected to a bond with any other state party having deposited its own declaration. Hence, its legal effect is not conditioned upon any subsequent action of the Secretary-General. The Court went on to say that no time period was required for the establishment of a consensual bond following such a deposit. It therefore rejected the first preliminary objection.[43]

It is interesting to note here the Dissenting Opinion of Vice President Weeramantry, who clearly stated that he was against such reasoning on the grounds of the formulation of Article 36.4 of the ICJ Statute. Such provision establishes two prerequisites for establishing the so-called consensual bond between States having made declarations under the optional clause system, namely, the deposit of the declaration with the Secretary-General and the transmission by the Secretary-General of copies to the parties to the Statute and to the Registrar of the Court.[44] In this sense, he considered the approach taken by the Court to be not in conformity with the "[e]ssential philosophy governing the Optional Clause"[45] and therefore being able to undermine the Court's jurisdiction by not fostering due compliance of Article 36.4 of the Statute.

As a second preliminary objection, Nigeria claimed that during at least 24 years prior to the filing of the Application, the Parties had in their regular dealings accepted a duty to settle all boundary questions through the existing bilateral machinery. It was therefore, according to Nigeria, the case of an implicit agreement establishing a bilateral framework that would prevent both States from relying on the jurisdiction of the Court to settle a given dispute.

In this respect, before rejecting this objection the Court recalled that:

> [n]either in the UN Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court and that no such precondition was embodied in the Statute of the Permanent Court of International Justice, contrary to a proposal by the Advisory Committee of Jurists in 1920. The Court also stated that the fact that the Parties had attempted to settle some of the boundary issues dividing them bilaterally, did not

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[41] Ibidem, p. 187.

[42] ICJ: Right of Passage over Indian Territory (Portugal v. India), Judgment (26 November 1957). The Court then prescribed: "The contractual relation between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established, '*ipso facto* and without special agreement'".

[43] ICJ: Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment (11 June 1998), paras 41–45.

[44] Ibidem, Dissenting Opinion of Vice President Weeramantry, p. 365.

[45] Ibidem, p. 362.

imply that either one had excluded the possibility of bringing any boundary dispute concerning it before the ICJ.[46]

As a third objection, Nigeria put forward that the settlement of the maritime boundary dispute within the Lake Chad region was subject to the exclusive competence of the Lake Chad Basin Commission. However, the Court considered that the said commission did not include as one of its objectives the settlement of matters relating to the international peace and security of the region and that even if that was the case, the existence of procedures for regional negotiation could not prevent the Court from exercising its functions according to the Charter and its Statute.[47] Consequently, the Court also rejected this preliminary objection.

Nigeria advanced a fourth argument so as to challenge the jurisdiction of the Court, namely that the boundary Cameroon wanted to have determined would affect a third state, that is, the Republic of Chad. The Court stated that only when the interests of a third state were the very subject-matter of the dispute had it declined to exercise its jurisdiction. In the case at hand, the Court continued, Cameroon had requested to establish the frontier between that State and Nigeria and no other. Therefore, it went on to reject this objection, too.[48]

As a fifth preliminary objection Nigeria contended that there was no boundary delimitation dispute as such. The Court, however, dismissed this argument once again.[49] Similarly, Nigeria's sixth objection, of a rather formal character implying the alleged inaccuracy of Cameroon's Application, was also rejected by the Court on the grounds that an applicant had some leeway to determine how to present the facts and arguments to the Court.[50]

An interesting issue was raised as a seventh objection by Nigeria. It claimed that the Court could not effect a maritime delimitation without having first determined the title with respect to the Bakasi Peninsula. It then argued that the issue of maritime delimitation should not be admissible since no prior negotiations had taken place between the parties, pursuant to the provisions of UNCLOS. The Court recalled that it was up to its discretion to establish the order in which it dealt with the issues at hand and it held that it had not been seised according to Part XV (Settlement of Disputes) of UNCLOS, but on the basis of declarations made under the optional clause enshrined in Article 36.2 of the ICJ Statute, which do not contain any indication of prior negotiations having to be conducted within a certain time, before invoking the dispute settlement mechanism.[51] It then rejected this seventh preliminary objection.

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[46] Land and Maritime Boundary (Cameroon v. Nigeria) (11 June 1998), supra n. 43, paras 48–60.

[47] Ibidem, paras 67–68.

[48] Ibidem, paras 74–83.

[49] Ibidem, paras 84–94.

[50] Ibidem, paras 98–101.

[51] Ibidem, paras 103–111.

Finally, Nigeria put forward as a last objection the fact that any maritime delimitation would necessarily touch upon the rights and interests of third states. While acknowledging that the rights and interests of third states might be touched upon, especially those of Equatorial Guinea and São Tomé and Principe, the Court pointed out that it would have to deal with the merits of Cameroon's request so as to determine this. Accordingly, the Court concluded that this last preliminary objection did not possess an exclusively preliminary character and that it should be settled when dealing with the merits of the dispute.[52]

On 11 June 1998, the Court ruled, by 14 votes to 3 (Vice-President Weeramantry, Judge Koroma, and Judge *ad hoc* Ajibola dissenting), that it had jurisdiction on the basis of Article 36.2 of the Statute, and that Cameroon's Application, as amended by the Additional Application of 6 June 1994, was admissible.[53]

4 Territorial and Maritime Dispute (Nicaragua v. Colombia)[54]

On 6 December 2001, Nicaragua submitted an Application instituting proceedings against Colombia and requesting the Court to determine that the Applicant has sovereignty over the islands of Providencia, San Andrés and Santa Catalina and all the appurtenant islands and keys, and also over the Roncador, Serrana, Serranilla, and Quitasueño keys. It also asked the Court to determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Colombia, in accordance with equitable principles and relevant circumstances recognized by general international law. Nicaragua, as in the case against Honduras, put forward two basis for the jurisdiction of the Court. On the one hand, Article 36.1 of the ICJ Statute, in combination with Article XXXI of the American Treaty on Pacific Settlement (Bogotá, 30 April 1948)[55] officially known, according to Article LX thereof, as the "Pact of Bogotá" signed on 30 April 1948. On the other hand, Article 36.2 of the Statute whereby jurisdiction would also exist by way of the Declarations made by the Parties.[56]

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[52] Ibidem, paras 112–117. Regarding the issue of an objection not having an exclusively preliminary character, the Court decided to amend its Rules, especially Article 79.7 in 2001 (the amendment entered into force on 1 February 2001). See, e.g.: Eisemann 1998, pp. 178–182.

[53] Land and Maritime Boundary (Cameroon v. Nigeria) (11 June 1998), supra n. 43, para 118.

[54] For an early contribution to the subject, claiming Colombia's better legal standing with respect to the merits of the dispute, see: Diemer and Šeparović 2006, pp. 167–185.

[55] Entered into force on 6 May 1949.

[56] With respect to the Declarations made by the Parties, the Court noted that they were: "(…) made (…) under Article 36 of the Statute of the Permanent Court of International Justice, which are deemed, for the period which they still have to run, to be acceptances of the compulsory

On 21 July 2003, Colombia filed certain preliminary objections to the jurisdiction of the Court. Therefore, according to Article 79.5 of the Rules of Court, the proceedings on the merits were suspended.[57] Colombia requested the Court, under Article 79 of the Rules of Court, to declare that under Article VI and Article XXXIV of the Pact of Bogotá it lacked jurisdiction to hear the dispute and that the dispute had ended. It maintained, referring specifically to Article VI of the Pact, that the matters raised by Nicaragua were duly settled by a treaty in force (Barcenas-Esguerra Treaty) on the date on which the Pact was concluded.

Nicaragua, in turn, requested the Court to determine that both preliminary objections, that is (i) in respect of the jurisdiction based upon the Pact of Bogotá; and (ii) in respect of the jurisdiction based upon Article 36.2 of the ICJ Statute, were invalid. Alternatively, Nicaragua contended that, pursuant to Article 79.9 of the Rules of Court, the Colombian objections did not have an exclusively preliminary character.[58]

Hence, Nicaragua claimed that the 1928 Treaty and its 1930 Protocol did not settle the whole dispute between the Parties within the meaning of Article VI of the Pact of Bogotá and even if that was not the case, that the 1928 Treaty did not comprise all the matters at stake. Furthermore, Nicaragua claimed that the Court could not deal with these issues at this stage of the proceedings since that would require an examination of the merits.

At another point, the validity of the 1928 Treaty was also advanced by Nicaragua, as a reason confirming the fact that the dispute was not settled. First, because it was concluded "in manifest violation of the Nicaraguan Constitution of 1911 that was in force in 1928". Nicaragua considered that the conclusion of the 1928 Treaty violated Article 2 and Article 3 of its 1911 Constitution in force until 1939.[59] Second, because at the time of the conclusion of that Treaty, Nicaragua was under military occupation by the United States and was therefore precluded from entering into agreements that could harm the interests of the occupying power. In that sense, the Applicant claimed that Colombia, which was aware of this situation, "took advantage of the US occupation of Nicaragua to extort from her the conclusion of the 1928 Treaty".

Colombia, in turn, claimed that even assuming that the 1928 Treaty was against the 1911 Constitution of Nicaragua or that Nicaragua's will was undermined due

(Footnote 56 continued)
jurisdiction of the present Court pursuant to Article 36, para 5, of its Statute." See ICJ: Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment (13 December 2007), para 1.

[57] Ibidem, para 6.

[58] Ibidem, para 12.

[59] Articles of the Constitution: Article 2 stipulated, inter alia, that "treaties may not be reached that oppose the independence and integrity of the nation or that in some way affect her sovereignty…". Article 3 provided that "[p]ublic officials only enjoy those powers expressly granted to them by Law. Any action of theirs that exceeds these [powers] is null.".

to the US occupation, such claims were not raised during the ratification process in 1930, nor during the following 50 years. Therefore, Colombia considers that Nicaragua was precluded from challenging the validity of the 1928 Treaty and its 1930 Protocol. The Court found that the 1928 Treaty was valid and in force on the date of the conclusion of the Pact of Bogotá in 1948.[60]

With respect to the scope of application of the 1928 Treaty, the Court found that its terms did not answer the question of which maritime features apart from the islands of San Andrés, Providencia, and Santa Catalina form part of the San Andrés Archipelago over which Colombia had sovereignty. It thus considered that the matter had not been settled within the meaning of Article VI of the Pact of Bogotá and therefore that the Court did have jurisdiction under Article XXXI of the Pact of Bogotá in so far as it concerned the question of sovereignty over the maritime features part of the San Andrés Archipelago (Roncador, Quitasueño, and Serrana),[61] except for the islands of San Andrés, Providencia, and Santa Catalina.[62]

Finally, as regards the issue of maritime delimitation, the Court concluded that the 1928 Treaty and the 1930 Protocol did not establish a general delimitation of the maritime boundary between the Parties and that the dispute was therefore not settled within the meaning of Article VI of the Pact of Bogotá. In other words, it did not uphold Colombia's first preliminary objection concerning the Court's jurisdiction on the issue of maritime delimitation.[63]

On 13 December 2007, the Court ruled unanimously that it had jurisdiction on the basis of Article XXXI of the Pact of Bogotá to adjudicate upon the dispute concerning sovereignty over the maritime features claimed by the Parties other than the islands of San Andrés, Providencia, and Santa Catalina; and upon the dispute concerning maritime delimitation.[64]

5 Conclusion

It has been seen that, while still somewhat scarce, the practice of bringing a claim against another State without a special agreement is more and more frequent. Maritime delimitations, it has also been seen, are no exception to this crystallizing

[60] ICJ: Territorial and Maritime Dispute (Nicaragua v. Colombia), supra n. 56, para 81.

[61] Ibidem, para 104.

[62] Ibidem, para 97.

[63] Ibidem, para 120.

[64] Ibidem, para 142. On 19 November 2012, the Court rendered its judgement on the merits of this case, finding that Colombia has soverignty over the islands at Albuquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serranailla and deciding the line of the single maritime boundary delimiting the continental shelf and the exclusive economic zones of Nicaragua and Colombia in the Caribbean Sea.

practice, even though, after the ICJ decision in the *Nicaragua* case, some observers had put forward the elimination of the optional clause system.[65]

The author believes that the current state of international law regarding the issue of jurisdiction and admissibility, particularly in maritime delimitation cases, is the result of important developments, such as the increase in international litigation. This can only be good news for the strengthening of the rule of law in the international arena, since it gives States possibilities that not so long ago were hardly imagined, the possibility to bring to Court and settle peacefully otherwise eternal disputes.

Be that as it may, it can also be noticed that even though States can come up with different grounds so as to challenge the Court's jurisdiction or the admissibility of the other Party's claims, there seems to be a restrictive approach concerning the interpretation of previous agreements that could challenge the jurisdiction of the Court, in one way or another. Yet, on the other hand, it can also be seen that even when a State decides not to appear before the Court, for whatever reason—as was the case with Turkey in the *Aegean* case—the ICJ will have to satisfy itself that it does have jurisdiction, which could result in its finding that it indeed does not have such jurisdiction.

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Brief Notes on the Principle of *Non Bis in Idem* within Concurrent International and Domestic Criminal Jurisdiction

Fausto Pocar

1. The recent establishment of international criminal courts and tribunals and their concurrence with domestic courts in the adjudication of international crimes implies a coordination of their jurisdiction, in particular in relation to the principle of *non bis in idem*, according to which nobody can be tried or convicted twice for the same crime or the same set of acts. In the context of the application of the principle of complementarity, it may occur that a domestic court might deal with a case, which an international tribunal would subsequently consider not to have been handled properly and decide to take it up, commencing new proceedings against the same individual for the same act. In turn, it may also be questioned how far a national jurisdiction may be involved in a case which has already been considered by an international court, i.e. how far a decision of an international court is binding on the national court, so that the latter would be prevented from reconsidering the case or some aspects thereof.

This set of problems dates back to the International Military Tribunal in Nuremberg (hereinafter Nuremberg Tribunal). The latter's Statute (Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945)[1] indeed contained two provisions on the relationship between national courts and the International Military Tribunal. According to Article 10, "in cases where a group or organization is declared criminal by the Tribunal, the competent national

[1] Entered into force on 8 August 1945.

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authority of any Signatory shall have the right to bring individual to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned". By virtue of Article 11, "any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization".

Under these provisions, it was possible to try and convict a person having worked with the Axis, as a member of a criminal organisation, before the International Military Tribunal. A national jurisdiction was still allowed to intervene and consider the same set of facts for the purposes of establishing individual responsibility for a specific crime. Thus, the Statute expressly allowed for a certain *bis in idem*, and indicated the scope thereof. The Statute, however, did not envisage the reverse situation, i.e. that a national tribunal would act first and the International Military Tribunal would deal with the same case afterwards. In the circumstances in which the Nuremberg Tribunal was to perform its activity and the limited time frame for achieving it, it would have been hardly conceivable that any domestic court could try a case falling within the jurisdiction of the Tribunal before the latter had done so.

2. Unlike under the Statute of the Nuremberg Tribunal, the principle of *non bis in idem* is clearly laid down in Article 10 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY).[2] By virtue of this provision, "no person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal". Thus, once the ICTY has considered a case, national courts have no jurisdiction over the same accused for the same acts.

However, the contrary situation is approached differently. A person who has been tried by a national court may—*per* Article 10.2 of the ICTY Statute—be subsequently tried by the International Tribunal if, but "only if: (*a*) the act for which he or she was tried was characterized as an ordinary crime; or (*b*) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted". The mere characterisation of a crime as an ordinary crime under domestic law instead of a crime under international humanitarian law would allow the International Tribunal to intervene and prosecute the person again for the

[2] Report of the Secretary-General Pursuant to para 2 of Security Council Resolution 808 (1993), UN Doc. S/725704 (3 May 1993), Annex. The same applies to Article 9 of the Statute of the International Criminal Tribunal for Rwanda (Security Council Resolution on the establishment of an International Tribunal and adoption of the Statute of the Tribunal, UN Doc. S/RES/955 (1994) (8 November 1994), Annex), which is identical.

same conduct as an international crime. Similarly, if in the opinion of an ICTY Chamber, the national court proceedings were not impartial or independent, or were conducted in order to protect the accused rather than to fairly try him, the same set of acts charged before the domestic court could form the basis for a new trial at the international level.

The two situations appear to express different degrees of derogation from the principle of *non bis in idem.* In the second exception, if the domestic trial could not be properly characterised as a real or genuine trial, serving instead as a means to protect the accused from being seriously prosecuted, that trial could be regarded as null and void, and the new international trial would in effect be the only real trial. On the contrary, the first exception depends only on the characterisation of the crime and appears to be a more significant derogation from the principle, as it implies a double prosecution for the same set of facts under different legal qualifications and may more easily be seen as a duplication of the same criminal proceedings.

One may question whether the above-mentioned derogations should apply only in order to allow the International Tribunal to exercise jurisdiction over a case that has already been tried at the national level, or could also play a role in permitting a domestic court to deal with a case that has already been brought before by the ICTY. And this is probably the main outstanding issue, since the Tribunal has not so far made any use of the exceptions provided for in the law, and is most unlikely to do so in the remaining time of its activity.

As to the first exception, based on a different characterisation of the violation/offence under domestic and international law, Article 10 of the Statute suggests a negative answer, although it only prohibits a second trial, at the domestic level, for acts constituting serious violations of international humanitarian law and does not refer to the same acts as a violation of domestic criminal law. In this context, it has to be pointed out that normally the violation of domestic law will result in a lesser included offence, which in any event would not allow for a new trial in light of the principle of *non bis in idem.*

The other derogation hardly appears applicable in favour of domestic courts. Indeed, the danger that proceedings may be designed to shield the accused from international criminal liability should not arise when an accused is tried before the ICTY. Indeed, the establishment of the Tribunal was aimed precisely at affirming international criminal responsibility and preventing the possibility that perpetrators of violations of international humanitarian law would go unpunished.

However, within the framework of Article 10 of the Statute, the question of whether a domestic court should be prevented from exercising jurisdiction over crimes brought before the International Tribunal, which were the object of a plea agreement between the accused and the prosecutor and eventually accepted by a trial chamber, could in fact arise. There is no doubt that the counts to which the accused pleaded guilty, and for which he or she was convicted and sentenced, will bar domestic courts from dealing subsequently with the accused's conduct described therein. But it is inherent in a plea agreement that charges laid in the indictment may be abandoned by the prosecution, following an overall assessment

of the outcome of the proceedings and of the counts for which the accused is prepared to admit his or her responsibility. Would a domestic court be bound by the plea and prevented from exercising jurisdiction over the crimes that were dismissed? One can hesitate to give a general answer to this question. While in the case of a fully transparent agreement it would be unfair to allow another court to take up the counts that the prosecutor withdrew in exchange for the guilty plea, one may question how far this agreement may bind another court. An abandoned charge cannot be said to have been the object of a trial by the International Tribunal, which would be binding on domestic courts under Article 10 of the Statute. Moreover, and notwithstanding the trial chamber's control over the plea agreement, should the latter result in too lenient a treatment of the accused, one could question, albeit in an extreme case, whether the case was diligently prosecuted for the purposes of Article 10.2.*b*.

3. The application of the principle of *non bis in idem* may lead to different conclusions as far as the International Criminal Court (ICC) is concerned. Under Article 20.2 of the Rome Statute establishing the ICC (Rome, 17 July 1998; hereinafter Rome Statute)[3] "no person shall be tried by another court for a crime referred to in Article 5 [which makes reference to all the crimes within the jurisdiction of the Court] for which that person has already been convicted or acquitted by the Court". Unlike the Statutes of the ICTY and ICTR, there is no specific reference here to *domestic* courts. However, the Rome Statute being an international treaty between States, domestic jurisdictions of State parties to the Statute are those primarily concerned with the rule. The prohibition may additionally refer to other courts, including international and hybrid *ad hoc* courts, provided that the treaty is applicable to the countries concerned with their establishment.

The opposite situation, that arises when a domestic court has been seised before the ICC, should be the ordinary situation. Unlike the Statutes of the ICTY and ICTR, which establish the priority of the International Tribunals' jurisdiction, the ICC's jurisdiction is characterised in the Statute as complementary with respect to the States' jurisdiction, and may be exercised only when a State party that would be competent to prosecute a crime is unable or unwilling to do so. This principle has a bearing on the application of the *non bis in idem* principle, in particular on the ability of the ICC to exercise jurisdiction when a domestic court has already tried an accused brought before the Court. Article 20.3 of the Statute sets forth in this regard that "no person who has been tried by another court for conduct also proscribed under Article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings of the other court: (a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) otherwise were not conducted independently and impartially in accordance with the norms of due process recognized by

[3] Entered into force on 1 July 2002.

international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice".

This provision provides for a significantly more restricted exception to the principle of *non bis in idem* than the corresponding provisions in the Statutes of the *ad hoc* Tribunals. First, it does not allow for a new trial before the Court when the conduct for which the accused was tried by a domestic court was characterised as an ordinary crime. The consequence is that a State party will be generally regarded as having complied with the principle of complementarity when a person has been tried for the same conduct by its courts under domestic rules of criminal law, even if that conduct would constitute an international crime under the Rome Statute. The mere characterisation of the criminal conduct would not be sufficient to allow the Court to start a new trial. In order to do so, the Prosecutor would be obliged to establish that the characterisation of the crime as ordinary was adopted *for the purpose* of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court. The proof of such an intentional element may not be easy in all circumstances.

The ICC Statute's provision appears to have a more restricted scope also as far as the features of the domestic prosecution are concerned. Under Article 10.2.*b* of the ICTY Statute, the fact that the national proceedings were not impartial or independent was designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted constitute distinct circumstances and the non-compliance with any of them may allow for a new trial before the International Tribunal. On the contrary, under Article 20.3.*b* of the Rome Statute only shielding the accused from international criminal responsibility is singled out as a sufficient ground for a new trial before the Court. Following a literal reading, non-compliance with principles of impartiality and independence, and conducting proceedings in a manner which was inconsistent with the intent to bring the person concerned to justice are presented as cumulative conditions, linked by "and", rather than as independent ones. Thus, both should be established in order to allow for a new trial before the International Court.

4. Another issue, concerning the relationship between the ICC and domestic jurisdictions that deserves attention is the following. The Statutes of the ICTY and of the ICTR have been adopted by a resolution of the Security Council under Chapter VII of the UN Charter, which has a binding effect on all UN Member States. Thus, the application of the principle *non bis in idem*, as directed in the Statutes, is binding on the entire international community. Unlike these instruments, the Rome Statute is an international treaty, which has received wide participation in the last few years having been ratified by around 120 States, but cannot be regarded as reflecting the general position of the international community. In other words, although the Rome Statute has a universal vocation, the ICC is not (yet) a universal court, but simply a treaty-based judicial body. Its Statute is only binding for the States that have ratified it, except when the Security Council of the UN defers a situation to the attention of the Court. In these circumstances, domestic courts in a country not party to the Statute, which have jurisdiction over a case under domestic law, may exercise jurisdiction even after

the ICC has already tried the accused and rendered a conviction or acquittal. If there is concurrent jurisdiction of the ICC and the courts of a third country, the possibility of a further trial at the domestic level is not at all excluded, in particular, because the principle of *non bis in idem* does not apply in international relations, having been recognised in international law only as a principle for the exercise of criminal jurisdiction within a State, not when the jurisdiction of different States is in question. Indeed, as of today, the cross-border application of this principle remains controversial and is not recognised as a customary rule or a general principle of law.

The issue was brought before the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966)[4] by an alleged victim, who claimed that Article 14.7[5] of the Covenant had been breached by Italy, because he had been tried and sentenced in Switzerland and later tried and convicted by an Italian court for the same offence.[6] The consideration of the individual communication led the Human Rights Committee to conclude that the principle of *non bis in idem,* as set forth in Article 14.7 of the Covenant, applies only to domestic proceedings and not to proceedings involving two different countries. In the words of the Committee "this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State".[7] The European Convention on Human Rights (Rome, 4 November 1950)[8] confirms this approach in its Protocol No. 7 adopted on 22 November 1984. Article 4.1 of the Protocol provides that "No one shall be liable to be tried or punished again in criminal proceedings *under the jurisdiction of the same State* for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of the State".[9]

The sole exception appears to be the Charter of Fundamental Rights of the European Union (Nice, 7 December 2000; hereinafter Nice Charter),[10] which provides that the principle of *non bis in idem* will apply also when courts of different member States of the Union are concerned. Article 50 of the Charter provides that "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted *within the Union* in accordance with the law".[11] This development is

[4] Entered into force on 23 March 1976.

[5] Article 14.7 provides, "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country".

[6] See HRC: A.P. v. Italy, 204/1986, Decision (31 March 1983), UN Doc. CCPR/C/OP/2 (1990), p. 67.

[7] Ibidem, para 7.3.

[8] Entered into force on 3 September 1953.

[9] Emphasis added.

[10] See also Pocar 2001, p. 1167 ff.

[11] Emphasis added. See also EC Commission, Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings, COM (2005) 696 final (23 December 2005).

understandable in light of the Union's aim to establish a single judicial area, both in civil and criminal matters; it would be inconsistent with the notion of such an area if jurisdiction would be exercised in a non-coordinated way within its borders. But even the Nice Charter does not go beyond recognising the applicability of the principle within the area; its scope will therefore remain unaltered in the international context, between a court in a member State and a court in a third country.

Therefore, if the principle of *non bis in idem* has to be given this scope of application under international law, there would be no obstacle for the courts of a State which is not party to the Statute of the ICC to try again a person who has already been convicted or acquitted by the ICC.

Reference

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Jura Novit Curia in International Human Rights Tribunals

Dinah Shelton

The principle *jura novit curia* (the court knows the law) emerged in civil law systems, with origins traced to twelfth century glossators, clerics who re-annotated Roman law through applying this maxim.[1] In modern practice, particularly in continental Europe, it signifies in general the judicial power to address a case based on a law or legal theory not presented by the parties.[2] To some, its application represents the legal aspect of justice because it ensures that a party will not

This article represents the author's personal views and not those of the Inter-American Commission or any other part of the Organization of American States.

[1] The principle was expressed originally in a longer maxim: "*non dubitandum est iudici, si quid a litigatoribus vel ad his qui negotiis adsistunt minus fuerit dictum, id supplere et proferre, quod sciat legibus et iuri publio conveniure*" *Codex Iustinianus* in *II Corpus Iuris Civilis* (P. Krueger, ed. Bertolini 1963) 102.

[2] Damaška 1986, p. 116. Fox calls the adage a "presumption" that the court knows the law (Fox 1992). He does not mention another general principle of law: that all subjects of a legal system are presumed to know the law and ignorance of the law is no defense to its violation. How this general knowledge differs from the presumed knowledge of the judge is unexamined.

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lose a case simply because of a failure to invoke the correct legal ground.[3] Other authors link the concept to notions of equity whereby the court can recognize rights that an applicant or petitioner may not have invoked and may not even be aware pertain to the issues before the court.[4]

Use of *jura novit curia* remains more widespread in civil law jurisdictions than in those systems based on the common law. F.A. Mann suggested, in fact, that in continental legal systems the principle *requires* a judge to apply the appropriate legal rules to the facts presented to the court by the parties (*da mihi factum, dabo tibi jus*) and if necessary engage in its own legal research in order to identify the pertinent rules. Mann contrasted this system with those of England, Ireland, and Scotland, in which, according to him, the judge relies upon the submissions advanced by legal counsel, who frame the issues as they deem are best suited to advance their client's claims and interests. According to Mann, "perhaps the most spectacular feature of English procedure is that the rule *curia novit legem* has never been and is not part of English law".[5] In an opinion submitted to the European Court of Justice, Advocate General Francis Jacobs contended that Mann had exaggerated the distinction between common law and civil law jurisdictions. According to him:

[3] Geeroms 2004. See also Miller 2002, p. 1256 (describing the practices of appellate courts in the United States when they find a point of law has been wrongly stated or omitted by the parties, practices that range from ignoring the issue or deeming it waived to noting the issue and remanding the case for consideration of it, requesting supplemental briefing or deciding the issue without briefing).

[4] The Black's Law Dictionary 1990, p. 852 translates the principle as "the court knows the law; the court recognizes rights." Brooker 2005, p. 9, notes that the second part of this definition may support the creation of equitable remedies: "The translation the 'court recognises rights' and its association with the maxim 'no wrong without a remedy', (…) invalidates a defence based on the absence of law by legitimising a decision based on a judge-created rule imposed *ex post facto* to remedy a wrong, notwithstanding no law was breached. The factual wrong alleged in this application of *jura novit curia* is found by a court nonetheless as sufficiently egregious to justify 'recognising' protection from the wrong as a 'right' leading to the provision of a remedy in equity".

[5] Mann 1977, p. 369. Mann was critical of a decision of the European Commission of Human Rights (ECmHR) which stated: "it is a generally recognised principle of law that it is for the court to know the law (*jura novit curia*) (…). [T]he practice of the German courts whereby the parties are not necessarily invited to make oral submissions on all points of law which may appear significant to the courts does not constitute an infringement of 'fair hearing' within the meaning of [Article 6 ECHR]" (ECmHR: X. & Co. (England) Ltd v. the Federal Republic of Germany, 3147/67, Decision (07 February 1968)).

> Civil law courts, *jura novit curia* notwithstanding, may not exceed the limits of the case as defined by the claims of the parties and may not generally raise a new point involving new issues of fact. A common law court, too, will *sua sponte* take a point which is a matter of public policy; it will, for instance, refuse to enforce an illegal contract even if no party raises this point.[6]

The *jura novit curia* principle supports distinct litigation roles for the parties and the judge or other decision maker, most appropriately in international tribunals whose jurisdiction may be based on a *compromis* between the parties, defining the scope of the dispute to be resolved.[7] Even in human rights bodies, whose mandate is broader than dispute settlement, the applicant's role is to present a demand or claim arising from alleged facts that must be proven to justify the claim. The decision maker may not modify the claim, but, based on the submissions and being presumed to know the law, applies the relevant norms to the proven facts to decide the claim. This litigation structure may avoid difficulties when the parties themselves disagree over the applicable norms—as is often the case with customary international law—or fail to state the legal basis of the case clearly and completely.

Difficult questions remain: when may a judge or other decision maker apply *sua sponte* a law which the parties have not invoked? What are the procedural rights of the parties that should be respected? In particular, do the parties have a right to be heard on the scope or interpretation of the law before it is applied? How does application of *jura novit curia* interact with the procedural regulations in force for the tribunal?

This chapter examines the practice of human rights tribunals in applying *jura novit curia*. It illustrates the wide disparity between such tribunals on this issue, and criticizes an excessive application of the principle by the Inter-American Commission (IACmHR) and Court (IACtHR). The conclusions note the contexts in which international human rights tribunals may legitimately apply *jura novit curia,* while respecting the procedural rights of the parties. In addressing this issue of international practice, this chapter aims to honor Professor Tullio Treves for his distinguished service as a judge on the Law of the Sea Tribunal, as well as his extensive scholarship. He has been a pioneer in many subject areas of international law and it is a great pleasure to recognize his outstanding contributions.

1 The International Court of Justice and *Jura Novit Curia*

The principle *jura novit curia* was first invoked in international litigation in pleadings of the United Kingdom in the International Court of Justice (ICJ)'s

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[6] ECJ: Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten, C-430/93 and C-431/93, Opinion of Adv. Gen. Jacobs (15 June 1995), paras 34–35.

[7] This is the case, notably, with the International Court of Justice (ICJ) and arbitral tribunals. Cf. Shelton 2009.

Icelandic Fisheries case.[8] Iceland and the United Kingdom disputed the rules of international law applicable to decide the case, with the United Kingdom asserting that no burden of proof could be imposed to determine these rules, due to the principle *jura novit curia*: the ICJ had a duty to declare the applicable law. The Court's comments on this point have been cited by human right bodies to support their use of the principle, although a close examination reveals precise contexts and limited rationales for the ICJ's application of *jura novit curia*. The ICJ stated that international courts decide from the entire body of international law which norms are applicable, in particular when the applicable law itself is in dispute. The ICJ seemed to view this role as mandatory based on its role as a dispute-settlement body[9]:

> The Court (…), as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required (…) to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.[10]

The ICJ again referred to the principle in the *Nicaragua* case[11] after the United States withdrew from the proceedings. In the context of the case, the ICJ's reference to *jura novit curia* appears intended to minimize the impact of the U.S. withdrawal from the litigation and to reinforce the legitimacy of the subsequent judgment despite the absence of legal argument from this party to the dispute.[12]

It should also be noted that in the ICJ cases cited, *jura novit curia* concerned the existence of rules of customary international law. In domestic litigation, even common law courts have been counseled to take judicial notice of the relevant norms of customary international law when such norms are relevant to cases

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[8] ICJ: Fisheries Jurisdiction (United Kingdom v. Iceland), Pleadings, Vol. IV, p. 32.

[9] The function of the ICJ, as the principal judicial organ of the UN, "is to decide in accordance with international law such disputes as are submitted to it" (Article 38.1 of the Statute of the International Court of Justice). The panels and Appellate Body of the World Trade Organization are also dispute-settlement bodies, although the states parties declined to establish a court to decide trade disputes (Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter DSU), Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994), Annex 2, entered into force on 1st January 1995). The functions of the International Tribunal for the Law of the Sea include dispute settlement, but also include compliance monitoring (United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; hereinafter UNCLOS), entered into force on 16 November 1994, Annex VI).

[10] ICJ: Fisheries Jurisdiction (United Kingdom v. Iceland), Judgment (25 July 1974), paras 17–18.

[11] ICJ: Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment (27 June 1986), para 29.

[12] According to the Court, "for the purpose of deciding whether the claim is well founded in law, the principle *jura novit curia* signifies that the Court is not solely dependent on the argument of the parties before it with respect to the applicable law (…) so that the absence of one party has less impact", ibidem The Inter-American Court used much the same language when Peru failed to appear in a case before it, IACtHR: Constitutional Court v. Peru, Judgment (31 January 2001), para 58.

before them.[13] Like the common law, customary international law may not be definitively known in reference to specific facts until a tribunal pronounces judgment on the matter. Treaty law, in contrast, contains rules that have been expressly agreed to by states and thus generally have greater legal certainty. Parties to a dispute may disagree over the interpretation of the applicable norm, but rarely about its existence.

2 Human Rights Tribunals

Unlike the ICJ, human rights tribunals are created by and have jurisdiction in respect to a specific treaty or treaties, wherein the rights and obligations are set forth in detail and thus circumscribe the choice of norms that the tribunal may apply.[14] Another difference from the ICJ is that the functions of human rights tribunals are not limited to or even primarily about dispute settlement. International human rights bodies are created expressly "to ensure the observance of the engagements undertaken by the High Contracting Parties"[15] or they "have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties" to the agreement.[16] The language of these mandates indicates that states parties intend the tribunals to undertake compliance monitoring as well as or perhaps more than dispute settlement. A human rights tribunal that emphasizes its compliance-monitoring function may be more likely to apply frequently *jura novit curia* and to insist on including all possible rights linked to the alleged acts or omissions, in order to advise the respondent state on the full range of deficiencies in its comportment.

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[13] *The Paquete Habana*, 175 U. S. 677, 708 (1900)("This rule of international law is one which prize courts administering the law of nations are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.").

[14] Of course, in some instances, the ICJ's jurisdiction is also limited to a specific treaty, based on a compromissory clause in that agreement, e.g., the International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965), entered into force on 4 January 1969, Article 22.

[15] [European] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; hereinafter ECHR), Entered into force on 3 September 1953, as amended by Protocol No. 11 (Strasbourg, 11 May 1994), entered into force on 1 November 1998 and Protocol No. 14 (Strasbourg, 13 May 2004), entered into force on 1 June 2010.

[16] American Convention on Human Rights (San José, 22 November 1969; hereinafter ACHR or American Convention), entered into force on 18 July 1978, Article 33.

2.1 The UN Human Rights Committee

At the global level, the UN Human Rights Committee established pursuant to the International Covenant on Civil and Political Rights (New York, 16 December 1966; hereinafter ICCPR)[17] has a variety of compliance review procedures at its disposal, most comprehensively the periodic reporting procedure. It is through such state self-reporting that the Committee and other UN human rights treaty bodies assess state compliance with the rights and obligations contained in the applicable agreement(s). The communications procedure of the Optional Protocol to the ICCPR (New York, 16 December 1966),[18] unlike regional arrangements, seems therefore to have a greater focus on resolving the specific complaint brought to the Committee by an applicant, with the Committee acting as a dispute-settlement body. The Committee appears never to have referred to *jura novit curia* in its decisions under the Optional Protocol and has applied it without specific mention only in rare instances,[19] generally to address communications that would be inadmissible without recharacterization.[20]

2.2 The European Court of Human Rights

Among regional human rights bodies, the European Court of Human Rights has decided the largest number of cases, more than 10,000 matters since its creation. It has rarely applied *jura novit curia*, although it accepts that it can, in principle, do so. A Grand Chamber ruling summed up the theory:

> Since the Court is master of the characterisation to be given in law to the facts of the case, it does not consider itself bound by the characterisation given by the applicant or the government. By virtue of the *jura novit curia* principle, it has, for example, considered of

[17] Entered into force on 23 March 1976.

[18] Entered into force on 23 March 1976.

[19] See e.g., HRC: BdB et al. v. The Netherlands, 273/1989, Decision (30 March 1989), UN Doc. Supp. No. 40 (A/44/40), p. 286.

[20] In the Omniayak Case, for example, the applicant invoked the right of self-determination (ICCPR, Article 1), in respect to the rights of his indigenous community in Canada. The Committee determined that its jurisdiction did not extend to alleged violations of Article 1, because it does guarantee individual rights. Rather than declare the communication inadmissible, the Committee considered it as falling within the provision concerning minority rights, ICCPR Article 27. See: HRC: Omniayak, Chief of the Lubicon Lake Band v. Canada, 267/1984, Views (26 March 1990), UN Doc. CCPR/C/38/D/167/1984 (10 May 1990), p. 1.

> its own motion complaints under Articles (…) not relied on by the parties and even under a provision in respect of which the [European] Commission had declared the complaint to be inadmissible while declaring it admissible under a different one.[21]

In practice, the European Court rarely makes use of this power. In its jurisprudence, it has referred to *jura novit curia* in only 32 cases, with many references found in dissenting opinions[22] or inadmissibility decisions.[23] Other judgments or decisions simply refer to domestic courts' application of the principle[24] sometimes as a result of efforts by creative lawyers to avoid the European Court's jurisprudence on exhaustion of local remedies. The Court's case law requires an applicant to "plead in substance" to domestic courts the complaints later presented in Strasbourg.[25] Representatives of applicants to the European Court have argued unsuccessfully that they should not have to present these claims to local courts because the principle *jura novit curia* means that the domestic judges should know and apply the European Convention without a party invoking it.[26] Thus, the applicant's failure to invoke the Convention in substance should not be deemed

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[21] ECtHR: Scoppola v. Italy (no. 2) [GC], 10249/03, Judgment (17 September 2009), para 54. See also ECtHR: Powell and Rayner v. United Kingdom, 9310/81, Judgment (21 February 1990), para 29 ("The Court is the master of the characterisation to be given in law to the facts submitted to its examination.").

[22] ECtHR: Hermi v. Italy [GC], 18114/02, Judgment (18 October 2006), Dissenting Opinion of Judge Zupančič (concerning the role of judges and prosecutors in criminal cases); Akdivar and others v. Turkey, 21893/93, Judgment (16 September 1996), Dissenting Opinion of Judge Gölcüklü (referring to *jura novit curia* in reference to exhaustion of local remedies); McFarlane v. Ireland [GC], 31333/06, Judgment (10 September 2010), Dissenting Opinion of Judge López Guerra (on exhaustion of local remedies).

[23] See, ECtHR: Pentiacova and 48 others v. Moldova, 14462/03, Decision (4 January 2005); Nelissen v. The Netherlands, 6051/07, Decision (5 April 2011).

[24] ECtHR: Eskelinen and others v. Finland, 43803/98, Judgment (8 August 2006); Tarnawczyk v. Poland, 27480/02, Judgment (7 December 2010); Turek v. Slovakia, 57986/00, Judgment (14 December 2004); Juha Nuutinen v. Finland, 45830/99, Judgment (24 April 2007); Marcic and 16 others v. Serbia, 17556/05, Judgment (30 October 2007); Hellborg v. Sweden, 47473/99, Decision (30 November 2004); Jusufoski v. "the Former Yugoslav Republic of Macedonia", 32715/04, Decision (31 March 2009); AGRO-B SPOL. S R.O. v. The Czech Republic, 740/05, Decision (1 February 2011). See also, ECtHR: Benham v. the United Kingdom, 19380/92, Judgment (10 June 1996), para 41; Gusinskiy v. Russia, 70276/01, Judgment (19 May 2004), para 66.

[25] ECtHR: Van Oosterwijck v. Belgium, 7654/76, Judgment (6 November 1980), para 34; Cardot v. France, 11069/84, Judgment (19 March 1991).

[26] ECmHR: W. v. Austria, 10757/84, Decision (13 July 1988); X. v. Federal Republic of Germany, 9228/80, Decision (16 December 1982). ECtHR: Van Oosterwijck, supra n. 25, para 39 (the applicant argued that the Belgian courts were bound by the principle *jura novit curia* to apply the ECHR even though he had not requested them to do. "The Court is not persuaded by this argument. The fact that the Belgian courts might have been able, or even obliged, to examine the case of their own motion under the [ECHR] cannot be regarded as having dispensed the applicant from pleading before them the [ECHR] or arguments to the same or like effect"). See also ECtHR: Lelas v. Croatia, 55555/08, Judgment (20 May 2010).

non-exhaustion of local remedies. The Court has consistently rejected this argument.

A handful of references to *jura novit curia* can be found in Grand Chamber judgments analyzing a case differently from the Chamber that first heard the matter. The Grand Chamber usually exercises jurisdiction on important matters of first impression or when a Chamber declines to follow prior case law. In this context, Grand Chambers have consistently held that their scope of jurisdiction in a case is limited by the Chamber's decision on admissibility,[27] but within that limit they can examine all the issues raised by the record. Arguably, the Grand Chamber should not find it necessary to refer to *jura novit curia* in those instances when it is exercising, in effect, appellate review and modifying a Chamber judgment.

In only 15 cases has the European Court re-characterized the legal issues before it and assessed the complaint for violation of a right the applicant did not initially invoke. The right most often added has been Article 8 (privacy and home life)[28] which has been given a broad reading by the Court, one unlikely to be obvious to litigants lacking expertise in the European Court's jurisprudence. In the case of *Guerra and Others v. Italy*[29] a Grand Chamber of the European Court added Convention Articles 2 (right to life) and 8 (privacy and home life) to a case which was initially admitted as an alleged violation of Article 10 (freedom of expression). The Court agreed to hear the merits of the new claims over the government's objections, stating that:

> [S]ince the Court is master of the characterisation to be given in law to the facts of the case, it does not consider itself bound by the characterisation given by an applicant, a government or the Commission. By virtue of the *jura novit curia* principle, it has, for example, considered of its own motion complaints under Articles or paragraphs not relied on by those appearing before it and even under a provision in respect of which the

[27] See ECtHR: Perna v. Italy [GC], 48898/99 Judgment (6 May 2003), para 23; Azinas v. Cyprus [GC], 56679/00, Judgment (28 April 2004), para 32. The case ECtHR: Contrada v. Italy, 27143/95, Judgment (24 August 1998), provides an example of the refusal to apply *jura novit curia* to bring in a new complaint. In his memorial to the Court and at the hearing, the applicant challenged, as he had previously done before the Commission, the lawfulness of his arrest and detention, saying that they had been in breach of Article 5.1.c ECHR. Relying for the first time on Article 3, he also submitted that the conditions of his detention (solitary confinement in military prisons) amounted to ill-treatment in breach of that provision. The Court observed, firstly, that on 14 January 1997 the Commission declared the complaint under Article 5.1.(c) inadmissible. It further noted that although Mr Contrada complained from the outset that he had been detained for an unreasonable period (Article 5.3 ECHR), the complaint under Article 3 ECHR concerns the actual conditions of detention, not its length. The Court held it had no jurisdiction *ratione materiae* to hear the Article 3 claim.

[28] In addition to the cases cited in the text, see ECtHR: Slawomir Musial v. Poland, 28300/06, Judgment (20 January 2009); Mocny v. Poland, 47672/09, Decision (30 November 2010); Dolenec v. Croatia, 25282/06, Judgment (26 November 2009).

[29] ECtHR: Guerra and others v. Italy, 14967/89, Judgment (19 February 1998), para 44; see also Philis v. Greece (no. 1), 12750/87-13780/88-14003/88, Judgment (27 August 1991), para 56; Berktay v. Turkey, 22493/93, Judgment (1 March 2001), para 167; Eugenia Lazăr v. Romania, 32146/05, Judgment (16 February 2010), para 60.

> Commission had declared the complaint to be inadmissible while declaring it admissible under a different one. A complaint is characterized by the facts alleged in it and not merely by the legal grounds or arguments relied on (…).
>
> The Court has full jurisdiction only within the scope of the 'case', which is determined by the decision on the admissibility of the application. Within the compass thus delimited, the Court may deal with any issue of fact or law that arises during the proceedings before it (…).[30]

At least in this case, the use of *jura novit curia* may have been be motivated by a desire to maintain consistency in the Court's jurisprudence. By reformulating the *Guerra* case as one concerned with privacy and home life and the right to life, the Court avoided having to reconsider its precedents on the limited scope of freedom of information under Article 10 (as the Chamber had done), while finding that the applicants had a right to the specific information sought, pursuant to a procedural dimension to Article 8.

The Grand Chamber has expressed concern when applying *jura novit curia*, despite its rare use, for the right of the parties to be heard. In *Scoppola v. Italy,* the Court pointed out that the factual basis for considering an additional violation under the principle *jura novit curia* had appeared in the original complaint and had not been declared inadmissible.[31] In its view, the Court's Second Section "did no more than use its right to characterise the applicant's complaint and to examine it under more than one Convention provision. Such a reclassification, which took into account, among other considerations, the applicant's new arguments, cannot be considered arbitrary."[32] The Grand Chamber also noted that the applicant's observations and the final decision on admissibility were communicated to the Government which therefore had the opportunity before the Grand Chamber to submit any argument to the effect that the complaint was inadmissible or ill-founded.[33]

The Court on occasion has applied *jura novit curia* subsequent to developing new jurisprudence on an issue, an approach that serves to treat in a similar manner subsequent cases (as well as applicants and governments) presenting the same issue. Thus, after holding that the Convention's guarantee of the right to life (Article 2) has a procedural dimension requiring good faith investigation of dis-

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[30] ECtHR: Guerra, supra n. 29, para 43 (citations omitted).

[31] See also ECtHR: Castravet v. Moldova, 23393/05, Judgment (13 March 2007), para 23; Marchenko v. Ukraine, 4063/04, Judgment (19 February 2009), para 34; Berhani v. Albania, 847/05, Judgment (27 May 2010), para 46; Anusca v. Moldova, 24034/07, Judgment (18 May 2010), para 26. In the case of Gatt v. Malta, 28221/08, Judgment (27 July 2010), the Court decided to examine the issue raised by the applicant not only under Article 3 as alleged, but also under Article 5 ECHR and Article 1 of Protocol no. 4 to the ECHR.

[32] Scoppola (no. 2), supra n. 21, para 55. The applicant had originally invoked Article 6, but no ruling was made on its admissibility.

[33] Similarly, once the case of Serife Yigit v. Turkey was submitted to the Grand Chamber, it invited the parties, in their observations and pleadings before it, to address the issue of compliance with Article 14 ECHR taken in conjunction with Article 1 of Protocol no. 1 to the ECHR. See also ECtHR: Göç v. Turkey [GC], 36590/97, Judgment (11 July 2002), para 36.

appearances and suspicious deaths, the Court added consideration of this Article to later cases if the applicant failed to cite it. In *Akdeniz v. Turkey*,[34] the Court noted that while the applicant in her application to the Commission had not expressly invoked Convention Article 2, she had raised it in substance.

The Court pointed out that its *Timurtaş*[35] judgment had held that lengthy periods of unacknowledged detentions or disappearances are not merely a violation of Convention Article 5 (right to liberty and security) but also raise issues from the standpoint of Article 2 and it was thus appropriate to add this article to the case.[36] In the *Case of Celikbilek v. Turkey*,[37] the Court similarly applied *jura novit curia* to accept the addition of a claimed violation of Article 13 (right to a remedy), because it had examined similar factual assertions under this provision and it was thus deemed to be the pertinent article. Indeed, in almost every case in which the European Court has applied *jura novit curia*, it has referred to prior jurisprudence on the appropriate articles for the type of claim being brought.[38]

In sum, the European Court applies *jura novit curia* sparingly and mainly to ensure that parties are afforded equality of treatment, especially in the aftermath of judgments announcing new doctrine. The Court insists on the right of the parties to be heard and normally will accept the applicant's characterization of a case. The Court also maintains a focus on the main issue(s) raised, often deciding that it is unnecessary to examine other alleged violations, even when raised by the applicant.[39] Finally, the European Court has consistently held that the failure to succeed in domestic courts does not necessarily mean denial of access to justice or lack of

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[34] In ECtHR: Akdeniz v. Turkey, 25165/94, Judgment (31 May 2005), the Court observed that the applicant did not initially invoke Article 2 ECHR in her application form, but later included it in observations to the Court. The Court reiterated that since it is master of the characterization to be given in law to the facts of the case, it is not bound by the characterization given by an applicant, a government, or the Commission and by virtue of the *jura novit curia* principle it could and had considered of its own motion complaints under articles or paragraphs not relied on by those appearing before it and even under a provision in respect of which the Commission had declared the complaint to be inadmissible while declaring it admissible under a different one. Within the compass of the admissibility decision, the Court may deal with any issue of fact or law that arises during the proceedings.

[35] ECtHR: Timurtaş v. Turkey, 23531/94, Judgment (13 June 2000). See also ECtHR: Bilgin v Turkey, 23819/94, Judgment (16 November 2000); Baysayeva v. Russia, 74237/01, Judgment (5 April 2007).

[36] See also ECtHR: Pastor and Ticlete v. Romania, 30911/06-40967/06, Judgment (19 April 2011); and Anusca, supra n. 31, similarly adding Article 2.

[37] ECtHR: Celikbilek v. Turkey, 27693/95, Judgment (31 May 2005).

[38] See, ECtHR, Brosset Triboulet and other v. France, 34078/02, Decision (29 April 2008), (adding Article 8);.

[39] Thus, if the European Court finds a right violated, such as freedom from inhuman or degrading treatment or freedom of expression, it rarely examines the issue of discrimination in addition to that of the specific violation. The court seems to do so only when the applicant introduces sufficient evidence that the violation was specifically motivated by discrimination. Compare, e.g. ECtHR: Arslan v. Turkey [GC], 23462/94, Judgment (8 July 1999); and Nachova and Others v. Bulgaria [GC], 43577/98-43579/98, Judgment (6 July 2005).

due process in the local venues.[40] Only once in its history has the Court added Article 13 through application of *jura novit curia*. The Court's approach finds considerable support in the views of domestic courts and analysts.[41] The practice is in sharp contrast to that of the Inter-American Commission and Court.

2.3 The Inter-American Commission and Court

The Inter-American Commission[42] and the Inter-American Court of Human Rights have made the most extensive use of *jura novit curia* to reframe petitions and include rights not invoked by the petitioners, even at times adding victims to the case. In *Hilaire*, the Inter-American Court invoked the ICJ precedents in stating that it had not only the right but also the obligation to find a violation of any provision of the American Convention found to be applicable.[43] One scholar has noted that, "[t]he Court also exercises the authority to find different violations from those the Commission has alleged on the same facts, formulating its own legal theories on the principle of *jura novit curia*."[44] The Court's approach, particularly during its most activist phase in the early 2000s, has influenced the Commission, which increasingly uses *jura novit curia*. A comparison of the Commission's annual reports from 2006 to 2010 indicates how often and under what circumstances the Commission applies the doctrine.

The 2006 Annual Report of the Commission included 56 admissibility reports and 8 merits determinations. At the admissibility stage, the Commission used *jura novit curia* in just under half (48 %) of the reports declaring a matter admissible. In 2010, the Commission decided in favor of the admissibility of 74 cases; in 38 of them it added rights and/or victims to the claim presented by the petitioners, amounting to more than half of admissible petitions being altered through the use of *jura novit curia*.[45]

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[40] See, e.g. ECtHR: Silver v. United Kingdom, 5947/72-6205/73-7052/75-7061/75-7107/75-7113/75-7136/75, Judgment (25 March 1983).

[41] As Booker notes, in France, recourse to *jura novit curia* has been justified by *le principe d'égalité devant la justice* which is meant to guarantee that all litigants receive equal treatment from the courts. *Le principe d'égalité devant la justice* may impose a duty on the court duty to intervene with its own point of law because it is the courts' duty to decide according to the 'applicable' law in all cases, regardless of the legal argument on which parties base their case. This sense of *jura novit curia* relates to the court's duty, where necessary, to intervene to correct a party's erroneous or inadequate legal argument because otherwise some parties would be denied the benefit of the law that is the right of all French citizens, see Brooker 2005.

[42] References to the Commission in this section should be understood to encompass the Secretariat, whose lawyers process petitions and present them to the Commission.

[43] IACtHR: Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, Judgment (21 June 2002), paras 107, 187.

[44] Neuman 2008, p. 101, citing IACtHR: Godínez-Cruz v. Honduras, Judgment (20 January 1989), para 172 and "Ituango Massacres" v. Colombia, Judgment (1st July 2006), para 191. See also IACtHR: Ricardo Canese v. Paraguay, Judgment (31 August 2004), paras 128, 131, 134.

[45] The Commission did not use *jura novit curia* at the merits stage in either year.

Many reasons might explain such an extensive use of the principle. First, petitioners might be unfamiliar with the system and not represented by legal counsel. In such instances, petitions might not refer to any specific right in the American Declaration[46] or to an applicable treaty,[47] or it may refer to non-applicable instruments.[48] Since neither the American Convention[49] nor the Commission's Rules of Procedure[50] require reference to specific rights that may have been violated by the alleged facts, it could then becomes the task of the Commission to determine admissibility in reference to guaranteed rights.[51] It does not appear, however, to make a difference whether the petitioner has legal representation, even when the representative is an experienced and knowledgeable

[46] For members of the Organization of American States (OAS) not party to the ACHR, the Commission applies the rights contained in the American Declaration of the Rights and Duties of Man (Bogota, 2 May 1948).

[47] Unlike United Nations practice, the OAS does not create a separate treaty body for each human rights agreement it adopts; instead the jurisdiction of the Commission expands with each human rights treaty when it enters into force. For these texts, see the *Basic Documents Pertaining to Human Rights in the Inter-American System*, OAS/Ser.L/V/I.4, Rev. 13 (30 June 2010).

[48] IACmHR: Jesús Tranquilino Vélez Loor v. Panama, 92-04, Report 95/06 (23 October 2006). The petition alleged violation by the Panamanian State of Articles 5, 7, 8, 10, 21, and 25 ACHR in conjunction with Article 1.1, and Articles 1, 2, 3, 7, 8, 9, 10, and 11 of the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (UNGA res. 3452 (XXX), Annex (9 December 1975)). The Commission declared the case admissible under Articles 1.1, 2, 5, 8, 21, and 25 ACHR, but substituted for the UN Torture Declaration Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture (Cartagena de Indias, 12 September 1985; hereinafter Inter-American Torture Convention), entered into force on 28 February 1987. See also IACmHR: Jorge, Jose and Dante Peirano Basso v. Uruguay, 1109-04, Report 35/06 (14 March 2006), in which petitioners invoked Articles 5.1, 5.2, 7.1, 7.3, 8.1, 9, 24, 25, and 29 ACHR in conjunction with Article 1.1 of the same Convention. The petitioners further alleged violations of Articles II, XVIII, XXV and XXVI of the American Declaration on the Rights and Duties of Man, and Articles 1, 2, 6, and 8 of the Inter-American Torture Convention; Articles 9, 14, and 26 ICCPR, and Article 26 of the Vienna Convention on the Law of Treaties (Vienna, 22 May 1969), entered into force on 27 January 1980, and the UN Standard Minimum Rules for the Treatment of Prisoners (Geneva, 30 August 1955), approved by ECOSOC ress 663 C(XXIV) (31 July 1957) and 2076 (LXII) (13 May 1977). The Commission admitted the case only on alleged violations of Articles 7, 8, 9, and 25 ACHR.

[49] Articles 46–47 ACHR set forth the admissibility requirements.

[50] Rules of Procedure of the Inter-American Commission on Human Rights, Approved by the Commission at its 137th regular period of sessions, held from 28 October to 13 November 2009.

[51] See, e.g. IACmHR: Carlos Alberto Valbuena and Luis Alfonso Hamburger Diazgranados v. Colombia, 668-05, Report 87/06 (21 October 2006); Nueva Venecia Massacre v. Colombia, 1306-05, Report 88/06 (21 October 2006): "The Commission considers that the facts the petitioner is reporting regarding the alleged violation of the right to life, the right to humane treatment, the right to a fair trial and the right to judicial guarantees could tend to establish violations of the rights protected under Articles 4, 5, 8.1 and 25 of the American Convention, in combination with Article 1.1 thereof." See also IACmHR: María Emilia González, Paula Micaela González, and María Veronica Villar v. Argentina, 618-01, Report 15/06 (2 March 2006) and Israel Gerardo Paredes Costa v. Dominican Republic, 12.174, Report 48/06 (15 March 2006).

litigant before the Inter-American bodies and can be expected to frame allegations to present the petitioner's best case.

Second, the use of *jura novit curia* could reflect a broad view of the Commission's function to monitor and promote compliance with the full range of human rights through the case system. Unlike in the United Nations, the Inter-American system does not require periodic reporting by states; the case system is one of the main avenues through which the Commission becomes aware of violations occurring in OAS members states and can recommend not only redress, but also measures to ensure non-repetition of violations. This does not explain, however, the discrepancy between the practice of the European Court and that of the Inter-American bodies. The Commission applied *jura novit curia* in the 2 years reviewed to judge acts under an often lengthy list of rights, rather than following the European Court's practice of focusing on the central issues.[52] The Commission may augment or modify the list of rights even without citing *jura novit curia*.[53]

A third factor pressing toward extensive use of *jura novit curia* may be a decidedly negative view of the judicial systems of many countries in the hemisphere. In both 2006 and 2010, the Commission most frequently added Convention Articles 8 (due process)[54] and 25 (access to justice)[55] of the American Convention

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[52] This practice can sometimes reach the point of including nearly every provision of the ACHR. See: IACmHR: Residents of the Village of Chichupac and the Hamlet of Xeabaj, Municipality of Rabinal v. Guatemala, 1579-07, Report 144/10 (1st November 2010). In this case alleging army-perpetrated massacres, rape, failure to lend assistance, extrajudicial executions, torture, forced disappearance, illegal detentions, and/or forced labor, the Commission decided that it was not only competent to hear the claim filed by the petitioners for the alleged violations of Articles 4, 5, 6, 7, 8, 11.1, 12, 13, 16, 17, 21, 22, 24, and 25 ACHR in conjunction with Article 1.1 of that Convention and Article 1 of the Inter-American Convention on Forced Disappearance of Persons (Belém do Pará, 6 September 1994; hereinafter Inter-American Forced Disappearances Convention), entered into force on 28 March 1996, but that in application of the principle of *jura novit curia,* the petition was admissible for the alleged violation of Articles 3 and 23 in conjunction with Article 1.1 ACHR.

[53] IACmHR: Xavier Alejandro León Vega v. Ecuador, 278-02, Report 22/06 (2 March 2006) concerned conscientious objection to military service. The petitioner alleged that the ability to refuse military service is a right guaranteed by Articles 12 (Freedom of conscience and religion), 13 (Freedom of thought and expression), and 22.2 (Freedom of movement and residence) ACHR and of Article 6 (Right to Work), and 13.1.2.3 (Right to Education) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador, 17 November 1988; hereinafter Protocol of San Salvador), entered into force on 16 November 1999. The Commission considered that the allegations could constitute violations to the petitioner's rights as enshrined in Articles 1.1, 2, 11, 12.1, and 22.2 ACHR and to Article 13.1 Protocol of San Salvador.

[54] For petitions in which Article 8 was added, see, e.g. IACmHR: Neusa Dos Santos Nascimento and Gisele Ana Ferreira v. Brazil, 1068-03, Report 84/06 (21 October 2006); Union Of Ministry Of Education Workers (Atramec) v. El Salvador, 71-03, Report 23/06 (2 March 2006); Jacobo Arbenz Guzman v. Guatemala, 569–99, Report 27/06 (14 March 2006).

[55] Article 25 ACHR, entitled "judicial protection", expresses the right to a remedy. For cases adding Article 25 ACHR, often in connection with Article 8 ACHR, see, e.g.: IACmHR: Alicia Barbani Duarte, Maria Del Huerto Breccia, et al. (Depositors Of The Banco De Montevideo) v. Uruguay,

through the use of *jura novit curia*, sometimes in conjunction with the victim's family members, who were not part of the original petition.[56] Thus, unlike the European Court of Human Rights, the Inter-American Commission seems more willing to assume a deprivation of due process and/or access to justice when the petitioner did not receive a remedy in the domestic courts. When petitioners have alleged violation of Articles 8 and 25, alone or in connection with other rights, the Commission has been less likely to have recourse to *jura novit curia*.[57]

It is not easy to assess the appropriateness and value of the frequent use of *jura novit curia* to add Articles 8 and 25 of the American Convention. On the one hand, not every case lost at the domestic level involves violations of these articles, even if mistakes are made by a judge or tribunal. Further, petitioners may have made a deliberate choice to focus on the underlying violation and not on the subsequent failure to obtain local remedies. Petitioners' formulation of the case, if legally

(Footnote 55 continued)
997-03, Report 123/06 (27 October 2006) (adding Articles 8 and 25 ACHR in case concerning bank fraud); Jesús Mohamad Capote, Andrés Trujillo et al. v. Venezuela, 4348-02, Report 96/06 (21 October 2006) ("Although the petitioners did not make any express allegations to that effect, in application of the principle of *jura novit curia* the Commission finds that the facts recounted in connection with the alleged delay and lack of due diligence may tend to establish a violation of the rights to a fair trial and to judicial protection, recognized in Articles 8, 25 and 1.1 of the [American] Convention, to the detriment of the alleged victims and their next of kin."); Victoria Jiménez Morgan and Sergio Jiménez v. Costa Rica, 469-05, Report 178/10 (24 November 2010); Fredy Marcelo Núñez Naranjo et al. v. Ecuador, 1011-03, Report 2/10 (15 March 2010); Oscar Muelle Flores v. Peru, 147-98, Report 106/10 (16 July 2010).

[56] See, e.g., IACmHR: Thalita Carvalho De Mello and others v. Brazil, 1454-06, Report 127/10 (23 October 2010) (adding by *jura novit curia* possible violations of Articles 5.1 and 8 ACHR with respect to the family members of the alleged victims); Estadero "El Aracatazzo" Massacre v. Colombia, 1325-05, Report 47/10 (18 March 2010); Oscar Orlando Bueno Bonnet et al. Colombia, 11.990, Report 124/10 (23 October 2010).

[57] Violation of Articles 8 and 25 ACHR, as well as other rights, were alleged in 33 of 36 matters in 2006. In none of these cases did the Inter-American Commission apply *jura novit curia.* See e.g., IACmHR: Eugenio Sandoval v. Argentina, 619-01, Report 16/06 (2 March 2006); Persons Deprived of Freedom at Urso Branco Prison, Rondônia v. Brazil, 394-02, Report 81/06 (21 October 2006); Manoel Luiz Da Silva v. Brazil, 641-03, Report 83/06 (21 October 2006); Omar Zúñiga Vásquez and Amira Isabel Vásquez De Zúñiga v. Colombia, 458-04, Report 20/06 (2 March 2006); Members of José Alvéar Restrepo Lawyers' Collective v. Colombia, 12.380, Report 55/06 (20 July 2006); Workers Belonging to the "Association Of Fertilizer Workers"(Fertica) Union v. Costa Rica, 2893-02, Report 21/06 (2 March 2006); El Mozote Massacre v. El Salvador, 10.720, Report 24/06 (2 March 2006); Erwin Haroldo Ochoa López and Julio Armando Vásquez Ramírez v. Guatemala, 1083-05, Report 58/06 (20 July 2006); Jimmy Charles v. Haiti, 81-06, Report 65/06 (20 July 2006); Garífuna Community of "Triunfo De La Cruz" and its Members v. Honduras, 906-03, Report 29/06 (14 March 2006); Angel Pacheco León v. Honduras, 848-04, Report 118/06 (26 October 2006); Silvia Arce et al. v. Mexico, 1176-03, Report 31/06 (14 March 2006); Rita Irene Wald Jaramillo et al. v. Panama, 875-03, Report 34/06 (14 March 2006); Francisco Usón Ramírez v. Venezuela, 577-05, Report 36/06 (15 March 2006); Sebastián Echaniz Alcorta and Juan Víctor Galarza Mendiola v. Venezuela, 562-03, Report 37/06 (15 March 2006); Mercedes Chocron Chocron v. Venezuela, 549-05, Report 38/06 (15 March 2006); Carlos Rafael Alfonzo Martinez v. Venezuela, 73-03, Report 39/06 (15 March 2006); María Cristina Reverón Trujillo v. Venezuela, 406-05, Report 60/06 (20 July 2006).

sound, should be given some deference to ensure that they do not feel that the Commission has diluted their case or infringed their access to justice by adding claims and/or victims to the case they presented. On the other hand, there is no doubt about the inadequacies of many judicial systems in OAS member states and governments themselves have called on the Commission to devote more attention to judicial training and improvement. Making specific findings on the failures of domestic remedies can be one method of addressing the problem.

Fourth, as in Europe, one may also infer concern to ensure that like situations result in similar decisions, providing equality of treatment to petitioners and governments. Thus, forced disappearance and torture cases are usually deemed to involve the same set of rights under the convention(s), irrespective of the rights invoked by the petitioner.[58] In cases of forced disappearances, for example, the Commission normally adds Article 3 (right to juridical personality) of the American Convention,[59] as well as other rights and other conventions,[60] based on the Court's jurisprudence,[61]

[58] With respect to disappearances, the Inter-American Commission has followed a general practice of finding violations of Articles 3, 4, 5, 7, 8, and 25, in relation to Articles 1.1 and 2 ACHR; as well as Articles I and III Inter-American Forced Disappearances Convention. See, e.g. IACmHR: Jeremías Osorio Rivera et al. v. Peru, 11.845, Report 76/10 (12 July 2010).

[59] See, e.g. IACmHR: Gerson Jairzinho González Arroyo v. Colombia, 11.144, Report 123/10 (23 October 2010); César Gustavo Garzón Guzmán v. Ecuador, 11.587, Report 70/10 (12 July 2010) (adding Articles 3, 5, and 7 as well as Article 1 Inter-American Forced Disappearances Convention); Luis Eduardo Guachalá Chimbó v. Ecuador, 247-07, Report 141/10 (1st November 2010); Patricia Emilie Cuellar Sandoval et al. v. El Salvador, 1138-04, Report 107/10 (20 August 2010); Jesús Angel Gutiérrrez Olvera v. Mexico, 497-03, Report 147/10 (1st November 2010).

[60] E.g. "In accordance with the principle of *iura novit curia*, the [Inter-American Commission] also rules these petitions admissible with respect to possible violations of Articles 3 (for the allegedly disappeared victims), 7 (for all alleged victims), 19 (for the alleged victims who were children at the time of the facts) and 24 (for all alleged victims) of the American Convention, to the detriment of the respective alleged victims; Articles 5.1 and 8 of the American Convention, to the detriment of the family members of the alleged victims and the surviving alleged victim. (…) Moreover, also by virtue of the principle of *iura novit curia*, the Inter-American Commission declares these petitions admissible with regard to Articles 1, 6, 7 and 8 of the Inter-American Convention to Prevent and Punish Torture", IACmHR: Roberto Carlos Pereira De Souza et al. v. Brazil, 1448/1452/1458-06 and 65-07, Report 126/10 (23 October 2010), para 3.

[61] In the seminal judgment Velásquez-Rodríguez v. Honduras the Inter-American Court signaled a broad approach to the phenomenon of forced disappearances, stating: "The phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion (…). The forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee." (IACtHR: Velásquez-Rodríguez v. Honduras, Judgment (29 July 1988), paras 150–155.

The Court has substantially influenced the Commission's use of *jura novit curia*, for example, in routinely adding Articles 1 and 2 of the American Convention, which contain the general obligations of states parties.[62] The Commission may substitute one of these generic obligations[63] for another[64] or add to the obligations invoked by the petitioner.[65] The Inter-American Court's first use of *jura novit curia* came in relation to Article 1 and set the stage for the Commission's practice on these articles:

> The Commission did not specifically allege the violation of Article 1(1) of the Convention, but that does not preclude the Court from applying it. The precept contained therein constitutes the generic basis of the protection of the rights recognized by the Convention and would be applicable, in any case, by virtue of a general principle of law, *jura novit curia*, on which international jurisprudence has repeatedly relied and under which a court has the power and the duty to apply the juridical provisions relevant to a proceeding, even when the parties do not expressly invoke them ("*Lotus*", Judgment No. 9, 1927, P.C.I.J., Series A No. 10, p. 31 and Eur. Court H.R., *Handyside* Case, Judgment of 7 December 1976, Series A No. 24, para 41).[66]

Another aspect of the Commission's practice that follows the Court's use of *jura novit curia* is in adding rights and obligations from other relevant Inter-American treaties, if the petitioner fails to refer to them.[67] The Court initiated this practice in the *Case of Heliodoro-Portugal v. Panama*,[68] when neither the Commission nor the victim's representatives alleged a failure to comply with the provisions of the Inter-American Convention on Forced Disappearance of Persons, which Panama had ratified on 28 February 1996, instead basing the decision exclusively on the rights and obligations contained in the American Convention. Citing the *jura novit curia* principle, the Court decided to rule not only with regard to Article 7 of the American Convention, but also with regard to the provisions of

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[62] Sometimes only these articles are added. See, e.g. IACmHR: Omar Francisco Canales Ciliezar v. Honduras, 691-04, Report 71/10 (12 July 2010) (admitting the case on Articles 8 and 25 ACHR, adding Articles 1.1 and 2 ACHR pursuant to *jura novit curia*).

[63] IACmHR: Members of the Indigenous Community of Annas et al. v. Brazil, 62-02, Report 80/06 (21 October 2006).

[64] IACmHR: Nasry Javier Ictech Guifarro v. Honduras, 2570-02, Report 30/06 (14 March 2006); Paloma Angélica Escobar Ledezma et al. v. Mexico, 1175-03, Report 32/06 (14 March 2006), para 39 ("under the principle of *jura novit curia,* the Inter-American Commission will analyze claims addressing Article 2 of the American Convention.").

[65] IACmHR: Alejandro Fiallos Navarro v. Nicaragua, 799-04, Report 59/06 (20 July 2006), para 51 ("The Commission, invoking the principle of *jura novit curia*, will analyze the possible violations in conjunction with the general obligations set out in Articles 1 and 2 of the American Convention.").

[66] Velásquez-Rodríguez, supra n. 61, para 163. See also Godínez-Cruz, supra n. 44, para 172. The insertion of the reference to *jura novit curia* was proposed by a single judge, Hector Gros-Espiell, but accepted by the other members of the Court.

[67] Unlike the UN system, the Inter-American continues to have a single monitoring commission for all of its treaties, rather than creating a separate treaty body for each major agreement.

[68] IACtHR: Heliodoro-Portugal v. Panama, Judgment (12 August 2008), paras 105–113.

the Disappearances Convention, after making some general observations on the forced disappearance of persons in light of the new treaty.

At present, following the Court's initiative, in cases involving disappearances, torture, or violence against women, it is not enough to invoke the American Convention guarantees, but the specialized treaty must be included as well.[69] Even if, for example, the petitioners invoke[70] the Torture Convention or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Belém do Pará, 9 June 1994; hereinafter Convention of Belém do Pará),[71] the Commission may add other articles to those cited.[72] Unfortunately, with the exception of the *Heliodoro-Portugal Case,* the practice has amounted thus far to a mere formality, because neither the Commission nor the Court has ever analyzed any of the provisions of the additional treaty or indicated why the facts demonstrate it has been violated. It seems to be taken for granted that the provisions mean exactly the same as the Articles of the American Convention.

It is difficult to assess which of the reasons described above correctly explains the Commission's practice, because it has rarely given a rationale for its use of *jura novit curia*. In an almost unique instance,[73] the Commission once specified that "[b]y virtue of the principle *jura novit curia* and the repeated rulings based on case law issued by the Commission and the Court to the effect that, if a forced disappearance is proven, it would constitute a violation of the right to life, the IACHR is also admitting the present case on the grounds of a presumed violation of Article 4."[74] The only other reasoned decision found in the 2 years reviewed concerned violence against women.[75] The petition was admitted on petitioner's allegations of violations of Articles 4, 8.1, 11, 19, and 25 of the American Convention, in connection with Articles 1.1 and 7 of the Convention of Belém do Pará. The Commission added Article 24 (equal protection of the law), explaining:

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[69] See IACmHR: Juan Carlos Jaguaco Asimbaya v. Ecuador, 245-05, Report 64/10 (12 July 2010), adding Articles 1, 6, and 8 of the Inter-American Torture Convention; Irineo Martínez Torres and Candelario Martínez Damián v. Mexico, 161-01, Report 72/10 (12 July 2010), adding Article 24 ACHR and Articles 1, 6, and 8 of the Inter-American Torture Convention.

[70] See IACmHR: Linda Loaiza López Soto and next of kin v. Venezuela, 1462-07, Report 154/10 (1st November 2010). In this case, the Commission also added American Convention Article 11 without mentioning *jura novit curia*: "Within this framework, the petitioners also allege that public officials from the justice system discredited and blamed the victim for the acts of sexual violence during the challenged investigation and criminal proceeding, violating her honor and dignity; claims that the Commission considers pertinent to analyze under Article 11.1 of the American Convention.".

[71] Entered into force on 5 March 1995.

[72] See IACmHR: Natividad de Jesús Ramírez, et al. v. El Salvador, 1137-04, Report 143/10 (1st November 2010), adding the alleged violation of the rights enshrined in Articles 2, 3, 17, and 19 ACHR and Articles 1 and 6 of the Torture Convention.

[73] ECmHR: José Adrián Rochac Hernández v El Salvador, 731-03, Report 90/06 (21 October 2006).

[74] Ibidem, para 41.

[75] ECmHR: María Isabel Véliz Franco v. Guatemala, 95-04, Report 92/06 (21 October 2006).

> Furthermore, it considers that the alleged facts would constitute possible violations to Article 24 of the American Convention, in connection with Article 1(1) of said instrument. The IACHR observes that the petitioners allege that the facts described have occurred in a context of impunity toward violent acts by the administration of justice, which affect women disproportionately as a group and promotes the repetition of these acts. Within this context of impunity, attitudes from justice officials based on sociocultural discriminatory concepts that affect mostly women are claimed. This pattern of impunity has been observed by the IACHR Rapporteurship on the Rights of Women.[76]

If some of the explanations above justify at least in part the Commission's extensive application of *jura novit curia*, they fail to support the Court's practice. As noted above, the Court added a reference to *jura novit curia* in its first merits judgment in the 1988 *Velasquez Rodriguez* judgment, at the request of Judge Gros Espiell. More than a decade passed before the principle was referred to again, in the *Blake* case. The Court therein noted that a possible violation of Article 5 had not been included in the Commission's application submitting the case to the Court, but only in its final pleading. The Court stated, without further explanation or rationale, that it could nonetheless consider the allegation "in accordance with the principle of *jura novit curia*."[77] This statement has been reiterated in later cases, often over the objections of the respondent state.[78]

The greatest expansion in the Inter-American Court's use of *jura novit curia* came after the revision of its regulations in 2000, which including enhanced standing for the representatives of the victims to present their own written and oral arguments, rather than having the Commission alone present the case to the Court. The Court began allowing the victim's representatives to make arguments about violations that had not been presented to the Commission at any earlier stage of the

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[76] Ibidem, para 52.

[77] IACtHR: Blake v. Guatemala, Judgment (24 January 1998), para 112; Acosta-Calderón v. Ecuador, Judgment (24 June 2005) (adding violations of Articles 7.6 and 25 ACHR).

[78] IACtHR: Castillo-Petruzzi et al. v. Peru, Judgment (4 September 1998), para 90. The eighth objection interposed by the State concerned "ambiguity in the manner of submitting the application" due to differences in the application and the final brief. The Court rejected the State's objection, citing *jura novit curia*. See also IACtHR: Castillo-Petruzzi et al. v. Peru, Judgment (30 May 1999), para 116 (noting that the Commission's first reference to a violation of Article 9 was in its final pleading but finding that this did not preclude the Court from examining that allegation during the proceedings on the merits, in accordance with the principle of *jura novit curia*); Durand and Ugarte v. Peru, Judgment (16 August 2000), para 38 ("The Court considers that the fact that the violation of Article 5(2) of the Convention was not discussed in the application brief of the Commission does not prevent if from being examined by the Tribunal, according to the general principle of *jura novit curia* right, used repeatedly by the international jurisdiction in the sense that a judge is entitled and even has the obligation to implement the corresponding legal dispositions in a proceeding, even when the parties are not explicitly invoked." The Court found no violation of Article 5.2 in the case.).

proceedings, erroneously allowing this on the basis of *jura novit curia*. The Commission objected to these late additions of factual and juridical elements.[79]

The Commission[80] and states[81] futilely insisted that the Convention permits only them to initiate proceedings before the Court and to establish the juridical content of the case, that is, what facts need to be proven by the parties and analyzed by the Court, just as the Court must establish what rights have been abridged. In this respect, they asserted, the Commission′s report, issued pursuant to Article 50 of the American Convention, or its applications, are the limits of the claims in the cases before the Court (as is the practice in the European Court). States additionally invoked the rights to defense and to due process, procedural balance and legal certainty, to argue for limiting the proceeding before the Court to issues set forth in the Article 50 report issued by the Commission and in the application filed before the Court.

The Court has agreed with these objections only to the extent of excluding the presentation of new facts.[82] As to the presentation of new rights, the Court held that "the petitioners may invoke those rights. They are the *titulaires* of all the rights set forth in the American Convention, and not to admit [newly invoked rights] would be an undue restriction to their condition of subjects of the International Law of Human Rights. It is understood that the aforesaid, concerning other rights, pertains to the facts already contained in the complaint".[83] In fact, in the first case involving separate petitioner representation, Judge Cancado-Trindade argued at great length in favor of liberal recourse to *jura novit curia* to accept new arguments and issues presented by petitioners late in the litigation, characterizing

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[79] IACtHR: "Five Pensioners" v. Peru, Judgment (28 February 2003). See also Gómez-Paquiyauri Brothers v. Peru, Judgment (8 July 2004) (Commission objection to introduction of claimed violations of Articles 11 and 17 ACHR deeming the claims to "transcend the object of the instant proceeding." para 174). Paraguay raised similar objections in IACtHR: "Juvenile Reeducation Institut" v. Paraguay, Judgment (2 September 2004), para 114. The Court repeated that it can consider any right at any stage, but added "[i]t is understood that the parties will always be given an opportunity to present whatever arguments and evidence they deem relevant to support their position vis-à-vis all the legal provisions under examination." (ibidem, para 126). See also IACtHR: Serrano-Cruz Sisters v. El Salvador, Judgment (23 November 2004), para 124 (rejecting the objection of the State that "the plea in the application is contrary to the "body" of the application. In this regard, the State alleged that:…f) The principle of *jura novit curiae* is not limitless, because "judges and courts cannot […] change the subjective claims of petitioners."); Pueblo Bello Massacre v. Colombia, Judgment (25 November 2006) (state objection to a lack of procedural equality).

[80] See, e.g. IACtHR: Miguel Castro–Castro Prison v. Peru, Judgment (25 November 2006), para 163.

[81] See, e.g. IACtHR: Mapiripán Massacre v. Colombia, Judgment (7 March 2005), para 57–60; See, e.g., IACtHR: Perozo et al. v. Venezuela, Judgment (28 January 2009), paras 28–34 (entitled "On the Alleged Inadmissibility of the new Arguments and Allegations contained in the Autonomous Brief signed by the Alleged Victims"); Usón Ramírez v. Venezuela, Judgment (20 November 2009).

[82] "Five Pensioners", supra n. 79, paras 153–154.

[83] Ibidem, para 155.

the matter as an issue of access to justice.[84] He contended that the issue could be handled consistent with the State's right of defense, ensuring a right of reply to new allegations, but finally justified *jura novit curia* on the basis that it might make no practical difference because, as in the *Five Pensioners Case,* the Court could ultimately find no violation of the newly asserted right.[85]

From the *Five Pensioners Case* forward for about a decade, the Court repeatedly permitted petitioners to raise new issues and claims,[86] including for new victims,[87] after the case was decided and submitted to the Court by the Commission. Indeed, the Court held that it "has the duty to apply all appropriate legal standards—even when not expressly invoked by the parties—in the understanding that those parties have had the opportunity to express their respective positions with regard to the relevant facts."[88]

The Court's posture in allowing late claims by parties is not defensible, given the generally lengthy time and multiple stages of proceedings before the Commission, where the petitioners are equally entitled, as before the Court, to have legal representation. The Court has never indicated why petitioners should not be estopped from raising additional rights violations if they fail to litigate them before the Commission, giving both the state and the Commission the opportunity to assess the merits of the claim and provide a full record to the Court. In many legal systems, procedural default attaches at the end of first instance proceedings[89] and litigants are then deemed to have waived any rights they have failed to invoke.

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[84] IACtHR: "Five Pensioners", supra n. 79, Concurring Opinion of Judge Cancado-Trindade, para 21 ("The criterion adopted by the Court in the present Judgment in the case of the *Five Pensioners versus Peru* correctly considers that one cannot hinder the right of the petitioners of access to justice at international level, which finds expression in their faculty to indicate the rights which they deem violated. The respect for the exercise of that right is required from the States Parties to the Convention, at the level of their respective domestic legal orders, and it would not make any sense if it were denied in the international procedure under the Convention itself. The new criterion of the Court clearly confirms the understanding whereby the process is not and end in itself, but rather a means of realization of Law, and, ultimately, of justice.").

[85] Ibidem, para 13.

[86] IACtHR: Moiwana Community v. Suriname, Judgment (15 June 2005), para 91.

[87] In IACtHR: Myrna Mack-Chang v. Guatemala, Judgment (25 November 2003), paras 223–225 the representatives of the next of kin of the victim asked the Court to find a violation of Article 5 ACHR to the detriment of the next of kin. The Inter-American Commission did not allege such a violation. See also, IACtHR: Ximenes-Lopes v. Brazil, Judgment (30 November 2005), para 156 (pointing out that the next of kin of the victims of violations of human rights may be victims themselves and adding additional victims to the proceeding).

[88] IACtHR: Moiwana Community, supra n. 86, para 107.

[89] The Court and Commission may both insist that the Court does not act as a review body for decisions of the Commission. Concededly, the Commission is not a judicial body like the Court and the system is not akin to that of the European Court of First Instance and the European Court of Justice. In practice, however, petitioners and states both view the Commission as acting as a quasi-judicial body in deciding cases, making findings of fact, and conclusions of law on the matters before it. The Court is, in reality, reviewing the decisions of the Commission presented to it in the Article 50 report prepared for each case.

International courts apply the doctrine of waiver to state defenses like exhaustion of remedies and there appears to be no compelling reason to justify a different rule for petitioners. The Court has indeed held that some late claims are time barred—but in the same sentence agreed to consider them under *jura novit curia*, a practice that at the least seems to flout the Court's rules of procedure if not due process.[90]

The Convention sets out a procedure that is intended to provide for the orderly consideration of petitions, first and fully before the Commission. In effect, the Court's approach allows the petitioner to bring two separate cases; by-passing the Commission on issues the victim or legal representative thinks might get more sympathetic treatment from the Court. Aside from its deficiencies in procedural regularity, the Court's approach makes no sense from the perspective of limited judicial resources. The current practice means the Court often faces new allegations late in the proceedings without a solid body of evidence or legal arguments from the parties.[91] Having issues fully litigated before the Commission should provide the Court a better record; moreover, requiring the full presentation of a case before the Commission could induce more friendly settlements and compliance, lessening the burden on the Court. Given the length of time required for petitions to proceed through the Commission from initial filing to a merits determination, petitioners would be hard-pressed to argue they would be disadvantaged by a rule requiring that they present all their allegations and legal arguments first to the Commission.

A different situation arises if the petitioners raise an issue and the Commission decides against admissibility or finds no violation on the merits.[92] No doubt the Court can review such decisions, but it does not need *jura novit curia* for this

[90] IACtHR: Maritza Urrutia v. Guatemala, Judgment (27 November 2003), para 140 (adding Article 19, rights of the child, on behalf of the son and nephew of the victim based on a request by the representatives of the victims in their brief with final arguments. The Court called this allegation time barred, but then decided to examine, based on the *jura novit curia* principle.) The Court took the same approach in the cases Girls Yean and Bosico v. Dominican Republic, Judgment (23 November 2006) and Ximenes-Lopes, supra n. 87, para 155.

[91] IACtHR: García-Asto and Ramírez-Rojas v. Peru, Judgment (25 November 2005). In written arguments, the Commission pointed out that the victim's representatives referred for the first time in the proceedings before the Court to a new issue: the "bodily and psychological harassment and coercion" inflicted on the petitioners (ibidem, para 68). The representatives responded that "the particulars detailed by the [alleged victims] in the brief of requests, arguments, and evidence, refer[red] to the facts mentioned in a general way in the application filed by the Commission" (ibidem, para 71). The Court recalled its own ability to apply the *jura novit curia* principle but stressed that, with regard to rights claimed for the first time by the representatives of the alleged victims and/or their next of kin, the legal arguments must be based upon the facts set out in the application.

[92] In fact in the *Five Pensioners Case*, petitioners had raised an alleged violation of Article 25 in the original petition, but the Commission did not determine the existence of the alleged violation. Thus, the Commission agreed that the Court could examine the matter ("Five Pensioners", supra n. 79, para 102).

purpose.[93] The Court could apply *jura novit curia* correctly in the rare instance that it determines that the petitioners, the Commission, and the State have all missed a relevant legal issue; this will normally arise if the case presents an issue of first impression or the Court aims to extend its jurisprudence.[94]

3 Conclusions

Jura novit curia is an established principle that international human rights tribunals have the inherent power to apply and are justified in using to ensure equality of treatment among petitioners as well as among respondent states, ensuring that similar proven facts result in finding similar violations. In appropriate cases, the principle may also provide a means for human rights tribunals to develop new doctrine or re-examine approaches to interpreting specific rights.

Granting the utility if not the necessity of the principle, there are basic guidelines that human rights tribunals should follow. First, any use of *jura novit curia* should be supported by a reasoned decision, explaining why rights or treaties have been added or substituted for those invoked by the petitioners. Any perceived additional victims should be informed of the right to bring their own petition and should not be added to the petition under consideration, thereby diluting attention to claims of the primary victim. The decision to modify cases through *jura novit curia* should be taken as early as possible in the proceedings, normally at the admissibility stage, giving both parties an opportunity to present legal arguments and facts relevant to the newly included rights. New claims should not be asserted by any parties late in the litigation.

As a general matter, courts and other tribunals must respect the due process rights of the parties appearing before them. No tribunal should base a decision on a legal theory that the parties have not had an opportunity to argue or been notified will be part of the judgment. Such a practice may be rightly perceived to conflict with the parties' right to be heard (*audiatur et altera pars*).[95] Moreover, broad

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[93] Moiwana Community, supra n. 86, para 60. ("the Commission's assessment with respect to alleged violations of the American Convention is not binding upon the Court.").

[94] In IACtHR: Sawhoyamaxa Indigenous Community v. Paraguay, Judgment (29 March 2006), the Court made use of *jura novit curia* to announce a new doctrine on the right to juridical personality (Article 3 of the Convention). This method of developing the jurisprudence is not entirely misplaced, since litigants will often focus on litigating established standards rather than arguing for a new principle. This approach was also followed in IACtHR: "Ituango Massacres", supra n. 44 (expanding the interpretation of Article 11.2 on the right to a home). See also IACtHR: Kimel v. Argentina, Judgment (2 May 2008).

[95] Instances where common law judges have used *jura novit curia* in this manner have led to reversal and criticism by appellate courts. In Hadmore Productions v. Hamilton [1983] A.C. 191, the House of Lords overturned Lord Denning's judgement in the Court of Appeal, [(1981) 2 All E.R. 724] because he had researched and used in the case a passage from a source which, at the time, both courts and parties were not allowed to use. Lord Diplock described this as a breach,

application of *jura novit curia* overrides the parties' authority (at least in private law) to decide the subject and aims of the litigation.[96] In international human rights proceedings, as well, applicants may perceive a reformulation of their claims as diminishing their right of access to justice, placing the tribunal's own interests or concerns above their own. Thus, a woman who claims she has been beaten and raped by prison guards may justifiably want to focus attention on those violations and not on any defects in the judicial system that failed to remedy the abuse. An indigenous community that has been the target of a military massacre may frame the claim as one of genocide or a crime against humanity and not deem it necessary or appropriate to add every violation of right encompassed by the killings, from freedom of association to rights of the family.

Finally, tribunals must give attention to the legitimacy of their process. Legitimacy may be questioned when the decision maker introduces a point of law that permits one party to succeed on the basis of a claim that, absent the tribunal's intervention, would not have been part of the case. The losing side may well perceive judicial bias in the outcome.

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(Footnote 95 continued)
"of one of the most fundamental rules of natural justice: the right of each to be informed of any point adverse to him this is going to be relied upon by the judge and to be given an opportunity of stating what his answer to it is." Id. at 233.

[96] Consequently, a court judgment should normally stay within the bounds established by the pleadings and arguments of the parties reflected in the adage *nea eat judex ultra et extra petita partium*. Damaška 1986, p. 160, n. 22. Roland and Boyer 1999, p. 521; Cornu 2003, p. 308.

The Composition of the International Court of Justice

Budislav Vukas

1 Introduction

The title of my contribution to the Collection of Studies in Honour of my dear friend and colleague Tullio Treves represents the continuation of my discussion relative to the Statute of the International Court of Justice (hereinafter the Statute) which I published in the Essays in Honour of Edward McWhinney.[1] Namely, in that article I analyzed some provisions of the Statute which in my view require amendments in order to promote the role of the International Court of Justice (hereinafter ICJ or the Court).

In the present text, I will mainly discuss some other provisions of the ICJ Statute and some provisions of the Charter of the United Nations (hereinafter the Charter) dealing with the peaceful settlement of disputes. Naturally, also relevant are the additional documents to the Statute, primarily the Rules of the Court and the Practice Directions.[2]

In discussing that topic, one has to start with the Charter, which often mentions the peaceful settlement of disputes and establishes the ICJ as the principal judicial organ of the United Nations (Chapter XIV).

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[1] Vukas 2009, pp. 277–283.
[2] All these documents can be found in the ICJ publication Charter of the United Nations, Statute and Rules of the Court and Other Documents, No. 6, 2007.

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The reason for now dealing with the ICJ is the fact that in the last decade I have been chosen as judge *ad hoc* in two cases before the Court, and that in that period of time I have reconsidered my impressions concerning the rules and the work of the Court.[3] The work with the Members of the Court has clarified some doubts I had concerning the role of judges *ad hoc*, but also indicated some questions/problems concerning their role.

2 The UN Charter and the Peaceful Settlement of Disputes

The Charter contains various provisions dealing with the goal/principle of the United Nations to promote the peaceful settlement of disputes which may arise among its members.

Already among the "Purposes and Principles" of the United Nations (Chapter I of the Charter), the governments of the States establishing the United Nations stressed the importance of the peaceful settlement of international disputes. Therefore, in Article 1.1, the authors of the Charter stressed their decision to avoid any breach 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". In accordance with that purpose, Article 2.3 of the Charter states the following as one of the Principles in accordance with which the United Nations and its Members shall act in the pursuit of the Principles stated in Article 1:

> All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

Taking into account the fact that the Purposes and Principles somehow represent the Preamble to the Charter, one should not try to give a precise/clear interpretation to every word of its first two articles. The majority of the terms used in these introductory articles have received a clear interpretation in the following articles of the Charter and in the Statute of the ICJ. Thus, for example, the list of "peaceful means" has been provided in Article 33.1 of the Charter: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements (…) Moreover, the Charter established the International Court of Justice as one of the principal organs of the Organization (Article 7), and all the Members of the UN are *ipso facto* parties to the Statute of the ICJ (Article 93.1).

[3] ICJ: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia and Montenegro); Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece).

3 Members of the International Court of Justice

Chapter XIV of the Charter, which deals with the ICJ, does not contain any provision referring directly to the composition of the Court. However, there is a sentence in Article 92 of the Charter which states that the Court shall function in accordance with its Statute which is annexed to the Charter.

Chapter I of the Statute deals with the "Organization of the Court", which means that it deals primarily with the judges, the Members of the Court. First of all, the Statute contains rules requiring that the Members of the ICJ have a high moral character and professional competence (Article 2). Many articles contain rules on the election and status of the Members of the Court (Articles 3–33). The judges are finally elected by the General Assembly and the Security Council, but no two of them may be nationals of the same State (Article 3.1 of the Statute).

There is no indication of the right of any State to have an advantage in the election of its nationals as Members of the Court. It is only stated that "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" (Article 9 of the Statute). Taking into account that rule and the number of States which are Members of the United Nations, one could expect that nationals of each State would have long intervals between two elections to the Court. These consequences of the rules contained in the Statute are the reality of the practice of electing members of the ICJ, with the exception of five States. Although such a rule does not exist in the Statute, nationals of the five permanent members of the Security Council are always members of the rather small body of fifteen judges of the ICJ! Therefore, whatever the "moral character" and the professional competence of the candidates proposed by China, France, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America, they will spend at least nine years in the Court. Is it correct that for the various roles these States had in World War II and in the international regime they wanted to establish after the drafting/adoption of the UN Charter in 1945, their nationals permanently represent one-third of the International Court of Justice?

On the other hand, even the best experts in international law—members of the Institute of International Law coming from other countries—will not very often become Members of the ICJ. Thus, for example, after the end of the mandate of Judge Milovan Zoričić in 1958, none of the excellent experts from the former Yugoslavia became a Member of the ICJ during the next 33 years of Yugoslavia's existence and during the 20 years of the States established after the dissolution of that Federation.

Another question which could be discussed concerning the composition of the International Court of Justice is the number of its members. According to Article 3, para 1, of its Statute, the ICJ consists of fifteen members. In some specific cases it can reach the number of seventeen members: these are cases when both parties are entitled to choose a judge *ad hoc* as the Court does not include on its Bench a judge of their nationality (see infra para 11).

In discussing the question of the number of the members of the Court it is difficult not to recall that the number of fifteen judges was decided upon when the United Nations only had 50 Member States, while the number of Members of the World Organization today is almost 200 States.

The creation of new States, having mostly a colonial history and various political regimes, has made it very difficult to satisfy the requirement of the Statute that in the ICJ "the representation of the main forms of civilization and of the principal legal systems of the world should be assured" (Article 9).

However, a considerable enlargement of the composition of the ICJ would inevitably affect its work. Therefore, suggestions have been made for a slight increase in the number of Members of the Court.[4] Thus the Institute of International Law concluded in 1954 that an increase in the number of the Members of the Court which would make the deliberations of the ICJ more difficult should be avoided. If the new circumstances would make an increase necessary, the number of judges should not be greater than eighteen.[5]

In discussing the number of judges of the ICJ, one should mention the establishment of the International Tribunal for the Law of the Sea (ITLOS). Although created by the 1982 United Nations Conference on the Law of the Sea as a tribunal open to all parties to the Convention, it is composed of only 21 members (Article 2, para 1, of Annex VI to the Law of the Sea Convention). It is impossible to compare the work of the ICJ and ITLOS, as the Law of the Sea Tribunal commenced its work only in 1996 and it has not heard many cases.

The question of composition should also be analyzed by taking into account the possibility of more often forming chambers, and limiting, or totally excluding the meetings of the plenary of the ICJ. However, I have the feeling that the opinions of the plenary of the ICJ have more effect on the development of international law than the judgments of the small chambers.

4 Judges *Ad Hoc*

Due to the interests of the population of their State, but even more often because of their own interests, State leaders have always been reluctant to make use of arbitration or judicial settlement to resolve their disputes. For that reason, notwithstanding the creation of the International Court of Justice, even the members of the United Nations are free to decide (in various ways) whether they will refer their disputes to the ICJ.

Such a limited competence of the ICJ has not evolved since the establishment of the Permanent Court of International Justice, notwithstanding the fact that the members of the Court are nationals of the Member States of the United Nations.

[4] Rosenne 1995, p. 61.

[5] Institut de droit international 1957, pp. 157–158.

Because of the limited number of the Members of the ICJ (see above, Sect. 3), the Statute of the Court provides a system which is intended to make all the parties to a case referred to the Court equal. Namely, the parties to a case whose nationals are not members of the Bench are entitled to "choose a person to sit as judge" in that case (Article 31.2 of the Statute). This is the institution of the so-called judges *ad hoc*. Although States mostly choose judges *ad hoc* having their nationality, this is not their duty, and there have been many judges *ad hoc* (including the author of this text) not having the nationality of the party entitled to choose a judge *ad hoc*.

Judges *ad hoc* must fulfill the same moral and professional conditions as the Members of the ICJ and "They shall take part in the decision on terms of complete equality with their colleagues" (Article 31.6 of the Statute). This is true in respect of the decisions which are relevant for the substance of the case, but they do not participate in every procedural decision concerning the case. Thus, for example, they are not invited to join the Bench in adopting the order determining the time limits for the filing of the written pleadings.[6]

Notwithstanding the equality of the judges *ad hoc* with their colleagues in the process of the decision of the Court, there are some differences between the two kinds of judges.

The Members of the Court discuss every case in the context of the practice of the Court in dealing with previous cases. Although the judges *ad hoc* may also be familiar with the previous practice of the ICJ, they are not supposed to participate in their specific case as lawyers being able to contribute to the general practice of the Court. They are supposed to follow the general practice/procedure of the Court and—if necessary—to contribute to the Court by some specific information concerning the case in which they are nominated as judges *ad hoc*.[7]

5 Final Remark

I will now end my comments on the International Court of Justice for the Essays in Honour of my dear colleague and friend since our participation in the Third United Nations Conference on the Law of the Sea, Professor Tullio Treves. However, I intend to discuss some additional remarks concerning the rules of the Court and its practice in Essays in Honour of some of my other colleagues. The first topic I would like to deal with is the question of the official languages of the Court—only French and English!?

[6] See e.g. ICJ: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia and Montenegro), Order (4 February 2010).

[7] Rosenne 1995, pp. 73–75.

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Interventions in Proceedings Before International Courts and Tribunals:

To What Extent May Interventions Serve the Pursuance of Community Interests?

Rüdiger Wolfrum

Most Statutes and Rules of International Courts and Tribunals provide for the possibility of intervention by a third State in the proceedings between two parties.[1] Nevertheless, the procedure has so far not been used that frequently. The reason

[1] See Article 84 of the Convention on the Pacific Settlement of International Disputes (the Hague, 18 October 1907), entered into force on 26 January 2010); Articles 62 and 63 of the Statue of the International Court of Justice (San Francisco, 26 June 1945; hereinafter ICJ Statute), entered into force on 24 October 1945; Articles 36 and 37 of the General Act for the Pacific Settlement of International Disputes (Geneva, 26 September 1928), entered into force on 16 August 1929, as replaced by the Revised General Act (New York, 28 April 1949), entered into force on 20 September 1950; Articles 32 and 33 of the European Convention for the Peaceful Settlement of Disputes (Strasbourg, 29 April 1957), entered into force on 30 April 1958; Article 40 of the Protocol (no. 3) on the Statute of Court of Justice of the European Union, as amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Lisbon, 13 December 2007), entered into force on 1st December 2009; Article 47 of the Treaty Instituting the Benelux Economic Union ('s-Gravenhage, 3 February 1958), entered into force on 1st November 1960; Article 40 of the Treaty for East African Co-operation (Kampala, 6 June 1967), entered into force 1st December 1967; Article 21 of the Protocol (A/P.l/7/91) on the Community Court of Justice of the Community of West African States (6 July 1991); Articles 31 and 32 of the Statute of the International Tribunal for the Law of the Sea, United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), entered into force on 16 November 1994, Annex VI. Further rules to that extent exist in many other international agreements of a more technical nature. On interventions see, in particular, Zimmermann 2011.

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for this is to be seen in the traditional conceptualization of a legal dispute. According to the traditional definition by the International Court of Justice (ICJ),[2] based upon the jurisprudence of the Permanent Court of Justice and adopted by, among others, the International Tribunal for the Law of the Sea (ITLOS),[3] a legal dispute is a disagreement among the parties on a point of law or fact, a conflict of legal views or of interests and the claim of one party must be positively opposed by the other.[4] It is held that it is for the parties to the concrete dispute to settle that dispute and that an intervention by a third State constitutes an interference which may complicate the peaceful settlement of the dispute. This bilateralization of a legal dispute which, as a consequence, limits the possibility to intervene is appropriate for truly bilateral relations but one has to acknowledge that international disputes rarely fit into a purely bilateral pattern.[5] Other States may have a legal interest in the interpretation of a particular norm of international law as well. For example, the interpretation of Article 121 of the United Nations Convention on the Law of the Sea (hereinafter the Convention) is not only of interest for the parties to a concrete case requesting a decision as to whether a particular geographical feature constitutes an island or a rock, but to all States Parties to the Convention. Apart from that, an intervention may be appropriate where international organizations, as well as States, are parties to a given international agreement and are, at the same time, parties to a given dispute settlement mechanism, as is the case with the European Union (EU) in respect of the dispute settlement system under Annex VI of the Convention.[6] In such a case, it may even be mandatory for the international organization to intervene. If, for example, the European Commission had intervened in the MOX Plant case before ITLOS,[7] which would have been procedurally possible,[8] the European Commission could have asserted its legal position at an earlier stage.

It should be noted in this context that in respect of the choice of procedure under Article 287 of the Convention the options for the EU are limited. It may only become a party in proceedings before ITLOS or arbitral tribunals because proceedings before the ICJ are open to States only; the same applies for interventions. However, under Article 43 of the Rules of Court[9] a public international

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[2] PCIJ: Mavrommatis Palestine Concession (Greece v. United Kingdom), Judgment (30 August 1924), p. 11; ICJ: Continental Shelf (Tunisia/Libya), Judgment (24 February 1982), p. 27; South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Judgment (21 December 1962), p. 328.

[3] ITLOS: Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Order (27 August 1999), p. 293.

[4] For further details see Tomuschat 2006, MN 8-10.

[5] Wolfrum 1998, p. 428.

[6] Zimmermann 2011, MN 3.

[7] ITLOS: MOX Plant (Ireland v. United Kingdom), Order (3 December 2001), p. 95.

[8] On that see below.

[9] Adopted on 14 April 1978 and entered into force on 1st July 1978 (as amended on 14 April 2005). www.icj-cij.org. Accessed 15 June 2012.

organization, which is a party to a convention the interpretation of which is in question, may submit observations. This procedure comes close to an intervention.

In spite of these new developments, as far as States are concerned the tendency seems to prevail that a State attempting to intervene must demonstrate that it has a concrete interest in the case proceedings in which it wants to intervene rather than merely an abstract interest. This is inappropriate for international legal regimes serving community interests rather than individual State interests since it restricts—if not eliminates—the possibility for individual States to introduce, by the means of an intervention in bilateral disputes, community interests which may supplement or even contradict the views of the two parties to the dispute. Such interventions would have a certain similarity with "amicus curiae briefs" not—at least not explicitly—provided for by the statutes and rules of international courts and tribunals.

Such a possibility is however enshrined in the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia.[10] This approach, namely that the general interest of a State in the interpretation of an agreement to which it is a party may also warrant protection, had been recognized by the Draft Convention on the Regulation of Antarctic Mineral Resource Activities (Wellington, 2 June 1988).[11] This draft agreement provided for a mandatory dispute settlement system which opened the possibility for interventions beyond what is so far common in international law.[12] Opening this possibility for interventions was prompted by several converging considerations. The Antarctic Treaty Consultative Parties considered themselves to be the trustees of Antarctica and felt that they were commonly responsible for the preservation of the Antarctic environment. The Antarctic Treaty Consultative Parties were very much aware that they had divergent interests as far as mineral resource activities were concerned and considered the dispute settlement system as a means—actually the ultimate means—to control such activities supplementing the inspection system. Finally, the Antarctic Treaty Consultative Parties have divergent views concerning territorial sovereignty over Antarctica. Opening the possibilities for intervention was one means to ameliorate the differences among them.[13]

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[10] Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, UN Doc. IT/32/Rev. 46 (20 October 2011), Rule 74. This option is referred to as an *amicus curiae* brief which the Trial Chamber may invite.

[11] The Draft Convention did not enter into force since Australia and France decided not to ratify the draft.

[12] Annex I, Article 7 which read: "Any Party which believes it has a legal interest, whether general or individual, which may be substantially affected by the award of an Arbitral Tribunal, may, unless the Arbitral Tribunal decides otherwise, intervene in the proceedings." The text is reproduced in Wolfrum 1991, p. 146.

[13] For further details on the dispute settlement system which was inspired by the dispute settlement system as provided for by the UN Convention on the Law of the Sea, see Watts 1992, pp. 93–105; Wolfrum 1991, p. 74 ff. A text on a comprehensive dispute settlement system was first jointly introduced by a draft of the German Democratic Republic, the Federal Republic of Germany and the USSR.

In the following, an attempt will be made to establish whether the jurisprudence of the International Court of Justice indicates a tendency to give Articles 62 and 63 of the ICJ Statute a more flexible interpretation and whether the Rules for the ITLOS[14] would allow that Tribunal to develop a more progressive attitude toward interventions.

1 Interventions in the Proceedings Before the ICJ

The Statute of the ICJ provides for two different types of interventions, namely an intervention in the case where the decision in question may affect an interest of a legal nature of the State seeking to intervene (Article 62 ICJ Statute) and an intervention in cases where the "construction of the convention (…) is in question" (Article 63).[15] The two provisions are supplemented by Articles 81–85 of the Rules of Court of 1978. The two procedures differ; whereas Article 63 provides for a right to intervene, Article 62 leaves it to the Court to decide whether the applicant has an interest of a legal nature[16] and on that basis may accommodate the request for an intervention. They also differ as to whether the judgment is binding upon the intervening State.

1.1 Under Article 63 of the ICJ Statute

If a State Party intervenes on the basis of Article 63 of the ICJ Statute the interpretation given by the Court is binding upon the intervener in accordance with Article 63.2 of the ICJ Statute. However, for all other State Parties to that international treaty Article 59 of the ICJ Statute is of relevance which means that the judgment remains a *res inter alios acta*.

Article 63 of the ICJ Statute has not been frequently invoked. The first case where the object of the dispute was the interpretation of a multilateral treaty (the Treaty of Versailles) and where a third State intervened was the Wimbledon case.[17] In the three cases decided by the ICJ, namely the Haya de la Torre case,[18]

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[14] Rules of Procedure of the International Tribunal for the Law of the Sea (28 October 1997, as amended on 17 March 2009).

[15] The term "construction" (in French: "interprétation") means that it is not sufficient that the convention is referred to but its interpretation must be of relevance for the decision in the case.

[16] See Chinkin 2006, MN 9-12.

[17] PCIJ: S.S. "Wimbledon" (United Kingdom, France, Italy and Japan v. Germany), Judgment (28 June 1923); for further details see Chinkin 2006, MN 14.

[18] ICJ: Haya de la Torre (Columbia v. Peru), Judgment (13 June 1951), p. 76.

the Nicaragua case[19], and the Request for an Examination of the Situation in accordance with para 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests case,[20] the International Court of Justice made it clear that the "right of intervention" contained in Article 63 of the ICJ Statute is not an absolute right. One may thus argue that the ICJ ameliorated the distinction between an intervention according to Article 63 of the Statute and the one under Article 62.

Scrutinizing the limited jurisprudence of the ICJ under Article 63 of the ICJ Statute is not enlightening. The declaration of intervention by the Republic of El Salvador was dismissed for the reason that it was submitted in the phase dealing with the jurisdiction of the Court; however, the matters addressed had to be dealt within the merits.[21] As far as the Application of Fiji of 18 May 1973 to intervene is concerned, the Court in its Order of 20 December 1974 referred to its Judgment of 20 December 1974 which had found that the claim of New Zealand no longer had any object and, consequently, there were no longer any proceedings before the Court to which the Application for permission to intervene could relate.[22] As far as the intervention of Cuba was concerned, the Court stated:

> On that point, the Court observes that the Memorandum attached to the Declaration of Intervention of the Government of Cuba is devoted almost entirely to a discussion of the questions which the Judgment of November 20th, 1950, had already decided with the authority of *res judicata,* and that, to that extent, it does not satisfy the conditions of a genuine intervention. However, at the public hearing on May 15th, 1951, the Agent of the Government of Cuba stated that the intervention was based on the fact that the Court was required to interpret a new aspect of the Havana Convention, an aspect which the Court had not been called on to consider in its Judgment of November 20th, 1950.
>
> Reduced in this way, and operating within these limits, the intervention of the Government of Cuba conformed to the conditions of Article 63 of the Statute, and the Court, having deliberated on the matter, decided on May 16th to admit the intervention in pursuance of paragraph 2 of Article 66 of the Rules of the Court.[23]

According to the wording of the said provision only two conditions are to be met, namely that the State intending to intervene is a party to the Convention and that the interpretation of that Convention is relevant for deciding the case under consideration.[24]

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[19] ICJ: Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Order (4 October 1984), p. 216 (para 2).

[20] ICJ: Request for an Examination of the Situation in accordance with para 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests case (New Zealand v. France), Order (22 September 1995), p. 288.

[21] See in this respect ICJ: Nicaragua, supra n. 19, Dissenting Opinion of Judge Schwebel, p. 223, who stated that neither the Declaration of Intervention nor Article 63 of the Statute were clear.

[22] ICJ: Nuclear Tests (New Zealand v. France; Australia v. France), Order (20 December 1974), p. 535.

[23] ICJ: Haya de la Torre, supra n. 18, p. 77.

[24] The Rules of the Permanent Court of International Justice as well as those of the ICJ of 1946 and 1972 were silent as to what information the potential intervener had to provide in its declaration of intervention. The 1978 Rules changed this situation (see Article 82). The potential

Article 63 of the ICJ Statute is based upon the premise that the interests of the potential intervener are to be assumed due to its participation in the convention which is to be interpreted. Theoretically, there are many cases where the interpretation of one particular norm of a multilateral treaty is in question. For example, in all cases concerning the delimitation of exclusive economic zones or continental shelves the interpretation of Articles 74 or 83, respectively, of the Convention is necessary. The question is whether all States Parties to the Convention with similar disputes may and why do they not intervene in such a dispute between State A and B? The wording of Article 63 of the ICJ Statute does not seem to prevent other States Parties from doing so, nor do the Rules. The reasons as to why not more use is made of this possibility may rest in the very broad wording of Article 63 of the ICJ Statute[25] which makes it likely that the Court will develop limits with a view to be able to manage the settlement of the dispute between its original parties. It would not serve the proper functioning of the Court if another case was to be added to the case before it. On the other hand, a more frequent use of Article 63 of the ICJ Statute might contribute to a more coherent interpretation of a multilateral treaty. This objective could be achieved if States Parties were not allowed to intervene in their own interest but that those who do so have the purpose of safeguarding the overarching objective of the multilateral treaty in question. To be more concrete, Article 63 of the ICJ Statute seems to be appropriate to uphold, for example, the common heritage principle of the Convention on the Law of the Sea as well as its implications for individual claims which in fact mean that it is eroded. Such an interpretation of the rules on intervention might open the possibility for State Parties to the Convention to intervene to preserve the scope of the Area in proceedings concerning the delimitation of the outer continental shelf.

Only one of the interventions under Article 63 of the ICJ Statute was successful—at least in part.

The limited number of applications and their content seem to indicate that States are not fully aware of the potential offered under Article 63 of the ICJ Statute. The unfortunate treatment of El Salvador may have contributed there to[26] as well as the already mentioned broad scope of Article 63 of the ICJ Statute.

1.2 Under Article 62 of the ICJ Statute

Article 62 of the ICJ Statute in turn allows a State that believes it has an interest of a legal nature that may be affected by the Court's decision in a case between two or

(Footnote 24 continued)
intervener has to submit the relevant information for establishing that it is a party to the convention under consideration; it must identify the relevant norm and its interpretation ("construction").

[25] Correctly critical in this respect is Rosenne 1993, p. 190.

[26] Chinkin 2006, p. 1392, MN 58.

more other parties to request permission to intervene. The wording of Article 62 of the ICJ Statute contains several restrictions; further, restrictions are derived from the nature of intervention as incidental proceedings.[27] The interest of the potential intervener must be a legal one[28] and the potential intervener must be subject to the jurisdiction of the respective court or tribunal. According to the Rules of the Court (Articles 81.2 from (a) to (c)), the applicant shall specify the interest of a legal nature which the State applying to intervene considers may be affected by the decision in that case, the precise object of the intervention and any basis of jurisdiction which is claimed to exist.

As far as the legal interest is concerned the potential intervener must demonstrate that it has specific legally protected interests that may be impinged upon by any decision rendered. However, it must not at the same time introduce a new dispute between the State applying to be admitted as an intervener and the main parties to the dispute. In the Libya/Malta Continental Shelf case Italy expressed its interest in the litigation with a view to protecting its own sovereign rights over the continental shelf. Both Libya and Malta objected to the intervention by arguing that Italy had not shown, and could not show, the existence of "any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the Parties to the case." The ICJ stated, while referring to its earlier decision in the Continental Shelf case between Tunisia and Libya[29] that

> "it does not consider paragraph 2 [of Article 62 of the Statute] to confer upon it any general discretion to accept or reject a request for permission to intervene for reasons simply of policy. On the contrary, in the view of the Court the task entrusted to it by that paragraph is to determine the admissibility or otherwise of the request by reference to the relevant provisions of the Statute."

However, the ICJ dismissed the claim of Italy because it considered that admitting Italy as an intervener would have meant involving the Court in pronouncing upon Italy's rights.[30] This decision—at least in theory—made the application of Article 62 of the ICJ Statute somewhat complicated. If Italy had stated its interests more generally as Malta had done in its application to intervene, then such an application would have been rejected on the basis that it had not demonstrated a legal interest.[31] However, account should be taken of the object of this judgment. It was not meant to delimit the continental shelf between Libya and Malta but rather to prescribe the relevant principles for delimitation. Therefore, it was indeed doubtful whether Italy could demonstrate a legal interest.

In the case of Sovereignty over Pulau Ligitan and Pulau Sipadan Philippines did not have a legal interest in the dispute as such but asserted that it had a claim in the Court's reasoning which could affect the outcome of the Philippines' claim with

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[27] Wolfrum 1998, p. 432.

[28] Chinkin 2006, MN 41.

[29] ICJ: Continental Shelf (Tunisia/Libya), Judgment (14 April 1981), p. 12.

[30] ICJ: Continental Shelf (Libya/Malta), Judgment (21 March 1984), p. 8 ff.

[31] Continental Shelf (Tunisia/Libya) (14 April 1981), supra n. 29, p. 12 ff.

respect to North Borneo. The Court dismissed this application as being too remote for the purposes of Article 62.[32]

Finally, in the Order of 4 July 2011 on the Application of the Hellenic Republic for Permission to Intervene in the case between Germany and Italy[33] the Court accepted the intervention of Greece which had stated that the object of its intervention was "to inform the Court of the nature of the legal rights and interests of Greece that could be affected by the Court's decision in the light of the claims advanced by Germany."

As already stated, according to Article 81.2.c of the Rules of the ICJ the intervening State is to set out in its application "any basis of jurisdiction" which is claimed to exist as between the State applying to intervene and the parties to the case. Whether such a jurisdictional link is required under Article 62 of the ICJ Statute was and remains controversial. This question is connected with that of the status of the intervener in the Land, Island, and Maritime Frontier Dispute case.[34] This was reconfirmed in the Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria, Application by Equatorial Guinea for Permission to Intervene.[35] The ICJ determined that a jurisdictional link between Nicaragua and the parties was not required where the intervening State does not seek to become a party to the case.[36]

In summarizing the rules of the ICJ on interventions and its jurisprudence in this respect one has to conclude that the Court did not use Article 63 of the ICJ Statute with a view to ensuring that the uniform interpretation of multilateral treaties is preserved. It rather remained procedurally within the pattern of bilateral legal disputes which does not reflect the shift of international law away from bilateralism to multilateralism as far as substantive international law is concerned. Such a shift should also be reflected in the procedure on the settlement of legal disputes. As far as interventions on the basis of Article 62 of the ICJ Statute are concerned the Court was more forthcoming. It accepted an intervention without a

[32] ICJ: Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment (23 October 2001), para 83. The Court stated: "The Philippines needs to show to the Court not only "a certain interest in (…) legal considerations" (Continental Shelf (Libyan Arab Jamahiriya/Malta) Application to intervene, Judgment, ICJ Reports 1981, p. 19, para 33) relevant to the dispute between Indonesia and Malaysia, but to specify an interest of a legal nature which may be affected by reasoning or interpretations of the Court. The Court has stated that a State seeking to intervene should be able to do this on the basis of the documentary evidence upon which it relies to explain its own claim."

[33] ICJ: Jurisdictional Immunities of the State (Germany v. Italy), Order (4 July 2011). See also the Declaration of Judge *ad hoc* Gaja who seemed to have doubts about Greece's intervention.

[34] ICJ: Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Judgment (13 September 1990), para 100.

[35] ICJ: Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Order (21 October 1999), p. 1035, MN 12/13.

[36] Frontier Dispute (El Salvador/Honduras), supra n. 34, para 90. On the development of the jurisprudence see Chinkin 2006, MN 64-73.

jurisdictional link. Given the widespread accession to the ICJ Statute the issue is of a rather academic nature; with respect to the International Tribunal for the Law of the Sea, to whose jurisdiction only a limited number of States have submitted, it is not. The Court further accepted interventions which have as their objective to inform the Court on issues which may become relevant for its decision on the merits as clearly demonstrated in the Application of the Hellenic Republic for Permission to intervene in the legal dispute Germany v. Italy.[37] With such an objective the intervention takes a form similar to an *amicus curiae* brief.

2 Interventions in Proceedings Before the ITLOS

The Statute of the International Tribunal for the Law of the Sea provides for two possibilities to intervene, both worded similar to those of the Statute of the International Court of Justice.

2.1 Under Article 31 Statute of ITLOS

The equivalent of Article 62 of the ICJ Statute is to be found in Article 31 Statute of ITLOS. Articles 31.1 and 31.2 of the Statute of ITLOS are—apart from some modifications of a drafting nature—identical to Articles 62.1 and 62.2 of the ICJ Statute. The Tribunal decided against requiring the intending intervener to specify a jurisdictional link between itself and the parties to the dispute. Articles 99.3 of the Rules of ITLOS even states that permission to intervene under the terms of Article 31 of the Statute may be granted irrespective of the choice made by the applicant under Article 287 of the Convention.[38] Considering the widespread membership of the Convention this opens the possibility for widespread intervention. This approach is also justified by the fact that one should consider the various procedures as alternatives in an otherwise unified dispute settlement system.

Article 31.3 of the Statute of ITLOS spells out, however, that, if the right to intervene is granted, the decision of the intervener shall be "binding in so far as it relates to matters in respect of which that State Party intervened." Nevertheless, Article 103.4 of the Rules of ITLOS provides that the intervener is not entitled to choose a judge *ad hoc* or to object to an agreement of the parties to the dispute to discontinue the proceedings. This means that the intervener does not become a party to the dispute. This deviates from the jurisprudence of the ICJ. In the

[37] Jurisdictional Immunities, supra n. 33.

[38] Wolfrum 1998, p. 440.

Judgment on the Land, Island and Maritime Frontier Dispute[39] the Chamber of the International Court of Justice stated "(…) that a State permitted to intervene under Article 62 of the Statute, but which does not acquire the status of a party to the case, is not bound by the Judgment given in the proceedings in which it has intervened."

Which consideration guided the Tribunal to decouple the status of the intervener from the binding nature of the decision is not of relevance here. However, the combination of being bound by the decision without having acquired the full status of a party to the dispute may not be an incentive for interventions.

The Rules of ITLOS, as far as the required interest of a legal nature is concerned, do not deviate from the respective provisions which govern the intervention under Article 62 of the ICJ Statute. No indication is given as to what is meant by the term "interest of a legal nature". The State Party to the Convention requesting the right to intervene is only obliged under Article 99.2 of the Rules of ITLOS to "(…) set out the interest of a legal nature which the State Party applying to intervene considers may be affected (…)" Considering the recent jurisprudence of the International Court of Justice one may assume that the International Tribunal for the Law of the Sea may apply a similarly low threshold.

Equally, in its wording Article 32 of the Statute of ITLOS follows, in general, Article 63 of the ICJ Statute. Article 32.1 of the Statute of ITLOS refers to "interpretation and application of this Convention" thus reiterating the terminology of Article 288 of the Convention. This wording signals that an intervention is open to all States Parties to the Convention. Given the widespread participation in the Convention the scope for possible interventions is quite broad.

The Rules of ITLOS do not further specify the criteria under which the Tribunal will have to scrutinize an application for intervention under Article 32.3 of the Statute of ITLOS since it is evident that the Tribunal has the right to reject such applications.[40] According to Article 100 of the Rules of ITLOS it is the procedural obligation of the potential intervener to identify the particular provisions of the Convention (or of the international agreement) the interpretation of which the declaring party considers to be in question and to set out its own views in this respect. This means that the application to intervene must be quite substantiated. The Tribunal would then have to decide whether *prima facie* the provisions referred to are relevant for deciding the case. Apart from that, the *ratio decidendi* of the Tribunal is left vague.[41]

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[39] Frontier Dispute (El Salvador/Honduras), supra n. 34, p. 135.

[40] Article 102.1 of the Rules of the Tribunal provides that the "Tribunal shall decide whether (…) an intervention under Article 32 of the Statute is admissible as a matter of priority unless in view of the circumstances of the case the Tribunal determines otherwise."

[41] See Article 102.1 of the Rules of the Tribunal.

3 Concluding Remarks

Traditionally, interventions in the proceedings have been designed as mechanisms to allow third States to protect their own interests in such cases where their interest may be affected by a decision in a legal dispute between two other States. The interest must be a legal one and it is for the potential intervener to specify its interest. Considering the jurisprudence of the International Court of Justice the potential applicant has to be sufficiently specific to meet that requirement but not too specific so as not to attach another case to the original one. Certainly, the jurisprudence of the ICJ Chamber in the Land, Island, and Maritime Frontier Dispute case[42] developed a way out of this dilemma. Nevertheless, this form of intervention is not suited to serve community interests; it is tailored to the traditional bilateral approach toward solving international disputes.

The situation could be different as far as interventions under Article 63 of the ICJ Statute or Article 32 of the Statute of ITLOS are concerned. In particular, Article 32 of the Statute of ITLOS referring to the interpretation of the Convention on the Law of the Sea makes it quite clear that the possibility to intervene is open to all States Parties to the Convention. It is for the international courts and tribunals having jurisdiction under Article 287 of the Convention to develop suitable limits to such possibility. In doing so, they should bear in mind that the parties to a concrete dispute have a right to have their dispute decided without being burdened with the opinions or views of States pursuing their individual interests. But it should also be borne in mind that Article 32 of the Statute of ITLOS—although drafted along the lines of Article 63 of the ICJ Statute—by referring explicitly to the Convention on the Law of the Sea can be read as an encouragement of ITLOS to uphold the community interests which the Convention is meant to protect.

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Part IV
Law of the Sea

Some Aspects of the Use of Force in Maritime Law Enforcement

David H. Anderson

1 Introduction

This paper reviews the development by international courts and tribunals of the law of the sea on a narrow topic, namely the right of the authorities of States to threaten or use force in order to apply, implement and enforce their legislation relating to areas under coastal State sovereignty or jurisdiction.[1] Some of the judicial decisions were later taken into account in formulating provisions in two multilateral treaties, namely the Agreement relating to the Conservation and Management of Straddling and Highly Migratory Fish Stocks (New York, 8 September 1995; hereinafter Straddling Stocks Agreement and the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of of Maritime Navigation).[2]

As is well known, the UN Convention on the Law of the Sea (Montego Bay, 10 December 1982; hereinafter UNCLOS)[3] represents an extensive statement of the law of the sea in conventional form, building upon the four Geneva Conventions on the law of the sea of 1958. The UNCLOS contained new provisions defining the jurisdiction of coastal States to prescribe and enforce laws relating to fisheries and pollution in the Exclusive Economic Zone (EEZ). Law enforcement in the EEZ is dealt with both in Article 73 (Enforcement of laws and regulations of the coastal State), which refers explicitly to boarding, inspection, arrest and judicial proceedings in the context of fisheries protection, and Article 220 (Enforcement by coastal States), which refers to inspection, detention and legal proceedings in the

[1] For recent general surveys, see Guilfoyle 2009 and Kraska 2010.
[2] Entered into force on 11 December 2001.
[3] Entered into force on 16 November 1994.

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context of marine pollution. Article 225 lays down the safeguard that "[i]n the exercise (…) of their powers of enforcement against foreign vessels, States shall not endanger the safety of navigation or otherwise create any hazard to a vessel (…)". Although included in Part XII concerning the protection of the marine environment, this provision has general relevance. As regards the continental shelf, enforcement jurisdiction is included in the concept of "sovereign rights" in Articles 56 and 77, read in the light of the explanation of that concept in its application to the continental shelf given by the International Law Commission in para 2 of its Commentary on draft Article 68, where it was stated that "Such rights include jurisdiction in connexion with the prevention and punishment of violations of the law."[4]

Professor Max Sorensen pointed out that "[t]he coastal state can (…) grant concessions to private (…) companies. It can prevent any exploitation by persons (…) not so authorised. It can legislate on all relevant matters, and it can take administrative and judicial action with respect to any person (…) engaged in such activities, even if he operates from floating installations (…) outside the limits of the territorial sea."[5]

However, certain topics, including many practical aspects of the enforcement at sea of national jurisdiction, were not addressed in detail in the UNCLOS. Professor Shearer noted that "[t]here was a disinclination at [the Third UN Conference on the Law of the Sea] to discuss the meaning of such phrases as 'enforcement measures' and 'necessary steps'(…). It was assumed that customary international law already governed the exercise of force—including force in a peace time police role—at sea and that the customary rules would, for the most part, be sufficient."[6] In particular, as the International Court of Justice (ICJ) has noted, "the relevant provisions of the 1982 United Nations Law of the Sea Convention relating to enforcement measures (…) make no mention of the use of force."[7] The law on this topic has been developed, first, by State practice, in enacting and applying national legislation authorising public officers to exercise police powers; and, secondly, by decisions of international courts, commissions and tribunals arising from incidents at sea. The last recital in the UNCLOS's preamble affirms that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law." Policing at sea is one of those matters.

There is an extensive State practice made up of legislation authorising law enforcement agencies to board, inspect, detain, divert to port and arrest vessels at sea. These powers are a projection seaward of police powers on land. They may be exercised, both within areas of maritime jurisdiction and on the high seas as the right of hot pursuit, by coastguards, fishery control officers and navies. In British

[4] II YBILC (1956) at p. 297.

[5] Sorensen 1958, p. 229 (cited in Whiteman's Digest of International Law, vol. IV p. 869). State practice is in line with this description.

[6] Shearer 1986, p. 341. Professor Shearer participated in the Conference as a delegate.

[7] ICJ: Fisheries Jurisdiction (Spain v. Canada), Judgment (4 December 1998), para 80.

practice, naval officers are imbued with the powers of sea fishery officers when engaged on fishery protection work. In practice, there has been no confusion between the military role of the navy and the law enforcement role. The powers of boarding, etc., are exercised most frequently in the case of fishing vessels and vessels suspected of smuggling or other customs offences.

2 Twentieth Century Developments

In reviewing developments during the twentieth century on this topic, four cases stand out: the *I'm Alone*,[8] *the Red Crusader*,[9] the *Fisheries Jurisdiction*,[10] and the *Saiga (no.2)*.[11] The first two cases were the subjects of reports by Commissioners. The third case was decided by the ICJ in 1998, while the final case was decided by a large majority of the International Tribunal for the Law of the Sea (ITLOS), including Judge Treves, in 1999. In 1995, between the first two cases and the remaining two, the principles of the *I'm Alone* and *Red Crusader* cases were codified and developed in the UN Conference (for which Professor Treves acted as a vice-chairman) which concluded the UN Straddling Stocks Agreement. These developments are best reviewed in chronological order.

In their report of 1935 into the incident concerning the *I'm Alone* (a Canadian-flagged vessel suspected of smuggling alcoholic liquor during the time of the US "Prohibition"), the Commissioners expressed the view that the United States, as a coastal State, was entitled to "use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purposes, the pursuing vessel may be entirely blameless."[12] On the facts of the incident, however, the Commissioners found that the admittedly deliberate sinking of the suspected vessel, with the loss of one life, had not been justified. The test of "reasonable and necessary" force meant, according to a leading commentator, that coastguards were entitled to use such reasonable force as was necessary to board, search and arrest a suspect vessel. If such force caused the vessel to sink unintentionally, this would not be unlawful; but deliberate sinking would not be reasonable.[13]

The next case was that of the *Red Crusader* in 1962. The case concerned an incident between a Scottish fishing vessel and a Danish warship when the latter

[8] Arbitral Tibunal: S.S. "I'm Alone" (Canada/United States of America), Award (30 June 1933).

[9] International Commission of Inquiry: Red Crusader Incident (Denmark/United Kingdom), Report (23 March 1962).

[10] Fisheries Jurisdiction (Spain v. Canada), supra n. 7.

[11] ITLOS: M/V "Saiga" (no. 2) (Saint Vincent and the Grenadines v. Guinea), Judgement (1 July 1999).

[12] I'm Alone, supra n. 8, p. 1617.

[13] Fitzmaurice 1936, p. 99.

was exercising fisheries enforcement jurisdiction near the Faroe Islands. After the initial boarding and arrest of the *Red Crusader*, the crew of the fishing vessel overpowered the boarding party and fled with the warship in pursuit. After firing warning shots to no avail, the warship fired at the vessel. A Commission of Inquiry found that the warship, in attempting the re-capture, had "exceeded legitimate use of armed shot on two counts: (a) firing without warning of solid gun-shot: (b) creating danger to human life on board the "Red Crusader" without proved necessity, by the effective firing at the Red Crusader (…)."[14]

Professor O'Connell commented that the two cases "make it clear that, while force may be employed in arrest of foreign ships which resist boarding, this is a measure of last resort."[15] Professor Poulantzas concluded that the cases showed "how extremely difficult it is to obtain legal approval during peace time for the use of arms against offending vessels (…)."[16]

While the UNCLOS had remained silent about the use of force in law enforcement, the Straddling Stocks Agreement (an implementation agreement) did contain a detailed provision defining the basic procedures for boarding and inspecting fishing vessels at sea. Article 22.1.f. reads as follows:

> (1) The inspecting State shall ensure that its duly authorised inspectors (…) (f) avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.

This formulation, using "avoid," was adopted after discussions that showed a certain reluctance on the part of some delegations to adopt any more positive wording lest it be misunderstood as tending to condone or encourage the use of force, even as a police power. The formulation reflected the practice of many (but not all) coastal States, based on the decisions in the *I'm Alone* and *Red Crusader* cases. Although the provision relates only to fisheries, the principles appear to be equally applicable to other law enforcement work at sea.

The ICJ had occasion in the *Fisheries Jurisdiction case (Spain v. Canada)*, when considering the question of its jurisdiction, to examine the arrest at sea by Canadian fisheries officers of the *Estai*, a fishing vessel flying the flag of Spain. The incident occurred as part of a wider fisheries dispute between Canada and the European Community within the North Atlantic Fisheries Organisation arising from the activities of Spanish vessels on the Grand Banks. Spain's arguments included the contention that Canada's use of force against the *Estai* amounted to a violation of Article 2.4 of the UN Charter.[17] Canada contended that its actions

[14] Red Crusader, supra n. 9, p. 485.

[15] O'Connell 1984, p. 1073.

[16] Poulantzas 2002, p. 237.

[17] In the earlier *Fisheries Jurisdiction* cases brought by the UK and Germany against Iceland, complaints were made of harassment by the Icelandic coastguard of British and German fishing vessels by actions such as cutting warps and ramming, leading in the view of the two Applicants to legal responsibility on the part of the Respondent. However, no complaint was made under

amounted to law enforcement, pointing to the nature and purpose of the action taken. The Court's judgment noted that the Canadian legislation which had been applied to the *Estai* authorised the use of reasonable force, when other less violent means of persuasion had failed, for the purpose of arresting foreign fishing vessels. The Court found that "these limitations (…) bring the authorised use of force within the general category of measures familiar in enforcement of fisheries conservation." The Court noted further that "such provisions are of a character and type to be found in legislation of various nations dealing with fisheries conservation and management, as well as in Article 22.1.f of the [Straddling Stocks Agreement]." For those reasons, the Court held that "the use of force authorised by the Canadian legislation and regulations falls within the ambit of what is commonly understood as enforcement of conservation and management measures (…)."[18] In effect, Spain's argument based on Article 2.4 of the UN Charter was rejected by the Court's characterization of the use of force as a law enforcement measure. The Court's methodology was to analyse the legislative powers of Canada as the coastal State, without paying particular regard to the details of the actual boarding and arrest of the *Estai* at sea or the views of persons involved.

The *Saiga (No.2)* case arose from the arrest of the *M/V Saiga*, a small bunkering vessel, by the navy and coastguard of Guinea at a position just outside that State's claimed EEZ. St Vincent (as the flag State) argued that excessive force had been used, but made no complaint under Article 2.4 of the UN Charter. The ITLOS found that the arresting officers, as they approached the *Saiga*, "fired at the ship itself with live ammunition from a fast-moving patrol boat without issuing any of the signals and warnings required by international law and practice."[19] The Tribunal also found that the officers had fired indiscriminately, while on the deck after boarding, injuring two persons on board and damaging the vessel. The Tribunal held that the respondent's coastguard had "used excessive force and endangered human life before and after boarding the Saiga (…)."[20] The judgment cited the "*I'm Alone*" and "*Red Crusader*" cases, as well as Article 22.1.f of the Straddling Stocks Agreement. The Tribunal observed that "the normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop." The Tribunal accepted that warning shots across the bows of a suspect vessel could be necessary before stating that "[i]t is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force." The judgment went on to point out that "appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered."[21]

(Footnote 17 continued)
Article 2.4. of the UN Charter, presumably because the two Applicants did not consider that provision to be relevant or applicable. ICJ: Fisheries Jurisdiction (United Kingdom v. Iceland), Judgment (2 February 1973), pp. 3 and 182.

[18] Fisheries Jurisdiction (Spain v. Canada), supra n. 7, pp. 432–466.

[19] Saiga (no. 2), supra n. 11, pp. 10–63.

[20] Ibidem, para 159.

[21] Ibidem, para 156.

3 Twenty-First Century Developments

During the present century, one relevant decision has been given: this was in the case of *Guyana v. Suriname*,[22] an *ad hoc* arbitration under Annex VII of the UNCLOS.[23] The principal issues in the case concerned the establishment of a maritime boundary between the parties extending from the terminus of the terrestrial boundary to the outer limits of the EEZs. These issues were disposed of in a manner that has drawn favourable comment from both parties to the case, as well as commentators.[24]

Guyana's third submission raised a further charge concerning certain acts of Suriname in regard to a rig licensed by Guyana to drill in a disputed area of continental shelf. The charge was characterised by the judgment as "incidental to the real dispute between the parties" whether the incident was "designated as a 'border incident' or as 'law enforcement activity.'"[25] In greater detail, Guyana sought damages for an alleged violation of international law by the Surinamese Navy when, in 2000, before the institution of the arbitration, it had ordered the personnel of an oil rig licensed by Guyana to cease activities in disputed waters and to leave its station within a time limit, failing which they would have to "face the consequences." Having heard the witnesses, the Tribunal concluded that "the order given by (the Surinamese naval officer) to the rig constituted an explicit threat that force might be used if the order was not complied with."[26]

The Tribunal proceeded to consider whether this threat of force was a measure of law enforcement or rather a military act in the context of a frontier dispute. Having reviewed the *Fisheries Jurisdiction (Spain v. Canada)* and *Saiga (No 2)* cases, the Tribunal accepted that "force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary."[27] The judgment continued: "in the circumstances of the present case (…) the action mounted by Suriname (…) seemed more akin to a threat of military action rather than mere law enforcement activity." The Tribunal based that rather nuanced finding "primarily on the testimony of witnesses to the incident, in particular the testimony of (the two men on the rig)."

The decision was unanimous and the five members of the Tribunal had the advantage of hearing the five witnesses and seeing their demeanour. It appears that

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[22] PCA/UNCLOS Arbitral Tribunal: Guyana v. Suriname, Award (17 September 2007).

[23] The arbitrators were Judge D. Nelson, Professor T. Franck, Dr K. Hossain, Professor I. Shearer and Professor H. Smit.

[24] Fietta 2008, p. 119; Colson and Smith (Eds), International Maritime Boundaries, vol. VI, p. 4236 (Report No. 3-10(Add.1)) and the survey by the present writer at p. 4119.

[25] Guyana v. Suriname, supra n. 22, para 410.

[26] Ibidem, para 439.

[27] The addition of the word "unavoidable" appears to depart from the formula in the Fish Stocks Agreement in the sense that the obligation to "avoid" the use of force in Article 22 is subject to some exceptions.

the Tribunal largely accepted the evidence of the two men on the rig and, by implication, largely rejected that of the three Surinamese officers. It is relevant to note that, in later findings, the Tribunal held that both parties had failed, for different reasons, to comply with the obligation in Article 83.3 of the UNCLOS not to jeopardise the conclusion of a boundary agreement by negotiations. In Suriname's case, this was due to the resort to "self-help in threatening the (…) rig" with force, instead of accepting Guyana's last-minute offer of talks in the days prior to the arrival on station of the rig.[28] In other words, the action was held to have breached both the UN Charter and the LOSC. In Guyana's case, the failure to comply with the obligation under Article 83.3 arose from allowing its licensee to prepare for drilling by positioning the rig in disputed waters.[29]

The Tribunal's findings on this incident and its legal characterisation as an unlawful threat of force by Suriname give rise to five observations.[30] First, it is clear that the Tribunal's findings of violations of Article 2.4 of the UN Charter and Article 83.3 of the UNCLOS were all inter-linked. This may have been a factor in reaching each particular finding of violation. Second, considering the facts of the story, the actions of the Surinamese officers were within the range of actions typically taken by coastguards in fisheries and similar operations. Indeed, the ITLOS stated in the *Saiga (No.2)* case that appropriate warnings should be given during law enforcement operations. In this case, however, a warning was characterised on the basis of the evidence as an unlawful threat. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court stated that "the notions of "threat" and "use" of force under Article 2.4 of the Charter stand together in the sense that if the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter."[31] It would also appear from this "standing together" test that if a use of force would be legal—e.g. for the reason that it would be a reasonable measure of law enforcement in a claimed maritime zone—then a warning that, in the event of non-compliance with an order to depart, reasonable force would be used to board and arrest would likewise be legal.

Third, the order to leave or "face the consequences" was ambiguous and, for that reason alone, unwise in the particular circumstances. There were clearly many possible consequences. The Tribunal's finding that the officers' warning amounted to an *explicit* threat of force may come as a surprise to the reader of the judgment since the summaries of the evidence do not include any mention by the officers of the threat or use of force. They did not board the rig at any stage or fire warning shots or attach a hawser to a leg. The two men on the rig are recorded as

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[28] Guyana v. Suriname, supra n. 22, paras 476 and 484.

[29] Ibidem, paras 479–482 and 486.

[30] For a survey, see Kwast 2008, p. 49.

[31] ICJ: Legality of the Threat or Use of Nuclear Weapons, Advisory Op. (8 July 1996), pp. 226–246.

concluding that they were being evicted by threat of armed force, but this conclusion appears from the wording of the judgment to be no more than their *interpretation* of the ambiguous order to leave or "face the consequences". It is true that a rig cannot be arrested and taken into port for prosecution like a fishing vessel, but there could be some jurisdictional possibilities to charge the operator, e.g. a foreign licensee, with offences before the courts of the State concerned. In such circumstances, the facts that an order to leave and a warning had been given to the personnel on board the rig may be admissible in evidence before those courts.

Fourth, the situation facing a State which becomes aware of the arrival of a foreign rig in a disputed area is a difficult one. What is its best course of action? There are two broad possibilities: national law enforcement or diplomatic action. In the first instance, high-level diplomatic action in the form of a protest and reservation of rights would appear to be required immediately. In State practice, seismic surveys in disputed waters have resulted in diplomatic protests in some cases, rather than arrest and prosecution.[32] As a second step, such unilateral actions could also be countered by recourse to any dispute settlement provisions in force between the States concerned. As Tullio Treves has demonstrated, the entry into force of the UNCLOS has increased, directly and indirectly, the possibilities for recourse to litigation, although this possibility is not available in all instances.[33] A third available recourse would be to raise the dispute in an international political forum such as the United Nations. There are two examples. Complaints about Turkish seismic surveys in disputed waters were made by Greece to the UN Security Council. Similarly, Malta complained to the Security Council when an attempt was made by Libya to tow a newly positioned rig away from disputed waters.[34] The Security Council approved the UN Secretary-General's offer to extend his good offices: subsequently, the dispute was referred to the ICJ by agreement between the two States. The conclusion emerges that all these different diplomatic actions, on both the bilateral and the multilateral levels, are clearly preferable to attempting to arrest a trespassing rig and its staff.

Fifth, the Tribunal's judgment explained the finding that Suriname's action "seemed more akin to a threat of military action rather than mere law enforcement

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[32] For example, the ICJ: Aegean Sea Continental Shelf (Greece v. Turkey), Order (11 September 1976).

[33] Treves 2006, p. 417.

[34] Letters dated 1 and 4 September 1980 from the Permanent Representative of Malta to the President of the Security Council, Security Council documents S/14140 and S/14147 (1980). According to Malta, Libya ordered the captain of the rig to cease operations, threatening force. Malta considered that the Libyan actions were a "use of force", "unwarranted and provocative threats", "menacing" and "illegal" (without further elaboration), arguing that they constituted a threat to regional and international peace, as well as an act of molestation. This incident in 1980 had some parallels with the incident between Suriname and Guyana. In this sense, the action off Suriname cannot be said to have been unprecedented: indeed, Libya went much further than Suriname in actually using force by mooring a warship against the rig. This Libyan action appears to have been an act of self-help, rather than a measure of law enforcement.

activity" by pointing to the evidence of the two men on the rig. Drawing the distinction between military activity and law enforcement activity is an important step since the law applicable to the one is different from that applicable to the other. The question arises: how should the distinction best be drawn? What are the relevant tests? The distinction was drawn, in the context of fisheries, by the ICJ in the *Fisheries Jurisdiction case*. The Court's methodology was to analyse Canada's legislation and to compare it with the regulations of other States and the terms of Article 22 of the Straddling Stocks Agreement. The Court did not investigate the views of those involved in the arrest of the *Estai*. True, the Court was not examining the merits, being concerned rather with questions of jurisdiction. Despite this difference and the inherent differences between mobile vessels and static drilling rigs, this methodology appears to be equally applicable also in the context of activities relating to non-living resources. The alternative methodology of according decisive weight to the perceptions of certain persuasive witnesses over those of other less persuasive witnesses would not appear to be the most appropriate test for the future, especially if the witnesses in a particular case were not completely disinterested in the outcome of the case. The distinction between military action and law enforcement is so important that a safe, objective test should be applied.

4 Concluding Observations

This volume is devoted to examining the role of international courts and tribunals in developing international law. In the first place, it has to be noted that courts, whether international or national, are called upon simply to decide specific legal issues that arise in those cases that come before them. This means that courts are not in a position to develop the law on a systematic basis. At the same time, it is well-known that individual decisions of courts may have far-reaching effects on the development of the law. Although, strictly speaking, binding only upon the parties, some decisions in contentious cases have nonetheless influenced State practice worldwide.[35] Similarly, Advisory Opinions by the ICJ and by the Seabed Disputes Chamber of the ITLOS have served to clarify the law and influence the work of international organisations.[36] Most decisions and Advisory Opinions, handed down by courts and tribunals over the decades, have been accepted as general guidance as to the content of the law. However, a few decisions have proved to be unacceptable as a statement of general international policy, with the result that the law based on these decisions has then been reformed by means of

[35] The *I'm Alone* and *Red Crusader* cases can be said to belong to this category.

[36] Judge Treves was the President of the Seabed Disputes Chamber when it issued its Advisory Opinion (ITLOS: Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Seabed Disputes Chamber, Advisory Op. (1 February 2011)).

international conventions, in effect reversing the unpopular or inconvenient decisions for future cases.[37]

In the case of international law, there is no legislator, formally speaking. The nearest to an international legislator is the diplomatic conference called to consider proposals for a law-making convention. During the second half of the twentieth century, important parts of international law, many based on decisions of different courts, were the subject of codification and progressive development. This was achieved through the work of the International Law Commission and law-making conferences. In addition, the law of the sea was the subject of a process of codification, development and reform by the LOS Conference.[38] As a result, major areas of international law are now conventional in character, but courts retain an important role in interpreting the conventions and in deciding issues not covered by them. The number of *lacunae* is surprisingly high.

In Article 38.1.f of the Statute of the ICJ, judicial decisions are described as subsidiary (*auxiliary* in the French text) means for the determination of rules of law.[39] The use of force in law enforcement by coastal States remains a topic on which the current rules of law are determined primarily by the jurisprudence produced by the decisions of several different courts, commissions and tribunals. Latterly, such decisions have taken account of Article 22 of the Straddling Stocks Agreement, as well as customary law.

Judge Treves has contributed positively to this jurisprudence through his participation in the *Saiga (no.2)* case. Earlier, Professor Treves had made significant contributions to the codification and development of the law relating to law enforcement at sea through his participation in negotiations that led to both the UNCLOS and the Straddling Stocks Agreement. To the present writer, he was a learned, hard-working and resourceful colleague in all these different endeavours, both diplomatic and judicial, and it was always a pleasure to work with him.

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[37] For instance, PCIJ: S.S. "Lotus" (France v. Turkey), Judgment (7 September 1927), concerning penal jurisdiction in collision cases was in effect reversed by international conventions, including today Article 97 UNCLOS.

[38] Themes examined in Anderson 2008, chapter 2, esp. pp. 40–43.

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Procedures Entailing Binding Decisions and Disputes Concerning the Interpretation or Application of the Law of the Sea

Rafael Casado Raigón

1. Nearly 30 years ago, Professor Michel Virally published an interesting paper[1] in the *Revue générale de droit international public* in which he set out to ascertain the actual field of operation for international justice through an inventory of the disputes that had in fact been brought before the International Court of Justice (ICJ) and its predecessor, the Permanent Court of International Justice (PCIJ). In his conclusions, this French scholar contended that questions of jurisdiction of moderate importance constituted the *natural* domain of international judicial settlements.

In the pages below, in which I wish to pay a fond tribute to Professor Tullio Treves, I shall limit my study to disputes involving the law of the sea, although here I include not only the cases that have been submitted to the ICJ since 1945,[2]

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[1] Virally 1983.

[2] Three disputes submitted to the PCIJ were related to law of the sea, specifically navigation (passage through the Kiel Canal, PCIJ: S.S. "Wimbledon" (United Kingdom, France, Italy, Japan v. Germany)), national jurisdiction to entertain criminal proceedings for events occurring on the high seas (PCIJ: S.S. "Lotus" (France v. Turkey)) and maritime delimitation (PCIJ: Delimitation of the Territorial Waters between the Island of Castellorizo and the Coasts of Anatolia (Turkey/Italy)). The title of jurisdiction invoked in the first case was Article 37 of the Permanent Court's Statute ("When a Treaty or Convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court will be such tribunal"); in the other two it was a special agreement. In the third, the proceedings instituted were discontinued.

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but also the cases submitted to other procedures entailing binding decisions,[3] i.e., disputes lodged with the International Tribunal for the Law of the Sea (ITLOS) and submitted for arbitration. The aim of the present study is to establish the operational domain of the procedures entailing binding decisions in disputes on the interpretation or application of the law of the sea[4] subject by subject. After identifying the questions submitted to judges or arbitrators, the article also proposes to determine whether the instruments providing for the compulsory jurisdiction of those fora are actually effective (and for what nature of disputes) within the framework of the general principle of the free choice of means.

2. Michel Virally's paper on the ICJ analysed 39 contentious cases lodged with the Court in the 35 years from 1947 to 1982, a period that he claimed was characterised by an *underuse* of the Court. Of these 39 cases, only eight[5] involved the law of the sea. From 1982 to date, the *use* of this judicial body has grown significantly. In the last 29 years (1982–2011), 55 cases[6] have been brought before the Court, 14 of which were in connection with maritime topics. That increase was to be expected in light of the developments involving the law of the sea since the Third United Nations Conference and the concomitant problems of interpretation and application. The question posed in this regard is whether that increase is really significant.

Of the first eight cases (1948–1982), six addressed maritime delimitation (in connection with the continental shelf or fisheries zones),[7] one revolved around the establishment of an exclusive fisheries jurisdiction zone,[8] and the eight dealt with the right of innocent passage.[9] The last 14 cases on the law of the sea (1982–2011), however, have covered a somewhat wider variety of areas: while maritime

[3] The present study is consequently limited to contentious cases.

[4] This study deals not only with cases exclusively affecting the law of the sea, but also others that might be referred to as mixed, involving both territorial and maritime issues or which were related to a number of areas of international law.

[5] Professor Virally considers the fisheries jurisdiction cases (ICJ: Fisheries Jurisdiction (Federal Republic of Germany v. Iceland) and ICJ: Fisheries Jurisdiction (United Kingdom v. Iceland)) to be one.

[6] Counting as one, for instance, are the ten cases relating to the legality of the use of force, but excluding the applications for revision and/or interpretation, with the exception of the ICJ: Request for an Examination of the Situation in Accordance with para 63 of the Court's Judgment of 20 December 1974 in the *Nuclear Tests* (New Zealand v. France) Case.

[7] ICJ: Fisheries Jurisdiction (United Kingdom v. Norway); North Sea Continental Shelf (Federal Republic of Germany/Netherlands); North Sea Continental Shelf (Federal Republic of Germany/Denmark); Aegean Sea Continental Shelf (Greece v. Turkey); Continental Shelf (Tunisia/Libya); Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) and Continental Shelf (Libya/Malta).

[8] ICJ: Fisheries Jurisdiction (UK v. Iceland; Germany v. Iceland), supra n. 5.

[9] ICJ: Corfu Channel (United Kingdom v. Albania).

delimitation (of some or all maritime zones) continued to account for the largest number of cases (eight),[10] other issues were also submitted to the Court, including coastal state sovereignty in internal or territorial waters and freedom of communications and maritime commerce,[11] the legal situation of maritime spaces,[12] passage through straits and the right of innocent passage,[13] fishing and the conservation of fishing resources[14] and the marine environment.[15] Consequently (1947–2011), 22 cases on the law of the sea have been submitted to the ICJ, 15 of which (including the legal status of maritime zones) have addressed maritime delimitation.

In inter-State arbitration, the proportion of law of the sea cases is somewhat smaller than in ICJ-mediated judicial settlement. Further to the information published in the United Nations' *Reports of International Arbitral Awards* and the Permanent Court of Arbitration website, from 1945 to 1982 only four issues involving the law of the sea were submitted to this jurisdictional channel, three of which involved maritime boundaries.[16] From 1982 to 2011 that figure increased substantially: twelve more cases were related to the law of the sea, seven on maritime delimitation (on some or all maritime zones),[17] three dealing with the

[10] ICJ: Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway); Maritime Delimitation between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal); Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain); Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening); Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras); Territorial and Maritime Dispute (Nicaragua v. Colombia); Maritime Delimitation in the Black Sea (Romania v. Ukraine); and Maritime Dispute (Peru v. Chile).

[11] ICJ: Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States).

[12] ICJ: Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening).

[13] ICJ: Passage through the Great Belt (Finland v. Denmark) and Delimitation between Qatar and Bahrain, supra n. 10.

[14] ICJ: Fisheries Jurisdiction (Spain v. Canada) (the Court, defining the object of the demand, rejected Spain's contention that this case related to the exercise of jurisdiction on the high seas. See Casado Raigón 1999) and ICJ: Whaling in the Antarctic (Australia v. Japan).

[15] ICJ: Nuclear Tests II, supra n. 6.

[16] Arbitral Tribunal: Beagle Channel Arbitration (Argentina/Chile); Arbitral Tribunal: Delimitation of the Continental Shelf (United Kingdom/France); and Arbitral Tribunal: Delimitation of Maritime Areas (Canada/France). The fourth case involved the Rights and Duties of Neutral Powers in Naval War (Arbitral Tribunal: Attilio Regolo and other Vessels (Italy/Spain/United Kingdom/United States)).

[17] Arbitral Tribunal: Delimitation of Maritime Boundary between Guinea and Guinea-Bissau (Guinea/Guinea-Bissau); Arbitral Tribunal: Delimitation of Maritime Boundary between Guinea-Bissau and Senegal (Guinea-Bissau/Senegal); PCA Arbitral Tribunal: Maritime Delimitation (Eritrea/Yemen); PCA/UNCLOS Arbitral Tribunal: Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore); PCA/UNCLOS Arbitral Tribunal: Delimitation of the EEZ and the Continental Shelf (Barbados/Trinidad and Tobago); PCA/UNCLOS Arbitral Tribunal: Guyana v. Suriname; and PCA/UNCLOS Arbitral Tribunal: Delimitation between Bangladesh and the Republic of India (Bangladesh v. India).

marine environment[18] in one way or another, two with the conservation and management of living resources[19] and one with the entitlement to establish maritime zones.[20] In all, then, 16 disputes involving the law of the sea have been submitted to arbitration since 1945, over half of which, ten, addressed maritime delimitation.

These numbers indicate that on the whole from 1982 to 2011, the involvement of international judges and arbitrators in maritime disputes grew considerably. In addition, 18 contentious cases have been submitted to the ITLOS since 1997, nine referring to the prompt release mechanism envisaged in Article 292 of the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; hereinafter UNCLOS)[21] and three to the provisional measures laid down in Article 290.5 of that instrument. Of the remaining five, only one addressed maritime delimitation,[22] one the conservation of living resources[23] and three the detention of vessels.[24]

The total number of cases submitted to the ITLOS is an indication that, of the fora provided for in Article 287 of the UNCLOS, this is the one to which States have resorted most assiduously since 1997 to settle their maritime disputes. This provision enables States to freely choose "one or more of the following means (ITLOS; ICJ; an arbitral tribunal constituted in accordance with Annex VII (AT7); or a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein (SAT8)) for the settlement of disputes concerning the interpretation or application of this Convention". Such a choice must be the object of a written declaration. In the "rivalry" between the

[18] PCA Arbitral Tribunal: Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom); Land Reclamation, supra n. 17 (in this case, the plaintiff, Malaysia, had also requested delimitation of its territorial waters) and PCA/UNCLOS Arbitral Tribunal: MOX Plant (Ireland v. United Kingdom).

[19] Arbitral Tribunal: Filleting within the Gulf of St. Lawrence between Canada and France (Canada/France) and the UNCLOS Arbitral Tribunal: Southern Bluefin Tuna (Australia v. Japan; New Zealand v. Japan).

[20] The latter is a case recently disputed by Mauritius and the United Kingdom (PCA/UNCLOS Arbitral Tribunal: Mauritius v. United Kingdom). See Churchill 2011, pp. 509–512.

[21] Entered into force on 16 November 1994.

[22] ITLOS: Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar).

[23] ITLOS: Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union).

[24] ITLOS: M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea); ITLOS: M/V "Louisa" (Saint Vincent and the Grenadines v. Spain); ITLOS: M/V "Virginia G" (Panama/Guinea-Bissau). In these three cases, the detention of vessels was not, however, the sole issue addressed (UNCLOS Article 111 right of hot pursuit, ITLOS: M/V "Saiga" (No. 2), or underwater heritage, ITLOS: M/V "Louisa").

ITLOS and the ICJ, the above assertion mirrors the preferences declared by States in accordance with the provisions of Article 287.[25]

In the "rivalry" between judicial means and arbitration, in turn, the broader use of the former in practice does not mirror the current results of the application of Article 287. In the declarations deposited to date, judicial settlement is explicitly chosen much more often than arbitration. Judicial settlement has been preferred in 32[26] cases (excluding arbitration or otherwise), and arbitration in only six[27] (excluding judicial settlement or otherwise).[28] Nonetheless, by virtue of Article 287.3,[29] the 117 Parties to the Convention that have not lodged a declaration should be considered in the same category as these latter six.[30]

3. Another question posed is in which areas of the law of the sea do judicial and arbitral settlement appear to be operational. In this regard, and in terms of the cases submitted to the procedures entailing binding decisions, five such areas may be identified: (a) maritime delimitation, (b) fisheries and the conservation of living resources, (c) the marine environment, (d) navigation, and (e) arrest and detention of vessels. This classification excludes two cases that involve coastal state rights and obligations within the sphere of their sovereignty.

The ICJ and arbitration figures clearly denote a prevalence of maritime delimitation. It may, however, be premature to draw conclusions as to the operational domain of the ITLOS. Only 14 years have elapsed since the first case was submitted. While twelve of the disputes brought were related to the detention of vessels, nine were submitted pursuant to Article 292, which appears to constitute the Tribunal's *de facto* operational domain. These cases might be regarded as jurisdictional issues of minor importance. Nonetheless, Case No. 16, the *Dispute*

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[25] Except in seven cases in which only the ICJ was chosen, the ICJ was never prioritised over the ITLOS. In 11 cases they were afforded the same priority. The ITLOS was chosen as the sole means in eight cases (although Bangladesh concerning maritime delimitation in the Bay of Bengal with India and Myanmar only and in the Saint Vincent and the Grenadines declaration, only for disputes on the arrest and detention of vessels) and in seven cases with preference over the ICJ. In three other cases, the ITLOS appeared on a list in which the ICJ was missing (without prejudice to the choice of the ITLOS in three declarations for issues relating to prompt release as per Article 292). In three other cases the ICJ was radically excluded.

[26] 27 + 5.

[27] 2 + 3 + 1.

[28] In 27 cases only judicial settlement was chosen, via ICJ or ITLOS or both, with or without mention of priority. By contrast, only five declarations chose arbitration only: in two, AT7 and in three AT7 and SAT8. In three cases judicial means were chosen with no order of preference. In another five preferences were established, with ITLOS consistently ahead of arbitration, whether AT7 or SAT8, except in one declaration where SAT8 was listed ahead of AT7.

[29] "A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII".

[30] In addition, Article 287.5 provides as follows: "If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree". These cases have not been taken into account in this discussion.

C*oncerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*,[31] afforded the ITLOS an excellent opportunity to show that the ICJ (or the ICJ/arbitration tandem) does not monopolise the judicial settlement of disputes involving maritime delimitation. Moreover, in Case No. 7, on the *Swordfish Stocks in the South-Eastern Pacific Ocean* (Chile/European Union),[32] the ITLOS had a major issue at hand (both as regards the object and the parties involved, since one was an international organisation).[33] Due to the agreement ultimately reached by the parties, however, it was deprived of a golden opportunity to broach a subject virtually bereft of case law: fishing on the high seas.[34]

The total figures for all the disputes submitted to these three fora entailing a binding decision are as follows: the first area, maritime delimitation, accounted for 27 cases, widely outnumbering the sum (19) of all the other cases combined: seven of the latter involved fisheries and conservation, four marine environment, three navigation and three arrest and detention (the three submitted to the ITLOS).[35] Adding the two cases excluded from the above classification would round up the total.

4. For the purposes of this paper, these courts' and tribunals' titles of jurisdiction may be classified into three groups. The first group comprises *ad hoc* titles in which the parties express their consent in connection with the dispute after it arises; that consent is reflected in a special treaty (arbitration agreement, special agreement) regarding dispute submission or any other treaty. The second includes *post hoc* titles in which the parties' consent is obtained after the procedure is initiated (*forum prorogatum*). And the third category is *ante hoc* titles in which consent is expressed for as yet non-extant, undetermined or uncertain disputes and is reflected in a treaty which may or may not deal specifically with dispute settlement (such as the UNCLOS) or, in the case of the ICJ, in declarations made pursuant to Article 36.2 of the Statute of the International Court of Justice (San Francisco, 26 June 1945; hereinafter ICJ Statute)[36] (optional clause).

In gross numbers, i.e., irrespective of the situations where the court found that it lacked the necessary jurisdiction to proceed and of the cases of discontinuance, seven of the ICJ's 22 cases invoked *ad hoc* titles (five special[37] and two *ad hoc*

[31] Delimitation in the Bay of Bengal, supra n. 22.

[32] Swordfish, supra n. 23.

[33] Naturally, "only States may be parties in cases before the" International Court of Justice (Article 34.1 of the Statute).

[34] A number of cases involving fishing have been brought before the ITLOS, but in the context of the prompt release provisions of Article 292 UNCLOS.

[35] These latter cases differ from the prompt release of vessels and crews provided for in UNCLOS, Article 292.

[36] Entered into force on 24 October 1945.

[37] North Sea Continental Shelf, supra n. 7; Continental Shelf (Tunisia/Libya), supra n. 7; Gulf of Maine, supra n. 7; Continental Shelf (Libya/Malta), supra n. 7; and Land, Island and Maritime Frontier Dispute, supra n. 12.

agreements),[38] while 13 invoked *ante hoc* titles (eight under the optional clause of Article 36.2 *et seq.* of its Statute[39] and five under treaties,[40] such as the American Treaty on Pacific Settlement (Bogotá, 30 April 1948; hereinafter Pact of Bogotá),[41] the 1928 General Act for the Pacific Settlement of International Disputes[42]; and an exchange of notes), while in one case jurisdiction was established by virtue of *forum prorogatum*.[43] One last dispute on law of the sea matters included in the total was the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case*,[44] with respect to which the Court decided that it did not "fall within the provisions of the said paragraph 63 and must consequently be dismissed".[45]

Of the 16 disputes submitted to arbitration, jurisdiction was established under an arbitration agreement (*ad hoc* title)[46] in eight, while an *ante hoc* title was invoked in the other eight (the UNCLOS on seven occasions and the OSPAR Convention on one).[47] Four of the cases submitted to the ITLOS invoked an *ad hoc*

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[38] Delimitation between Qatar and Bahrain, supra n. 10 and Maritime Delimitation in the Black Sea, supra n. 10. In the Aegean Sea Continental Shelf case, supra n. 7, a joint *communiqué* following an exchange of views was invoked in addition to the General Act for the Pacific Settlement of International Disputes (Geneva, 26 September 1928; entered into force on 16 August 1929).

[39] Fisheries Jurisdiction (UK v. Iceland; Germany v. Iceland), supra n. 5; Nicaragua, supra n. 11; Maritime Delimitation (Denmark v. Norway), supra n. 13; Maritime Delimitation (Guinea-Bissau v. Senegal), supra n. 10; Great Belt, supra n. 13; Land and Maritime Boundary (Cameroon v. Nigeria), supra n. 10; Fisheries Jurisdiction (Spain v. Canada), supra n. 14 and Whaling in the Antarctic, supra n. 15. Article 36.2 (together with an *ante hoc* title) was also invoked in Territorial and Maritime Dispute (Nicaragua v. Honduras), supra n. 10.

[40] Fisheries Jurisdiction (UK v. Iceland; Germany v. Iceland), supra n. 5; Aegean Sea Continental Shelf, supra n. 7; Territorial and Maritime Dispute (Nicaragua v. Honduras), supra n. 10; Territorial and Maritime Dispute (Nicaragua v. Colombia), supra n. 10 and Maritime Dispute (Peru v. Chile), supra n. 10. Treaties were likewise invoked in ICJ: Great Belt, supra n. 13 and Nicaragua, supra n. 11 (Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes to the 1958 Geneva Conventions on the Law of the Sea (Geneva, 29 April 1958; entered into force on 30 September 1962) and a bilateral treaty, respectively).

[41] Entered into force on 6 May 1949.

[42] Supra n. 37.

[43] ICJ: Corfu Channel, supra n. 9.

[44] ICJ: Nuclear Tests II, supra n. 6.

[45] Ibidem, Order (22 September 1995).

[46] Attilio Regolo, supra n. 17; Continental Shelf (United Kingdom/France), supra n. 16; Maritime Delimitation (Guinea/Guinea-Bissau), supra n. 17; Filleting within the Gulf of St. Lawrence, supra n. 19; Maritime Delimitation (Guinea-Bissau/Senegal), supra n. 17; Beagle Channel, supra n. 16; Delimitation of Maritime Areas (Canada/France) and Maritime Delimitation (Eritrea/Yemen).

[47] Southern Bluefin Tuna, supra n. 19; Access to Information, supra n. 18; Land Reclamation, supra n. 17; Arbitral Tribunal: Delimitation (Barbados/Trinidad and Tobago), supra n. 17; Delimitation (Guyana/Suriname), supra n. 17; MOX Plant, supra n. 18; Delimitation (Bangladesh v. India), supra n. 17 and Mauritius v. United Kingdom, supra n. 20.

title (two special agreements and two agreements waiving the right to AT7)[48] and one an *ante hoc* title, the UNCLOS.[49]

In gross terms, therefore, with respect to the three procedures (ICJ, arbitration and ITLOS) as a whole, *ad hoc* titles (i.e., voluntary jurisdiction) were invoked on 19 occasions and *ante hoc* titles (i.e., compulsory jurisdiction) on 22. The use of one vehicle or the other is, then, fairly well balanced.

Is this balance also reflected if we focus on the law of the sea sectors in which those titles have been invoked? A balance clearly exists in the area of maritime delimitation: seven *ad hoc* and eight *ante hoc* in the ICJ; six *ad hoc* and five *ante hoc* in arbitration and one *ad hoc* in the ITLOS. Taking the three procedures together, *ad hoc* titles were invoked in 14 disputes and *ante hoc* titles in 13. No such balance is found in the other areas (fisheries, marine environment, navigation and others), however. ICJ jurisdiction was based on *ante hoc* titles on five occasions and only once[50] on an *ad hoc* title. The numbers for arbitration were five[51] *ante hoc* and two *ad hoc* titles. One of the ITLOS cases invoked an *ante hoc* title and while three invoked *ad hoc* titles. On the whole, *ante hoc* titles were invoked on 11 occasions and *ad hoc* titles on five.

5. However, these figures on the titles of jurisdiction must be compared to the results after excluding the cases where the court (ICJ, arbitration or ITLOS) found that it was without jurisdiction, where proceedings were discontinued or where no ruling on the court's jurisdiction has yet been forthcoming[52]; in other words, only the cases where the title of jurisdiction invoked was actually effective.

In delimitation, of the 27 disputes examined, the title of jurisdiction was effective in 23, giving rise to a decision on the merits of the case. Of these 23 cases, *ad hoc* titles were invoked in 14 (five special agreements for the ICJ,[53] two *ad hoc* treaties for the ICJ,[54] six arbitration agreements[55] and one special

[48] Saiga (no. 2), supra n. 24; Swordfish, supra n. 23; Delimitation in the Bay of Bengal, supra n. 22 and Virginia, supra n. 24.

[49] Louisa, supra n. 24.

[50] Also computed in the delimitation area (Delimitation between Qatar and Bahrain, supra n. 10).

[51] This includes two cases in which delimitation issues also came into play (Land Reclamation, supra n. 17 and Mauritius v. United Kingdom, supra n. 20).

[52] Cases are also sometimes discontinued because the parties reach an out-of-court settlement, the conclusion of which may be largely influenced by the submission of the dispute to the judge or arbitrator. See Virally 1983, pp. 284–5.

[53] North Sea Continental Shelf, supra n. 7; Continental Shelf (Tunisia/Libya), supra n. 7; Gulf of Maine, supra n. 7; Continental Shelf (Libya/Malta), supra n. 7 and Land, Island and Maritime Frontier Dispute, supra n. 12.

[54] Delimitation between Qatar and Bahrain, supra n. 10 and Maritime Delimitation in the Black Sea, supra n. 10.

[55] Continental Shelf (United Kingdom/France), supra n. 16; Maritime Delimitation (Guinea/Guinea-Bissau), supra n. 17; Maritime Delimitation (Guinea-Bissau/Senegal), supra n. 17; Beagle Channel supra n. 16; Maritime Delimitation (Canada/France), supra n. 16 and Maritime Delimitation (Eritrea/Yemen), supra n. 17.

agreement for the ITLOS)[56] and *ante hoc* titles in nine (Article 36.2 of the ICJ Statute on three,[57] the Pact of Bogotá[58] in another three and the UNCLOS (Annex VII)[59] in yet another three).

In the other areas, the title of jurisdiction was effective in only nine of the 19 disputes submitted. Of these nine, five invoked an *ad hoc* title (one *ad hoc* treaty for the ICJ,[60] two arbitral agreements,[61] one special agreement for the ITLOS[62] and one agreement waiving the right to AT7 in favour of the ITLOS)[63] while three invoked an *ante hoc* title (Article 36.2 of the ICJ Statute[64] on one occasion and a treaty[65] on two). Jurisdiction was established by the application of *forum prorogatum* on one occasion.

Taking all the courts as a whole, then, jurisdiction was based on *ad hoc* titles on 18 occasions[66] (seven for the ICJ, eight for arbitration and three for ITLOS), on *ante hoc* titles on 12 (eight ICJ and four arbitration) and on a *post hoc* title once (one ICJ).

ICJ jurisdiction has more often been based on *ante hoc* (eight cases) than on *ad hoc* (seven cases) titles. Five of these *ante hoc* titles consisted of declarations made pursuant to Article 36.2 of the ICJ Statute. In one of those five, the declaration was invoked together with a bilateral treaty and in another together with the Pact of Bogotá.[67] Of the five cases in which the court judged itself to be competent under Article 36.2, four addressed maritime delimitations.

At the time of writing, declarations pursuant to Article 36.2 et seq. of the ICJ Statute are in effect in 66 States. Only 11 of those declarations[68] contain *ratione materiae* reservations relating directly to the law of the sea (on maritime

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[56] Delimitation in the Bay of Bengal, supra n. 22.

[57] Fisheries Jurisdiction (UK v. Iceland; Germany v. Iceland), supra n. 5; Maritime Delimitation (Denmark v. Norway), supra n. 13; and Land and Maritime Boundary (Cameroon v. Nigeria), supra n. 10.

[58] Territorial and Maritime Dispute (Nicaragua v. Honduras), supra n. 10; Territorial and Maritime Dispute (Nicaragua v. Colombia), supra n. 10 and Maritime Dispute (Peru v. Chile), supra n. 10.

[59] Delimitation (Barbados/Trinidad and Tobago), supra n. 17; Guyana v. Suriname, supra n. 10 and Delimitation (Bangladesh v. India), supra n. 17.

[60] Delimitation between Qatar and Bahrain, supra n. 10.

[61] Attilio Regolo, supra n. 16 and Filleting within the Gulf of St. Lawrence, supra n. 19.

[62] Virginia, supra n. 24.

[63] Saiga (no. 2), supra n. 24.

[64] Nicaragua, supra n. 11.

[65] Fisheries Jurisdiction (UK v. Iceland; Germany v. Iceland), supra n. 5 (exchange of notes) and Access to Information, supra n. 18.

[66] The Delimitation between Qatar and Bahrain, supra n. 10 case was included above in both the delimitation area and other areas (navigation).

[67] Nicaragua invoked Article 36.2 of the Statute and a bilateral treaty in Nicaragua, supra n. 11, and the Pact of Bogotá and Article 36.2 of the Statute in Territorial and Maritime Dispute (Nicaragua v. Honduras), supra n. 10.

[68] Australia, Barbados, Canada, Djibouti, Philippines, Honduras, India, Malta, Nigeria, Norway and New Zealand.

delimitation, the conservation and management of living resources, the marine environment, marine scientific research, maritime areas under national jurisdiction, etc.).[69] Only five such declarations exclude maritime delimitation from the court's jurisdiction, although two others[70] include reservations on boundary issues in general. As in any other question, however, other types of reservations along with, of course, the principle of reciprocity that informs the optional clause[71] may be applicable to maritime disputes. Consequently, the reservations on maritime issues do not lead to any relevant conclusions, unlike all the reservations as a whole contained in the Article 36.2 declarations, given the difficulties arising in practice in establishing the court's jurisdiction.

By contrast, Part XV of the UNCLOS, in particular Article 287, has never been invoked as a basis for ICJ jurisdiction. This convention now comprises 162 parts and has been in force for 16 years. It may be safely asserted, therefore, that no relationship exists between the ICJ and the UNCLOS in connection with dispute settlement jurisdiction.

The provisions of the aforementioned Article 287 exclude important categories of disputes by virtue of Article 297 of the same instrument, such as issues involving fisheries in the Exclusive Economic Zone (EEZ). Disputes over the protection and conservation of the marine environment or maritime delimitation are not excluded, however. Further to Article 298 of the UNCLOS, these latter disputes (along with two other categories of disputes) may be the object of discretional exclusion in connection with one or several of the procedures laid down in Article 287. Of the 33 States that have lodged declarations in this regard, 29 exclude disputes on maritime delimitation from the jurisdiction of these fora.

As might be expected, as far as compulsory procedures entailing binding decisions are concerned, Part XV of the UNCLOS is bearing fruit where arbitration pursuant to Annex VII is involved. It has been invoked on seven occasions, but the arbitral court has only ruled[72] (or will presumably rule)[73] on the merits of three. All three cases involve maritime delimitation. Significantly, in the delimitation cases previously submitted to arbitration, the arbitration agreement was the sole title for instituting the procedure.

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[69] Note that according to Norway's declaration, "the limitations and exceptions relating to the settlement of disputes pursuant to the provisions of, and the Norwegian declarations applicable at any given time to, the United Nations Convention on the Law of the Sea of 10 December 1982 and the Agreement of 4 December 1995 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, shall apply to all disputes concerning the law of the sea".

[70] Poland and Suriname.

[71] See, for instance, Casado Raigón 1987, p. 135 ff.

[72] Delimitation (Barbados/Trinidad and Tobago), supra n. 17 and Guyana v. Suriname, supra n. 10.

[73] Delimitation (Bangladesh v. India), supra n. 17.

The ITLOS has logically been the primary beneficiary of the UNCLOS, in particular because of the jurisdiction attributed thereto by Convention Articles 292 and 290 respecting prompt release and provisional measures. Nonetheless, Article 287 has only been invoked as the title of jurisdiction for the ITLOS in one case (Saint Vincent and the Grenadines v. Spain), and perhaps with scant success. Very tellingly in any event, of the five *important* contentious cases submitted to the ITLOS, two were introduced under a special agreement and two by agreement between the parties, which waived their right to an AT7.

6. Part XV, Section 2 of the UNCLOS is therefore bearing fruit in connection with the ITLOS and Annex VII arbitration, but none in connection with the ICJ and special arbitration as per Annex VIII, which has never been used. The ITLOS numbers refer to issues of minor importance, however, if that expression may be used to describe cases of prompt release and the provisional measures established within the framework of other procedures. As noted earlier, four of the five important contentious cases submitted to the ITLOS were instituted under *ad hoc* titles, i.e., via voluntary jurisdiction, and not the compulsory jurisdiction provided for (with limitations) in the UNCLOS or which might be laid down in any other convention.

In arbitration, *ad hoc* titles clearly prevail over their *ante hoc* brethren, i.e., voluntary jurisdiction prevails over compulsory jurisdiction. This is not the case in the ICJ, where the situation is better balanced due in part to the contribution of the Pact of Bogotá, a veritable *gem* for American parties keen on establishing Court jurisdiction. The area where *ante hoc* titles have been most effective is maritime delimitation (nine cases compared to three in all other areas).

Nonetheless, the increasing frequency with which *ante hoc* titles of jurisdiction have been invoked in recent cases submitted to arbitration or the ICJ is an indication that compulsory jurisdiction mechanisms, despite their many limitations, are not futile. In other words, progress is being made in jurisdiction that is not strictly voluntary, albeit very slowly.

The conclusion to be drawn concerning the operational domain of procedures entailing binding decisions in disputes relating to the law of the sea is obvious, at least as regards the ICJ and arbitration, the two most consolidated procedures. If it were not for maritime delimitation, these fora would be truly underused, at least as far as the settlement of disputes on the merits is concerned. The contribution made by the ICJ and arbitration to maritime fisheries, maritime navigation and maritime environment law, then, has been neither abundant nor topical.

In these latter areas of the law of the sea, the ITLOS is by no means lagging behind the other two fora, particularly in light of its infancy (14 years). Its case law in the area of the detention of vessels and, in that connection, in respect of fisheries, the environment or the right of hot pursuit, shows that the ITLOS is building its future and offering its possible clients a guarantee of due

qualifications. This assertion should not, however, be construed as a proposal for it to specialise in areas other than maritime delimitation. As a court specialising in the law of the sea, it should (logically) continue to seek prevalence in disputes involving this area of international law. If it succeeds, it will owe that achievement largely to Justice Tullio Treves's contribution.

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Prospects for the Judicial Settlement of the Dispute Between Croatia and Slovenia Over Piran Bay

Giuseppe Cataldi

1. On 10 November 1975, Italy and Yugoslavia signed the Treaty of Osimo, thus definitively establishing their boundaries and ending a historical phase that had begun with the 1947 Peace Treaty. In Article 2 of the Treaty the two nations delimited the boundary of the Gulf of Trieste, remanding to the enclosures the determination of the single points of the line of demarcation. In essence, they implemented the criterion of equidistance.

With the dissolution of Yugoslavia and Italy's recognition of Croatia and Slovenia as the legitimate successors to previous international commitments, those provisions have now become part of the legal heritage of these two nations, each for its respective competence.

The median line of delimitation of the Gulf of Trieste is certainly unfavorable to Slovenia, given the concave outline of Slovenia's coast and its very limited maritime seafront, to the point that Slovenia may be defined as a "*geographically disadvantaged*" State according to the terminology of the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; hereinafter UNCLOS).[1] Hence, Slovenia's general stance of laying claim to marine spaces of sovereignty or of jurisdiction to the maximum extent possible. Slovenia's position may be summarized as follows:

[1] Entered into force on 16 November 1994. States defined as "geographically disadvantaged" are specifically considered in Article 70 of the UNCLOS with reference to participation in the exploitation of the biological resources of the Exclusive Economic Zone (EEZ) of coastal States of the same region or sub-region.

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(a) Its status as a "geographically disadvantaged" State whose territorial sea is landlocked between waters that are under Italian and Croatian sovereignty or jurisdiction does not prevent Slovenia from aspiring to its own Continental Shelf and its own "Exclusive Economic Zone" (EEZ) or other equivalent zone of jurisdiction beyond the territorial waters, nor to a direct link to the high seas[2];
(b) The waters of Piran Bay cannot be delimited with Croatia according to the median line or by following the course of the land boundary. This is based on the assertion that since Piran Bay is a "historical bay", it is governed by the regime of Slovene internal waters.[3]

These Slovene claims have long been the subject of controversy with Croatia, which has always disputed them.[4] An agreement was reached in 2001, envisaging the recognition of Slovenia's right to an entry corridor to the high seas and the delimitation of Piran Bay, but it was never ratified by Croatia. Afterwards, a number of issues exacerbated the respective positions. First, the 2003 proclamation of a Croatian exclusive Zone of jurisdiction for ecological and fisheries protection which was immediately protested by Slovenia.[5] Slovenia then proceeded to an analogous and perhaps less credible proclamation in 2005.[6] Finally, Slovenia's accession to European Union membership in 2004, characterized by the immediate and persistent obstruction of the new Member State to any negotiations to extend membership also to Croatia.

Recently, however, the legal debate seems finally to be heading toward a positive conclusion. On 25 May 2011, both nations submitted an arbitration agreement for registration with the United Nations to resolve the controversy. The compromise was defined in Stockholm by the agreement of 4 November 2009 and confirmed in Slovenia with the positive results of a popular referendum held on 5

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[2] On the zones of jurisdiction in the Mediterranean see Andreone and Cataldi 2010.

[3] On historic bays see Gioia 1990; Talaie 1999.

[4] See, e.g., the Note Verbale dated 11 January 2005 from the Permanent Mission of the Republic of Croatia to the United Nations addressed to the Secretary-General of the United Nations with reference to the Note from the Permanent Mission of the Republic of Slovenia dated 30 August 2004. (2005) Law of the Sea Bulletin 57: 125–128, hereinafter "Note Verbale (11 January 2005)".

[5] The decision of the Croatian Parliament is reproduced in English in (2003) Croatian International Relations Review 9: 48 ff. See also ibidem, p. 1 ff., the interventions of the Round Table on Fisheries Policy in the Mediterranean and the Extension of Jurisdiction in the Adriatic Sea (Zagreb, 14 October 2003). On the same topic see Cataldi 2004. The protest against the unilateral declaration by Croatia of an exclusive ecological protection and fishing Zone is contained in the Note Verbale dated 7 November 2003 from the Permanent Mission of Slovenia to the United Nations addressed to the Secretary-General. (2003) Law of the Sea Bulletin 53: 70–71.

[6] See Ecological Protection Zone and Continental Shelf of the Republic of Slovenia Act dated 22 October 2005. (2006) Law of the Sea Bulletin 60: 56 ff. The exclusive zone is divided into "zone A" coinciding with the waters of the entire Bay of Piran, "zone B" comprising the territorial waters, "zone C" in international waters or in waters over which Croatia claims exclusive jurisdiction. The "zone C" is destined for ecological protection, the other two zones to control fishing. This is a provisional initiative, according to the statements of the Slovenian authorities, until a mutual agreement will be reached with Croatia.

June 2010. But before analyzing the legitimacy of the Slovene claims, it would be appropriate to review the provisions of the agreement.

2. It must first be noted that the arbitration agreement assigns a significant role to the European Union. In the preambular clauses, the two States congratulate the Commission for "the facilitation offered". Its President is also called upon, in Article 2, to contribute to the appointment of the members of the Arbitral Tribunal. The role of the Presidency of the Council of the European Union, on the other hand, is that of the guarantor of and a witness to the signing of the agreement. Articles 8 and 9 focus on the issue of accession to the Union. The first affirms the irrelevance, for the purposes of the Tribunal's decision, of the documentation submitted unilaterally by the two States during the negotiations on accession; the second ratifies Slovenia's commitment to withdraw its objections to the negotiations for Croatian membership and the commitment of both States not to take positions that might negatively influence ongoing negotiations. At a particularly unhappy historical moment for European integration, it is encouraging to note that membership of the Union, or the aspiration to membership, is a fundamental element in bringing together two nations and encouraging a positive solution to an ongoing dispute.

The task of the Tribunal, according to Article 3, will be the determination of the "course of the maritime and land boundary" between the two States, Slovenia's "junction" to the high seas and the regime governing the use of the relevant maritime areas. In order to attain the first goal, Article 4 indicates the "rules and principles of International law" as the applicable law, while concerning the other two goals the Tribunal will apply "International Law, equity, and the principle of good neighborly relations in order to achieve a fair and just result by taking into account all relevant circumstances". In the second case the Tribunal is given wider discretionary powers, which seems significant considering that a good part of Slovenia's claims are based on a consideration of its previously mentioned unfavorable geographic situation. It should be noted, however, that this circumstance is balanced by the "Statement on Non-Prejudgment" attached to the agreement, in which Croatia declares that "Nothing in the Arbitration Agreement between the Republic of Croatia and the Republic of Slovenia shall be understood as Croatia's consent to Slovenia's claim of its territorial contact with the High Seas". The terminology used is of special interest: the Tribunal will have to determine Slovenia's "junction" to the High Seas, with the limitation of Croatia's opposition to any possibility of "territorial contact".

Article 5, regarding the "critical date", states that no unilateral document or action undertaken subsequent to the date of independence of the two nations (both proclaimed on the same day, 25 June 1991) may be taken into consideration by the Tribunal and that any legal provision and administrative decision of the two countries will have no effect.

Article 7 concerning the decision to be taken by the Tribunal is also worthy of note. It states not only that the decision will be binding and definitive for both parties but, in the specifically drafted para 3, it calls for the commitment of both parties to take all necessary steps to implement the decision, including, where

applicable, the revision of national legislation. This is an atypical provision that reveals a significant and surely appreciable concern regarding effectiveness. It is worth noting that this wording has entered the lexicon of recent judicial decisions by international courts, clearly indicating an increased attention to the scrupulous enforcement of the decisions implemented, by providing specific measures to be adopted to this end by domestic legislation.[7]

3. We can now move on to a more detailed assessment of the legitimacy of Slovenia's claims, bearing in mind the content of the agreement between the two States to resolve the controversy.

The first point to be analyzed concerns Slovenia's stated right to direct contact with the high seas, with the consequent possibility of proclaiming exclusive zones of jurisdiction beyond the territorial waters. This right is affirmed by Slovenia notwithstanding the position of its territorial sea, completely enclosed by the territorial waters of Italy and Croatia, also due to the conformation of the Slovene coastline, as already stated.

The issue involves such ancient principles as the notion that "the land dominates the sea"[8] or the rule, propounded by developing countries at the time of the demand for a "new international economic order", qualifying access to the sea as a "universal right". But one must distinguish between the rigid application of the law and the application of legal rules tempered by considerations of equity and good neighborly relations, as suggested by the text of the agreement between the two States.

In fact, if we were to view the issue simply in terms of the application of the rules of international law, it does not appear that one may question the principle, expressed on more than one occasion by the International Court of Justice, and

[7] The evolution of the case law of the European Court of Human Rights is well known and is intended to indicate to States the general and specific measures to be implemented to remedy confirmed violations and especially to conform national systems to the requirements of the European Convention on Human Rights as interpreted by the Court. To this end, see: Caflish 2005; Esposito 2003; Lambert 2005; Cohen-Jonathan 2005; Zagrebelsky 2008. Significantly, the International Court of Justice (ICJ), especially in the *Avena* case, did not hesitate to indicate the measures strictly necessary for the correct implementation, by the losing State, of the obligations which the Court itself recognizes (ICJ: Avena and Other Mexican Nationals (Mexico v. United States), Judgment (31 March 2004)). For comments on doctrine, see: Simma and Hoppe 2005; Palombino 2005; Le Mon 2005; Dubin 2005. See also, with particular reference to the question of enforcement in the Law of the Sea, Gautier 2009.

[8] The ICJ affirmed in Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment (16 March 2001), para 185: "In previous cases the Court has made clear that maritime rights derive from the coastal State's sovereignty over the land, a principle which can be summarized as 'the land dominates the sea' (North Sea Continental Shelf, *I.C.J. Reports* 1969, p. 51, para 96; Aegean Sea Continental Shelf, *I.C.J. Reports* 1978, p. 36. para 86). It is thus the terrestrial territorial situation that must be taken as starting point for the delimitation of the maritime rights of a coastal State". On this principle in the international jurisprudence see Degan 2009.

obviously endorsed by Croatia, of the impossibility of disregarding geography.[9] A State whose coasts have no exit to the sea certainly cannot aspire to its own territorial sea. In the same manner, a State with a territorial sea landlocked between the sovereign waters of other States cannot legally extend its jurisdiction beyond the external line of delimitation of its territorial sea. Obviously the aspiration to a zone of jurisdiction must yield before the right of another State whose sovereignty over the territorial sea is not limited. In all provisions relating to the coastal zone of jurisdiction, the UNCLOS, ratified by both States, contains the concept of "adjacence" to the territorial sea (or of "contiguity" in the case of the contiguous zone, Article 33 UNCLOS). Naturally Slovenia, like any other "coastal or land-locked" State (Article 17 UNCLOS) enjoys the right of innocent passage through the territorial sea and the right of freedom of navigation through spaces subject to foreign jurisdiction.[10] The observance of these rights guarantees free passage from and toward the high seas, and it is obvious that Slovenia's geographic situation imposes a broad interpretation of these rules, but this does not imply that such a State may lay claim to direct contact with the high seas through the opening of a special corridor exempt from the rules that govern navigation through spaces subject to the jurisdiction or sovereignty of another State.

No exception to the implementation of such principles can be inferred by the fact that the spaces in question are part of an "enclosed or semi-enclosed sea" pursuant to Article 123 of the UNCLOS, as is the case for the Mediterranean and even more so for the Adriatic, defined as a "semi-enclosed sea within a semi-enclosed sea".[11] This point is clear in the decision handed down by the International Court of Justice on 3 February 2009 in the case between Romania and the Ukraine on the delimitation of the Black Sea.[12] Romania had maintained that the features of the enclosed sea of the Black Sea and its modest extension represented a "relevant circumstance" to be considered in the process of delimitation in order to prevent an unfair outcome. The position of the Court regarding this issue is sufficiently clear as it excludes the existence of any type of obligation or condi-

[9] The ICJ affirmed in North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/the Netherlands), Judgment (20 February 1969), para 91, with reference of the relationship between the geographic situation and equity: "There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restrictive coastline." The Note Verbale (11 January 2005), see n. 4 *supra* p. 6 states that: "as properly observed by the Secretary-General in this year's report, the UNCLOS was not meant to correct geographically circumstances, but to provide adequate remedies to the situations where States are at a disadvantage".

[10] On the right of innocent passage see Cataldi 1990.

[11] Sersic 2002.

[12] ICJ: Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment (3 February 2009).

tioning for the coastal States of a semi-enclosed sea that would compel the latter to use a method chosen previously by other coastal States of the same sea.[13]

But, as stated, concerning Slovenia's "junction" to the high seas and the regime of relevant marine areas, the agreement between the Parties calls for the Arbitral Tribunal not to limit itself to ascertaining and applying international law, but to consider other parameters in its evaluation (equity and the principle of good neighborly relations) for the purpose of reaching a *fair and just result, taking into account all relevant circumstances*. The concept of "fair result" is mentioned in the UNCLOS in several of its provisions on the delimitation of marine spaces. This is a concept elaborated upon by international case law, starting with the previously cited 1969 International Court of Justice decision in the North Sea Continental Shelf Case and that tends, when applying the ancient saying "*summus ius summa iniuria"*, to mitigate the *unfair* effects that may result from the application of the same rules to different geographic circumstances. The role of the Tribunal in this case will therefore be to reach a decision that considers, on the scale of fairness, the respective weight of rules of law, principles of equity and *good neighborly relations*. This latter criterion appears to implicitly refer also to the possibility of cooperation between the two States.

We can postulate several solutions that the Tribunal could adopt to this end. A first solution, one that had already been offered by Croatia in the past,[14] is the possibility of granting Slovenia the right of transit through the territorial waters of Croatia, as regulated by Articles 37–39 UNCLOS with reference to the so-called straits "which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone".[15] This right is more extensive that the simple right of innocent passage, as it can never be suspended and allows for overflight and for the navigation of submarines, including in immersion.

A second possibility, surely more advantageous for Slovenia than the preceding one (but the two are not mutually exclusive and may even be used together) consists of opening a navigation corridor that, as requested by Slovenia, will put the Slovene territorial waters in direct communication with the high seas, subject to the jurisdiction of the latter, for purposes of transit but without any other possibilities of using the spaces in question. Such a decision would obviously be

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[13] Ibidem, para 174: "The Court recall that it has intimated earlier, when it briefly described the delimitation methodology, that it would establish a provisional equidistance line (see para. 116 above). This choice was not dictated by the fact that in all the delimitation agreements concerning the Black Sea this method was used".

[14] See again the Note Verbale (11 January 2005), n. 4 *supra*, pp. 126 ff.: "The Republic of Croatia has always been and still is ready to respect the right of innocent passage and not to impair in any way the transit to and out of Slovenian and Italian ports in the Northern Adriatic. Throughout the years of negotiations, the Republic of Croatia even offered a more liberal regime of passage (i.e., transit passage), as well as various fisheries regimes in order to meet the real interest of the Republic of Slovenia, but not at the expenses of Croatian territory".

[15] On the right of transit regime see Fornari 2010.

motivated by the need to consider "special circumstances" relating to geographic position, but it would certainly not be justified (nor practicable) without a close political collaboration between the two countries since, as we have said, it does not appear to be indispensable for purposes of free passage and might even be prevented by the "Statement on Non-Prejudgment" enclosed in the agreement by Croatia. There is a significant precedent regarding this particular point, one that is founded specifically on the existence of particularly close neighborly relations between the two countries in question. This is the agreement between France and Monaco signed in Paris on 16 February 1984 calling for the creation of a corridor 3160 KM wide and 88 KM long in favor of Monaco, stopping at the equidistant line between the Continent and Corsica. In this case France agreed to cede part of its rights to prevent the territorial seas of Monaco, because of the conformation of its coastline, from being completely surrounded by French territorial waters. This was, indubitably, a unilateral concession by France.[16]

4. The other important decision the Tribunal must take concerns the determination of the "course of the maritime and land boundary" between the two States. In this case, as we have stated, the Tribunal will base its decision only on legal considerations.

It must first be said that it is not clear to this author why the two States did not precisely delimit the scope of the dispute regarding the land boundary, which is presently limited to a few villages along the final section of the course followed by the *Dragonja* River. That the importance of the land delimitation is relative in this case is also confirmed by the fact that it is referred to after the maritime one, whereas the contrary is usually the norm, according to the aforementioned principle of "the land dominates the sea". Will the two boundaries be charted separately or in a unitary manner? Obviously it is not possible to envisage any solution in this regard. But it must be noted that, in general, there is a significant difference between a maritime delimitation and the determination of a land boundary, as only with the latter are communities delimited.[17] The decision regarding maritime delimitation may in fact solve the inter-state problem, but that does not mean it will provide a definitive solution to the interests of the communities involved. The decision of the Parties to task the Court with determining both the maritime and the land border between the two States according to the same rules and at the same time could, in our opinion, be a source of some difficulty for the Court itself.

[16] See Convention on Maritime Delimitation between the Government of His Most Serene Highness the Prince of Monaco and the Government of the French Republic (Paris, 16 February 1984; entered into force on 22 August 1985). On the issue see Tavernier 2011, particularly p. 370.

[17] On the point see Conforti 1987.

The Slovene claim of sovereignty over the waters of Piran Bay by virtue of its being a "historic bay" is, obviously, the most fundamental aspect of the issue of maritime delimitation between two States. In this regard, Slovenia states that it has always had a monopoly for the management and exploitation of the waters of the bay, including, as an administrative entity, during the existence of the "Socialist Federal Republic of Yugoslavia". Its fishermen, its functionaries and local police forces, as well as its maritime agencies were, according to this thesis, the "protagonists" of the activities in the entire bay, which has always been indissolubly linked with the Slovene city, and related port, of Piran.[18] With the break up of the Federation and the emergence of new States the distribution of administrative competences that had existed during the old regime was allegedly automatically transformed into sovereign competences by reason of the well known principle of *uti possidetis iuris*, applied especially (but not exclusively) in cases of succession following decolonization. According to this principle, boundaries, whether *de facto* or *de iure*, in force within colonial domains are transformed into international boundaries once the former administrative territories become sovereign States.[19] In the case of Piran Bay, the principle is invoked with reference to maritime boundaries, a possibility that is certainly less frequent compared to the incidence of this same principle in land delimitation.

Croatia protests against the application of the principle in question both in general terms, that is, with reference to its possible use in cases of maritime delimitation, and with specific regard to the issue under review, since according to this position, while the administrative districts of the former Federal state were effective and determined by the central government assigning respective competences over land areas, such was not the case for marine spaces subject to the sovereignty or jurisdiction of the Federation.[20]

Case law and doctrine appear to be oriented in the sense of sustaining the validity and application of the principle of *uti possidetis iuris,* even for the determination of maritime boundaries. This matter was specifically dealt with in the controversy between Guinea Bissau and Senegal, decided by an Arbitral Tribunal with its decision of 31 July 1989,[21] and in two decisions handed down by the International Court of Justice in Honduras vs. Nicaragua[22] and Romania

[18] On this point see the White Paper on the Border between the Republic of Slovenia and the Republic of Croatia by the Slovenian Foreign Ministry (2006), available at www.esiweb.org/pdf/slovenia_SLO-white%20book-2006.pdf, accessed 7 May 2012.

[19] On this phenomenon see Nesi 1996.

[20] See in particular Note Verbale (11 January 2005), n. 4 *supra*.

[21] See Arbitral Tribunal: Delimitation of Maritime Boundary between Guinea-Bissau and Senegal (Guinea Bissau/Senegal), Decision (31 July 1989).

[22] See ICJ: Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment (8 October 2007).

vs. Ukraine, the latter having already been mentioned.[23] The principle was evoked and declared theoretically appropriate to regulating the specific case, but in the end, the ruling in all three cases was that it had not been proven that the maritime jurisdiction and related delimitation of the disputed spaces had been determined by the party that had previously exercised sovereignty over the waters in question. Based on this precedent, and in addition to considerations regarding the difference between these cases and others involving the determination of a boundary between communities, the principle of *uti possidetis iuris* may be considered admissible but much more difficult to prove in cases of maritime delimitations compared to land boundaries.

The above leads us to the matter of the specific application of the principle in the case of Piran Bay. In the absence of an explicit determination of a maritime administrative boundary, which does not appear to ever have been performed in the past, Slovenia will have to provide the Tribunal with proof of its claims through administrative acts and other pertinent documents.[24]

5. A few words on the Italian position regarding this question. Obviously Italy is not a party to the dispute and it can certainly only encourage a solution that would promote cooperation between States bordering on the Gulf of Trieste. Not incidentally, in 1983 Italy entered into an agreement with Yugoslavia on the common fishing zone between the two States to meet the needs of the community of fishermen of the zone, regardless of their nationality.[25] It must nevertheless be noted that Italy's recognition of Croatia and Slovenia as the legitimate successors of Yugoslavia, reiterated in the treaties entered into by the latter with Italy, is being used by Slovenia as an argument in support of its claims. In fact, in the "White Paper on the Border between the Republic of Slovenia and the Republic of Croatia", issued in 2006 by the Slovene Ministry of Foreign Affairs, we read that since Italy has taken note of the succession of Slovenia in the Agreement between Italy and Yugoslavia concerning the delimitation of the continental shelf between the two countries in the Adriatic Sea (Rome, 8 January 1968),[26] it has consequently admitted that Slovenia possesses its own continental shelf. But, as is evident, Italy's interest is simply the observance of previously established boundaries. Receiving the notice of succession without contesting it certainly does not imply a contribution to the constitution of a right if this right lacks justification.

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[23] See supra n. 12.

[24] On this point, and for more general information on the use of the principle of *Uti possidetis iuris* in maritime spaces, see Kohen 2009 (p. 169, especially on delimitation in the Adriatic); see also Bardonnet 1989; Bennouna 2009; Nesi 1991; Sanchez Rodriguez 2004.

[25] On the Agreement see Migliorino 1987.

[26] Entered into force on 21 January 1970.

The only significant effect is the impossibility of claiming ignorance of the Slovene claim.[27]

6. In conclusion it must be noted, in the opinion of this author, that the dispute between Slovenia and Croatia appears, in the end, to be more virtual than real, functional perhaps to the interests of the domestic or international policy of the authorities of both States, but the scope of which is certainly to be minimized in fact. The marine spaces in question are destined for the most part to become common spaces to be used by citizens of the European Union or spaces to be governed by rules issued by the Union. The passage of ships of all nationalities, as we have said, is already ensured by virtue of the right of innocent passage and, all the more so, it will be given to Slovene ships or ships of any other nationality entering or leaving Slovene ports when Croatia becomes a member of the Union. Furthermore, concerning the decision to be handed down on the regime of the waters in dispute, the Tribunal does not necessarily have to opt for delimitation, since by virtue of the two States' future membership of the European Union, it can also opt for a form of "condominium" or a regime of strengthened cooperation. The text of Article 3 of the Agreement does not exclude this possibility. Of course there still remains the issue of the "historic bay", which, if recognized as such, will be subject to the regime of the internal waters of Slovenia. But this problem can also be mitigated, given the possibility of intermediate solutions compared to the extreme possibilities of the recognition or negation of Piran Bay as a historic bay. One could, for example, profit from such precedents as the Agreement on the Gulf of Trieste (Rome, 18 February 1983) and assign part of the Bay for the exclusive exploitation of fishing by a part of the local communities involved, regardless of their nationality, reserving perhaps another part of the Bay to Slovene sovereignty.

In short, common sense can and must guide the Tribunal. If this is done, its decision would be remembered as an important juridical contribution to the evolution of international law, because it will have provided a successful solution to a controversy through the application of the rules of law without neglecting political aspects and principles of equity.[28]

[27] On the point see Degan 2007.

[28] For general considerations inferable from the observation of practice regarding methods of solving international disputes and the contribution of international judicial bodies, see Treves 1999.

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In Praise of Urgency: Reflections on the Practice of ITLOS

Jean-Pierre Cot

1 Introduction

Article 49 of the Rules of the International Tribunal for the Law of the Sea (ITLOS) provides that "The proceedings before the Tribunal shall be conducted without unnecessary delay or expense."

Judge Tullio Treves was the mastermind in drafting the Rules of the Tribunal. His unique experience as one of the major actors in the Third United Nations Conference on the Law of the Sea, his authority as an academic in international law generally and the Law of the Sea in particular, naturally led to his appointment as chairman of the Tribunal Working Group set up in 1996 to draft the Rules of ITLOS.

Commenting on the Rules shortly after their adoption, Judge Treves noted the central role of Article 49: "Not only did the Tribunal decide to formulate this policy in an Article of the Rules. It did its best to implement the policy in the specific rules so adopted."[1] Reference to "unnecessary delay or expense" was triggered by the specific functions of the Tribunal and the Chamber for Seabed disputes. It also took into account the remarks of the working group of the British Institute of International

[1] Treves 1997, p. 343: "Non seulement décida-t-il de formuler cette politique dans un Article du Règlement. Il s'efforça d'y donner application dans les dispositions concrètes de celui-ci".

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and Comparative Law, published in 1997 and critical of the practice of the International Court of Justice, in particular concerning unnecessary delays.[2]

Judge Treves' views were shared by the other members of the Tribunal when drafting the Rules, Guidelines and Resolution on the internal judicial practice of the Tribunal. They clearly stated their intentions in a variety of contributions shortly after the adoption of the Rules.[3]

As the late Judge Laing noted: "At the heart of the scheme as finally adopted on 28 October 1997, is Article 49 (…)"[4] He aptly described the rationale behind the decision to proceed as swiftly as possible: "To a large degree, ITLOS was created to facilitate international transportation, commerce and trade (…). Transportation, commercial efficiency and promptness are also largely the *raison d'être* of the Tribunal's Seabed Disputes Chamber (…)."[5]

The key rule was Article 49; the main preoccupation was with expeditiousness. It could well have turned out otherwise. Slow proceedings in judicial proceedings may sometimes be advisable. Judge Bedjaoui, considering the possibility of three rounds of written procedures, noted some years ago that one of the main attractions of the judicial settlement of disputes could well be its leisurely pace.[6] Bedjaoui probably had in mind the cooling-off effect of judicial proceedings, taking place within the hush and serenity of the courtroom and allowing time for the parties to negotiate behind the scenes while the public sittings were going on for weeks on end. Such was not the choice of the drafters of the UN Convention on the Law of the Sea (Montego Bay, 10 December 1982, entered into force on 16 November 1994 hereinafter Convention). For example, the expression "prompt release" carries an element of promptitude which is central to the proceedings. The judges, when drafting the rules, considered that the specific nature of the cases dealt with by the Tribunal, pertaining to maritime communication, economic activities or the preservation of the marine environment, called for speed and cost-effectiveness in judicial pronouncements.

It may be of interest to reflect upon the practice of the Tribunal 15 years later and to measure to what extent Article 49 has been effectively implemented by ITLOS. The focus of this paper will not be on the substance of the procedures and proceedings of the Tribunal, but on the specific question of unnecessary delays and expenses. It will only address issues examined by the Tribunal in its case law. It will concentrate on the two related aspects of the issue: Urgent Procedures (Sect. 2) and Urgency in the Proceedings (Sect. 3).

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[2] Bowett, Brownlie, Crawford, Sir Sinclair, Sir Watts 1996. The Working Group was composed of Sir Arthur Watts, Sir Ian Sinclair, Professors Bowett, Brownlie and Crawford. On the issue of the working methods of the ICJ more generally cf. Bedjaoui 1991; Guillaume 1996; Guillaume 2003; Lachs 1979; Lillich and White 1976; Thirlway 2006.

[3] On this issue, cf. Treves 1997; Treves 2001; Anderson 2001b; Laing 2001; Rahmatullah Khan 2001; Chandrasekhara Rao 2001b, pp. 1–12; Chandrasekhara Rao 2001a; Chandrasekhara Rao and Gautier 2006 (in particular, the commentary on Article 49 by Judge Mensah, pp. 144–145).

[4] Ibidem, p. 224.

[5] Ibidem, pp. 222–223.

[6] Bedjaoui 1991, p. 91.

2 Urgent Procedures

The Tribunal has implemented two sorts of urgent procedures since 1996: the prompt release of vessels and provisional measures.

Prompt release is provided for by Article 292 of the Convention. Paragraph 3 instructs the Tribunal to "deal without delay with the application for release". Article 112 of the Rules of the Tribunal specifies the time constraints.[7] The Rules do not provide for any flexibility in the eventual adaptation of the timetable. The deadlines are fixed and rigid.[8] The Tribunal is to give priority to applications for the release of a vessel or crew over all other proceedings before Tribunal. The President fixes the earliest possible date for the hearing within a period of 15 days following the date of the application. Hearings are organized over two days. The decision is to be read at a public sitting not more than 14 days after the closure of the hearing. The procedure is completed within a month of the date of the application. The Tribunal must deliberate within two weeks, including the initial deliberation, the appointment of the drafting committee, two readings, the adoption of the judgment and the drafting of separate or dissenting opinions.

Prompt release cases are relatively straightforward. They entail more or less the same ingredients in each case. They are not preceded by a lengthy negotiation between the Parties. Over the years, the Tribunal has elaborated a corpus of rules, clarifying the notions of a reasonable bond, etc.

The pressure on the judges and staff is nevertheless quite intense. The Tribunal is assisted by a small handful of legal officers. The strain is quite evident, as the Registry must come up with drafts within a few days and sometimes a few hours. Translation in due time is a major problem. Over 80 % of the original texts, whether drafted by judges or staff, are in English and must be translated into French. The bulk of texts are outsourced for translation with control by the Registrar. Speed is of essence given the timeframe. This is true in particular of the translation of amendments.

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[7] Rules of Procedure, Article 112: "1. The Tribunal shall give priority to applications for release of vessels or crews over all other proceedings before the Tribunal. However, if the Tribunal is seized of an application for release of a vessel or its crew and of a request for the prescription of provisional measures, it shall take the necessary measures to ensure that both the application and the request are dealt with without delay. 2. If the applicant has so requested in the application, the application shall be dealt with by the Chamber of Summary Procedure, provided that, within five days of the receipt of notice of the application, the detaining State notifies the Tribunal that it concurs with the request. 3. The Tribunal, or the President if the Tribunal is not sitting, shall fix the earliest possible date, within a period of 15 days commencing with the first working day following the date on which the application is received, for a hearing at which each of the parties shall be accorded, unless otherwise decided, one day to present its evidence and arguments. 4. The decision of the Tribunal shall be in the form of a judgment. The judgment shall be adopted as soon as possible and shall be read at a public sitting of the Tribunal to be held not later than 14 days after the closure of the hearing. The parties shall be notified of the date of the sitting".

[8] Akl 2001.

Pressure of time complicates decisions. In the *Juno Trader* case, the defendant decided not to file the written response provided for by Article 111.4 of the Rules of the Tribunal.[9] Guinea-Bissau was perfectly entitled to abstain from answering in writing, as the provision of Article 111.4 is not mandatory. But, as a result, the oral proceedings were unbalanced. The applicant, St. Vincent and the Grenadines, had no other choice in its first round than to repeat the contents of its application without any knowledge of the defendant's position. On the other hand, the defendant took full advantage of its two rounds.[10]

As to the internal judicial proceedings of the Tribunal, they are simple. There is simply no time to draft written notes. Written amendments are circulated among colleagues by e-mail before official translation and communication, as time is a paramount consideration if one wishes to have some influence on the outcome. Deliberations are mainly oral, with the initial deliberation, two full readings and the vote, all within a fortnight. Individual and dissenting opinions are short and to the point by virtue of necessity.

There is inevitably a degree of flexibility as to admission of evidence. Article 71.2 of the Rules authorizes the belated production of documents if the Tribunal so decides. In prompt release cases, this may well be the case. In the *Volga* case, the oral proceedings took place on 12 and 13 December 2002. The Tribunal was informed of the release of the crew on 21 December and redrafted the judgment accordingly for reading on 23 December.[11]

The timetable for provisional measures is more or less the same. The relevant provision in the Convention is Article 289. The corresponding provisions in the Rules of the Tribunal are Articles 89 and 90.[12] The tightness of the schedule is

[9] ITLOS: "Juno Trader" (Saint Vincent and the Grenadines v. Guinea-Bissau), Prompt Release.

[10] In my opinion, with hindsight, the correct decision for the Tribunal would have been to reverse the order of oral presentations. But retrospective views are always easier to produce than actual decisions under the pressure of strict time limits.

[11] ITLOS Reports, vol. 6, 2002, p. 26.

[12] Rules of Procedure, Article 89.1: "A party may submit a request for the prescription of provisional measures under Article 290, paragraph 1, of the Convention at any time during the course of the proceedings in a dispute submitted to the Tribunal. 2. Pending the constitution of an arbitral tribunal to which a dispute is being submitted, a party may submit a request for the prescription of provisional measures under Article 290, paragraph 5, of the Convention: (a) at any time if the parties have so agreed; (b) at any time after two weeks from the notification to the other party of a request for provisional measures if the parties have not agreed that such measures may be prescribed by another court or tribunal. 3. The request shall be in writing and specify the measures requested the reasons therefore and the possible consequences, if it is not granted, for the preservation of the respective rights of the parties or for the prevention of serious harm to the marine environment. 4. A request for the prescription of provisional measures under Article 290, paragraph 5, of the Convention shall also indicate the legal grounds upon which the arbitral tribunal which is to be constituted would have jurisdiction and the urgency of the situation. A certified copy of the notification or of any other document instituting the proceedings before the arbitral tribunal shall be annexed to the request. 5. When a request for provisional measures has been made, the Tribunal may prescribe measures different in whole or in part from those requested and indicate the parties which are to take or to comply with each measure". Rules of

compounded by the specifics of the provisional measures procedure in the Convention. Article 89.2 confers jurisdiction on the Tribunal to prescribe provisional measures pending the constitution of an arbitral tribunal. The Tribunal has no advance notice of the matter and is to decide upon provisional measures in often complex disputes. One may add the frustration of seeing the merits of the case dealt with in another forum and the risk of a contradiction between the decision to prescribe provisional measures and the position taken by the Annex VII arbitral tribunal on *prima facie* jurisdiction. Such was the case in the *Bluefin Tuna* dispute.[13] The result was an "unnecessary delay and expense".

Parties and the Tribunal have found ways to alleviate such situations by organizing informal cooperation between the relevant fora. In the *Mox* case, Judge Mensah sat in the Tribunal prescribing provisional measures then went on to chair the Annex VII arbitral tribunal.[14] In the *Land Reclamation* case, the two ad hoc judges, Kamal Hussein and Bernard Oxman, sat in the provisional measures phase with the Tribunal and wrote a common individual opinion concurring with the decision.[15] They then sat on the arbitral tribunal and oversaw the negotiations between the Parties on the basis of the ITLOS order prescribing the provisional measures. The Parties did find an agreement with the blessing of the arbitral tribunal.

Coming back to the issue of promptitude, provisional measures give rise to more difficulties than prompt release. The variety and technicality of the issues are hard to cope with in such a short time. The procedure is not without its problems due to the short time span. The President and Tribunal have to take difficult decisions on the spot on issues such as experts, witnesses or evidence.

The Tribunal has been confined to urgent procedures for a long time span. The first case on the merits, "*Saiga*" *(no. 2)*, was decided in 1999.[16] The second case, concerning the maritime boundary in the *Bay of Bengal*, was decided in 2012.[17] These long and lean years have been quite frustrating for judges and staff. But judges and the registry have learnt to work quickly, to deliver a judgment within a

(Footnote 12 continued)
Procedure, Article 90: "1. Subject to Article 112, paragraph 1, a request for the prescription of provisional measures has priority over all other proceedings before the Tribunal. 2. The Tribunal, or the President if the Tribunal is not sitting, shall fix the earliest possible date for a hearing. 3. The Tribunal shall take into account any observations that may be presented to it by a party before the closure of the hearing. 4. Pending the meeting of the Tribunal, the President of the Tribunal may call upon the parties to act in such a way as will enable any order the Tribunal may make on the request for provisional measures to have its appropriate effects".

[13] ITLOS: Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Order (27 August 1999).

[14] ITLOS: MOX Plant (Ireland v. United Kingdom), Order (3 December 2001).

[15] ITLOS: Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Order (8 October 2003).

[16] ITLOS: M/V "Saiga" (no. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment (1 July 1999).

[17] ITLOS: Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgement (14 March 2012).

few weeks with individual and dissenting opinions, without unnecessary delay or expenses for the Tribunal as well as for the Parties.

To sum up on urgent procedures, by and large the Tribunal has met the standards expected by the drafters of the Rules, Resolution, and Guidelines. It has been able to deliver its judgments and orders within the prescribed time limits. It has implemented the scant provisions of the Convention on prompt release in a manner generally accepted by the Parties and the international law community at large. It has found new and original ways of ensuring a follow-up to the provisional measures it has prescribed. It has interestingly contributed to the concept of preventing serious harm to the marine environment.

The Tribunal has sometimes been criticized for overextending its jurisdiction and setting a low standard for *prima facie* jurisdiction. Its decision on this issue was overturned by the arbitral tribunal in the *Bluefin Tuna* case. But the International Court of Justice has run into the same sort of difficulties on occasion.

3 Urgency in the Proceedings

Ensuring proceedings "without unnecessary delay" is not restricted to urgent procedures as such. It was also the intention of the drafters of the Rules and Guidelines to adjudicate swiftly and efficiently in proceedings dealing with the merits of a case. The issue here is one of a balance between the requirements of expeditiousness and the quality of the final judgment or advisory opinion.

The Tribunal has examined or is in the process of examining five cases on the merits. Four cases are contentious ones: Case N° 2, *The M/V "Saiga" (no. 2) (Saint Vincent and the Grenadines v. Guinea)*; Case N° 16, *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*; Case N° 18, *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*; Case N° 19, *The M/V "Virginia G" Case (Panama v. Guinea-Bissau)*. The fifth is an advisory opinion: Case N° 17, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*.[18] Cases N° 2, N° 16, and N° 17 have been completed at the time of this contribution. The other cases are still ongoing.

Written proceedings are regulated by the Rules. The time limits are strict: six months for each written pleading. Article 59.2 adds that "The Tribunal may at the request of a party extend any time-limit or decide that any step taken after the expiration of the time-limit fixed therefore shall be considered as valid. It may not do so, however, unless it is satisfied that there is adequate justification for the

[18] ITLOS: Reponsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Seabed Disputes Chamber, Advisory Op. (1 February 2011).

request. In either case the other party shall be given an opportunity to state its views within a time-limit to be fixed by the Tribunal."

These time limits have been respected in the cases before the Tribunal. In "*Saiga*" *(no. 2)*, the time limits were four months for each pleading in the first round, one month and a half for the Reply and Rejoinder. In the *Bay of Bengal* case, the respective time limits were five months and two and a half months. The time limits in the two other contentious cases are for the moment largely within the six months for the Memorials and the three months for the Reply. As to the Advisory Opinion, written statements were to be filed within the three months of the initial Order.

Oral statements were kept within a reasonable limit in "*Saiga*" *(no. 2)*. The Tribunal held 18 sittings. But 11 of the sittings were for the examination of witnesses. The statements of the Parties filled in 7 sittings. The same cannot be said of the oral proceedings in the *Bay of Bengal* case. A total of 15 sittings, with no witnesses to be examined, were necessary to hear the Parties. The statements were inevitably repetitious and the Parties did not use up their time in the last sittings. Article 75 of the Rules provides that the oral statements shall be as succinct as possible. It seems to have been overlooked in this case. The judges, when drafting the Rules, were contemplating some 3 or 4 days of oral pleadings.[19] Part of the responsibilities lie with the Parties, as they convey their wishes to the President. But the President has his say in the matter if he so decides. The practice of the International Court of Justice has amply demonstrated that, when a President decides to act, the Parties accept the decision.

The Tribunal had decided to endorse a "long morning" approach in its Guidelines so as to proceed quickly, while leaving time in the afternoon for extra sessions if necessary or for an examination of the case by the judges, individually or collectively. Article 17 of the Guidelines provides that the Tribunal sits between 9 am and 1 pm on all days when it holds oral hearings. That provision seems to have been abandoned. The approach is now the "short morning" approach, not really a time-saving policy. To be fair, one must add that, when necessary, the Tribunal will hold two sittings in one day. But that is the exception.

The advisory proceedings were far swifter. Four sessions were enough to hear the statements of nine States parties, the International Seabed Authority, the Intergovernmental Oceanic Commission of UNESCO and the International Union for the Conservation of Nature and Natural Resources.

The Rules call for the Tribunal to have an active role in the oral proceedings. The Tribunal may at any time indicate any points or issues which it would like the Parties especially to address or on which it considers that there has been sufficient argumentation (Article 76.1). The Tribunal and the individual judges may put questions and ask for explanations (Articles 76.2 and 76.3). Judge Rao noted that the Guidelines "(…) should convey that the Tribunal would not adopt a passive attitude in face of ill-prepared pleadings, unwarranted delays in the submission of

[19] Ramathullah Khan 2001, p. 15.

pleadings and repetitive oral proceedings, but would exercise firm control over the conduct of the proceedings in the interests of expeditious disposal of cases."[20] In contrast to the very formal and passive attitude of the International Court of Justice regarding the issue, the Tribunal was expected to adopt a more active attitude. Such was the case in *"Saiga" no. 2* and in the advisory opinion proceedings of the Chamber for seabed disputes. But, regrettably, it has been reluctant in recent years to take an active role in the oral proceedings, fearing that such an attitude could be misinterpreted by the Parties.

Questions have been put to the Parties by the Tribunal, but not by individual judges. The Rules do provide for both types of questions, but judges have refrained from posing individual questions. As Judge Anderson nevertheless noted, there may be a case for individual judges to pose a question if they have a different opinion than the majority.[21] I may add that the individual questions do not reflect the general position of the Tribunal and thus are less prone to a suspicion that they convey some sort of hidden agenda.

If the Tribunal faces some constraints as to the organization of the written and oral proceedings, it is free to arrange its internal deliberations within the framework set by the Rules and the Resolution on Judicial Practice.

It may be useful to consider the timing of the deliberations at the International Court of Justice. On an ordinary case on the merits, the initial deliberation will be conducted in some five days. The first reading of the draft judgment may take a week or so. The second reading and vote are shorter. A judgment is normally delivered some six months after the closure of the oral proceedings. The protracted nature of the proceedings before the Court is largely due to a heavy docket and to the planning of the meetings, as pointed out by the Working Group chaired by Sir Arthur Watts.[22]

The intent of the Tribunal was to be much swifter than the International Court of Justice, thus fully implementing Article 49 of the Rules. Article 46, more specifically, provides that time limits shall be as short as the nature of the case permits.

According to Article 2 of the Resolution on the Internal Judicial Practice, after the closure of the written proceedings, each judge may, within five weeks, file a brief written note. The idea is to ensure that the judges have had ample time to study the written proceedings.[23] Judge Treves insists upon the importance of the initial deliberation. But if the Tribunal keeps a hands-off attitude during the oral proceedings, the initial deliberation loses much of its importance. It nevertheless attunes the bench to the basic elements of the case and explains to a certain degree the attentive attitude of the judges during the hearings.

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[20] Chandrasekhara Rao 2001b, p. 189.

[21] Anderson 2001a, pp. 64–65.

[22] Bowett, Brownlie, Crawford, Sinclair, and Watts 1996; Bejaoui 1991, p. 102.

[23] The Watts Working Group notes that the ICJ judges do not always examine the written proceedings before the hearings, but tend rather to delve into the Memorials after the oral proceedings. Ibidem, para 21.

At the end of the oral proceedings, the judges may summarize their tentative opinions in the form of speaking notes filed within four working days (Resolution, Article 5). The Tribunal decided not to follow the cumbersome internal procedure of the ICJ. Judges are not required to draft a note stating their position on the main issues. The drafters of the Rules felt that such a requirement slows down the proceedings and complicates consensus-building, each judge feeling committed to his or her written statement. It is true that the ICJ deliberations are burdened by the requirement of written notes, translated and circulated simultaneously and anonymously.[24] But I do not believe that the discussions are less free or that judges in the ICJ feel more committed to a position because of their written note. On the other hand, in the absence of any obligation to write a note, certain judges at ITLOS act more as "passengers" than as "members of the crew", to use a metaphor coined by a former judge. The difficulty is compounded by the fact that judges at ITLOS do not enjoy the assistance of a clerk or even an intern to help them sort out the issues, find the references, or serve as a bouncing ball to try out ideas. Each judge is strictly on his own, with very limited secretarial facilities.

As a net result, notes are not filed within the strict time limits set by the Resolution. The process is more informal. Judges feel free to write notes at any time during the deliberations. The notes can be of a general nature or address a particular difficulty. The Registry translates and circulates these informal notes among the judges. The result is an interesting flow of input during the initial deliberation.

The indicative voting takes place at the end of the initial deliberation. Abstentions are allowed at this phase of the proceedings. They can be a useful tool in consensus-building. The first and second readings follow more or less the same pattern as the ICJ. The final vote takes place as in the ICJ on each separate issue, with the indication of the position of every judge and followed by declarations, individual and dissenting opinions. Traditionally, the opinions of judges are shorter than in the ICJ and are expected to be to the point.

The more casual approach to deliberations was intended in order to shorten the deliberations and deliver judgments, following the indications in Article 49 of the Rules, "without unnecessary delay or expense."

The net result, as far as I can see, does not meet these expectations. In the *Bay of Bengal* case, the Judgment was delivered in March 2012. That is some six months after the end of the oral proceedings, a time span which is very comparable to that of the International Court of Justice in similar cases, without the excuse of a heavy docket.

One may note a two-week so-called administrative session between the oral proceedings and the initial deliberation. But the Tribunal could well have organized its workload with morning sessions on administrative matters and deliberations in the afternoon or *vice versa*.

[24] The anonymous character of the ICJ notes is something of a "secret de polichinelle", to use a French expression.

The calendar of deliberations indicates lengthy discussions[25]: approximately four weeks for the initial deliberations after the oral proceedings; two and a half weeks for the first reading; two weeks for the second reading. The time allowed for deliberations is far more generous than at the International Court of Justice and cannot only be explained by the presence of 21 judges against 15 judges at the ICJ.

The same is true of the drafting committee. The Rules provide for a drafting committee of five members, compared to the three members at the International Court of Justice. The President is an *ex officio* member of the committee, meaning six members.[26] The idea was to reflect the main legal traditions within the committee. In practice, it has reflected the roughly geographical representation of the five voting groups among the States Parties.

Such a cumbersome architecture still has to prove that the quality of the drafting is enhanced by the number of members of the drafting committee. It may be of interest to note that, in drafting the Advisory Opinion on the *Responsibilities and Obligations of Sponsoring States*, the Seabed Disputes Chamber chaired by Judge Treves appointed a drafting committee of three members, including the President of the Chamber. The result was a well-drafted opinion by all standards.

As to the Judgment, it is delivered along the ICJ pattern, with separate votes on each issue and indicating the position of each Judge. Separate and dissenting opinions are expected to be short and to the point.[27] Such is the case in all urgent proceedings. In *M/V "Saiga" (no. 2)*, the separate and dissenting opinions were reasonably succinct. In the Advisory Opinion on the *Responsibilities and Obligations of Sponsoring States*, the decision was unanimous with no separate or dissenting opinions.

4 Concluding Remarks

Overall, Article 49 of the Tribunal Rules has been reasonably implemented. The Tribunal has been quite successful in dealing with urgent procedures. It has disposed of the cases of prompt release and of provisional measures within the strict time-table provided for by its Statute and Rules. On those occasions it has developed an interesting jurisprudence on the conditions of prompt release, the concept of a reasonable bond and respect for human rights. Orders on provisional measures have clarified difficult issues of jurisdiction and produced important dicta

[25] Cf. Meeting of States Parties. Report on Budgetary Matters for the Financial Periods 2009–2010 and 2011–2012, Doc. SPLOS/224 (4 April 2011), pp. 4 ff.; Report of the Twenty-First Meeting of the States Parties, Doc. SPLOS231 (29 June 2011), pp. 8–9.

[26] At the ICJ, the committee is composed of the President and two other members.

[27] Guidelines, Article 8.6: "Separate or dissenting opinions, which may be individual or collective, should be submitted within a time-limit fixed by the Tribunal. They should take account of any changes made to the draft judgment pursuant to paragraphs 4 and 5 and should concentrate on the remaining points of difference with the judgment."

on issues such as the protection of the marine environment. Moreover, the Tribunal has taken full advantage of the Statute and Rules to ensure a follow-up to the provisional measures.

On cases relating to the merits, the picture is currently not as clear. The Tribunal made a good start with *M/V "Saiga" (no. 2)* in terms of the swiftness of the proceedings, even though it was deeply divided on the merits of the case. The judgment was delivered three and a half months after the closure of the oral proceedings. By contrast, in Bay of Bengal, the Judgment is expected a full six months after the closure of the lengthy oral proceedings.

If the Tribunal continues to entertain lengthy proceedings, it will lose what was considered as a cutting edge by the drafters of Article 49 of the Rules in the inevitable competition between international courts and tribunals and the ensuing forum shopping by the Parties. As Judge Rao noted in 2001, the Tribunal "(…) was keen to ensure efficient, cost-effective and user-friendly administration of justice, and also to be the central forum for the rapid settlement of disputes involving the law of the sea."[28] It would be well advised to keep this advice in mind.

The Tribunal can work more swiftly and produce good Judgments and Opinions. Judge Treves, chairing the Seabed Disputes Chamber in the Advisory Opinion on the *Responsibilities and Obligations of Sponsoring States*, amply proved the point. I hope that the Tribunal in the future will follow that example.

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[28] Chandrasekhara Rao and Ramathullah Khan 2001, p. 187.

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International Courts and the Development of the International Law of the Sea on the Delimitation of the Continental Shelf

Umberto Leanza

1 Foreword

International case law has played a key role in reconstructing the contents of the rules on marine boundaries and, in particular, on the continental shelf. This case law has unfolded with logical legal continuity from the late 1960s onwards and has been consolidated, with no abrupt changes of direction, despite the partial change in the relevant conventional international standards—the Convention on the Continental Shelf (Geneva, 29 April 1958; hereinafter GCCS 1958)[1] and the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; hereinafter UNCLOS 1982)[2]—as a result. However, in order to identify the criteria for the delimitation of the continental shelf between opposite or adjacent States, it was and still is essential to determine the relationship between the rules of general codification and the customary rules of international law that have evolved as a result of State practice.[3]

First, the issue of the delimitation of the continental shelf between States with opposite or adjacent coasts was settled in international case law in the 1969 decision of the International Court of Justice (ICJ) on the delimitation of the

[1] Entered into force on 10 June 1964.
[2] Entered into force on 14 November 1994.
[3] For State practice see: Treves 1990, pp. 9–302.

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continental shelf in the North Sea[4] and in the arbitral decisions of 1977 and 1978 on the delimitation of the continental shelf in the English Channel.[5]

Furthermore, the same issue is governed by a different regime in UNCLOS 1982, which is analogous to the one governing the delimitation of the exclusive economic zone, despite differences between the two institutions.

International case law subsequent to that Convention, including decisions of the ICJ and of arbitral tribunals, seems to confirm this direction in general international law: the decisions are clearly more in line with the delimitation criteria set forth in UNCLOS 1982 than with those of GCCS 1958. The 1982 decision of the ICJ on the delimitation of the continental shelf between Libya and Tunisia[6] and the 1985 decision on delimitation between Libya and Malta[7] are cases in point. Interestingly, both of these decisions concern the delimitation of the seabed in the Mediterranean.

In this context, with reference to the policy of the median line and equidistance as a general rule, and the relevant circumstances as exceptions to vary the effect provided by GCCS 1958, the international case law has clarified that these criteria do not constitute any basis of customary international law for maritime delimitation. In summary, with reference to the criteria for the delimitation of the continental shelf between opposite or adjacent States, the courts have largely abandoned the method of the median line or equidistance corrected by the relevant circumstances set out in GCCS 1958 by taking the approach of a single unit address: the pursuit of an equitable solution in delimitation agreements that States will adopt.

Most recently, the ICJ has reiterated this case law and has intensified the aspects concerning the method for attaining an equitable delimitation of the continental shelf, thereby underlying the similarities between the equitable principle/relevant circumstances method and the equidistance/special circumstances method.[8] The method is therefore fundamental since it gives content to the equitable solution rule.

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[4] ICJ: North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/the Netherlands), Judgments (20 February 1969).

[5] Court of Arbitration (constituted in accordance with the Arbitration *ad hoc* Agreement of 10 July 1975): Delimitation of the Continental Shelf (United Kingdom v. France), Decision (30 June 1977) and Interpretative Decisions (14 March 1978).

[6] ICJ: Continental Shelf (Tunisia/Libya), Judgment (24 February 1982).

[7] ICJ: Continental Shelf (Libya/Malta), Judgment (3 June 1985).

[8] ICJ: Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment (16 March 2001), para 231; Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment (11 June 1998), para 228; Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment (14 June 1993), paras 48 and 50; Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment (3 February 2009), para 120 (where the Court stated that: "The course of the final line should result in an equitable solution (Articles 74 and 83 of UNCLOS). Therefore, the Court will at the next, second stage consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result"); Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea

2 Detecting the Customary Rule on the Delimitation of the Continental Shelf Beyond the "Equidistance/ Special Circumstances" Treaty Rule

The first decision relating to the delimitation of the continental shelf between the Federal Republic of Germany, Denmark, and the Netherlands of 20 February 1969 made clear that the criteria of the median line and equidistance are not grounded in customary international law but derive from the law of treaties and that, therefore, they are not binding upon a State which is not a Contracting Party to GCCS 1958.[9] Consequently, in such cases the delimitation of the continental shelf may only be accomplished by an agreement between opposite or adjacent States and, until such a delimitation agreement is reached, no coastal State may claim exclusive use of disputed areas of the continental shelf.

In its first decision concerning the stipulation of agreements, the ICJ made no distinction between lateral and frontal delimitations of the continental shelf. It held that in both cases the criteria of equidistance and the median line should not be the only ones which are applicable; other criteria should also be taken into consideration, such as the proportionality between the length of the coasts and the portion of the continental shelf assigned to each State. It also held that an agreement on delimitation must guarantee a reasonable relationship between the portion of the continental shelf assigned to each of the two States and the length of their respective coasts.[10]

Considering the unusual geographic conditions present in the said case—which could have affected delimitation to a varying extent—the Court emphasized that an agreement on delimitation must principally be based on criteria of equity. The

(Footnote 8 continued)
(Nicaragua v. Honduras), Judgment (8 October 2007), para 271 (where the Court also clarified that when the line to be drawn covers several zones of coincident jurisdictions, "the so-called equitable principles/relevant circumstances method may usefully be applied, as in these maritime zones this method is also suited to achieving an equitable result").

[9] On the contrary the Court observed that: "It emerges from the history of the development of the legal regime of the continental shelf, which has been reviewed earlier, that the essential reason why the equidistance method is not to be regarded as a rule of law is that, if it were to be compulsorily applied in all situations, this would not be consonant with certain basic legal notions which, (…), have from the beginning reflected the *opinio juris* in the matter of delimitation; those principles being that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles. On a foundation of very general precepts of justice and good faith, actual rules of law are here involved which govern the delimitation of adjacent continent shelves—that is to say, rules binding upon States for all de1imitations; in short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field, (…)". (North Sea Continental Shelf, supra n. 4, para 85).

[10] Pharand 1993, pp. 102–104.

Court thus anticipated UNCLOS 1982 and the subsequent international case law on the matter. As we will see, the legal weight of such a prescription differs according to whether it refers to criteria to be applied in an arbitral decision or in an agreement on delimitation. While in the first instance the criterion of equity can be objective, in the second it is necessarily subjective.[11]

The other two decisions concerning the delimitation of the continental shelf between France and Great Britain of 1977 and 1978 applied the two criteria of the length of the coasts and the median line in a case concerning delimitation involving the lateral and frontal demarcation of the continental shelf between an insular territory and a continental territory: they are important decisions inasmuch as the relevant circumstances referred to in Article 6 of GCCS 1958 seem to be applied not as an exception but as a general rule.[12] In that case, the median line or equidistance would have yielded disproportionate results because the Channel Islands, which are under British sovereignty, are located near the French coast. The Court of arbitration drew the delimitation line between the coasts of Great Britain and France as if the Channel Islands did not exist and then granted those Islands a proportionate, circumscribed portion of the French continental shelf.[13]

The arbitration Court considered the disposition of GCCS 1958 as a unique rule, composed by equidistance and relevant circumstances, in which the two elements are set in a position of absolute parity for achieving the goals of an equitable delimitation. From this it follows that the importance of the relevant circumstances in the application of that provision was to take the same equitable principles in the application of customary rule. That led to some overlap between the rule contained in GCCS 1958 and the customary rule on delimitation.

Equidistance and relevant circumstances, according to the Court, had the same object: the delimitation of the continental shelf in accordance with equitable principles. The customary rule is therefore relevant, and even necessary, for the interpretation and integration of conventional rules. In the view that the determination of the factors which are considered to be relevant circumstances must be with the objective of attaining an equitable result, all the factors, even those creating inequity in accordance with customary law, fall within the relevant circumstances clause under the Convention. Thus, the Court came to the conclusion

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[11] Eustache 1970, pp. 590–613.

[12] GCCS 1958, Article 6: "1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured. 2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured (…)".

[13] Pharand 1993, pp. 108–112.

that both the elements contained in the treaty provision formed a unique rule that expresses the actual content of the equity principle.[14]

3 The Content of the Customary Rule on the Delimitation of the Continental Shelf: The Equity of Delimitation as an Objective Criterion

In the subsequent settlement of disputes, the international case law seems to have been somehow influenced by the provisions of UNCLOS 1982, even if it had not yet entered into force.[15]

Associating the first ruling of the ICJ on the matter, and isolating the thesis adopted by the Franco–British Arbitral Court, subsequent case law has consistently reaffirmed the conventional nature of the equidistance/relevant circumstances rule, as expressed in GCCS 1958, and the need for an agreement between the parties or another instrument by which to achieve a fair result, expressed through the application of equitable criteria.

In line with this attitude, in the dispute between Dubai and Sharjah on the continental shelf in the Persian Gulf in 1981[16] the Court of Arbitration expressly stated, as both parties to the dispute were not parties to the GCCS 1958 that it would apply the common law definition of sea areas between the two countries in order to reach a fair solution.[17] Considering the circumstances which were relevant to the region, however, this Court used the criterion of equidistance as a method that, in this case, could guarantee a fair result as required by the general rule. Even in the case of the continental shelf between Libya and Tunisia in 1982, the ICJ expressly stated that it would apply customary law, as the parties involved were not parties to the GCCS 1958.[18]

Specifically, in its 1982 decision on the lateral delimitation of the continental shelf between Libya and Tunisia the ICJ enunciated certain basic principles according to which, in its judgment, delimitation must be effected in conformity

[14] McRae 1977, 190–191; Bowett 1978, pp. 15–16; Colson 1979, pp. 99–112.

[15] UNCLOS 1982, Article 83: "The delimitation of the continental shelf 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 International Court of Justice, in order to achieve an equitable solution (…)".

[16] Court of Abitration: Dubai-Sharjah Border (Dubai v. Sharjah), Award (19 October 1981) ILR 91, pp. 543–580.

[17] Bowett 1994, pp. 121–124.

[18] Feldman 1982, pp. 230–231; Christie 1983, p. 16; Sonenshine 1983, p. 230; Herman 1984, pp. 270–271; Hodgson 1984, pp. 30–33.

with criteria of equity and reasonableness with due consideration being given to all pertinent circumstances of the case in question.[19]

In the most recent interpretative decision concerning the same case, the ICJ has moved on from the formulation of the commitment of the parties to enter into negotiations in good faith to reach an agreement, to transforming it into a rule of general international law.

Furthermore, in the case on maritime delimitation in the Gulf of Maine in 1984, between the United States and Canada, the Chamber of the ICJ, in line with the negative attitude of the previous case, first of all reiterated the non-binding character of the provision for states which are not party to the GCCS 1958, also adding that this situation would remain even with respect to States Parties when it intends to proceed with a boundary line, which also includes marine areas which are different from the continental shelf only. The Chamber of the Court also argued that no delimitation between States with opposite or adjacent coasts may be made unilaterally, but that this must be done by agreement, following negotiations conducted in good faith and with the real intention of reaching a positive result. When it is impossible to reach any agreement, delimitation should be effected by means of an arbitration tribunal that has the required expertise.[20]

In the case of the maritime border between Guinea and Guinea Bissau in 1985, the Arbitral Tribunal also refused to consider a boundary that was not the result of negotiations or an equivalent document in accordance with international law. It reiterated that the application of various criteria of delimitation, however, should lead to an equitable solution that reflects proportionality between coastal development and the extension of the continental shelf of each State within the area being considered.[21]

Yet, in its decision of 1985 on the frontal delimitation of the continental shelf between Malta and Libya, the Court held that the fact that all the marine areas to be delimited were located within two hundred miles of the nearest coast simplified the task of delimitation.[22] This means that within such limits, criteria based on distance have precedence over those based on the submerged prolongation of the

[19] In particular the Court stated that: "(…) Treaty practice, as well as the history of Article 83 of the draft convention on the Law of the Sea, leads to the conclusion that equidistance may be applied if it leads to an equitable solution; if not, other methods should be employed. Nor does the Court consider that it is in the present case required, as a first step, to examine the effects of a delimitation by application of the equidistance method, and to reject that method in favour of some other only if it considers the results of an equidistance line to be inequitable. A finding by the Court in favour of a delimitation by an equidistance line could only be based on considerations derived from an evaluation and balancing up of al1 relevant circumstances, since equidistance is not, in the view of the Court, either a mandatory legal principle, or a method having some privileged status in relation to other methods". Continental Shelf (Tunisia/Libya), supra n. 6, paras 109–110.

[20] Nichols 1982, p. 12; Schneider 1985, pp. 539–543; McRae 1993, pp. 124–127.

[21] David 1985, pp. 350–389; Juste Ruiz 1990, pp. 7–41; Scovazzi 2007.

[22] Brown 1983, pp. 153–155; Leanza 1988, pp. 88–92.

land mass. This, however, does not mean that equidistance should automatically be the basis of delimitation in every case.[23]

It is interesting to stress that in the two above-mentioned decisions concerning the Mediterranean the Court emphasized the need to safeguard the interests of third States in addition to those of the parties to the action. In its 1982 decision on delimitation between Tunisia and Libya, the Court denied Malta's standing in the case yet safeguarded its interests by abstaining from setting a terminal point to the proposed delimitation line, indicating its direction with an arrow and leaving undecided the precise terminal point until such time when delimitation between Malta and Libya would be accomplished. Similarly, the Court denied Italy's standing in the more recent case between Malta and Libya, yet safeguarded its interests—properly, in our opinion—by refusing to draw a line in the areas claimed by Italy and by terminating the delimitation line at the outer edge of the area comprising the Medina Escarpment.[24]

The Court derived the distance criterion from the institution of the exclusive economic zone: provided that the zone is now recognized as an institution of general international law and given that it comprises the marine seabed and subsoil up to two hundred miles from the coast, whatever its geological conformation, the delimitation line should be drawn independently from any geological formation on the seabed, at least in cases of frontal delimitation where the distance between opposite coasts does not exceed four hundred miles.

However, if the preference accorded to the distance criterion—as the Court expressly indicated in its 1985 decision—does not imply its exclusive adoption for delimitation purposes it does not, on the other hand, signal the definitive abandonment of geomorphological criteria, especially in enclosed and semi-enclosed seas such as the Mediterranean, where there is still uncertainty as to whether the essentially oceanic institution of the exclusive economic zone is applicable. In the end it may prove useful to apply distance criteria in concert with geomorphological criteria to reach an equitable settlement of conflicting delimitation claims in geographical areas like the Mediterranean.[25]

The important point here is that in these two cases regarding delimitation in the Mediterranean the Court based its decisions on the criterion of equity, much as it did in the case of the Gulf of Maine between Canada and the United States. This

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[23] The Court stated that: "(…) In this assessment, account must be taken of the fact that, according to the "fundamental norm" of the law of delimitation, an equitable result must be achieved on the basis of the application of equitable principles to the relevant circumstances. (…) As already pointed out, existing international law cannot be interpreted in this sense; the equidistance method is not the only method applicable to the present dispute, and it does not even have the benefit of a presumption in its favor. Thus, under existing law, it must be demonstrated that the equidistance method leads to an equitable result in the case in question. To achieve this purpose, the result to which the distance criterion leads must be examined in the context of applying equitable principles to the relevant circumstances" (Continental Shelf (Libya/Malta), supra n. 7, paras 62–63).

[24] Leanza and Sico 1998, pp. 1–32; Sico 1993, pp. 133–136; Leanza 2008, pp. 137–149.

[25] Leanza 1992a, pp. 127–460.

does not mean that in so doing the Court has transformed itself into a court of conciliation. Moreover, as early as 1969, in its decision concerning the delimitation of the shelf in the North Sea, the Court had indicated the relevant criteria for the delimitation of the shelf, pointing out that they were essentially equitable in nature. That the Court limited itself to this prescription is due to the fact that it had been merely asked to lay down general guiding criteria to be applied concretely by the parties themselves in subsequent agreements on delimitation.[26]

On the contrary, in the last two cases under examination, the parties essentially requested that the Court itself should draw the lines of delimitation: this is why the Court—justifiably in our opinion—retained it authority to indicate these lines, making use of the equitable criteria that it had previously referred to on several occasions. Moreover, as we have seen, the French–British arbitral tribunal proceeded in a similar fashion in resolving the dispute in the English Channel.

In order to assess the importance of international case law in identifying a rule of equity, it is sufficient to trace the analysis of such case law. This analysis brings to light the logical evolution of the law in defining the rule of equity in the matter of the delimitation of the continental shelf, especially with regard to the Mediterranean Sea.

4 The Customary Equity Rule in the Delimitation of the Continental Shelf Compared with the Treaty Rule of Equitable Result

The progress of this evolution is marked by three decisions by the Court. In the first decision from 1969, concerning the delimitation of the continental shelf in the North Sea, the equity rule was introduced; in the second decision, from 1982, concerning the shelf between Libya and Tunisia, the lawfulness of the rule was affirmed; and, finally, in the third decision, from 1985, concerning the delimitation of the continental shelf between Malta and Libya, the general precepts of the rule were enunciated.[27]

Pertinent circumstances play a key role among these general precepts: as others have pointed out, they are invariably the element of a correlation in the rule of equity in case law, beginning with the earliest decision in the matter in 1969 and, before that, in the law of treaties, beginning with Article 6 of GCCS 1958 which, in referring to relevant circumstances—which essentially coincide with the pertinent circumstances of the case law—referred in essence to equity. A study of the case law shows that the said element of correlation is essential, since every equitable delimitation requires that due consideration be given to attendant circumstances, whether they be called relevant or pertinent, as in UNCLOS 1982.

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[26] Leanza 1993, p. 293.

[27] Leanza and Sico 1998, pp. 15–16; Leanza 1992b, pp. 183–195.

Such a study reveals, furthermore, that the case law has set clear limits to what circumstances are relevant and has identified three distinct criteria of relevance: first, conformity with general precepts of the rule of equity; second, verifiability by a subsequent test that the result is equitable; and, third, careful limitation of the *genus* of relevant circumstances.

A comparison of the equitable criteria for delimiting the continental shelf that emerge from the international case law examined with the delimitation criteria adopted in UNCLOS 1982 which require that there must be a correlation between equity and relevant circumstances in various dispositions, leads to the conclusion that, while the criteria of equity employed in the case law constitute a substantive rule of international law—though not a narrow rule—the criteria of equity defined in UNCLOS 1982 essentially constitute an instrumental rule which prescribes the exclusive duty to seek a solution.

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Ships

Vaughan Lowe

Tullio Treves is one of the great figures of the Law of the Sea. As coordinator of the French language group of the Drafting Committee of the Third United Nations Conference on the Law of the Sea (UNCLOS III), as Judge on the International Tribunal for the Law of the Sea (ITLOS) and as a perceptive and trenchant scholar, he transcended the role of an analyst and commentator on the subject and became one of its architects. We worked together as co-counsel only once, when I was a late addition to Finland's team in the *Great Belt* case,[1] shortly before its settlement deprived the world of what would surely have been a seminal judgment on the subject addressed in this small paper and on the scope of innocent passage. But appearing as counsel in the ITLOS, one was always conscious that with him, and other distinguished specialists in the field, on the bench it was possible to plead cases at a level of expert understanding that is rare in international tribunals. All of this gives him great weight as a scholar and lawyer; but more importantly, he is a fine man and genial companion, to whom this slight piece is offered with respect and affection.

The United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; hereinafter UNCLOS)[2] is replete with provisions according to rights to "ships" (such as rights of innocent and transit passage), imposing duties on ships (such as the duty to observe sea lanes and traffic separation schemes), or exposing ships to liabilities (such as the liability to seizure on suspicion of piracy). Similarly, "vessels" are protected by the provisions of Article 292 UNCLOS on

[1] ICJ: Passage through the Great Belt (Finland v. Denmark).
[2] Entered into force on 16 November 1994.

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prompt release, and to the provisions of Part XII ("Protection and preservation of the marine environment") on enforcement by flag, coastal and port States.

In all such situations the question might arise as to whether or not a particular "craft" (to use that term to describe any artefact that is purposefully floating at sea) is a "ship". In some situations UNCLOS itself makes the question of classification important. For example "ships" sail under the flag of a single State, and are in principle subject to its exclusive jurisdiction while on the high seas (Article 92); but "installations and structures" are subject to regulation by the coastal State in whose exclusive economic zone (Article 60) or on whose continental shelf (Article 80) they are located. The particular problem is that some offshore installations are designed to navigate at sea under their own power and steering, and in fact do so. Indeed, there are instances of installations navigating from northern Europe to Latin America. Such installations are built with engines—"thrusters"—mounted on their legs which provide both motive power and, by varying the balance of the thrust from each engine, steering. Once they arrive at the site where it is intended that they should operate, they affix themselves to the seabed in order to commence their operations. Are they ships, or are they installations? Or are they both, or one or the other depending upon the circumstances?

This question arose in the *Great Belt* case in the International Court of Justice. Tullio Treves was one of the counsels for Finland, which maintained that the offshore oil platforms built in Finnish shipyards are "ships" which have a right of passage through the territorial sea as a matter of international law. The possibility of them being able to exercise that right was threatened by Denmark's plan to construct a bridge across the Great Belt, linking the Danish islands of Sjaelland and Funen. The tallest platforms were too high to pass underneath the planned bridge. While there was another route out of the Baltic, through the Sound,[3] that route was too shallow to permit passage by the oil platforms. The consequence, argued Finland, was that the large platforms were deprived of their right of passage out of the Baltic, and that the profitability of the Finnish shipyards was jeopardised.

As a matter of law, the question turned upon two points. First, whether the platforms—known as Mobile Offshore Drilling Units ("MODUs")—were "ships" or were assimilated to ships for the purposes of the rules of international law concerning passage through international straits; and second, if they were, or were assimilated to, ships, whether the height restriction resulting from the building of the bridge would be an unlawful interference with their right of passage. The case was settled only a matter of days before it was due to be heard by the Court, and these questions were accordingly not answered.

Finland had argued that MODUs are ships that enjoy a right of innocent passage. Denmark had argued that they are not, or at least that they are ships with special characteristics that cannot expect to have the same unconstrained rights as more traditional ships; and that in any event it was not obliged to modify the

[3] At the time the link between Denmark and Sweden had not been built. That link, the Øresund Bridge, and an associated tunnel, connect Copenhagen and Malmo.

design of the Great Belt bridge so as to permit the unimpeded passage of even the very tallest MODUs.[4]

A survey[5] of multilateral treaty practise[6] at that time showed that there was no single definition of the term "ship". Many treaties contained no definition of the term: and among those that did, most of the definitions were expansive, referring to vessels of any kind whatever, engaged in maritime navigation. For example, the International Convention for the Prevention of Pollution of the Sea by Oil (London, 12 May 1954; hereinafter OILPOL)[7] did not define the term; and the 1962 Amendments to OILPOL, which introduced such a definition, stipulated that "'ship' means any sea-going vessel of any type whatsoever, including floating craft, whether self-propelled or towed by another vessel, making a sea voyage."[8] Later treaties adopted a similarly broad approach. Indeed, they emphasised the breadth of the concept. The International Convention for the Prevention of Pollution from Ships (London, 2 November 1973) as amended by the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (London, 17 February 1978) (MARPOL Convention),[9] for example, stipulated that "'ship' means a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms."[10] A survey of national legislation and legal doctrine at the same time, described in the Finnish *Memorial*,[11] recorded the same tendencies: definitions of "ship", if they existed at all, drawn in very broad terms.

Finland drew from these surveys the conclusion that the term "ship" had no single fixed meaning in international law, but that the characteristics common to the great majority of such definitions as did exist pointed to an understanding that the term was applicable broadly, and in principle to any craft that could float and navigate at sea. MODUs would fall within that definition. With the benefit of two decades of detachment from that litigation, that conclusion still seems correct, at least in its context. Rights of passage were and are essentially instrumental. They were and are

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[4] See Denmark's Counter-Memorial, chapters III and IV, www.icj-cij.org/docket/files/86/6893.pdf. Accessed 23 June 2012.

[5] See the Finnish Memorial, December 1991, Part III, Chapter II, www.icj-cij.org/docket/files/86/6885.pdf. Accessed 23 June 2012.

[6] Most bilateral treaties contained no definition of the term "ship". The Denmark–German Democratic Republic Agreement concerning Salvage Operations (13 October 1976) is a rare example, which includes a very wide definition ("vessel of any type which is used at sea, including hydrofoil boats, air-cushion vehicles, submarines, floating vessels and fixed or floating platforms"): see UN Legislative Series, ST/LEG/SER.B/19, p. 408.

[7] Not in force any more.

[8] Article 1 OILPOL.

[9] Entered into force on 2 October 1983.

[10] Article 2 MARPOL Convention; Scovazzi and Treves 1992, p. 179.

[11] See the Finnish *Memorial*, December 1991, Part III, Chapter II, www.icj-cij.org/docket/files/86/6885.pdf. Accessed 23 June 2012.

intended to enable the conduct of international seaborne trade and commerce, not to indulge the owners and operators of artefacts of a particular design. There is no greater reason to limit the scope of the rights to "ships" of traditional shape than there is to limit them to craft powered by sail or by galley slaves.

That is not to say that MODUs should be treated as ships for all purposes and in all contexts. Once they are "fixed" to the continental shelf of a State and engaged in drilling operations, they are covered by Article 56, Article 60 and Article 80 UNCLOS. They are treated not as ships, but as "installations" or "structures". So, for example, the jurisdiction of the flag State (or State of registration) that is applicable to ships[12] gives way to the "exclusive" jurisdiction of the coastal State over offshore installations and structures, whatever the implications of that change might be.[13] But the scope of the category of "ships" is, in abstract terms, very broad, and certainly capable of including them.

If the *Great Belt* case seemed to be heading towards an expansive definition of the category of craft entitled to rights of passage (though not necessarily to the conclusion that bridges had to be constructed so as to permit the unhindered passage of "ships" of every imaginable design), a more recent episode may appear to point in a rather different direction.

The International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969; hereinafter CLC)[14] and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Brussels, 18 September 1971; hereinafter Fund Convention)[15] make provision for compensation for damage resulting from spills from certain "ships". Article III CLC makes the shipowner liable, subject to certain exceptions and defences, for any pollution damage caused by the ship as a result of an "incident", such as a collision or stranding. The problem arises because extensive use is made of tankers to store oil. Sometimes a tanker may be decommissioned and anchored at a certain place where it is intended to stay for the foreseeable future, in order to take on board and store oil. The oil may be intended for eventual sale or use; or it may be waste oil stored pending final disposal. If there is an "incident" involving such a tanker, is it a "ship" for the purposes of the CLC and Fund Convention, or is it what might be called a floating storage tank and not a ship?

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[12] Article 92 UNCLOS.

[13] There is no obvious reason why this treaty arrangement should affect questions such as the nationality of the "installation" or "structure". It is not even clear that the "exclusive" coastal State jurisdiction would automatically exclude the applicability of flag State law if, for example, flag State employment law affords greater protection to workers on the installation than does coastal State law. The analysis of the position for the purposes of private international law may differ from the analysis for the purposes of public international law.

[14] Entered into force on 30 May 1996 as modified by the Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage (London, 27 November 1992).

[15] Entered into force on 30 May 1996 as modified by the Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (London, 27 November 1992).

The question has come before the courts in the *Slops* case, in Greece.[16] The case arose after a spillage of oil following a fire on board a floating oil storage facility, the *Slops*' which was anchored permanently—or at least indefinitely—in the Greek territorial sea. The owner was unable to pay the two companies that it hired to clean up the spill, and those companies therefore claimed against the International Fund for Compensation for Oil Pollution Damage (hereinafter Fund) established under the Fund Convention, which has a limited residual liability to compensate for oil pollution damage in certain circumstances. The *Slops* had, however, been put out of service at the time: its engine had been sealed off, and its propeller removed. The Fund argued accordingly that the *Slops* was not a "ship" within the meaning of the Fund Convention and that the Fund therefore had no liability to pay compensation—indeed, if that argument were correct the Fund would have no power to pay compensation.

Both the CLC and the Fund Convention contain the same definition of the term "ship":

> Article I
>
> For the purposes of this Convention:
>
> 1. "Ship" means any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.

The definition is curious because it is plainly not a definition of ships in general but only of one kind of ship—a ship constructed or adapted for the carriage of oil in bulk as cargo. But that was not the issue in the *Slops* case, which concerned a ship that indisputably had been constructed or adapted for the carriage of oil in bulk as cargo. The question was whether it remained a ship once it was dedicated to use as a static storage facility.

At first instance, the Greek court held that the Fund was liable to pay compensation. The case was then taken to the Court of Appeal of Piraeus which, in February 2004, reversed that decision, deciding that the CLC and Fund Convention applied only to vessels actually carrying oil in bulk as cargo, and not to permanently static vessels. A further appeal to the Hellenic Supreme Court followed. In 2006, the Supreme Court reversed the decision of the Court of Appeals. It held (with five judges dissenting) that because the *Slops* "had been constructed as a tanker, continued to possess all the properties of a tanker, and could at any time have had its

[16] *Marine Environmental Services MC and Environmental Protection Technical SA* v *International Oil Pollution Compensation Fund 1992*, Appeal judgment, No 103/2004; Oxford University Press, *International Law in Domestic Courts* ("ILDC") 855 (GR 2004); (2004) 26 *Peiraiki Nomologia* (Piraeus Jurisprudence) 188, 16 February 2004. Final appeal judgment in cassation, No 23/2006; ILDC 856 (GR 2006), (2006) 54 *Epitheorisi Emporikou Dikaiou* (Commercial Law Review) 1797; (2007) 56 *Nomiko Vima* (Law Tribune) 666; 6 July 2006. For further comment see Mensah 2011; Peplowska 2011; Harrison 2008.

engine un-sealed and its propeller re-affixed, and could also carry oil in bulk as cargo in tow", it was a "ship" within the meaning of the Conventions.

One wonders quite what one would have to do to convert a ship into a non-"ship" storage tank: bolt it to the seabed and hammer the sharp end flat, perhaps. But the difficulty does not stop there. Even on the basis of the approach of the Court of Appeals, the question of what is a "ship" would have remained unsettled. The situation is complicated by the fact that, because of the vicissitudes of international oil markets, it is not uncommon for a tanker that is laden with oil to be carried to a buyer to be told to anchor until a buyer is found or until oil prices increase. Tankers may remain at anchor in such circumstances for many months. Does such a tanker cease, at some point, to be a "ship" and become a floating storage tank?

One notion that is common to practically all definitions[17] of a ship is that the craft should have carriage at sea as its purpose or vocation, whether it is carrying cargo or passengers or its own equipment and capacities, and that carriage implies movement from one place to another by sea.[18] In the context of the CLC and Fund Convention, this view is supported by the *travaux préparatoires*.[19] But how long does a ship have to remain immobile[20] before it ceases to be a ship?

There is, in my view, no a priori answer to this question. "Ship" is one of those legal terms that is, like "property", more a label for a set of overlapping categories of objects—a family of related concepts—than a coherent and clearly delineated concept itself. It is a term that is commonly and naturally used in many different legal contexts, and it would be a mistake to think that it has the same meaning in each one. Indeed, it is probably a mistake to think that it has bright-line boundaries in any context. When one recalls that the definition of a "vessel" (commonly

[17] The definition in Article 2.7 Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships (Hong Kong, 15 May 2009; not yet in force) is an exception. It provides that: "'Ship' means a vessel of any type whatsoever operating or having operated in the marine environment and includes submersibles, floating craft, floating platforms, self-elevating platforms, Floating Storage Units (FSUs), and Floating Production Storage and Offloading Units (FPSOs), including a vessel stripped of equipment or being towed." This Convention is, however, focused on ships in their capacity as pieces of scrap metal and equipment, rather than as functioning maritime craft; and it is natural to include within the definition all artefacts destined for the marine breaker's yard. See further on this aspect the *Clemenceau* affair: Orellana 2006.

[18] Another, related, notion is that a ship is a craft used in navigation at sea. "To my mind the phrase 'used in navigation' conveys the concept of transporting persons or property by water to an intended destination. (…) 'Navigation' is not synonymous with movement on water. Navigation is planned or ordered movement from one place to another. (…) It may be possible to navigate a jet ski but in my judgment it is not 'a vessel used in navigation'": *R* v *Goodwin*, [2005] EWCA Crim 3184, at para 19 (quoting Steen J in *Steedman* v *Scofield* [1992] 2 Lloyd's Rep. 163).

[19] An analysis appears in a study prepared for the International Oil Pollution Compensation Funds in 2011: see Consideration of the Definition of "Ship", document IOPC/OCT11/4/4 (14 September 2011).

[20] Or almost immobile. A floating storage tank that is incapable of navigation may need to be towed to or from its site, or taken in for protection or repair.

treated as synonymous with "ship") in Rule 3 of the Collisions Regulations[21] includes seaplanes, it seems clear that there is a penumbra within which it is a matter of judgment, appreciation, and ultimately discretion, whether or not a particular instance is regarded as falling within the term. Equally, each time the term is used it would be wise to ask what, exactly, it is intended to denote, and to consider whether the term needs qualification or more precise definition in that particular context.

This paper has by no means exhausted the catalogue of uncertainties that are already evident in relation to the term "ship". The requirement that a vessel be "sea-going" will be problematic where vessels operating on the great rivers and canals of the world are concerned. The line that divides warships from merchant ships is called into question as police, customs and coastguard vessels are equipped with increasingly heavy arms and as the administrative and command structures of navies and law-enforcement agencies are revised and adapted to the demands of contemporary life. As Governments charge for more and more services and information, the distinction between ships on commercial and ships on non-commercial service is eroded. Floats, gliders and other unmanned craft used for exploration and observation at sea will surely become an increasingly common feature, raising questions as to their status.[22] The important lesson is that it is wiser to focus upon understanding the agreement that is expressed by the text than to fall prostrate before the words of the text: venerate the agreement, not the vessel that carries it.

The conclusion of this short paper may appear anodyne. Pointing to the elusiveness of precise definitions and denotations in international conventions is neither particularly novel nor particularly controversial. It does, however, seem a fitting topic for a Festschrift in honour of someone who, as a non-French national, whose first language is not French, was chosen to coordinate the French language drafting group at UNCLOS III, and to reproduce in French the ambiguities and connotations of provisions that had been negotiated largely in English; and it is offered here in homage.

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Where the Judge Approaches the Legislator: Some Cases Relating to Law of the Sea

Tullio Scovazzi

1 Rules in Foggy Weather

Under Article 38.1.d of the Statute of the International Court of Justice (ICJ), judicial decisions are only a subsidiary means for the determination of rules of customary international law. A decision can only confirm the existence of a rule which has already been created through other means. The basic assumption is that courts apply legal rules and cannot create them.

Such an assumption rests on solid ground in systems, as is the case with many domestic legal systems, where there is a legislator who makes the legal rules in a written form and there is a journal where the rules are published in their official wording. Here, courts can read the rules on paper and precisely determine their content. They also know from what day, hour, and minute the rules enter into force or will be abrogated.

However, the assumption becomes dubious in systems where custom has a major role to play. Here nobody can establish, with absolute certainty, what is the content of the applicable rule. Nor is it easy to determine when a new rule comes into effect and a previous different rule is superseded. Sometimes the distinction between old and new law becomes blurred. It is in this foggy weather that courts, more or less openly, can create or consolidate new rules, contradicting the belief

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that judicial decisions are only a subsidiary means for the determination of rules of law. In cases where the actual situation is confusing or inadequate, courts are called to make creative choices.[1] This would not be an unwarranted encroachment, but a reasonable accomplishment of the function entrusted to international courts (and even a desirable result from the point of view of those who believe that law does not amount to conservation, but to development and change).

Many instances could be put forward to illustrate the creative role of courts, but, for a number of reasons,[2] those recalled hereunder are limited to the field of international law of the sea.

2 A Choice Oriented Toward the Future

In deciding the *Fisheries* case in 1951, the ICJ did not hesitate to take a definitely creative attitude.[3]

Under a Royal Decree of 12 July 1935,[4] Norway was the first State to establish a straight baseline system from where to determine the extent of its territorial sea, as an exception to the rule that coastal zones are measured from the low water mark. For the first time a continuous series of segments were drawn in the sea by a coastal State to become the basis from which the waters subject to national jurisdiction were measured. No relevant precedent for such a measure existed in the practice of other States.[5] The decree mentioned in its preamble "the geographic conditions prevailing on the Norwegian coast" and the need to "safeguard the vital interest of the inhabitants of the northernmost parts of the country".

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[1] "In fact, the role performed by the ICJ often goes beyond the mere stating of existing customary law. By stating what is implied in existing rules and extracting general principles from such rules, the ICJ has developed important chapters of international law, such as the law of delimitation of maritime areas and the law of effective nationality, and added density to many areas of the law. In doing so the Court deploys a relevant amount of creativity, adopting in many cases an inductive approach that contrasts with the deductive process it describes as appropriate for determining the contents of international customary law" (Treves 2006, p. 85).

[2] Among the reasons are not only the limited space available in this collection of essays and the feeling that many relevant examples could be provided if I had a broader command of the subject, but also the recollection of the time when I was preparing my thesis on a subject related to the international law of the sea under the supervision of Tullio Treves and the gratitude that I owe to him.

[3] The decisions on the two questions submitted to the ICJ were taken by ten votes to two and by eight votes to four, respectively.

[4] The decree applied to the northern half of the coast of the country (beyond the Polar Circle, that is 66° 28.8′ latitude north).

[5] The closing by a line of the entrance to a single bay, as some States had previously done, was not comparable to a straight baseline system composed of 47 segments along a coast which was over 1,500 kilometers in length.

The legality of the method of straight baselines was questioned by the United Kingdom before the ICJ. In finding that the baselines established by Norway were not contrary to international law, the ICJ provided a significant contribution to the evolution of international law of the sea. To reach its conclusion, the ICJ relied on three different and concurring kinds of factors, namely geographic, economic and historical. First, the ICJ took into full consideration the almost unique geographic features of the Norwegian coastline, in particular its deep indentations (the fjords) and the numerous islands and islets fringing it (the *skjaergård*, composed of almost 120,000 insular formations).[6] According to the ICJ, geographic realities dictated that, in the specific case, the baseline could depart from the natural limit of the low water mark and be drawn according to a method based on a geometric construction.[7] Second, the ICJ took into consideration the weight of the economic factors existing in the region, in particular the traditional fishing activities which by far represented the main source of earnings for the local population.[8] Third, also historic factors played a role in the decision, considering that previous measures adopted by Norway, although not as extensive as the 1935 decree, had not given rise to any opposition by foreign States.[9]

The creative character of the decision is impressive. Can a number of factors that would qualify a national measure as *per se* reasonable overcome a total lack of precedent and justify the departure from a consolidated customary rule? In 1951 the ICJ gave a positive answer to the question and the effects of its choice were not confined to the specific case of Norway. The position taken by the court influenced the drafters of subsequent codification treaties to such an extent that the key passages of the judgment were reproduced in the wording of the relevant provisions of the Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958)[10] and the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; hereinafter UNCLOS).[11] While creating a new rule of customary international law, the ICJ was able to seize the evolutionary trend in the current international law of the sea.

Within a short time many coastal States were ready to follow the example of Norway. The practice of straight baselines became so widespread among States, including some whose coastline is geographically very different from the Norwegian case, that it gave rise to some concerns at the ICJ itself. In deciding the case on *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*,

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[6] ICJ: Fisheries Jurisdiction (United Kingdom v. Norway), Judgment (18 December 1951), p. 127.

[7] Ibidem, p. 129. Rather than referring to precise limits of length for the single segments of the baseline, as was suggested by the United Kingdom, the ICJ preferred to rely on the flexible condition that straight baselines must not depart to any appreciable extent from the general direction of the coast (Ibidem, p. 133).

[8] Ibidem, pp. 127 and 133. Oil had not yet been discovered in the Norwegian continental shelf.

[9] Ibidem, p. 138.

[10] Entered into force on 10 September 1964.

[11] Entered into force on 16 November 1994.

the Court pointed out that "the method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met. This method must be applied restrictively".[12]

3 A Choice Oriented Toward the Past

A passage from the judgments rendered by the ICJ in the *Fisheries Jurisdiction* cases (United Kingdom v. Iceland; Germany v. Iceland) sheds light on the delicate situation in which the court found itself.

> In recent years the question of extending the coastal State's fisheries jurisdiction has come increasingly to the forefront. The Court is aware that a number of states have asserted an extension of fishery limits. The Court is also aware of present endeavours, pursued under the auspices of the United Nations, to achieve in a third Conference on the Law of the Sea the further codification and progressive development of this branch of the law, as it is of various proposals and preparatory documents produced in this framework, which must be regarded as manifestations of the views and opinions of individual States and as vehicles of their aspirations, rather than as expressing principles of existing law. The very fact of convening the third Conference on the Law of the Sea evidences a manifest desire on the part of all States to proceed to the codification of that law on a universal basis, including the question of fisheries and conservation of the living resources of the sea. Such a general desire is understandable since the rules of international maritime law have been the product of mutual accommodation, reasonableness and co-operation. So it was in the past, and so it is necessarily today. In the circumstances, the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down.[13]

The above does not seem to be completely convincing. How could the ICJ ever anticipate the legislator, if an international law legislator does not exist? The ICJ was not called upon to apply a rule which had been formally adopted under a legislative procedure and, accordingly, to disregard an opposite rule which had not yet passed through such a procedure. It was rather called to make a choice between two alternative customary rules.

In the passage quoted above, the ICJ acknowledged that rules of customary international law are "the product of mutual accommodation, reasonableness and co-operation". Instances where two different normative trends occur, and where it is difficult to balance the weight of each of them, are an inevitable situation in any system based on customary rules. The stronger trend is put into question and is progressively eroded by the opposite trend until the moment, if any, when a reversal of positions takes place and the weaker trend becomes the stronger. No formal requirements for succession of legislation in time apply in a world where

[12] ICJ: Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Barhein), Judgment (16 March 2001), para 212.

[13] ICJ: Fisheries Jurisdiction (United Kingdom v. Iceland), Judgement (25 July 1974), para 53 and ICJ: Fisheries Jurisdiction (Germany v. Iceland), Judgment (25 July 1974), para 54.

State practice makes the rules in the absence of a legislator. Here, the main question is not to distinguish already existing law from not yet existing law. What is crucial, as stated by the ICJ in the judgment in the *North Sea Continental Shelf* cases (Germany/Denmark; Germany/Netherlands), is the occurrence of an extensive and a virtually uniform State practice, including that of States whose interests are specifically affected.[14] If such a practice does not occur, because of a clash of trends, a court is called upon to weigh the opposing trends and to make a choice according to where it is more likely that the elements of mutual accommodation, reasonableness and co-operation are found or will soon be found. This may be quite a difficult choice, as here the role of the judge closely approaches what should be the role of the legislator. The choice may be based on the subjective, and perhaps also emotional, evaluations made by those who are required to take a position. But there are no definite reasons why the choice should necessarily be oriented toward the past rather than toward the future.

In the *Fisheries Jurisdiction* case, the question at stake was the limit of fisheries jurisdiction, whether it was restricted to the 12-mile coastal belt, as stated by the major maritime powers and many developed States, including the United Kingdom and Germany, or whether it could extend far beyond such a distance, reaching 50 nm., as established in the Icelandic fisheries legislation, or even 200 nm., as proposed by many developing Latin American and African coastal countries. The court preferred the first alternative, deciding that the extension of the exclusive fishing rights of Iceland to 50 nm was not opposable to the United Kingdom and Germany.[15] Being compelled to take a direction in foggy weather, the ICJ set its course toward the haven provided by the major maritime powers. It disregarded the fact that, at the time of its judgment, the trend toward an extended jurisdiction for the purpose of the exploitation of marine economic resources (represented by the exclusive economic zone) was rapidly growing to encompass not only the developing coastal States but also two developed countries, such as Iceland and Canada.[16] The ICJ preferred conservation to innovation, despite the sensible

[14] "Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of states whose interests are specifically affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way to show a general recognition that a rule of law or legal obligation is involved" (ICJ: North Sea Continental Shelf (Germany/Denmark and Germany/Netherlands), Judgment (20 February 1969), p. 74).

[15] The decision was taken by ten votes to four. However, the ICJ also decided that the parties were under mutual obligation to undertake negotiations in good faith for the equitable solution of their differences concerning fishing rights.

[16] In 1970 Canada, under the Arctic Waters Pollution Prevention Act, adopted measures for the regulation of navigation and the prevention of pollution from vessels within a 100-mile zone in Arctic waters.

reasons which could have led to a different conclusion.[17] Perhaps it tried to soften the questionable choice it had made by attributing it to an imaginary legislator.

In fact, the 1974 judgments were overcome within a short time by State practice, as a consequence of the general acceptance in 1975 of the 200-mile exclusive economic zone by the States participating in the negotiations for the future UNCLOS. Even more impressive is the fact that Iceland itself took the liberty to execute the 1974 judgments in a reverse fashion: not only did it not abrogate its 50-mile fishing zone, but it also proceeded in the same year to extend it to 200 nm.

4 A Self-Defeating Rule

In the field of maritime boundaries the courts—both the ICJ and arbitral tribunals—are currently making a decisive contribution to the definition of the relevant rules of customary international law. While it is clear in its content, this creative process is not fully convincing for its logical construction. The starting point is Article 6 of the Convention on the Continental Shelf (Geneva, 29 April 1958; hereinafter 1958 C.S. Conv),[18] which provides as follows:

> 1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.[19]

According to this provision, in the absence of an agreement, the delimitation is effected by the rule of the equidistance line. Room is however left for flexibility and exceptions to the rule are envisaged if special circumstances justify another boundary line. But no indication is provided as to what such circumstances are and, if they occur, on what other basis must the delimitation be effected. This leaves a broad margin of discretion to the courts.

In 1969, when deciding the already mentioned *North Sea Continental Shelf* cases,[20] the ICJ found that a delimitation based on the equidistance line would

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[17] These reasons were already clearly explained in the declaration on the maritime zone (*zona marítima*), jointly adopted by Chile, Ecuador and Peru on 18 August 1952. For instance: "Los factores geológicos y biológicos que condicionan la existencia, conservación y desarrollo de la fauna y flora marítimas en las aguas que bañan las costas de los países declarantes, hacen que la antigua extensión del mar territorial y de la zona contigua sean insuficientes para la conservación, desarrollo y aprovechamiento de esas riquezas a que tienen derecho los países costeros".

[18] Entered into force on 10 June 1964.

[19] Article 6.2, provides in the same way for the delimitation of the continental shelf between adjacent States.

[20] The decision was taken by eleven votes to six.

have led, in the specific case, to an inequitable result due to the concave nature of the coastline of one of the three parties involved (Germany).[21] Considering also that Germany was not a party to the 1958 C.S. Conv., the ICJ concluded that the use of equidistance was not obligatory under customary international law.[22] However, for reasons that are not fully clear, the court preferred not to make use of the logical scheme provided by Article 6 of the 1958 C.S. Conv. It consequently did not state that a special circumstance of a geographical nature existed in the specific case (the concave nature of the German coast) that prevented resorting to the rule of the equidistance line and led to a boundary determined according to another method (proportionality).[23] It rather stated that a rule of customary international law dictated that maritime delimitations are to be effected through the application of equitable principles. The key to the reasoning lies in a carefully worded passage in the judgment: "In short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles (…)."[24]

After the seminal judgment of 1969, several subsequent cases of maritime delimitation were adjudicated by international courts. Such a notable body of international decisions demonstrated the use of a number of "methods" (such as equidistance,[25] proportionality, reduced effect of islands, the shifting of the equidistance line, the drawing of a corridor) that, in the light of the circumstances which were relevant in each specific case, were found by courts to be appropriate for delimiting maritime jurisdictional zones according to equitable principles or, what is more or less the same, in order to achieve an equitable solution.[26] Here, courts have made a tremendous contribution to the creation of new rules of customary international law. The "methods" that they have envisaged deserve to be upgraded from the apparent condition of technical devices into true customary

[21] In the case of a concave coast, the effect of the use of the equidistance method is to pull the line of the boundary inwards, in the direction of the concavity. In contrast to this, the effect of a convex coast is to cause boundary lines drawn on an equidistance basis to leave the coast on divergent courses, thus having a widening tendency in the marine area off that coast.

[22] North Sea Continental Shelf, supra n. 14, para 101.

[23] That is a reasonable degree of proportionality between the extent of the marine areas appertaining to one State and the length of its coast measured according to the general direction of the coastline. If the method of proportionality is applied, what influences the boundary line is the length of a coastline, instead of its shape.

[24] North Sea Continental Shelf, supra n. 14, para 85.

[25] Equidistance itself was not altogether discarded by the ICJ in the 1969 judgment, but it was considered as one among the various methods that could be employed for delimitation purposes (see para 85 of the judgment).

[26] Articles 74.1 and 83.1 of the UNCLOS merely provide that the delimitation of, respectively, the exclusive economic zone or the continental shelf has to be effected "in order to achieve an equitable solution". No substantive indication is given as to what criteria should be used.

rules applying where the relevant geographic circumstances occur.[27] This is a field where the courts must be admired for the amount of "geometrical imagination" that they have displayed.

But why have courts entered into the complicated construction of the rule which requires the application of equitable principles (or the achievement of an equitable solution)? The existence of such a self-defeating rule is hardly credible. Was it not sufficient to start with the guidance provided by Article 6 of the 1958 C.S. Conv. and simply to exploit the creative function that Article 6 gave to the international judge? In fact, the courts themselves have not concealed the evident consideration that, from a logical point of view, the inevitable way to determine the equity of a solution is to draw the equidistance line, as a criterion for reference, and then evaluate whether or not such delimitation does led to an equitable solution[28] (that is, more or less, to proceed according to the direction given by Article 6). Can the dubious assumption that the judge cannot create the law be an explanation for the birth of a self-defeating rule?[29]

5 Giving a More Precise Content to Customary Rules

In the recent advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*[30] a Chamber of the International Tribunal for the Law of the Sea (ITLOS)[31] made a number of choices which contribute to a more precise definition of the content of customary rules relating to the protection of the marine environment.

The Chamber remarked that States which sponsor mineral prospection and exploration activities carried out in the seabed beyond national jurisdiction (the

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[27] "Here (…) the customary norm has no existence until the judge determines its content. It is this determination which gives it life and identity. Custom is here defined without reference to any State conduct. It is disembodied custom. The content of customary law no longer derives from a combination of State practice and *opinio juris* but directly from the law-making power of the international courts. In short, customary law is none other than judge-made law" (Weil 1989, p. 155).

[28] "(…) in respect of the continental shelf boundary in the present case, even if it were appropriate to apply, not Article 6 of the 1958 Convention, but customary law concerning the continental shelf as developed in the decided cases, it is in accord with precedents to begin with the median line as a provisional line and then to ask whether "special circumstances" require any adjustment or shifting of that line" (ICJ: Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment (14 June 1993), para 51). In several subsequent decisions the same consideration has been repeated.

[29] The question is theoretical, because the assumption has not prevented the development of the creative role of the courts.

[30] ITLOS: Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area, Seabed Disputes Chamber, Advisory Op. (1 February 2011).

[31] The Chamber was chaired by Judge Treves. The opinion was adopted unanimously.

Area) are under an obligation to apply the precautionary approach, as stated in Principle 15 of the Declaration made by the 1992 Rio Conference on Environment and Development.[32] This approach "is also an integral part of the general obligation of due diligence, applicable even outside the scope of the mining regulations adopted by the International Seabed Authority.[33] The Chamber added its voice to a well-marked trend, strengthened also by a 2010 judgment by the ICJ:

> The Chamber observes that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law. This trend is clearly reinforced by the inclusion of the precautionary approach in the Regulations and in the 'standard clause' contained in Annex 4, section 5.1, of the Sulfides Regulations. So does the following statement in para 164 of the ICJ Judgment in *Pulp Mills on the River Uruguay* that 'a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute' (i.e., the environmental bilateral treaty whose interpretation was the main bone of contention between the parties). This statement may be read in light of article 31, para 3(c), of the Vienna Convention, according to which the interpretation of a treaty should take into account not only the context but "any relevant rules of international law applicable in the relations between the parties.[34]

An even stronger position was taken by the Chamber as regards the practice of making an environmental impact assessment of activities potentially harmful for the environment:

> It should be stressed that the obligation to conduct an environmental impact assessment is a direct obligation under the Convention [= UNCLOS] and a general obligation under customary international law.[35]
>
> With respect to customary international law, the ICJ, in its Judgment in *Pulp Mills on the River Uruguay*, speaks of a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.[36]

In particular, the Chamber extended the reasoning previously made by the ICJ in the transboundary context of an international river also to activities with an impact on the environment in areas beyond the limits of national jurisdiction and it

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[32] "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".

[33] Activities in the Area, supra n. 30, para 131.

[34] Ibidem, para 135. In his separate opinion to the order on provisional measures in the Southern Bluefin Tuna case, Judge Treves, without taking a position as to whether the precautionary approach is a binding principle of customary international law, pointed out that "a precautionary approach seems to me inherent in the very notion of provisional measures" (ITLOS: Southern Bluefin Tuna, Order (27 August 1999), Separate Opinion of Judge Treves, para 9).

[35] Activities in the Area, supra n. 30, para 145.

[36] Ibidem, para 147.

extended the ICJ's references to "shared resources" also to resources that fall under the concept of the common heritage of mankind, as the mineral resources of the Area.[37]

Insofar as the obligations related to the responsibility or liability of sponsoring States are concerned, the Chamber rejected the assumption that developing States enjoyed preferential treatment as compared with that granted to developed States.[38] Such an assumption could not find any textual basis in the UNCLOS and, more generally, would run against the desire to prevent the birth of sponsoring States of convenience:

> Equality of treatment between developing and developed sponsoring States is consistent with the need to prevent commercial enterprises based in developed States from setting up companies in developing States, acquiring their nationality and obtaining their sponsorship in the hope of being subjected to less burdensome regulations and controls. The spread of sponsoring States 'of convenience' would jeopardize uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind.[39]

The Chamber gave a more precise content to the obligation of the sponsoring State to adopt laws and regulations and to take administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction. While such measures are determined by the sponsoring State within the framework of its legal system,[40] it does not have an absolute discretion in this regard. It must act in good faith, taking into account "objectively, the relevant options in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole."[41] In particular,

> the sponsoring State may find it necessary, depending upon its legal system, to include in its domestic law provisions that are necessary for implementing its obligations under the Convention. These provisions may concern, *inter alia*, financial viability and technical

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[37] Ibidem, para 148.

[38] Ibidem, para 158.

[39] Ibidem, para 159. *Mutatis mutandis*, this could perhaps be seen as a change of attitude with respect to the position taken by the ITLOS in the judgment on the *Saiga (no. 2)* case, where it somehow "blessed" flags of convenience by stating that nothing in UNCLOS Article 94 (Duties of the flag State) permits "a State which discovers evidence indicating the absence of proper jurisdiction and control by a flag State over a ship to refuse to recognize the right of the ship to fly the flag of the flag State. The conclusion of the Tribunal is that the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States" (ITLOS: M/V "Saiga" (no. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment (1 July 1999), paras 82 and 83). The assumption that there exists a category of obligations established for the exclusive benefit of the State bound by the obligations, rather than for the benefit of the other States entitled to exercise the corresponding rights, indeed seems strange.

[40] Activities in the Area, supra n. 30, para 229.

[41] Ibidem, para 230.

capacity of sponsored contractors, conditions for issuing a certificate of sponsorship and penalties for noncompliance by such contractors.[42]

Important considerations were made by the Chamber also with regard to the right to claim compensation for damage to the marine environment beyond national jurisdiction. The Chamber found that, in the presence of an *erga omnes* obligation, such a right belongs to each State party to the UNCLOS, as well as to the International Seabed Authority, which is entitled to act on behalf of mankind, under Article 137.2 of the UNCLOS.[43] Moreover, for cases where the sponsored entity was not able to meet its liability in full and the sponsoring State was not liable, the Chamber suggested to the International Seabed Authority that it should consider the establishment of a trust fund to compensate for the damage not covered.[44]

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[42] Ibidem, para 234. "Other indications may be found in the provisions that establish direct obligations of the sponsoring States (…). These include: the obligations to assist the Authority in the exercise of control over activities in the Area; the obligation to apply a precautionary approach; the obligation to apply best environmental practices; the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the obligation to conduct environmental impact assessments. It is important to stress that these obligations are mentioned only as examples" (para 236).

[43] Ibidem, para 180.

[44] Ibidem, paras 205 and 209. This suggestion may be explained in the light of the broader margin of discretion left to the ITLOS in cases where it is called upon to give advisory opinions.

The Exercise of Administrative Functions by ITLOS: A Comment on Prompt Release Cases

Seline Trevisanut

1 Introduction

The International Tribunal for the Law of the Sea (ITLOS—the Tribunal) has residual compulsory jurisdiction in cases which require particular expeditiousness, such as prompt release cases.[1] This procedure is one of the novelties introduced by the United Nations Convention for the Law of the Sea (Montego Bay, 10 December 1982; hereinafter UNCLOS)[2] and is unique in the international judicial universe because of both its procedural characteristics and its functions.

Pursuant to Article 292.1 UNCLOS, "[w]here the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement *within 10 days from the time of detention*, to a court or tribunal accepted by the detaining State under Article 287 or *to the International Tribunal for the Law of the Sea, unless the parties otherwise agree*" (emphasis added). Flag states can request the

[1] Aside from the prompt release procedure, ITLOS has residual compulsory jurisdiction for prescribing provisional measures pending the constitution of the arbitral tribunal which will be competent on the merits (Article 290.5 UNCLOS). Expeditiousness is one of the characteristics of ITLOS judicial policy; see Article 49 Rules of Procedure (ITLOS RoP): "The proceedings before the Tribunal shall be conducted without unnecessary delay or expense". For a comment, see Treves 1997, pp. 342–343.

[2] Entered into force on 16 November 1994.

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prompt release of vessels when the coastal State has violated either Articles 73,[3] 220,[4] or 226[5] UNCLOS.

The procedure of prompt release is neither incidental nor prejudicial to the procedure on the merits before the national courts. It is an autonomous procedure. Article 292.3 underlines the fact that the competent court or tribunal "shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew". But the final judgment in a prompt release case necessarily intervenes pending the case on the merits before the domestic authorities. The procedure is consequently not subject to the prior exhaustion of local remedies.[6] If all the local remedies had to be exhausted, it would be too late for the flag State to apply for a prompt release.[7] Nevertheless, the international procedure directly impacts on the procedure on the merits at the domestic level as, for instance, it can overrule a decision to confiscate.[8]

States have sometimes granted international courts or tribunals an exclusive jurisdiction in order to preclude the exercise of authority by domestic courts.[9]

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[3] Article 73.1-2 UNCLOS: "1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention. 2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security".

[4] Article 220.6–7 UNCLOS: "6. Where there is clear objective evidence that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone, that State may, subject to section 7, provided that the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws. 7. Notwithstanding the provisions of para 6, whenever appropriate procedures have been established, either through the competent international organization or as otherwise agreed, whereby compliance with requirements for bonding or other appropriate financial security has been assured, the coastal State if bound by such procedures shall allow the vessel to proceed".

[5] Article 226.1(b) UNCLOS: "If the investigation indicates a violation of applicable laws and regulations or international rules and standards for the protection and preservation of the marine environment, release shall be made promptly subject to reasonable procedures such as bonding or other appropriate financial security".

[6] "[A]rticle 292 permits the making of an application within a short period from the date of detention and it is not normally the case that local remedies could be exhausted in such a short period", ITLOS: "Camouco" (Panama v. France), Judgement (7 February 2000), para 57.

[7] ITLOS: "Tomimaru" (Japan v. Russia), Judgement (6 August 2007).

[8] Tomimaru, supra n. 7, paras 59 ff. On 28 December 2006, Petropavlovsk-Kamchatskii City Court delivered its judgment in the proceedings instituted against the owner of the *Tomimaru* and imposed, *inter alia*, the confiscation of the vessel. The Kamchatka District Court confirmed this judgment in appeal on 24 January 2007. When Japan filed its application against the Russian Federation on 6 July 2007, the question was pending in front of the Supreme Court of the Russian Federation.

[9] Nollkaemper 2011, p. 31.

An author explains this phenomenon by a "lack of faith in the capability or will of national courts to provide for independent and impartial adjudication of international claims".[10] The same author points out that Article 292 UNCLOS is a perfect example of such a phenomenon. Other authors have highlighted that the powers exercised by ITLOS in prompt release cases correspond to functions ordinarily exercised by national administrations and reviewed by the domestic judiciary.[11]

This paper analyzes the prompt release case law of ITLOS in order to sketch the nature of the functions exercised by the Tribunal in this very peculiar procedure. It proceeds in three main steps. First, it examines the rationale and the objectives of the prompt release procedure in its normative context. The second step consists of studying the ambiguous relationship between ITLOS and the domestic legal order, in order to highlight in the last section the administrative nature of ITLOS' functions.

2 The Rationale and Objectives of the Prompt Release Procedure

The purpose of the prompt release procedure is to balance the interests of, on the one hand, the coastal States in protecting their sovereign rights and, on the other, of the flag States in the maritime activities of their fleet. The prompt release procedure was introduced in UNCLOS as a counterpart for the extension of coastal States' rights in the exclusive economic zone (EEZ).[12] In the last 30 years, the balance has shifted because several new interests and actors have emerged. So, it is debatable whose interests the prompt release procedure really protects (2.1). Moreover, private actors and their interests increasingly appear to be the subject and the object of the procedure (2.2).

2.1 The Protection of Whose Interests?

The question of whose interests ITLOS has to balance in a prompt release procedure was of particular relevance in the *Volga* case.[13] In this case, besides fixing a bond, Australia, the coastal State, "has made the release of the vessel conditional upon the fulfilment of two conditions: that the vessel carry a VMS [Vessel

[10] Ibidem, p. 34.

[11] Queneudec 2002, p. 88.

[12] Akl 2001, pp. 220–221; Churchill 2010, p. 153. The procedure of prompt release is one of the "substantive limits" to the sovereign rights of coastal states in their EEZ; *see* Oxman 2006, p. 839.

[13] ITLOS: "Volga" (Russia v. Australia), Judgment (23 December 2003).

Monitoring System], and that information concerning particulars about the owner and ultimate beneficial owners of the ship be submitted to its authorities".[14] Australia justified these further requirements in consideration of the "serious problem of continuing illegal fishing in the Southern Ocean, the dangers this poses to the conservation of fisheries resources and the maintenance of the ecological balance of the environment", and the CCAMLR (the Commission for the Conservation of Antarctic Marine Living Resources) conservation measures.[15] ITLOS dismissed Australia's claims and affirmed that: "The object and purpose of Article 73, para 2, read in conjunction with Article 292 of the Convention, is to provide the flag State with a mechanism for obtaining the prompt release of a vessel and crew arrested for alleged fisheries violations by posting a security of a financial nature whose reasonableness can be assessed in financial terms. The inclusion of additional non-financial conditions in such a security would defeat this object and purpose".[16]

In his separate opinion, Judge Cot emphasized the considerable margin of appreciation of the coastal State in exercising its sovereign rights with regard to the conservation of living resources.[17] But he also pointed out that "attaching conditions to the bond would transform the very nature of the procedure established by Article 292", it "would inevitably have the effect of complicating and slowing down the procedure, which would lose its *prompt* character", and it "would be tantamount to deflecting the Article 292 procedure from its purpose and distorting its meaning".[18]

Some 30 years after the adoption of UNCLOS, and considering the development of international environmental law during this same time frame, it might be appropriate to rethink the purpose of the prompt release procedure, even slightly distorting its "original" meaning. The prompt release procedure appears to be a strictly bilateral proceeding, but it is also closely linked to the protection of the marine environment. UNCLOS sets a number of obligations for the protection of the marine environment which consist of the normative context of any prompt release procedure. Protecting the marine environment and conserving marine living resources should combine the interests of both coastal and flag States and should have a considerable impact in prompt release matters.[19] Even if ITLOS

[14] Ibidem, para 75.

[15] Ibidem, para 67.

[16] Ibidem, para 77.

[17] Volga, supra n. 13, Separate Opinion of Judge Cot, para 12. See also Camouco, supra n. 6, Dissenting Opinion of Judge Wolfrum, para 12. For a comment, see Cot 2007, pp. 398–403.

[18] Volga, supra n. 13, Separate Opinion of Judge Cot, para 27.

[19] *Ad hoc* Judge Shearer emphasized in his dissenting opinion that: "A new 'balance' has to be struck between vessel owners, operators and fishing companies on the one hand, and coastal States on the other" (Volga, supra n. 13, Dissenting Opinion of Judge *ad hoc* Shearer, para 19). See also Brown 2003, pp. 628–630; Queneudec 2002, p. 92. In particular, Brown suggests that, in a case such as the *Volga* case, the precautionary principle might have been applied and used in order to assess the reasonableness of the bond; Brown 2003, p. 630.

rigidly considered that the prompt release procedure is not a legal tool for combating illegal fishing[20] (presumably, also not for the protection of the marine environment), these common interests should not excessively suffer from the promptness imperative.[21]

2.2 The (Indirect) Role of Private Actors

One of the unique characteristics of the prompt release procedure consists of the role given to private parties which are both the object and the subject of such a procedure. First, the arrested vessel is owned and/or exploited by a private actor who does not necessarily have the nationality of the flag State. The detention of the vessel entails considerable economic and financial losses for the shipowner who has justified interests, even more than the flag State, in its prompt release. For this reason, and in consideration of the fact that flag States are often not so motivated in pursuing the claim,[22] UNCLOS has provided an "on behalf" clause. Article 292.2 states that "[t]he application for release may be made *only by or on behalf of* the flag State of the vessel" (emphasis added).

The prompt release procedure is not a case of diplomatic protection, but it can be considered as a form of diplomatic protection where the flag State acts on behalf of its ship and crew.[23] The flag State espouses a private claim of persons linked to it by the nationality of the vessel[24] and those persons can eventually enjoy an important delegation of sovereignty if authorised to act on behalf of the same State.[25] On the one hand, the "on behalf" clause aims to preserve the

[20] Volga, supra n. 13, paras 67–69. Shany noted that "judicial settlement (being law-based) tend to be binary in nature and may run counter to important interests of some of the conflicting parties [such as the protection of the marine environment or the fight against illegal fishing]. In other words, as a problem-solving tool law has its limits"; Shany 2009, p. 88.

[21] In the specific case of the *Volga*, the Australian request might seem excessive as it entailed the payment by the owner of the ship of 1 million Australian dollars to guarantee the carriage by the vessel of the VMS. These requirements consisted of a "good behaviour bond" (Volga, supra n. 13, paras 79–80; for comment, Tanaka 2004, pp. 269–270) in order to prevent the arrested vessel from committing future violations. ITLOS concluded that such a "good behaviour bond" is not consistent with Article 73.2, read in conjunction with Article 292.1 (Volga, supra n. 13, paras 79–80).

[22] Flag states with an open registry or the so-called "flag of convenience states" do not have a strong genuine link (see Article 91 UNCLOS) with their vessels which are left with very little official protection.

[23] Churchill 2010, p. 153.

[24] ITLOS: "Grand Prince" (Belize v. France), Judgement (20 April 2001), Separate Opinion of Judge Treves. ITLOS supports the recognition of the right of a flag State to seek redress for non-national crew members (see ITLOS: M/V "Saiga" (no. 2) (Saint Vincent and the Grenadines v. Guinea), Order (11 March 1998)). This rule has been embedded in the Draft Articles on Diplomatic Protection by the International Law Commission, UN Doc. A/61/10 (2006).

[25] Article 110 ITLOS RoP: "2. A State Party may at any time notify the Tribunal of: (a) the State authorities competent to authorize persons to make applications on its behalf under article 292 of

interstate nature of the dispute and of the litigation[26]; even if the private party acts, formally on behalf of the flag State, but concretely to protect his/her own interests.[27] On the other hand, it somehow erodes the legal fiction that once a State espouses a private claim, that claim only belongs to that State. This clause translates the material rights at the center of the dispute into procedural rights.[28]

The private party does not have an independent right to act, however. In the *Grand Prince* case, ITLOS decided to examine *proprio motu* the basis of its jurisdiction because important doubts subsisted concerning the nationality of the vessel at the moment when the application was made.[29] The existence of the nationality link in the relevant phases of the procedure grounds the jurisdiction of the Tribunal and, consequently, the right of the private party to act on behalf of the flag State.

Private parties also play an important role in the post-adjudication phase. Namely, the bond or other financial security fixed by the Tribunal will be materially paid either by the shipowner or by his/her insurance company. It is then understandable that interested private parties claim a primary role during the adjudication phase.

In the light of these arguments, it clearly appears how the prompt release procedure is atypical in the international judiciary panorama. It is formally an intergovernmental procedure but materially blurs the distinction with transnational

(Footnote 25 continued)
the Convention; (b) the name and address of any person who is authorized to make an application on its behalf; (c) the office designated to receive notice of an application for the release of a vessel or its crew and the most expeditious means for delivery of documents to that office; (d) any clarification, modification or withdrawal of such notification. 3. An application on behalf of a flag State shall be accompanied by an authorization under paragraph 2, if such authorization has not been previously submitted to the Tribunal, as well as by documents stating that the person submitting the application is the person named in the authorization. It shall also contain a certification that a copy of the application and all supporting documentation has been delivered to the flag State".

[26] "The development of flags of convenience, with their minimal "genuine link", leaves ship owners with little official protection. (…) The "on behalf" clause was drafted to overcome this difficulty and to give shipowners a fast-track procedure, cutting through red tape and gaining a form of direct access to the Tribunal while preserving the intergovernmental nature of the dispute and the litigation"; Cot 2002, p. 843.

[27] In his dissenting opinion in the *Volga* case (supra n. 19), *ad hoc* Judge Shearer highlighted the fact that: "Fishing companies are highly capitalised and efficient, and some of them are unscrupulous. The flag State is bound to exercise effective control of its vessels, but this is often made difficult by frequent changes of name and flag by those vessels. It is notable that in recent cases before the Tribunal, including the present case, although the flag State has been represented by a State agent, the main burden of presentation of the case has been borne by private lawyers retained by the vessel's owners" (para 19).

[28] "It has often been said that, in the case of diplomatic protection, once a state has assumed a claim and asserted it in an interstate procedure, that claim belongs to nobody other than the state itself. However, that fails to distinguish between the material right and the procedures for their vindication", *see* Nollkaemper 2011, p. 251.

[29] Grand Prince, supra n. 24, paras 76–77.

proceedings. It aims at guaranteeing flag States' rights, but concretely protects ship owners from undue economic and financial losses. These specific aspects have an impact on the content of ITLOS jurisdiction in prompt release cases and consequences for the case on the merits before the competent domestic authorities.

3 The Ambiguous Relationship Between ITLOS and the Domestic Legal Order

As mentioned before, the prompt release procedure takes place while the case on the merits is still pending before the competent authorities of the detaining State. Consequently, pursuant to Article 292.3 UNCLOS, ITLOS "shall deal only with the question of release, *without prejudice to the merits of any case before the appropriate domestic forum* against the vessel, its owner or its crew" (emphasis added). This limitation of ITLOS jurisdiction is sometimes elusive as the Tribunal has to appreciate the merits in order to determine the admissibility of the claim and the eventual release (3.1). The judgment of the Tribunal will then bind the authorities of the detaining State (Article 292.4).[30] ITLOS has exclusive jurisdictional control over the amount of the bond (3.2).

3.1 The Limited (Not So Much) Jurisdiction of ITLOS in Prompt Release Procedures

In the *Camouco* case, the Tribunal affirmed that "Article 292 provides for an independent remedy and not an appeal against a decision of a national court".[31] As pointed out by Judge Cot in the *Volga* case, when appreciating the reasonableness of a bond, "the Tribunal does not have to substitute its discretion for that of the coastal State (…) nor is it the hierarchical superior of an administrative or government authority".[32] But, in prompt release cases, ITLOS is actually asked to control and evaluate the discretional exercise of sovereign rights by the coastal State.[33]

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[30] "Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew". Gallala has rightly affirmed that: "la procédure de l'Article 292 constitue l'un des points de rencontre ou d'interférence entre la justice interne et la justice internationale"; *see* Gallala 2001, p. 936.

[31] Camouco, supra n. 6, para 58.

[32] Volga, supra n. 13, Separate Opinion of Judge Cot, para 22.

[33] "[L]e tribunal est amené à contrôler l'exercice du pouvoir discrétionnaire de l'Etat côtier en la matière", *see* Queneudec 2002, p. 88.

ITLOS has to consider whether the arrest of the ship and the eventual bond are in compliance with the relevant UNCLOS provisions (Articles 73, 220, or 226). ITLOS is then called upon to review how the coastal State has applied international law to the facts.[34] Some authors assert that, in such cases, the competent international tribunal should defer to prior assessments of the domestic courts; in other words, it should apply the margin of appreciation doctrine.[35] In the *Camouco* case, both Judge Wolfrum and Judge Anderson highlighted in their respective dissenting opinions that the discretionary powers of the coastal State and the related margin of appreciation should limit ITLOS' powers of review concerning the reasonableness of a bond.[36] Considering that UNCLOS does not regulate in detail the enforcement powers of coastal States[37] which, as often mentioned above, have a wide margin of discretion in defining and enforcing their EEZ regulations, ITLOS should not consider the reasonableness of such a system without taking into consideration the enforcement policy of the coastal State[38] and the context of this enforcement measure.

The discretion of coastal States also applies at the procedural level, that is concerning the procedural requirements and guarantees to be applied to the detained vessel and crew, both at the moment of the arrest and then to the request for a prompt release before the competent national authorities. Consequently, the circumstances of the seizure of the vessel "are not relevant to (…) proceedings for prompt release under Article 292 of the Convention".[39] However, in the *Juno Trader* case,[40] the Tribunal affirmed that: "The obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process

[34] Nollkaemper distinguishes between "cases where international courts have to review decisions by national courts on abstract questions of international law, such as may be the case in *Jurisdictional Immunities of the State (Germany v Italy)*, and cases where they have to review the application of international law to facts", *see* Nollkaemper 2011, p. 254.

[35] Ibidem; Cot 2007, p. 387. The margin of appreciation doctrine has been particularly studied in the field of human rights in relation to the case law of the European Court of Human Rights. This aspect will not be discussed here.

[36] "These discretionary powers or margin of appreciation on the side of the coastal State limit the powers of the Tribunal on deciding whether a bond set by national authorities was reasonable or not. It is not for the Tribunal to establish a system of its own which does not take into account the enforcement policy by the coastal State in question", Camouco, supra n. 6, Dissenting Opinion of Judge Wolfrum, para 11. *See* also the dissenting opinion of Judge Anderson in ibidem.

[37] As rightly pointed out by Judge Cot, UNCLOS "does not put a limit upon the amount of fines against violators a coastal state may consider appropriate"; Cot 2007, p. 401. UNCLOS, however, does prohibit imprisonment or other kinds of corporal punishment for fisheries violations (Article 73.3) and requests the prompt release of the detained vessel and crew (Article 73.2).

[38] Camouco, supra n. 6, Dissenting opinion of Judge Wolfrum, para 12.

[39] Volga, supra n. 13, para 83.

[40] ITLOS: "Juno Trader" (Saint Vincent and Grenadines v. Guinea-Bissau), Judgment (18 December 2004), para 77.

of law".[41] In his separate opinion, Judge Treves pushed this argument somewhat further and claimed that concepts of the abuse of law and the due process of law as applied by national courts should be appreciated by the Tribunal.[42] He subsequently pointed out how, in the *Juno Trader* case, the Tribunal used the reference to considerations of humanity as "a substitute for human rights".[43]

What may seem to be an extension of ITLOS' field of concerns, and consequently of its jurisdiction, corresponds to what has been defined as the "human rights consequences of expanding the bases of jurisdiction".[44] If UNCLOS provided coastal States with an extension of jurisdiction on their adjacent sea, it also limited their discretion in consideration of the rights, not only of the other States, but also of individuals.[45] This is more evident in the field of maritime pollution as UNCLOS sets some specific limitations and requirements concerning the proceedings before domestic courts (e.g., Articles 228 and 230). In the field of fisheries, UNCLOS is more vague. As already mentioned above, Article 73 does not detail the procedure before the domestic authorities, but merely rules out possible imprisonment. In the light of this vagueness and of the above quoted "considerations of humanity", ITLOS has elaborated in its case law certain procedural and substantive guarantees to be applied also to final domestic decisions which might have an effect on the prompt release procedure.[46]

In the *Tomimaru* case, ITLOS affirmed that the "confiscation of a fishing vessel must not be used in such a manner as to upset the balance of the interests of the flag State and of the coastal State established in the Convention".[47] The Tribunal went further by specifying that a confiscation decision "should not be taken in such a way as to prevent the shipowner from having recourse to available domestic judicial remedies, or as to prevent the flag State from resorting to the prompt release procedure set forth in the Convention; nor should it be taken through proceedings inconsistent with international standards of due process of law".[48]

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[41] The Tribunal also invoked the application of "international standards of due process of law" in the *Tomimaru* case in relation to the confiscation decision adopted by the domestic authorities which may have had the consequence of eliminating "the provisional character of the detention of the vessel rendering the procedure for its prompt release without object" (supra n. 7, para 76).

[42] Juno Trader, supra n. 40, Separate Opinion of Judge Treves, para 6.

[43] Treves 2010, p. 5.

[44] Oxman 1997, p. 422.

[45] Ibidem.

[46] Juno Trader, supra n. 40, para 63 and Separate Opinions of Judge Mensah and Judge Wolfrum. *See* Cogliati-Bantz 2009, pp. 255–257.

[47] Tomimaru, supra n. 7, para 75.

[48] Ibidem, para 76.

3.2 The Criteria for Assessing the Reasonableness of the Bond

The ambiguous relationship between ITLOS and the domestic legal order is particularly evident in the way the Tribunal assesses the reasonableness of the bond which was previously decided by the competent authorities of the detaining State.[49] Securing a bond provides assurances for the detaining State concerning the effectiveness of the final judgement to be adopted by its authorities.[50] The ITLOS is then called upon to assess whether the bond or other financial security is reasonable in terms of Article 292 UNCLOS, whether the bond consists of a fair balance between the right (of the flag State, the shipowner and the crew) of prompt release and the right (of the coastal State) to try and punish.[51] But UNCLOS itself does not provide for any criterion to be used in performing such a task by either the ITLOS or the competent domestic courts. The Tribunal has consequently elaborated its own criteria for assessing the reasonableness of the amount, nature and form of the bond or other financial security.[52]

In the *Camouco* case, the Tribunal listed the elements which are relevant in order to assess the reasonableness of a bond: "the gravity of the alleged offenses, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form".[53] In the *Volga* case, it specified that the gravity of the alleged offenses may be evaluated by reference to "the penalties that may be imposed for the alleged offenses under the laws of the Respondent [Coastal State]".[54] In the *Monte Confurco* case, ITLOS affirmed that "the balance of

[49] ITLOS has dealt with the reasonableness of the bond in six cases: M/V "Saiga" (Saint Vincent and Grenadines v. Guinea), Judgment (4 December 1997); Camouco, supra n. 6; "Monte Confurco" (Seychelles v. France), Judgement (18 December 2000); Volga, supra n. 13; Juno Trader, supra n. 40; and "Hoshinmaru" (Japan v. Russia), Judgement (6 August 2007). It discussed the reasonableness of the bond set by the detaining State in four of these cases (Camouco, Monte Confurco, Volga, Hoshinmaru) and, in all four cases, it declared the bond to be unreasonable within the meaning of Article 292 UNCLOS. See Gao 2008, p. 126.

[50] This statement is confirmed by Article 114.2 of the ITLOS RoP: "The Registrar shall endorse or transmit the bond or other financial security to the detaining State to the extent that it is required to *satisfy the final judgment*, award or decision of the competent authority of the detaining State" (emphasis added).

[51] Monte Confurco, supra n. 49, para 71; *see* Gao 2008, p. 131.

[52] According to Article 113.2 ITLOS RoP, the Tribunal "shall determine the amount, nature and form of the bond or financial security to be posted". In the *Saiga* case, the Tribunal affirmed that: "The overall balance of the amount, form and nature of the bond or financial security must be reasonable" (ITLOS: Saiga, supra n. 49, para 82).

[53] Camouco, supra n. 6, para 67.

[54] Volga, supra n. 13, para 69.

interests emerging from Articles 73 and 292 (…) provides the guiding criterion for the Tribunal in its assessment of the reasonableness of the bond".[55]

Pursuant to Article 293.1 UNCLOS, "a court or tribunal having jurisdiction under this section shall apply this Convention and other rules of *international law* not incompatible with this Convention" (emphasis added). Consistently, the Tribunal has stated that "[w]hen determining whether the assessment made by the detaining State in fixing the bond or other security is reasonable, the Tribunal will treat the laws of the detaining State and the decisions of its courts as *relevant facts*"[56] (emphasis added). However, once the gravity of the alleged offense is evaluated on the basis of the domestic legislation, which is an expression of the coastal State policy, how is it possible to determine a reasonable bond without again referring to the domestic legislation?[57] Moreover, the bond set by the detaining vessel is another relevant factor in order to assess whether a bond is reasonable. ITLOS will then evaluate the reasonableness of the bond determined by the domestic court within the meaning of Article 292 UNCLOS by reference, once again, to the relevant national legislation and its application to the concrete case. The domestic legislation and the decision of the national court then seem to be more than just "relevant facts".[58]

With the lack of precise provisions in the UNCLOS concerning the assessment of a reasonable bond, the ITLOS has rightly been looking at the practice of the State concerned by the concrete case, and has then tried to deduce from there, in the light of the relevant international legal context, some useful criteria. However, this judicial technique has as a consequence that domestic courts cannot rely on clear rules in order to perform their functions in compliance with international law. Gallala has provacatively suggested that: "Tant que le tribunal estime que le terme "raisonnable" doit être interprété d'abord et essentiellement au regard du droit international, ne serait-il pas approprié de mettre à la disposition des jurisdictions des Etats immobilisateurs une procédure de question préjudicielle auprès du [Tribunal]?".[59] This solution is quite interesting because it would prevent, in part, the emergence of disputes concerning the reasonableness of the bond. But what would happen if the flag State, or whosoever on its behalf, requests the ITLOS to consider the reasonableness of a bond which the national court has fixed on the basis of the prejudicial answer? Would the ITLOS then become a sort of "supreme court" in bond issues and not only on prompt release? Maybe this is already the case.

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[55] Monte Confurco, supra n. 49, para 72.

[56] Ibidem.

[57] Cogliati-Bantz 2009, pp. 251–252.

[58] Nollkaemper 2011, p. 253. Gao interestingly noted that "sometimes the ITLOS seemed to determine the amount of the reasonable bond by eliminating the unreasonable components from the bond requested by the detaining state"; Gao 2008, p. 139.

[59] Gallala 2001, p. 945.

4 Concluding Remarks on the Exercise of Administrative Functions by ITLOS

ITLOS forms part of the institutional apparatus created by UNCLOS. Its functions are not only those of settling disputes among States parties, but also regime maintenance.[60] The prompt release procedure is emblematic of such a function. It aims at protecting the balance between the interests of flag States/the fishing industry and the sovereign rights of coastal States that UNCLOS has now recognized. But, as discussed above, the balance between these interests needs a new equilibrium in the light of the developments which have occurred in particular in the field of environmental protection. ITLOS is then also called upon to be part of a strategy to solve global problems,[61] such as maritime pollution and overfishing.

Because of the procedural specificities of prompt release, ITLOS is also called upon to act as an administrative institution. It exercises functions which are equivalent to those of States' authorities,[62] specifically domestic authorities in charge of implementing national regulations concerning the EEZ. ITLOS evaluates whether the national law provides a basis for the national measure and then considers whether both the law and the measure conform to the relevant international rules[63] which, concerning the reasonableness of a bond, rely on the national law of the detaining State. Moreover, the bond or other financial security can be posted either with the Registrar of the Tribunal or with the detaining State.[64] ITLOS acts both as a court exercising judicial review and an administrative institution.

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[60] Shany 2009, p. 81.

[61] Bogdandy and Venzke 2012, p. 8. "Like few other institutions, [international courts] stand in the service of international law's promise of contributing to global justice"; but the authors consider that "international courts' practice can be sufficiently justified neither on the traditional basis of state consent, nor by a functionalist narrative that exclusively clings to the goals or values courts are supposed to serve. Nor can courts draw sufficient legitimacy from the fact that they form part of the legitimation of public authority exercised by other institutions, be it states or international bureaucracies". Ibidem.

[62] Wolfrum 2010, p. 917.

[63] Ibidem, p. 936.

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Consolidation or Deviation? On Trends and Challenges in the Settlement of Maritime Delimitation Disputes by International Courts and Tribunals

Davor Vidas

1 The Importance of International Law for Inter-State Boundary Delimitation

Boundary disputes may lead to tense inter-state relations, causing confrontations, border incidents and, at worst, armed conflicts. Throughout history, various boundaries—not least in Europe—settled by political arrangements agreed by or between major powers have, over time, led to new disagreements and tensions. The role of international law is of the utmost importance here, since it can enable delimitation based on the rule of law instead of recourse to force or political actions. Reliance on international law thus emerges as a key factor in facilitating long-term stability in relations between neighboring states as well as in entire regions.

The basic consideration in maritime delimitation under international law is the importance accorded to neutral, objective legal criteria to enable predictability, along with an appreciation of the specific circumstances of each case, to achieve an equitable solution. By offering predictability and balance, principles and rules of international law consolidated through an increasingly consistent judicial and arbitral practice may have significant potential as a factor for stability. Especially since the first half of the 1990s, international judicial and arbitral practice on maritime dispute settlement has greatly contributed to the interpretation and consolidation of

This contribution is dedicated to Professor and Judge Tullio Treves, who has made invaluable contributions towards the governance of international law in inter-State relations, not least in respect of the peaceful settlement of disputes in the field of the law of the sea.

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principles of international law and rules for maritime delimitation, as is evident in several important recent decisions by international courts and arbitral tribunals.

2 Consolidation of International Law Principles for Maritime Delimitation

States have made increasing use of the international courts and arbitral tribunals in the past two decades. A general reason for the greater emphasis accorded to the international peaceful settlement of disputes can be seen in the onset of the post-Cold-War period.[1] More specifically, as to the law of the sea, the entry into force of the United Nations Convention on the Law of the Sea[2] (Montego Bay, 1982; hereinafter LOS Convention) may also have facilitated recourse to the international judiciary.[3]

Even in the late 1980s, however, some were arguing that the influence of juridical settlement on the theory of boundary making was limited by the degree of geographic specificity adopted by tribunals, since "if each adjudicated maritime boundary is treated as unique, or nearly unique, it may not be easy or even desirable to extract general principles for the purposes of theory-building."[4]

While this observation might have had some accuracy when it was made, it has been increasingly challenged by the development of judicial and arbitral practice in maritime delimitation over the past two decades. Since the first half of 1990s, courts and tribunals have contributed to defining various general rules of maritime delimitation, leading to predictable results in their application.[5] In analyzing the

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[1] Guillaume 2007, p. 2.

[2] Entered into force on 16 November 1994. As of 13 January 2012, there were 162 parties to the LOS Convention.

[3] Treves 2011, paras 49 and 89.

[4] Johnston 1988, p. xiii.

[5] See Degan 2007, p. 609, referring to the judgment by the International Court of Justice in Maritime Delimitation in the Area between Greenland and Jan Mayen as an early example of this tendency in the judicial and arbitral practice of defining some simple and general rules that can lead to predictable results in their application (ICJ: Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment (14 June 1993)).

[6] Churchill 2007, p. 475.

[7] Since the end of the 1990s, this has notably related to judicial decisions and arbitral awards in the following cases: PCA Arbitral Tribunal: Eritrea/Yemen, Award in the Second Stage—Maritime Delimitation (17 December 1999); ICJ: Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment (16 March 2001); ICJ: Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment (10 October 2002); PCA/UNCLOS Arbitral Tribunal: Delimitation of the EEZ and the Continental Shelf (Barbados/Trinidad and Tobago), Award (11 April 2006); PCA/UNCLOS Arbitral Tribunal: Guyana v. Suriname, Award (17 September 2007); ICJ: Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea

practice of international courts and tribunals since the late 1990s, Churchill concluded that these have now "arrived at a clear and consistent approach to maritime delimitation … in contrast to some vagaries in the earlier case law".[6]

Several landmark court judgments and arbitral awards have contributed to that consolidation in recent years.[7] The basic principle that maritime rights derive from the coastal state's sovereignty over the land ("the land dominates the sea") was restated, with reference to the previous judgments of the International Court of Justice (ICJ), in the Court's 2001 judgment on maritime delimitation and territorial questions between Qatar and Bahrain: "It is thus the terrestrial territorial situation that must be taken as starting point for the delimitation of the maritime rights of a coastal State."[8]

In its 2009 judgment regarding the maritime delimitation between Romania and Ukraine in the Black Sea, the ICJ recalled two principles underpinning the previous jurisprudence of the Court: first, that the "land dominates the sea" in such a way that coastal projections in a seaward direction generate maritime claims; and second, that the coast, in order to be considered as relevant for the purpose of the delimitation, must generate projections which overlap with projections from the coast of the other party.[9]

Regarding the methods of territorial sea delimitation, the ICJ confirmed in 2007 that "the methods governing territorial sea delimitations have needed to be, and are, more clearly articulated in international law than those used for the other, more functional maritime areas."[10]

Furthermore, with respect to the delimitation of the territorial sea, the Court referred in the same judgment to its previous practice, stating: "[T]he most logical and widely practiced approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances."[11]

Although Article 15 of the LOS Convention on the delimitation of the territorial sea, on the one hand, and Articles 74 and 83 on the delimitation of the exclusive economic zone and the continental shelf, respectively, on the other hand, contain

(Footnote 7 continued)
(Nicaragua v. Honduras), Judgment (8 October 2007); ICJ: Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment (3 February 2009).

[8] Delimitation between Qatar and Bahrain, supra n. 7, para 185.

[9] Maritime Delimitation in the Black Sea, supra n. 7, para 99. In the same judgment the Court further observed that the legal concept of the "relevant area" must be taken into account as part of the methodology of maritime delimitation, in which the "relevant area", first, depending on the configuration of the relevant coasts, may include certain maritime spaces and exclude others not germane to the case in hand; and second, is pertinent to checking disproportionality (ibidem, para 110).

[10] Territorial and Maritime Dispute (Nicaragua v. Colombia), supra n. 7, para 269.

[11] Ibidem, para 268, referring to the Court's 2001 Judgment on Delimitation between Qatar and Bahrain, supra n. 7, para 176.

[12] Delimitation between Qatar and Bahrain, supra n. 7, para 231.

quite different wording, the ICJ stated in its 2001 judgment on maritime delimitation and territorial questions between Qatar and Bahrain:

> the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been adopted since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated.[12]

Moreover, the Court explained in its 2007 judgment that when a line applying to several zones of coincident jurisdictions is to be determined, the "equitable principles/relevant circumstances" method may usefully be applied, as

> [T]his method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an 'equitable result'.[13]

Regarding an equitable result, in its latest judgment on maritime delimitation, adopted in 2009, the ICJ stated: "The purpose of delimitation is not to apportion equal shares of the area, nor indeed proportional shares. (…) The object of delimitation is to achieve a delimitation that is equitable, not an equal apportionment of maritime areas."[14]

That "equity does not necessarily imply equality" had already been stated by the ICJ in its 1969 judgment in the North Sea Continental Shelf cases, observing that "[t]here can never be any question of completely refashioning nature".[15] Reliance on the given geographic features was further confirmed by the ICJ in its 2002 judgment in the case of the land and maritime boundary between Cameroon and Nigeria, stating that: "the geographical configuration of the maritime areas that the Court is called upon to delimit is a given. It is not an element open to modification by the Court but a fact on the basis of which the Court must effect the delimitation."[16]

Indeed, as remarked by the UN Secretary-General: "UNCLOS was not negotiated to correct geographical circumstances. To compensate partially for the latter, the Convention provides adequate remedies for situations where States are at a disadvantage."[17]

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[13] Territorial and Maritime Dispute (Nicaragua v. Colombia), supra n. 7, para 271, referring to Land and Maritime Boundary (Cameroon v. Nigeria), supra n. 7, para 288.

[14] Maritime delimitation in the Black Sea, supra n. 7, paras 110 and 111, referring to the following previous judgments: ICJ: North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/The Netherlands), Judgment (20 February 1969), para 18; Maritime Delimitation (Denmark v. Norway), supra n. 5, para 64.

[15] North Sea Continental Shelf, supra n. 14, para 91.

[16] Land and Maritime Boundary (Cameroon v. Nigeria), supra n. 7, para 295.

[17] Oceans and the Law of the Sea: Report of the Secretary-General, UN Doc. A/59/62 of 4 March 2004, para 41.

[18] ICJ: Continental Shelf (Libya/Malta), Judgment (3 June 1985), para 45.

[19] Delimitation (Barbados/Trinidad and Tobago), supra n. 7.

In that connection, the ICJ had already made it clear in its earlier judgments that, as regards the search for predictable, objectively determined criteria for delimitation, as opposed to subjective findings without precise legal or methodological basis, "the justice of which equity is an emanation, is not abstract justice but justice according to the rule of law".[18]

The 2006 Award in the Barbados v. Trinidad and Tobago arbitration[19] contributed to this overall trend by providing a highly authoritative and clear restatement of the development of the law governing the delimitation of maritime boundaries.[20] The Arbitral Tribunal observed that the "apparently simple and imprecise formula" contained in Articles 74.1 and 83.1 of the LOS Convention allows for a broad consideration of legal rules embodied in treaties and customary law as pertinent to delimitation, and that:

> the search for an approach that would accommodate both the need for predictability and stability within the rule of law and the need for flexibility in the outcome that could meet the requirements of equity resulted in the identification of a variety of criteria and methods of delimitation.[21]

The Arbitral Tribunal also stated that, with very few exceptions, "the quest for neutral criteria of a geographical character prevailed in the end over area-specific criteria such as geomorphological aspects or resource-specific criteria such as the distribution of fish stocks."[22]

In its conclusions, the Arbitral Tribunal emphasized the importance of certainty, equity and stability as integral elements in the process of delimitation: a decision must be both equitable and as practically satisfactory as possible, while also being guided by the requirement of achieving a stable legal outcome.[23] To that effect, jurisprudence leading to predictable results has been gradually developed.

In that respect, geographic circumstances have been repeatedly accorded a predominant role by the ICJ and arbitral tribunals. This has led to an increasingly consistent international juridical practice, in which other factors can sometimes, if justified by peculiar circumstances, play certain, albeit lesser, roles.[24] While some previous judgments of the ICJ until the early 1980s may have given rise to uncertainty and may even appear arbitrary, the Court has progressively altered its jurisprudence. Especially since the 1993 Greenland and Jan Mayen (Denmark *v*. Norway) judgment the ICJ has:

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[20] In addition to Churchill 2007 and Degan 2007, see also a comment by Kwiatkowska 2007.

[21] Delimitation (Barbados/Trinidad and Tobago), supra n. 7, paras 221 and 232.

[22] Ibidem, para 228.

[23] Ibidem, para 244.

[24] See Scovazzi 2006, especially paras 9, 12, 14 and 39.

[25] Guillaume 2011, pp. 11–12.

> unified the law of maritime delimitation—whether the continental shelf, territorial sea or the exclusive economic zone—in holding that in all these cases it was necessary to first draw the line of equidistance, then adjust it to take account of relevant factors related mainly to the coastline. Finally, it generalized this solution in 2001 in *Bahrain/Qatar*, and resumed it in the 2009 case of *Romania/Ukraine*.[25]

Neutral formulas found in the delimitation provisions of the LOS Convention are, thus, implemented through the gradual development of international case law marked by carefully balancing objective and general considerations with specific ones. The central importance of this trend of consolidation in the interpretation and application of principles and rules of the international law of maritime delimitation through juridical and arbitral practice cannot be overstated.

3 Legal Nature of International Judicial Decisions on Maritime Delimitation: The Role of Precedents or of Unique Solutions Due to Specific Circumstances?

Article 38.1 of the Statute of the ICJ clearly distinguishes judicial decisions from the sources of international law listed in that article (international treaties, international customary law, and general principles of law), and lists judicial decisions among "subsidiary means for the determination of rules of law" (subject to the provisions of Article 59).[26] As one experienced practitioner has noted, that may be viewed as being "somewhat ironic", since "when it comes to identifying the principles and rules of maritime delimitation in their concrete application, the jurisprudence provides the most important source of legal guidance."[27]

While judicial decisions are clearly not the source of international law *per se*, their importance, especially in the field of inter-State maritime delimitation, has been conditioned by two factors. One relates to the impact of previous judgments and arbitral awards on later judicial and arbitral decisions, while the other concerns the actual content of relevant international law provisions in this field.

First, as succinctly observed by Guillaume, while "the International Court of Justice does not recognize any binding value to its own precedent (…) it takes it into great consideration".[28] As to international arbitrations, although these are mostly convened on an *ad hoc* basis, in inter-State disputes they also tend to be "imprinted with jurisprudence from the International Court of Justice and arbitration tribunals

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[26] Article 59 of the Statute reads: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

[27] Bundy 2006, p. 95.

[28] Guillaume 2011, p. 12.

[29] Ibidem, pp. 14–15.

[30] This aspect has proven its importance, beyond third-party decisions, also for the conclusion of bilateral agreements in the settlement of some long-standing maritime disputes between States,

on which they rely".[29] Also the ICJ has recently made references to some selected arbitral awards, though exclusively to those issued in disputes between States—in particular on boundary delimitation—and never to, e.g., commercial arbitration awards. It can, therefore, be concluded that whereas in public international law the judiciary is not precedent based, the development of practice in the field of maritime boundary delimitation over the past two decades has brought the international judiciary rather close to that. This serves to offer States in dispute some guarantees of certainty regarding the consistent application of international law.[30]

Second, the wording of articles of the LOS Convention on maritime delimitation, not least of Articles 74 and 83, help to explain the role of international judicial and arbitral decisions. While the courts and arbitral tribunals do not have the role of developing the law, the general and vague language of the relevant provisions of the LOS Convention has brought the role of the international judiciary "close to" that—in the sense of *contributing* to the development of international law.[31] This "creative role" of international jurisprudence has been necessitated by the evasive character of the LOS Convention provisions in this field.[32]

Nonetheless, the predominance of unique circumstances in individual cases has been frequently cited as a key element for maritime boundary delimitation, even in respect of some regions.[33] This approach has been met with arguments on the applicability of general principles and rules for maritime delimitation, equally in all cases and regions. Even in situations where some exceptional peculiarities may be involved, the need for the predictability and stability of rules for delimitation remains a paramount consideration of international law. This does not mean that evolution in law due to changes in the relevant circumstances can or should be disregarded. Rather, it is a question of striking a balance between the need for predictability and certainty, on the one hand, and adjusting to evolving situations, on the other.

(Footnote 30 continued)
such as between Norway and Russia, where the appreciation of principles for maritime delimitation as consolidated through the ICJ judgments and arbitral awards played an important role in the successful conclusion of the Treaty between Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean (Murmansk, 15 September 2010), entered into force on 7 July 2011; for a review and the text of the treaty, see Jensen 2011.

[31] For an early argument in that direction, see Vukas 1999, pp. 102–103.

[32] Scovazzi 2006, para 3.

[33] See further the discussion in Oude Elferink and Rothwell 2001.

4 Pending and Emerging Maritime Delimitation Issues: New Challenges Ahead?

While the settlement of maritime boundaries is of high importance for the orderly functioning of inter-State relations, the fact remains that less than half of the world's maritime boundaries have as yet been delimited. This is due not only to the strategic and economic importance of maritime spaces. Unlike terrestrial delimitation, maritime delimitation involves, in addition to the settlement of boundaries of sovereignty (internal waters and the territorial sea), also the boundaries of other maritime zones of States' sovereign rights and jurisdiction: continental shelves, EEZs and some other zones of functional jurisdiction. As a consequence of this multiplicity of zones, the maritime political map of the world has remained profoundly incomplete.

Although several long-standing maritime delimitation disputes have recently been resolved, whether by international decisions or bilateral agreements, the overall trend has not been a decrease in the number of open and emerging maritime delimitation issues. Quite the contrary, for various reasons the number of maritime delimitation disputes seems to be increasing as new issues emerge. This trend can be noted also in some of the seas adjoining Europe.

One overview prepared under the auspices of the US Department of State set the theoretical total of actual and potential maritime boundaries at 420—of which less than half had been settled.[34] That study, made in 1990, contained two additional remarks. First, potential boundary situations where the continental shelf extends beyond 200 nautical miles were not included. And second, the total number of boundaries would increase significantly, should States with existing continental shelf boundary agreements decide to negotiate new maritime boundaries to delimit their respective EEZs. Those remarks, made two decades ago, today relate to two key trends that have entered the maritime boundary agenda in the intervening period. A third remark can be added here: the 1990 study did not envisage the then-imminent dissolution of States like the Soviet Union and Yugoslavia, which added several complex cases to the number of open maritime boundary disputes.

As a result of developments over the past two decades, we are increasingly faced with three categories of emerging maritime delimitation issues, relating to:

- continental shelves extending beyond 200 nautical miles from the baselines[35];
- various maritime zones of functional jurisdiction, such as ecological zones or ecological and fisheries zones, related to the water column only, and their relationship to the continental shelf delimitation;

[34] Smith 1990, pp. 3–7. More recent estimates are contained in Prescott and Schofield 2005, pp. 245–246.

[35] See the chapters in Part V, on "Continental Shelf Beyond 200 Nautical Miles", in Vidas 2010, pp. 423–589.

- the delimitation of territorial seas and other maritime zones between several new coastal States following the dissolution of a former coastal State, in particular in situations where the predominance of a "historic title" or other "special circumstances" is invoked by some of those States.

Although individual cases of maritime boundaries remain unresolved at various places around the globe, certain regions seem to be emerging as particularly acute in this regard. In the seas adjoining Europe, that is the case with two regions located at the extreme north and the extreme south of the continent: the Arctic and the Mediterranean, including the Adriatic Sea. Both are today characterized by certain specific features and the emergence of acute delimitation issues.

Among those challenging developments there are those that are genuinely unique in their substance, while others are only allegedly so, and are in fact prompted mainly by political agendas. Some developments—such as the setting of the "outer" continental shelf limits in the Arctic and possible delimitation issues—while not unique to that region, are emerging in an extraordinary complex setting. Other developments, such as environmental ("ecological") protection zones derived from the EEZ concept yet relating exclusively to the water column, are as yet a uniquely regional (Mediterranean) feature, accompanied by arguments for a specific approach to maritime delimitation.[36] Finally, in the case of the Adriatic Sea, political arguments favoring peculiar solutions in some cases make reference to the alleged uniqueness of the situation.[37]

Those developments, embodying for one reason or another, the demand for unique solutions to be employed in maritime delimitation, confront the evident trend toward the consolidation of international judicial and arbitral practice. How will those two trends impact on each other? Can such specific, complex situations be satisfactorily solved by the application of "general" rules, increasingly consolidated through already long-standing practice in international dispute settlement? Or will the genuinely unique elements, if involved, spur the courts and tribunals to further developments in the interpretation of principles and rules of maritime delimitation and methodology for their application?

Responding to newly emerging questions of maritime delimitation (each of which will involve more or less specific features), while also maintaining the balance between the certainty, equity, and stability of the process and its results, is very much a matter of degree. Defining the constituent elements of that degree remains, in turn, a persistent challenge for international courts and arbitral tribunals in deciding on maritime delimitation disputes.

[36] See further Papanicolopulu 2007.

[37] See further Vidas 2009.

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Part V
Environmental Law

Legal Standing of NGOs in Environmental Disputes in Europe

Elena Fasoli

1 Preliminary Remarks

Article 9 of the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998; hereinafter Aarhus Convention),[1] the so-called "access to justice pillar", allows members of the public having a sufficient interest or maintaining an impairment of a right to use legal mechanisms in order to gain a review of potential violations of the public participation provisions and of other relevant rules of the Convention where this is so provided under national legislation (para 2). Under the same provision "what constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law". Furthermore, Article 2.5 specifies that only non-governmental organizations (NGOs) that promote environmental protection and meet "any requirement under national law shall be deemed to have an interest".

In light of the above, the Convention leaves room for the State Parties (hereinafter "the Parties") to define the qualifications required of NGOs to bring actions in the courts. For this reason, the terms for access to judicial protection in environmental matters vary considerably among the different European legal systems.

[1] Entered into force on 30 October 2001. See Wates 2005, pp. 393–406; Pallemaerts 2011; UNECE 2011.

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However, some common features can be determined. As far as NGOs are concerned, some European Union Member States (hereinafter "Member States") in addition to the general requirements, such as being established for the purpose of environmental protection, provide for standing criteria related to the territory covered by the activity of the NGO and/or to the number of its members.

The aim of the present article is to assess whether the above-mentioned criteria comply with the obligations under the Aarhus Convention.[2]

2 Standing Criteria for Small/Local NGOs: Examples of Problematic Domestic Legislation Within the Perspective of the Aarhus Convention

Among the different European legal systems, attitudes differ with regard to the types of NGOs allowed to participate in environmental procedures.[3] The majority of the European States are quite flexible as they allow NGOs that can be considered "small", in terms of the number of their members or the activities they cover, to take legal action and do not require any particular "recognition procedure". In this regard, NGOs have standing mainly as long as they defend environmental interests according to their statutes and/or previous activities.[4]

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[2] Provided that within the different European legal systems the processes for decision making, including appeals and enforcement, in this area of the law can be based upon administrative, civil or criminal law procedures, depending on the different legal cultures—although, however, the main venue for environmental NGO claims remains before the Administrative Court—in the present paper we will refer, more generally, to "environmental procedures".

[3] See, among the other sources, Ebbesson 2001; De Saadeler et al. 2002; Harding 2007. A general overview of access to justice in environmental matters in 25 European countries—with the exclusion of Romania and Bulgaria—is also provided by Milieu Reports (2007) Measures on Access to Justice in Environmental Matters (Article 9(3)). http://ec.europa.eu/environment/aarhus/study_access.htm. Accessed on 10 September 2011. See, also, NGO Justice and Environment (2010) Report on Access to Justice in Environmental Matters. www.justiceandenvironment.org/_files/old-uploads-wordpress/2010/05/JE-Aarhus-AtJ_Report_10-05-24.pdf. Accessed on 10 September 2011.

[4] In Austria, for example, the associations must be organized in the form of a non-profit legal person or of a foundation which has environmental protection as its main objective, and they must have been legally incorporated as working for environmental protection for at least three years. See 2011 Aarhus Convention National Implementation Report prepared by Austria, p. 26, para 97. http://live.unece.org/fileadmin/DAM/env/pp/reporting/NIRs%202011/Austria_NIR_2011.pdf. Accessed on 10 September 2011. See, similarly, the legislation of Germany, Denmark, Latvia, Cyprus, Czech Republic, Romania, Slovakia, Poland, the Netherlands and the United Kingdom in 2011 Aarhus Convention National Implementation Reports (http://live.unece.org/env/pp/reports_implementation_2011.html. Accessed on 10 September 2011). See also 2007 Milieu Reports, *supra* n. 3. The Belgian and the French systems also appear illustrative. As to the former, the criteria for standing are set out mainly in the 1993 Act on the right to take legal action to protect the environment. The Act sets up an emergency judiciary procedure before the President of the Court of first instance, aiming to obtain injunctive relief, that can be triggered by legal entities in order to challenge decisions considered as a clear violation of the regulations protecting

By contrast, few Member States adopt a restrictive approach in terms of standing. In addition to the more general criteria, they require that the association's activity has a certain geographic reach and/or a minimum number of adherents.

This is the case, for example, in Italy where the NGO's activity must be nationwide or reaching at least five regions in order to be officially recognized.[5] This trend is confirmed by practice; in fact, the Italian Council of State's case law denies *ius standi* to local branches of environmental associations.[6]

(Footnote 4 continued)
the environment. As to the conditions to be satisfied, while the 1993 Act does not apply any criterion based on the number of adherents taking part in the association's activities, it nevertheless requires that the "territory covered by its activity be defined in its statute" (Article 2 of the 1993 Act). Although this wording appears vague as it does not give indications as to the geographical scope of the provision, the case law on the matter provides useful guidance. For instance, in a judgment rendered by the *Tribunal de premiere instance de Bruxelles* in 2001 it was clearly stated that the interpretation of Article 2 to be adopted by the Court should have been to the effect that it was necessary to check if the action in the collective interest instigated by the NGO tended to protect the environment referred to in its statute. Moreover, the Tribunal specified that this assessment would have to be conducted irrespective of the regional or local character of the NGOs (Tribunal de premiere instance de Bruxelles: l'A.S.B.L. Inter-environnement Wallonie, l'A.S.B.L. Inter-environnement Bruxelles, l'A.S.B.L. Bond Beter Leefmilieu Vlaanderen, l'A.S.B.L. Brusselse Raad Voor Het Leefmilieu, contre l'Etat Belge, Audience publique No 2001/2622/A (27 April 2001)). This interpretation of the geographical scope was also confirmed by the European Court of Human Right in the *Erablière A.S.B.L. v. Belgium* case. More precisely, in assessing the applicability of Article 6 of the Convention (the right to a fair trial) to the case at issue, the Court relied on the consideration that, according to the *Conseil d'Etat*'s case law, legal standing is only granted to NGOs if they can demonstrate to have a link with the territory affected by the appealed decision (ECtHR: Erablière A.S.B.L. v. Belgium, 49230/07, Judgment (24 February 2009), paras 27–30). As to the French legislation, a substantial coincidence between the association's field of activities and the territory affected by the appealed act is similarly required (see 2007 Milieu Report *supra* footnote 3, Table 1, iv). Moreover, the French Environmental Code does not provide any reference to the national or local nature of the environmental associations' activities in order to be considered "associations agréées" eligible to be granted legal standing. Under the *Code de l'environnement* "[l]orsqu'elles exercent leurs activités depuis au moins trois ans, les associations régulièrement déclarées et exerçant leurs activités statutaires dans le domaine de la protection de la nature et de la gestion de la faune sauvage, de l'amélioration du cadre de vie, de la protection de l'eau, de l'air, des sols, des sites et paysages, de l'urbanisme, ou ayant pour objet la lutte contre les pollutions et les nuisances et, d'une manière générale, oeuvrant principalement pour la protection de l'environnement, peuvent faire l'objet d'un agrément motivé de l'autorité administrative" (Article L. 141-1 ff.). Admittedly, one should not overestimate the flexibility applied in Belgium and France. The geographical criterion, in fact, could also lead to the consequence that an organization whose objective expands to a large

[5] In addition, Article 13 of the 1986 Law on the Institution of the Ministry of the Environment requires that the environmental associations must be identified by a decree by the Minister of the Environment on the basis of the statutory goals of the associations and so long as they can demonstrate a democratic organization at the internal level, continuity of action as well as its external relevance. An advice by the National Council for the Environment is also needed.

[6] By way of example, see Council of State, section VI n. 1403 (9 March 2010).

Similarly, the Republic of Slovenia adopts an approach which combines, among other things, the requirement of a sufficient number of members with the need for the NGO's activity to have a certain territorial reach. An environmental association can, in fact, obtain the status of "acting in the public interest" only if it has at least thirty adherents and is active in the whole territory of the Republic of Slovenia.[7]

The situation in Sweden is also relevant, especially in light of the new legislation that was adopted in 2010, as we will explain further on.[8] Suffice it to say that the 1999 Environmental Code allowed only organizations with at least 2,000 members to appeal against decisions in environmental cases.[9]

As a result, it seems highly questionable that Italy, Slovenia as well as Sweden (before the legislative reform) meet their obligations under Article 9.2 of the Aarhus Convention.

3 The Limits Imposed on EU Member States by the Aarhus Convention and by the Implementing EU Legislation with Regard to the Criteria for Standing

As explained above, the Aarhus Convention lays down that only NGOs meeting the requirements under national law shall have standing to pursue a review in public participation cases.[10]

While it is true that in addition to the general requirements the Parties are allowed to provide additional criteria for standing depending on the constraints that may exist in their national administrative or environmental laws, this does not mean that they have complete liberty in selecting them.

Article 9.2.b, second sentence, of the Convention in fact specifies that these criteria must be determined in accordance "with the objective of giving the public concerned wide access to justice within the scope of the Convention". This means that the Parties should interpret the application of their national law requirements

[7] See Articles II.3.7 and 4.1.1 of the 2006 Environmental Protection Act (ZVO-1-UPB1, Ur.l. RS št. 39/2006), which define the status of non-governmental organizations undertaking environmental protection activities in the public interest. As to the other necessary conditions, the legislation requires that the NGO was established for the purpose of environmental protection; it must be independent from public authorities and political parties; the founder was not the State, Municipality, or other public law entity or political party and it must have been active in the field of the environment for at least five years.

[8] See infra, Sect. 5.

[9] See Chap. 16, Sect. 13, of the Environmental Code and the 2011 Aarhus Convention National Implementation Report submitted by Sweden, p. 25, http://live.unece.org/fileadmin/DAM/env/pp/reporting/NIRs%202011/Sweden_NIR_2011_e.pdf. Accessed on 10 September 2011.

[10] See supra, Sect. 1.

in accordance with the objectives pursued by the Convention so as not to deprive the provision in question of its effectiveness.[11]

The implementing EU Legislation confirms the rationale of the above provision.[12] Article 10bis of Directive 85/337, dealing with access to justice, paraphrases the content of Article 9.2, and refers to the need to comply with the spirit of the Convention when defining the national criteria.

4 The 2009 EUCJ Ruling in the *Djurgården-Lilla Värtans Miljöskyddsförening* v. *Stockholms kommun genom dess marknämnd* Case

Article 10bis of Directive 85/337 has been recently interpreted by the Court of Justice of the European Union (EUCJ) in a preliminary ruling under Article 234 EC (now Article 267 of the Treaty on the Functioning of the European Union).[13]

The reference was made in 2008 by the Swedish Supreme Court (*Högsta domstolen*) within the framework of a dispute between an association for environmental protection and the Municipality of Stockholm regarding the location of electric cables—replacing overground high-tension cables—that could have had a significant impact on groundwater.

The case gave the Court the opportunity to deal with the right of access to a review procedure to challenge environmental decisions linked to projects based on a local scale by small, locally established, environmental protection associations. More precisely, among the different questions referred to, the Court was asked "whether, in the context of the implementation of Article 6.4[14] and 10bis of Directive 85/337,

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[11] Along the same lines, see the Sofia Guidelines, "Draft Guidelines on access to Environmental Information and Public Participation in Environmental Decision-Making", Ministerial Conference, Environment for Europe, ECE/CEP/24 (23–24 October 1995), para 26, available at http://www.unece.org/fileadmin/DAM//env/documents/1995/cep/ece.cep.24e.pdf. Accessed on 10 September 2011. On the principle of effectiveness (*ut res magis valeat quam pereat*) see, particularly, Jennings 1991, pp. 144 ff.

[12] At the European level, the implementation of Article 9.2 into EU law has been made through Article 10bis of Council Directive 85/337 CEE dealing with "the assessment of the effects of certain public and private projects on the environment" (Official Journal of the European Union L 175 (5 July 1985)), as amended by Directive 2003/35/EC of the European Parliament and of the Council "on public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC" (Official Journal of the European Union L 156/17 (25 June 2003)).

[13] EUCJ: Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun genom dess marknämnd, C-263/08, Judgment (15 October 2009). On preliminary references see, particularly, Wenneras 2007, pp. 171–214.

[14] The article provides as follows: "[t]he public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in

Member States may provide that small, locally established environmental protection associations have a right to participate in the decision-making procedures referred to in Article 2.2 of that Directive but no right of access to a review procedure to challenge the decision adopted at the end of that procedure".

The Court, while leaving room for national differences as to the conditions required in order for a non-governmental organization which promotes environmental protection to have a right of appeal, stated that:

> the national rules thus established must, first, ensure 'wide access to justice' and, second, render effective the provisions of Directive 85/337 on judicial remedies. Accordingly, those national rules must not be liable to nullify Community provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are to be entitled to bring actions before the competent courts. […] Furthermore, it is conceivable that the condition that an environmental protection association must have a minimum number of members may be relevant in order to ensure that it does in fact exist and that it is active. However, the number of members required cannot be fixed by national law at such a level that it runs counter to the objectives of Directive 85/337 and in particular the objective of facilitating judicial review of projects which fall within its scope.[15]

It is significant that according to the Swedish government the local associations could contact the larger ones complying with the numerical requirement and ask them to bring an appeal against the decision on their behalf.[16] However, on this specific point, the Court clearly stressed:

> that possibility in itself is not capable of satisfying the requirements of Directive 85/337 as, first, the associations entitled to bring an appeal might not have the same interest in projects of limited size and, second, they would be likely to receive numerous requests of that kind which would have to be dealt with selectively on the basis of criteria which would not be subject to review. Finally, such a system would give rise, by its very nature, to a filtering of appeals directly contrary to the spirit of the directive which as stated in para 33 of this judgment, is intended to implement the Aarhus Convention.[17]

(Footnote 14 continued)
Article 2.2 and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken".

[15] Djurgården-Lilla, supra n. 13, paras 45 and 47. On the discretion left to Member States in setting the conditions under Article 10bis of Directive 85/337, although with reference to the collective or individual nature of the rights enforceable before the courts, the Court has recently stated that it would be inconsistent with the objective of ensuring that the public concerned have wide access to justice, and the principle of effectiveness, if NGOs could not rely in the courts on the infringement of rules flowing from EU environmental law and intended to protect the environment, for the sole reason that they protect the interests of the general public and not the interests of individuals (EUCJ: Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg, C-115/09, Judgment (12 May 2011)).

[16] Djurgården-Lilla, supra n. 13, para 51.

[17] Ibidem.

Accordingly, the Court concluded that:

> Article 10bis of Directive 85/337 precludes a provision of national law which reserves the right to bring an appeal against a decision on projects which fall within the scope of that directive solely to environmental protection associations which have at least 2 000 members.[18]

5 The Possible Impact of the 2009 EUCJ Ruling on the Legislation of EU Member States Providing for Territorial or Numeric Criteria

The 2009 EUCJ preliminary ruling described above interprets Article 10bis of the Directive 85/337 and states that it "does not exclusively concern projects on a regional or national scale, but also projects more limited in size which locally based associations are better placed to deal with".[19]

In light of this decision, the Swedish legislation was amended to the effect that only associations of at least 100 members have the right to appeal.[20]

The question now remains as to whether this ruling can also have an impact on other Member States that still apply criteria relating to the territory covered by the associations' activity or to the number of adherents, such as Italy and Slovenia.

In this regard, it must be recalled that within the framework of the transposition of the EU Directives at the internal level, when the Member State concerned has not implemented the directive at all, or in time, or it has done so incorrectly, private individuals (or legal entities) can enforce the rights provided by it directly before the Courts of the Member State itself. This is only possible if two conditions are satisfied: the relevant provision must be unconditional and sufficiently precise.[21] As to the first requirement, both the Italian and the Slovenian legislation seem to have complied with it in so far as they have adopted Law 349 on the Institution of the Ministry of Environment, on the one hand, and the 2006 Environmental Protection Act, on the other. As to the second condition, it is clear that Article 10bis does not comply with the "sufficiently precise" requirement in so far as the provision leaves discretionary power to States in determining its content.

However, as highlighted by legal doctrine, this does not imply that non-sufficiently precise provisions would be totally incapable of being directly effective. Problems related to the assessment of the precise content of a specific provision could, in fact, be solved by the EUCJ by way of interpretation through a preliminary ruling put in motion by domestic judges.[22]

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[18] Djurgården-Lilla, supra n. 13, para 52.

[19] Djurgården-Lilla, supra n. 13, para 50.

[20] See the new Chap. 16, Sect. 13, of the Environmental Code.

[21] On the so-called "direct effect" of Directives see, particularly, Prechal 2005, pp. 241–253.

[22] Ibidem.

The question to be referred to the Court would then be to what extent do Member States in exercising their discretionary power have liberty in defining the criteria for standing. Thus, the question would be materially identical to the subject matter already addressed by the Court in 2009. The Swedish criterion as to the minimum number of members seems in fact to be similar, in terms of its effects, to the ones provided by the Italian and the Slovenian legal systems: provided that the activities carried out by local associations are naturally based on territorially limited areas, one can legitimately presume that these concern a limited number of adherents. The Italian/Slovenian judges would thus be exempted from the obligation to trigger the EUCJ on the same subject matter as they should apply the principle already highlighted by the Court.[23] As a result, once all the other requirements are satisfied, they should grant *locus standi* to small/local associations to challenge local environmental decisions subjected to a public participation procedure to which they were denied to take part.

Indeed, without affecting the rights of Member States to set standing criteria, the principle highlighted by the Court in 2009 gave new content to Article 10bis of Directive 85/337 and precluded all Member States from determining territorial criteria for access to justice that could undermine the scope of the Directive itself.[24]

6 The Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters

The reference to the criteria to be met at the national level by "members of the public" in order to be granted legal standing is also provided for by Article 9.3 of the Aarhus Convention, dealing with access to administrative or judicial proceedings against acts or omissions by public authorities which contravene environmental law.

In this regard, one has to recall that the implementation, at the European level, of Article 9.3 still remains mostly under the responsibility of the EU Member States as it was declared upon approval of the Convention in 2005.[25]

However, an attempt to implement Article 9.3 at the European level is currently under way through the "Proposal for a Directive of the European Parliament and

[23] On this point see EUCJ: Cilfit Srl and Lanificio di Gavardo Spa v. Ministry of Health, C-283/81, Judgment (6 October 1982).

[24] According to Darpö 2009, p. 193: "the procedure should allow all kinds of environmental organizations defending an environmental interest to participate and have access to justice. From a democratic point of view, it is not acceptable that only the larger and more established NGOs are invited".

[25] The declaration of competence made by the European Union in 2005 is available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en#EndDec. Accessed on 10 September 2011.

of the Council on access to justice in environmental matters" establishing a framework of minimum requirements for access to justice.[26]

Although the adoption of the text still remains highly controversial,[27] it appears interesting that Article 8 of the proposed Directive, laying down the criteria for the recognition of members of the public as "qualified entities" eligible to have access to justice, explicitly mentions local organizations alongside international, national and regional ones. Most importantly, Article 5 of the text confirms that all these entities should only have access to environmental proceedings if the matter under review falls within the specific geographic area of their activity. This clearly constitutes a further confirmation of the fact that local associations should be considered by the Member States as being eligible for *locus standi* when they act to challenge decisions subjected to a public participation procedure that affect territorially limited areas.

7 Triggering the Compliance Committee of the Aarhus Convention

The Compliance Committee procedure activated by local associations whose environmental rights have been violated constitutes an alternative to judicial procedures.[28] Under the Guidance document of the Committee it appears, in fact, that the local character of an association does not constitute a limit to the triggering of the procedure.[29]

In this context, a noteworthy case is the communication submitted to the Committee in 2005 by a Belgian environmental association (*Bond Beter Leefmilieu Vlaanderen VZW*) regarding the non-compliance by Belgium, among others, with Article 9.2 of the Convention.[30] The case gave the Committee the opportunity to consider the degree of flexibility left to Member States in establishing the criteria that the organization has to meet in order to have access to justice. More specifically, an association challenged the position taken by the Belgian Council of State to the effect that only local NGOs (and not the larger ones) could take action against construction permits and planning decisions related to a circumscribed and specific territory. On this point, the Committee confirmed that an act which refers

[26] Proposal presented by the Commission of the European Communities, COM (2003) 624 final, 2003/0246 (COD) (24 October 2003).

[27] According to Darpö 2009 the proposed Directive will never be realized except perhaps in a watered-down version.

[28] On the Aarhus Convention's Compliance Committee see, particularly, Pitea 2009 and Kravchenko 2011.

[29] See Guidance Document on the Aarhus Convention Compliance Mechanism (December 2010), pp. 31 ff. www.unece.org/index.php?id=21457. Accessed on 10 September 2011.

[30] UN Doc. ECE/MP.PP/C.1/2006/4/Add.2 (28 July 2006).

to a well-defined territory can be challenged by an association whose activities refer to that specific territory.[31]

In light of this, it is believed that the outcome of any proceedings that could be brought against Italy or Slovenia before the Committee by a local association would most likely be in favor of the association.

Admittedly, the practical consequences of a possible declaration of non-compliance would be limited. The Committee would, in fact, detect the presence of the non-fulfillment of a treaty provision by a Member State and would recommend it to amend the contested legislation and/or jurisprudence, as it did in the case of Belgium.[32] Nevertheless, it must be recalled that a form of control after the finding of non-compliance is provided by the Committee's procedure in so far as the latter should monitor the implementation of its decision by the targeted State. Indeed, the State remains "under observation", having to submit to the Committee all the information about its state of non-compliance.[33]

8 Concluding Remarks

As highlighted above, the Italian and the Slovenian legislation do not meet the obligations under Article 9.2 of the Aarhus Convention nor the implementing EU legislation to the extent that the former requires that the environmental association's activity must be nationwide or reaching at least five regions, whereas the latter establishes a minimum number of at least 30 adherents besides being active in the whole territory.

Italy and Slovenia should follow the new interpretation of Article 10bis of Directive 85/337 put forward by the EUCJ in 2009 to the effect that Member States must not determine territorial criteria for access to justice that could undermine the scope of the Directive itself. As a consequence, local/small associations, not acting on behalf of national organizations and relying on the so-called "direct effect" of Article 10bis, should be considered eligible to challenge before the Italian and the Slovenian Courts local environmental decisions subjected to a public participation procedure to which they were denied to take part.

The proposed EU Directive on access to justice in environmental matters confirms this trend, although its adoption still remains unlikely.

As an alternative, the association could also decide to send a communication to the Compliance Committee of the Aarhus Convention. It is believed, in fact, that the outcome of a proceeding brought against Italy or Slovenia before the Committee by a local association would be most likely in favor of the latter.

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[31] Ibid., p. 4, para 15.

[32] Ibid., p. 11, paras 48–49.

[33] On this point see, particularly, Pitea 2009.

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Indigenous Peoples, the Environment, and International Jurisprudence

Alessandro Fodella

1 Introduction

The rights of indigenous peoples have been generally neglected for many years until only recently, and few ad hoc normative instruments have been adopted on this subject. In this context, the role of international jurisprudence[1] (mainly in the human rights field) has been (and continues to be) the crucial factor for legal development, especially with reference to the relationship between indigenous peoples and the environment, which is the cornerstone of the protection of their rights. Although often overlooked, jurisprudence in this field is extensive, relevant and creative, also offering an interesting point of view concerning more general issues relating to the work of international courts and monitoring bodies.

2 Indigenous Peoples, the Environment and Human Rights Jurisprudence at the Global Level

A major contribution to the development of indigenous peoples' rights connected with the environment has been provided by global human rights treaties'

[1] With the term "jurisprudence" reference is made to both proper international courts and tribunals with their binding decisions, as well as other international monitoring bodies with their non-binding measures (e.g., views, comments, observations, etc.).

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monitoring bodies,[2] first and foremost by the Human Rights Committee (HRC), which, in the absence of specific norms in the International Covenant on Civil and Political Rights (New York, 16 December 1966; hereinafter ICCPR),[3] has interpreted the Treaty extensively in order to fill the gaps.

The HRC has established that members of indigenous populations are entitled to the right of persons belonging to minorities to enjoy their own culture (Article 27), which, considering indigenous peoples' special relationship with the environment, includes their right to live according to their own peculiar ways of life and economic systems associated with land and natural resources.[4] This conclusion has been reinforced by reading Article 27 in light of Article 1.2 on self-determination, which grants all peoples (including indigenous peoples, according to the HRC) the right to dispose of their natural resources.[5] With this premise, the HRC has elaborated a right for indigenous peoples to use and manage natural resources that are essential elements of their culture, and to the protection of the relevant environment, a right that would be violated by any substantial interference with culturally significant indigenous economic activities, that is carried out without the free, prior and informed consent of indigenous peoples and that does not allow the community to continue to benefit from its traditional economy, thus threatening its very survival.[6]

The development of indigenous peoples' environmental rights based upon the link with indigenous culture must be appreciated (also as a legacy for other regimes), together with the recent elaboration of effective participatory rights,[7] even if the threshold for a violation of Article 27 seems to be quite high.[8] It should also be noted that although in its jurisprudence on individual petitions concerning

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[2] For further reference on the jurisprudence and institutional mechanisms discussed below, see Thornberry 2002; Anaya 2004; Ulfstein 2004; Castellino and Walsh 2005; Manus 2005; Fodella 2006; Barsh 2007; Xanthaki 2007; Anaya 2009.

[3] Entered into force on 23 March 1976.

[4] See, in particular, HRC: Kitok v. Sweden, 197/1985, Views (27 July 1988), UN Doc. CCPR/C/33/D/197/1985, para 9.2; Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada, 167/1984, Views (26 March 1990), UN Doc. CCPR/C/38/D/167/1984, para 32.2; General Comment no. 23: The Rights of Minorities (Article 27), UN Doc. CCPR/C/21/Rev.1/Add.5 (4 August 1994), paras 3.2 and 7.

[5] See inter alia HRC: Mahuika et al. v. New Zealand, 547/1993, Views (27 October 2000), UN Doc. CCPR/C/70/D/547/1993, para 9.2.

[6] For the most relevant cases see supra n. 4; HRC: Länsman v. Finland, 511/1992, Views (26 October 1994), UN Doc. CCPR/C/52/D/511/1992, para 9.2–10; Länsman v. Finland, 671/1995, Views (30 October 1996), UN Doc. CCPR/C/58/D/671/1995, para 10.2–11; Mahuika et al. v. New Zealand, supra n. 5, paras 9.3–10; Länsman v. Finland, 1023/2001, Views (15 April 2005), UN Doc. CCPR/C/83/D/1023/2001, paras 10.1–.2; and, in particular, the recent and innovative Ángela Poma Poma v. Peru, 1457/2006, Views (27 March 2009), UN Doc. CCPR/C/95/D/1457/2006, paras 7.1–8. On the HRC's jurisprudence (in addition to supra n. 2), see Pentassuglia 2011, p. 182 ff.

[7] See in particular Ángela Poma Poma v. Peru, supra n. 6, para 7.6.

[8] The test has been passed in only very few cases (Lubicon Lake Band v. Canada, supra n. 4; Ángela Poma Poma v. Peru, supra n. 6).

Article 27 the HRC has technically dealt with the rights of individual members of communities,[9] it has considered the collective dimension of these rights in general comments and concluding observations, which also address the collective right of peoples to natural resources (not directly cognizable through individual petitions),[10] and which in addition to the principles already mentioned so far, call for the recognition of indigenous communities' rights to land (including its equal distribution and demarcation).[11]

An even more creative approach has been taken by the Committee on the Elimination of Racial Discrimination (CERD). Expanding solely upon the prohibition of discrimination against indigenous peoples, which falls under the International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965),[12] the CERD has elaborated specific obligations concerning indigenous peoples' environmental rights. States must respect indigenous culture and way of life, they must allow for "a sustainable economic and social development compatible with their cultural characteristics", and ensure that "decisions directly relating to their rights and interests" are taken with their prior informed consent.[13] The connection between these requirements and environmental protection has been explicitly established (in line with the HRC's reasoning).[14] In addition, the CERD explicitly requires the protection of indigenous peoples' "right to *own*, develop, control and use their communal lands, territories and resources",[15] and to ensure the equitable sharing of benefits deriving from the exploitation of indigenous traditional resources.[16]

To address these issues, the CERD has mainly relied upon general recommendations, concluding observations,[17] and on an "early warning and urgent

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[9] General Comment no. 23, supra n. 4, paras 1, 3.1, 6.2. In this context, the collective dimension of the right is considered only indirectly insofar as petitions may be brought by a group of individuals, if they are commonly affected (e.g., Mahuika et al. v. New Zealand, supra n. 5, para 9.2), and since respect for individual rights will most likely depend upon the treatment of the community as such.

[10] General Comment no. 23, supra n. 4, para 3.1.

[11] E.g. HRC: Concluding Observations on Mexico, UN Doc. A/49/40 (1994), paras 177, 182; Brazil, UN Doc. A/51/40, paras 320, 337; Canada, UN Doc. A/54/40 (1999), para 230; Guyana, UN Doc. A/55/40 (2000), paras 379–380; Australia, ibid., paras 506–510; Philippines, UN Doc. A/59/40 (2003–2004), para 63(16); Colombia, ibid., para 67(20); Suriname, ibid., para 69(21); Finland, UN Doc. A/60/40 (2004), para 81(17).

[12] Entered into force on 4 January1969.

[13] CERD: General Recommendation no. 23: Indigenous Peoples, UN Doc. A/52/18, annex V (1997), para 4.

[14] E.g. CERD: Early Warning and Urgent Action Procedure, Decision 1 (68)—United States, UN Doc. CERD/C/USA/DEC/l (11 April 2006), para 8.

[15] General Recommendation no. 23, supra n. 13, para 5 (emphasis added).

[16] E.g. CERD: Concluding Observations on Ecuador, UN Doc. A/58/18 (2003), para 62.

[17] E.g. CERD: Concluding Observations on Nicaragua, UN Doc. A/50/18 (1995), paras 535–536; Russian Federation, UN Doc. A/51/18 (1996), paras 139, 148; Finland, ibid., paras 177, 189; Brazil, ibid., paras 299, 303, 309; Panama, UN Doc. A/52/18 (1997), paras 338, 350;

action procedure", developed by the CERD itself to prevent serious violations of the Treaty, which can be triggered by indigenous communities (or proprio motu), and which has been used to deal with specific cases regarding indigenous peoples' environmental rights in their collective dimension.[18]

The approach and principles elaborated by the HRC and the CERD can also be recognized in the work of other relevant monitoring bodies. For example, the Committee on Economic, Social and Cultural Rights (CESCR), in interpreting Article 15 of the International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)[19] on the right to cultural life, has established that States must protect the communal dimension of indigenous peoples' cultural life which includes the right to own and use traditional lands and resources, and they should respect "the principle of free, prior and informed consent" in matters covered by indigenous peoples' rights.[20] Moreover, the degradation of indigenous peoples' environment and the interference with their use of natural resources or land rights may also result in a violation of the right to an adequate standard of living (Article 11).[21] The Committee on the Rights of the Child (CRC) as well has stressed the importance of traditional land and the natural environment for indigenous children's culture, development and survival, according to the Convention on the Rights of the Child (New York, 20 November 1989).[22]

The monitoring bodies of the International Labor Organization (ILO) have had a less challenging task in assessing compliance with the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries n. 169 (Geneva, 27 June 1989; hereinafter ILO Convention 169),[23] since the latter already contains

(Footnote 17 continued)
Cambodia, UN Doc. A/53/18 (1998), paras 293, 299; Costa Rica, UN Doc. A/54/18 (1999), paras 194, 202; Colombia, ibid., paras 469, 473; Australia, UN Doc. A/55/18 (2000) para 32; United States, UN Doc. A/56/18 (2001), para 400; Canada, UN Doc. A/57/18 (2002), paras 330–331; Ecuador, UN Doc. A/58/18 (2003), paras 59–62; Bolivia, ibid., paras 335, 339; Finland, ibid., para 405; Brazil, UN Doc. A/59/18 (2004), para 60; Suriname, ibid., paras 190–194; Nigeria, UN Doc. A/60/18 (2005), para 294.

[18] CERD, Working Paper on the Prevention of Racial Discrimination, Including Early Warning and Urgent Procedures, UN Doc. A/48/18, annex III (15 September 1993). See e.g., the case of the Western Shoshone indigenous peoples in the United States in CERD: Early Warning and Urgent Action Procedure, Decision 1 (68)—United States, UN Doc. CERD/C/USA/DEC/l (11 April 2006); see also infra n. 79.

[19] Entered into force on 3 January 1976.

[20] CESCR: General Comment no. 21, UN Doc. E/C.12/GC/21 (21 December 2009), paras 36–37, 49.d, 55.e.

[21] E.g. CESCR: Concluding Observations on Russian Federation, UN Doc. CESCR/E/1998/22 (1997), paras 100, 109, 116; Cameroon, UN Doc. CESCR/E/2000/22 (1999), para 337; Honduras, UN Doc. CESCR/E/2002/22 (2001), paras 121, 132, 151; Panama, ibid., paras 450, 466; Colombia, ibid., para 761; Brazil, UN Doc. CESCR/E/2004/22 (2003), paras 142–143, 165–166; Ecuador, UN Doc. CESCR/E/2005/22 (2004), paras 278, 301.

[22] CRC: General Comment no. 11: Indigenous Children and their Rights Under the Convention, UN Doc. CRC/C/GC/11 (2009), para 35. The CRC entered into force on 2 September 1990.

[23] Entered into force on 5 September 1991.

many significant provisions in this field. The ILO Convention 169 establishes, inter alia, the obligation to protect indigenous peoples' environment (including through environmental and social impact studies) (Articles 4.1 and 7.3–.4), to respect their cultural and spiritual collective relationship with lands (Article 13.1), their right of ownership, possession and use of traditional lands (Article 14), and their rights to natural resources pertaining to the latter, including the right to participate in the use, management and conservation of such resources, and to receive a share of the benefits from their exploitation (Article 15). States must also allow for indigenous peoples' participation, including through consultation "with the objective of achieving agreement or consent", with regard to measures, plans, and programmes which may directly affect them, particularly when dealing with natural resources (Articles 6, 7.1, 15). Although less imaginative, the work of the ILO supervisory bodies has not been less important, as they have addressed States' lack of conformity with these obligations in several cases, through individual observations,[24] the examination of individual cases,[25] and the exceptionally flexible "representation" procedure (under Article 24 of the ILO Constitution), which allows any workers' or employers' organization to file a complaint without necessarily being the victim of the alleged violation, and which has been used to bring cases on behalf of indigenous populations, mainly regarding States' failure to guarantee their rights to land and resources, or their participatory rights therein.[26]

[24] E.g. Committee of Experts on the Application of Conventions and Recommendations: Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169), Paraguay, UN Doc. ILOLEX no. 062010PRY169 (2010); Id., Individual Observation on Peru, UN Doc. ILOLEX no. 062010PER169 (2010); Id., Individual Observation on Brazil, UN Doc. ILOLEX no. 062011BRA169 (2011).

[25] E.g. International Labor Conference Committee on the Application of Standards: Examination of Individual Case concerning Convention No. 169 on Indigenous and Tribal Peoples, 1989, Peru, ILOLEX Doc no. 132009PER169 (2009).

[26] E.g. Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) and the Colombian Medical Trade Union Association, ILOLEX UN Doc. no. 161999COL169B (2001); Id., Representation alleging non-observance by Denmark, made by the National Confederation of Trade Unions of Greenland (Sulinermik Inuussutissarsiuteqartut Kattuffiat-SIK) (SIK), ILOLEX UN Doc. no. 162000DNK169 (2001); Id., Representation alleging non-observance by Guatemala, made by the Federation of Country and City Workers (FTCC), ILOLEX UN Doc. no. 162007GTM169 (2007); Id., Representation alleging non-observance by Brazil, made by the Union of Engineers of the Federal District (SENGE/DF), ILOLEX UN Doc. no. 162006BRA169 (2009). On the ILO's supervisory mechanism and indigenous peoples' rights (in addition to supra n. 2), see Rodríguez-Piñero 2005.

3 The Ultimate Jurisprudential Expansion of Indigenous Peoples' Rights at the Regional Level

3.1 The Inter-American System

The crucial jurisprudential evolution in this field can be seen at the regional level, primarily with the development of a broad, detailed and innovative body of case law within the Inter-American human rights system.

The leading case, in this regard, is that of the Mayagna indigenous community, in which the Inter-American Court of Human Rights (IACtHR) established that the granting by Nicaragua of (inter alia) logging concessions on indigenous territory violated the right to property in Article 21 of the American Convention on Human Rights (San Jose, 22 November 1969; hereinafter ACHR).[27] With this progressive decision, the Court interpreted Article 21 as protecting not only individual private property, but also the indigenous communities' collective right to land and natural resources, implying inter alia a right to demarcation and protection of traditional lands, and a right to use traditional natural resources thereof.[28]

The subsequent jurisprudence of the Inter-American Commission on Human Rights (IACmHR) and of the IACtHR has further expanded this case, and is well synthesized in the case of the Saramaka people in Suriname, which is particularly significant for the detailed and comprehensive analysis of relevant environmental issues.[29] In this case, the IACtHR restated that Article 21 of the ACHR (also interpreted in light of ICCPR Articles 1 and 27) protects the communal land property rights of indigenous and tribal peoples (including the right to obtain "title to their territory" guaranteed in law through land demarcation), and their close connection with their traditional lands, which is essential for their culture, spiritual life, economy, and ultimately survival.[30] It added that Article 21 also protects the right to own and use natural resources that have been traditionally used within their territory, and that are essential for their cultural, spiritual, economic, and physical

[27] Entered into force on 18 July 1978.

[28] IACtHR: Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment (31 August 2001), in particular paras 148–155.

[29] IACtHR: Saramaka People v. Suriname, Judgment (28 November 2007). Other relevant cases include IACmHR: Mary and Carrie Dann v. United States, 11.140, Report (15 October 2001); Maya Indigenous Communities of the Toledo District v Belize, 12.053, Report (12 October 2004); IACtHR: Moiwana Community v. Suriname, Judgment (15 June 2005); Yakye Axa Indigenous Community v. Paraguay, Judgment (17 June 2005); Sawhoyamaxa Indigenous Community v. Paraguay, Judgment (29 March 2006); Xákmok Kásek Indigenous Community v. Paraguay, Judgment (24 August 2010). For an analysis of the extensive Inter-American jurisprudence (in addition to supra n. 2) see Anaya and Williams 2001; Anaya and Grossman 2002; Brunner 2008; Citroni and Quintana Osuna 2008; Pasqualucci 2009; Del Toro Huerta 2010; Pentassuglia 2011, p. 170 ff.

[30] Saramaka People, supra n. 29, paras 82–96 and 115.

survival, without which land rights would be meaningless.[31] Finally, it specified that these rights to land and resources can only be limited[32] if interferences do not amount to a denial of the survival of the group as such (in conformity with the HRC's jurisprudence), something the State must guarantee by adopting three "safeguards" elaborated in great detail.[33] Firstly, it must ensure effective participation by community members (in conformity with their customs and traditions) in decision-making regarding development, investment, exploration, or extraction plans in their territory (in line with other international standards in this field)[34]: this entails, as a minimum, consultation, but also free, prior, and informed consent for large-scale projects that would have major impacts within indigenous and tribal territory.[35] Secondly, the State must guarantee that indigenous and tribal peoples receive a reasonable share of the benefits arising from such plans, a duty derived from the right to just compensation in Article 21 itself and from other international sources.[36] Thirdly, it must ensure environmental and social impact assessments of such plans. The Court concluded by finding a violation of Article 21, as a consequence of Suriname's authorization of mining and logging concessions, which had major impacts on the Saramaka's traditional lands and essential resources, and which were carried out without the above-mentioned safeguards.[37]

Other important implications of the connection between indigenous peoples and the environment have been analyzed in the case of the Xákmok Kásek Indigenous Community v. Paraguay. In line with its consolidated jurisprudence, the IACtHR reaffirmed the community's right to communal property over traditional land and resources, and the right to participate in decision making relating to the latter, finding that Paraguay had violated Article 21, inter alia by failing to guarantee the restoration of traditional land (which the community had been deprived of) and by declaring a part of this land as a private wildlife reserve without consultation, all of which also affected indigenous cultural and spiritual identity.[38] The Court also dealt with the impact of these issues upon other rights, again looking at their collective dimension. It established that the lack of access to land and natural resources had created a situation of insufficient water and food, as well as vulnerability and social exclusion for the community, which amounted to a violation of the right to a dignified existence for all members (as part of the right to life in

[31] Ibidem, paras 118–122.

[32] In addition to common human rights requirements that limitations must be established by law, be necessary, proportionate, and aimed at a legitimate objective in a democratic society.

[33] Saramaka People, supra n. 29, paras 124–140.

[34] The IACtHR recalls inter alia the jurisprudence of the HRC and CERD, the ILO Convention 169, and Article 32 of the United Nations Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295 (13 September 2007; hereinafter UNDRIP).

[35] In this regard, the IACtHR recalls the CERD and relevant reports of the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people.

[36] The IACtHR refers to the CERD's jurisprudence and to ILO Convention 169.

[37] Saramaka People, supra n. 29, paras 141–158.

[38] Xákmok Kásek, supra n. 29, paras 85–89, 108–116, 157–158, 171–182.

Article 4 ACHR)[39]; the same had also caused such suffering as to constitute a violation of their right to personal integrity (Article 5.1 ACHR),[40] in particular as far as indigenous children were concerned (thus also violating Article 19 ACHR on the rights of the child).[41] Finally, the Court found a situation of overall discrimination against the community and its members, in violation of the principle of equality and non-discrimination (Article 1.1 ACHR) which, according to the Court, had "entered the realm of *jus cogens*".[42]

The relevance of the Inter-American jurisprudence is evident, with an international court developing in great detail the collective dimension of indigenous peoples' rights to land and resources, and the connection between environmental issues and other human rights, all this taking an open-minded approach towards other legal sources and jurisprudence.

3.2 The African System

The Inter-American jurisprudence has largely inspired the African Commission on Human and Peoples' Rights (ACmHPR), which has dealt with indigenous peoples and the environment under the African Charter on Human and Peoples' Rights (Banjul, 26 June 1981; hereinafter ACHPR),[43] a treaty which explicitly provides for the justiciable collective rights of peoples (that are applicable, according to the ACmHPR, to indigenous peoples).

In the Ogoni case, the ACmHPR was confronted with the direct and indirect involvement of Nigeria in the exploitation of oil reserves in Ogoniland, resulting in the serious environmental degradation of the land and its resources, which violated the ACHPR in several respects.[44] The ACmHPR found inter alia violations of the right to health (Article 16 ACHPR) and of the collective right to a satisfactory environment (Article 24 ACHPR), which require States to prevent pollution and ecological degradation, to promote conservation, and to guarantee the sustainable use of natural resources, including through prior environmental and social impact studies, and participation by affected communities' members.[45] It also found violations of Article 21 on the collective right of peoples to freely dispose of their

[39] Ibidem, paras 183–217.

[40] Ibidem, paras 242–244.

[41] Ibidem, paras 256–264.

[42] Ibidem, paras 265–275.

[43] Entered into force on 21 October 1986.

[44] ACmHPR: The Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria, communication 155/96, 27 October 2001, Doc. ACHPR/COMM/A044/1. On the ACmHPR's jurisprudence in this field see Coomans 2003; Udombana 2008; Pentassuglia 2011, p. 184 ff.

[45] SERAC, supra n. 44, paras 50–54.

wealth and natural resources[46] and of the right to food, which the ACmHPR implicitly derived from the right to health, to life (Article 4), and from the collective right to economic, social, and cultural development (Article 22).[47] Moreover, pollution and environmental degradation to a "humanly unacceptable" level, and the destruction of lands essential for Ogoni survival, had affected the life of the community as a whole, thereby also breaching Article 4 on the right to life and integrity of the person.[48] Finally, the ACmHPR also found a violation of Article 2 on non-discrimination.

Some of these conclusions were expanded in a subsequent case regarding alleged violations of the ACHPR by Kenya, resulting inter alia from the displacement and forcible removal of the Endorois Community from its ancestral land, as well as the denial of access to this land and its resources, as a consequence of the selling and expropriation of such land, the granting of ruby-mining concessions, and the designation of a Game Reserve therein, without either compensation or participation.[49] The ACmHPR made extensive use of the UNDRIP (in particular Articles 26–28 on the rights to land and resources), the Inter-American jurisprudence (particularly the Saramaka case)[50] and other external sources[51] to give content to Article 14 of the ACHPR on the right to property, concluding that such a provision protected the Endorois collective right of de jure ownership over ancestral land, and that this had been violated by the above-mentioned conduct, which was disproportionate to any public need or general interest (including the establishment of the Game Reserve), and was not in accordance with international standards, i.e., the safeguards elaborated by the IACtHR in the Saramaka case.[52] Along the same lines, and again extensively "importing" the Saramaka jurisprudence, the ACmHPR also found a violation of Article 21 of the ACHPR on the collective right to natural resources.[53] It also established that the relationship with ancestral land and traditional resources was essential for the Endorois' religious life and cultural identity, so that the denial of access to such land also violated Article 8 on the right to freely practice one's religion[54] and Article 17 on the

[46] Ibidem, paras 55–58.

[47] Ibidem, paras 64–66.

[48] Ibidem, para 67.

[49] ACmHPR: Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003 (4 February 2010).

[50] Saramaka People, supra n. 29. See supra, Sect. 3.1.

[51] Inter alia: decisions of the European Court of Human Rights (interpreting Article 1 of Protocol no. 1 to the European Convention on Human Rights, Paris, 20 March 1952, for the concept of property), CESCR's jurisprudence (on forced evictions), and the reports of the Special Rapporteur of the United Nations Sub-Commission for the Promotion and Protection of Human Rights (for limitations on land rights).

[52] Endorois, supra n. 49, paras 174–238. The ACmHPR also refers to ILO Convention 169 to uphold indigenous participatory rights (ibidem, para 281).

[53] Ibidem, paras 252–268.

[54] Ibidem, paras 163–173.

individual and collective right to culture (also inspired by the HRC's jurisprudence).[55] Finally, the ACmHPR interpreted the collective right to development (Article 22) as a multifaceted right implying inter alia freedom of choice, participation in the development process, and the improvement of peoples' capabilities, which had been violated by depriving the Endorois of their traditional means of subsistence, by failing to obtain their consent for activities having major impacts on their territory (including the designation of the Game Reserve), and by failing to provide compensation or benefit sharing therein.[56]

The contribution to the development of indigenous peoples' environmental rights by the ACmHPR is certainly not secondary. Despite the existence of explicit collective rights already in the ACHPR, the ACmHPR has also considered the collective dimension of rights originally conceived as individual rights (e.g., the right to life, or to property), it has created new rights (e.g., the right to food) and it has explored the possible impacts of indigenous peoples' environmental issues on different human rights, showing important examples of the justiciability and implementation of economic, social and cultural rights, such as the fundamental right to development.

4 Reflections and Possible Developments

The present analysis offers several elements for reflection, which also demonstrate the important role of jurisprudence in the development of international law. In fact, international courts and monitoring bodies have elaborated several fundamental principles, norms and rights concerning indigenous peoples and the environment, with a creative and proactive approach, from different points of view.

They have established significant indigenous peoples' environmental protection through an inspired, extensive interpretation of treaty provisions, with a commendable consideration of indigenous cultural, spiritual, social, and economic values. It is also a particularly strict protection when it is based on rights that generally tolerate few limitations (e.g., the right to culture) or that are non-derogable (e.g., the right to life),[57] or else that are considered *jus cogens* (e.g., non-discrimination).[58]

They have also provided an essential contribution to the development of indigenous peoples' collective rights (and thus of group rights more generally) that are indispensable for the effective protection of communities. Apart from the ILO

[55] Ibidem, paras 239–251.

[56] Ibidem, paras 228, 269–298. These last two elements are upheld also recalling the CERD. It is worth noting that the ACmHPR recommended that the State, to comply with benefit sharing, should pay royalties from existing economic activities to the Endorois, and ensure that they benefit from employment possibilities within the Game Reserve.

[57] The ACmHPR has specifically addressed this point, ibidem, paras 118, 216, 249 ff.

[58] See Xákmok Kásek, supra n. 29, para 269, and infra n. 81.

and the African systems (which already contemplate some of these rights at the normative level), the collective dimension of indigenous peoples' rights has also been recognized by the HRC,[59] CERD,[60] CESCR,[61] CRC,[62] and the IACtHR, even on the basis of "traditional" individually centred human rights instruments. The acceptance of these rights at the substantive level is reinforced by their progressive recognition at the procedural level, e.g., when cases may be brought by indigenous communities (directly, or indirectly on their behalf),[63] or when reparation is established in their favor,[64] with these solutions, in some instances, also being the result of jurisprudential creativity.[65] On a related note, these may also be signs of a more general trend towards the enhancement of the role of indigenous peoples as actors under international law.

All this has been done by frequently relying on external sources (other treaties, or soft law instruments such as the UNDRIP, and other jurisprudence) for interpretation in a broad, intense and flexible manner; in some cases, the content of the treaty under consideration seems to have been plainly "imported" from these external elements,[66] interpretations, and standards are easily transferred from one

[59] Supra n. 11. In particular, the HRC explicitly refers to indigenous communities' rights "to which they are entitled individually and *as a group*" (Concluding Observation on Mexico, UN Doc. A/54/40 (1999), para 331—emphasis added).

[60] Supra nn. 13, 15, 17–18.

[61] In particular, the CESCR explicitly states that "indigenous peoples (…) have the right to the full enjoyment, *as a collective* or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law, as well as the United Nations Declaration on the Rights of Indigenous Peoples" (General Comment no. 21, supra n. 20, para 7—emphasis added) and clarifies that the term "everyone" in Article 15 "may denote the individual *or the collective*" (para 9—emphasis added). See also supra n. 21.

[62] See in particular CRC: General Comment no. 11, supra n. 22, para 39.

[63] As with the Inter-American and African systems, the CERD's "early warning and urgent action procedure" (supra n. 18) and the ILO's "representations" (supra n. 26).

[64] E.g. the IACtHR in the Saramaka case ordered the State inter alia to grant collective title over Saramaka territory, to recognize their collective juridical capacity, to ensure Saramaka peoples' participation and benefit sharing, and to establish a development fund for the benefit of the community as such; the Court explicitly defined the reparation, which was in favor of all community members indistinctively, as being "collective" in nature (Saramaka People, supra n. 29, paras 188–189, 194, 198–201; see also Lixinski 2010, p. 599 ff.). In the Xákmok Kásek case, the IACtHR ordered the State inter alia to return the land to the community, to provide goods and services to it, to pay compensation for pecuniary damages to the community's leaders for the benefit of the community, and to establish a development fund for compensation of non-pecuniary damages suffered by the community as such (Xákmok Kásek, supra n. 29, paras 281–283, 300–306, 318–325).

[65] As in the case of the CERD (supra n. 63) and IACtHR (supra n. 64).

[66] E.g. the ACmHPR in the Endorois case relies almost entirely on the IACtHR's Saramaka jurisprudence in order to establish the content of the right to property and to natural resources in the ACHPR (supra Sect. 3.2).

right to the other,[67] and the basis for such practice, especially from the point of view of the rules on treaty interpretation in the Convention on the Law of Treaties (Vienna, 23 May 1969),[68] is not always clear (although sometimes it seems that external sources are taken into consideration for arguably being universal standards,[69] on other occasions it is not specified, and other treaties are relied upon even if the State under consideration is not a party to them).[70] While this approach may be criticized for being even too expansive, it may increase legal unity and harmonization[71]; in fact, it has facilitated the circulation of legal solutions and cross-fertilization between different instruments, favoring the development of common principles, rules and standards, which may even evolve into (or already be, in some cases) international customary law. In this regard, international jurisprudence seems to recognize[72] that indigenous peoples have the right to own and use traditional lands[73] and resources, and to the protection of the relevant environment, as a minimum to the extent required for their survival as communities with their particular identity; that they have a right to participate in decision-making affecting them, as a minimum through consultation, but also prior informed consent for plans having a major impact on their territories and resources; and, finally, that States have a duty to undertake environmental and social impact assessments for plans and activities which may affect indigenous peoples, and they should share with them the benefits arising therefrom.

This jurisprudential elaboration may have a significant impact also outside of the human rights sphere, thereby strengthening corresponding principles and rules developed in international environmental law (inter alia on the conservation of natural resources, public participation, environmental impact assessments, or

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[67] E.g. the IACtHR in the Saramaka case interprets the right to property in light of the HRC's views on self-determination and cultural rights, as well as in light of the CERD's views on non-discrimination (supra Sect. 3.1). The latter are also used by the ACmHPR to interpret the right to development (supra n. 56).

[68] Entered into force on 27 January 1980.

[69] This seems to be the case concerning the UNDRIP, for the CESCR (General Comment no. 21, para 7, supra n. 61) and for the ACmHPR (Endorois, supra n. 49, para 207: "[t]he African Commission notes (…) Articles 26 and 27 of the UN Declaration on Indigenous Peoples (…) to stress that indigenous peoples have a recognised claim to ownership to ancestral land under international law (…)").

[70] E.g. the IACtHR in the Saramaka People case (supra n. 34 and 36) and the ACmHPR in the Endorois case (supra n. 52) both use ILO Convention 169, although the respective relevant State is not a party thereto.

[71] For different views on the matter, as far as the Inter-American system is concerned, see Neuman 2008; Lixinski 2010, p. 596 ff.

[72] Analyzing in detail the content and status of each principle or rule is well beyond the scope of this contribution; in this regard (in addition to supra nn. 2, 29) see in particular Anaya 2004, pp. 61 ff.; Anaya 2005a; Anaya 2005b; Wiessner 2008; Lenzerini 2010; Pentassuglia 2011; Wiessner 2011.

[73] This is customary international law according to the IACmHR (IACtHR Mayagna, supra n. 28, para 140) and to the ACmHPR (Endorois, supra n. 49, paras 196, 207).

benefit sharing), which should be interpreted in light of human rights norms, with the latter playing a particularly useful supplementary role.[74] Besides, also human rights jurisprudence should look at environmental norms for support and for more specific environmentally related content in this field.[75] This could be crucial, as human rights monitoring systems may become increasingly attractive fora to raise issues connected with international environmental law having implications for indigenous peoples' rights,[76] inter alia because of the already mentioned accessibility[77] and capacity to offer justiciability and redress, in particular for certain key collective, or economic, social and cultural rights.[78] A holistic approach at the jurisprudential level is essential to promote the harmonious, integrated development and implementation of international law in this field, but also to minimize potential conflicts that may arise between the rights of indigenous peoples and the protection of the environment.[79] Such an approach is going to be more generally

[74] For example, the recent Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (Nagoya, 29 October 2010) provides for some rules in favor of indigenous peoples that seem to apply only if the latter have "established rights" over genetic resources (see in particular Article 5–6; on the Protocol see Morgera et al. 2013); human rights norms could be used to uphold that indigenous peoples have such rights, thus triggering the application of the relevant environmental rules. In the same field, human rights jurisprudence could also provide indications of the implementation of benefit sharing (e.g. supra n. 56, 64).

[75] The ACmHPR, for example, has drawn from the African Convention on the Conservation of Nature and Natural Resources (Algiers, 15 September 1968, entered into force on 9 October 1969) to interpret the right of indigenous peoples to land, territories and resources (ACmHPR: Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples (May 2007), para 35).

[76] See e.g. the petition to the IACmHR, brought by Inuit indigenous peoples, regarding their human rights violations in connection with the international regime on climate change (Petition of 7 December 2005, presented on behalf of the Inuit of Canada and the United States, to the IACmHR, Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, available at http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf; on the issue see Osofsky 2009); see also the CERD cases cited infra n. 79.

[77] See supra, in particular n. 63.

[78] For example in the Inter-American (supra Sect. 3.1 and n. 64) and African (supra, Sect. 3.2, especially in the Endorois case) systems.

[79] E.g. the CERD been recently addressed potential indigenous peoples' human rights violations arising out of forestry-related projects (involving financing from the World Bank) implemented in Indonesia within the framework of Reducing Emissions from Deforestation and Forest Degradation (REDD) under the United Nations Framework Convention for Climate Change (New York, 9 May 1992) (CERD: Concluding Observations on Indonesia, UN Doc. CERD/C/IDN/CO/3, 2007, para 17; Letters addressed to Indonesia under the early warning and urgent action procedure, of 13 March and 28 September 2009, available at http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Indonesia130309.pdf and http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Indonesia28092009.pdf). Another example of a conflict scenario could also be the establishment of a protected area or reserve where indigenous peoples claim rights to land and resources (see the cases of Xákmok Kásek (supra n. 29), supra Sect. 3.1, Endorois (supra n. 49), supra Sect. 3.2, and of the Chagos Archipelago infra n. 80). On possible

relevant since the issue of indigenous peoples' rights relating to the environment has even wider cross-sectoral implications, potentially involving few other sectors of international law and other international courts, tribunals, monitoring bodies, and institutions.[80] This is likely to pose a critical challenge in terms of accommodating the tensions that may occur across such different sectors (human rights jurisprudence seems to provide indications as to how some of these inconsistencies could be handled)[81] and of ensuring the coherent application of international law, making this area an interesting field for testing the possibilities of international legal systemic evolution.

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(Footnote 79 continued)
divergences between indigenous peoples' rights and environmental protection see also Heinämäki 2009.

[80] For example, Ecuador has instituted proceedings before the International Court of Justice (ICJ), raising inter alia the issue of damages caused by pollution to the indigenous peoples on its territory (ICJ: Aerial Herbicide Spraying (Ecuador v. Colombia), Application of 31 March 2008). On 20 December 2010 Mauritius initiated Arbitration proceedings against the United Kingdom, under the provisions of the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), regarding the creation of a marine protected area in the Chagos Archipelago, which allegedly would also have an impact on the rights of some indigenous populations. Issues relating to indigenous peoples' environment can also raise questions connected to international investments, trade, or development, and therefore to the work of organizations such as the World Bank or the World Trade Organization (see e.g. supra n. 79, infra n. 81; Barsh 2001; MacKay 2002; Charters 2008; Heinämäki 2009).

[81] In the Sawhoyamaxa case, for example, the IACtHR rejected Paraguay's argument that the non-enforcement of indigenous land rights was justified by a bilateral investment Treaty concluded with Germany, which protected the rights of the land owners: according to the Court, such treaties would always have to be compatible with multilateral human rights treaties, as the latter generate rights for individuals and are not based on reciprocity (Sawhoyamaxa, supra n. 29, para 140). Moreover, the categorization of non-discrimination as jus cogens by the same Court (Xákmok Kásek, supra n. 29, supra Sect. 3.1 and n. 58) means that duties relating to indigenous peoples and the environment which can be connected to such a principle will prevail over incompatible treaties and obligations more in general.

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Les vertus pratiques des obligations générales relatives à l'environnement dans la Convention des Nations Unies sur le droit de la mer

Philippe Gautier

1 Introduction

C'est bien entendu un honneur de participer à un ouvrage dédié à un éminent juriste; c'est également un plaisir d'écrire en l'honneur de Tullio Treves que j'ai eu la chance de côtoyer pendant plus de 20 ans, à New York, Kingston, Bruxelles ou Hamburg. C'est enfin un exercice délicat lorsque l'on veut rendre hommage à un internationaliste non seulement doté d'une connaissance encyclopédique du droit mais également d'un esprit vif et acéré.

Le point de départ de cette étude est une intuition qui est présente dans l'opinion individuelle du Juge Treves, jointe à l'ordonnance rendue en 2001 par le Tribunal international du droit de la mer et prescrivant une mesure conservatoire dans le cadre de l'affaire de l'usine MOX.

2 L'affaire MOX devant le TIDM

L'affaire MOX (acronyme utilisé pour désigner le combustible nucléaire « Mixed Oxide nuclear fuel ») portait sur les risques environnementaux que faisait peser sur la mer d'Irlande le fonctionnement d'une nouvelle usine destinée à traiter du combustible irradié à Sellafield au Royaume-Uni. Un différend s'ensuivit entre

Les opinions émises dans l'article sont exprimées à titre personnel.

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l'Irlande et le Royaume-Uni et l'Irlande soumit le règlement de ce litige à un tribunal arbitral en vertu de l'Annexe VII de la Convention des Nations Unies sur le droit de la mer (Montego Bay, 10 décembre 1982; ci-après la Convention de 1982).[1] Dans l'attente de la constitution de ce tribunal arbitral, l'Irlande institua une procédure en prescription de mesures conservatoires devant le Tribunal international du droit de la mer (TIDM) sur la base de l'Art. 290.5 de la Convention de 1982. Selon cette disposition, le TIDM est compétent pour prescrire des mesures conservatoires « pour préserver les droits respectifs des parties en litige ou pour empêcher que le milieu marin ne subisse de dommages graves ».

Devant le TIDM, l'Irlande avait demandé, à titre de mesure conservatoire, l'interdiction de la mise en service de l'usine MOX, en invoquant la violation de ses droits au fond (essentiellement, le droit de ne pas subir de pollution et de ne pas être exposé à un risque de pollution en raison de la mise en service de l'usine MOX) et de ses droits procéduraux (le droit à la coopération et à l'information). Dans son ordonnance du 13 novembre 2001, le Tribunal n'accéda pas à la demande de l'Irlande de suspendre l'exploitation de la centrale, principalement en raison de l'absence de l'urgence requise par l'Art. 290.5 de la Convention de 1982. En effet, en vertu de cette disposition, l'urgence doit être appréciée, non pas par rapport à la période de temps qui s'écoulera jusqu'à l'adoption de la décision au fond, mais bien en fonction du délai que requiert la mise en place du tribunal arbitral prévu à l'annexe VII de la Convention de 1982.[2] Il s'agit d'une période de quelques mois et, aux yeux du Tribunal, l'Irlande n'avait pas apporté d'arguments convaincants démontrant que des dommages surviendraient au cours de cette courte période. Le Tribunal jugea cependant approprié d'adopter une mesure provisoire enjoignant le Royaume-Uni et l'Irlande de coopérer et notamment d'échanger des informations « concernant les conséquences possibles, pour la mer d'Irlande, de la mise en service de l'usine MOX ».[3]

Dans son opinion individuelle,[4] le Juge Treves observe que le Tribunal semble avoir

> fait une distinction entre le droit lié au fond invoqué par l'Irlande de ne pas être polluée ou exposée à un risque de pollution en raison de la mise en service de l'usine MOX, et les droits de caractère procédural touchant la coopération et l'information. Si le Tribunal n'a

[1] Entrée en vigueur le 16 novembre 1994.

[2] TIDM : Usine MOX (Irlande c. Royaume-Uni), ordonnance (3 décembre 2001), par. 81.

[3] *Ibidem*, p. 111 : « L'Irlande et le Royaume-Uni doivent coopérer et, à cette fin, procéder sans retard à des consultations dans le but :

a) d'échanger des informations supplémentaires concernant les conséquences possibles, pour la mer d'Irlande, de la mise en service de l'usine MOX;

b) de surveiller les risques ou les effets qui pourraient découler ou résulter, pour la mer d'Irlande, des opérations de l'usine MOX;

c) d'adopter, le cas échéant, des mesures pour prévenir une pollution du milieu marin pouvant résulter des opérations de l'usine MOX ».

[4] *Ibidem*, pp. 137-140.

> pas jugé que la condition d'urgence était satisfaite en ce qui concerne les premiers, il a implicitement considéré qu'elle l'était pour ce qui est des seconds.

Plus loin, il ajoute :

> On peut arguer que le respect de droits procéduraux concernant la coopération, l'échange d'informations, etc. s'impose eu égard à l'obligation générale de diligence lorsque l'on mène des activités risquant d'avoir un impact sur l'environnement.

Le propos est important à un double titre. D'une part, il souligne le caractère coutumier de l'obligation générale d'agir avec la diligence requise lorsque l'on mène des activités risquant d'avoir un impact sur l'environnement marin. L'État a donc certains devoirs en vertu du droit coutumier, indépendamment de l'existence d'obligations spécifiques convenues par voie de traité. D'autre part, il souligne qu'une telle obligation ne se contente pas d'imposer de vagues devoirs mais entraine, au contraire, des effets concrets sur le comportement des États. Dans le cadre de circonstances déterminées, le devoir de diligence imposera à l'État d'adopter un comportement bien précis, par exemple de s'assurer que certaines informations relatives à une activité potentiellement dangereuse sont bien communiquées à un État voisin.

3 L'arbitrage OSPAR

Ce qui vient d'être énoncé peut paraître banal. Mais, pour en mesurer la portée, il est utile de se référer à la sentence rendue le 2 juillet 2003 par un tribunal arbitral constitué pour trancher un différend concernant également l'usine MOX.[5] Il s'agissait cependant d'une procédure distincte, instituée cette fois sur la base de la Convention pour la protection du milieu marin de l'Atlantique du Nord-Est (Paris, 22 septembre 1992; ci-après Convention OSPAR).[6] Dans le cadre de cette affaire, l'Irlande considérait que le refus exprimé par le Royaume-Uni de lui communiquer la version complète de deux rapports internes,[7] préparés en vue de l'approbation de la mise en service de l'usine MOX par les autorités britanniques, constituait une violation de l'Art. 9 de la Convention OSPAR. L'Irlande avait alors institué une procédure arbitrale fondée sur la clause de règlement des différends contenue dans la Convention OSPAR.

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[5] PCA : Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom), Sentence (2 juillet 2003).

[6] Entrée en vigueur le 25 mars 1998.

[7] Cela visait un « financial assessment report » établi par la firme de consultance PA Consulting Group ("PA" report) et un « report of the economic justification for the MOX plant », établi par la firme de consultance Arthur D. Little ("ADL" Report) (v. par. 25, 26, 35, 42 de la sentence du 2 juillet 2003).

Les arbitres devaient tout d'abord répondre à la question de savoir si l'Art. 9.1 de la Convention OSPAR, enjoignant le Royaume-Uni de faire « en sorte que [ses] autorités compétentes soient tenues de mettre à la disposition de toute personne physique ou morale les informations (…) »[8] constituait une obligation de moyen (obligeant le Royaume-Uni à mettre un système en place à cet effet) ou de résultat (obligeant le Royaume-Uni à garantir que les informations soient effectivement communiquées). Sur ce point, les arbitres décidèrent que l'Art. 9 établissait une obligation de résultat. À première vue, la conclusion peut paraître étrange dans le cas d'une obligation qui se limite à demander à un État de « faire en sorte » ou de « s'efforcer » d'atteindre un certain résultat. Toutefois, il convient d'observer que, dans ce cas précis, il s'agissait pour l'État concerné de s'assurer qu'un résultat soit atteint par ses propres autorités et non par une tierce personne. Dans ces circonstances, il était somme toute logique de ne pas retenir une simple obligation de comportement, sous peine de vider de sa substance l'obligation énoncée à l'Art. 9 de la Convention OSPAR.

Une deuxième question posée au tribunal arbitral concernait la portée de l'obligation contenue à l'Art. 9.2,[9] en vertu de laquelle le Royaume-Uni devait fournir des informations « concernant l'état de la zone maritime et les activités ou les mesures les affectant (« adversely affecting ») ou susceptibles de les affecter ». Aux yeux de l'Irlande, le risque environnemental découlait bien de la production de combustible MOX et dès lors l'obligation d'information devait viser tous les aspects de cette activité et non pas uniquement les informations liées spécifiquement à l'environnement. Au contraire, le Royaume-Uni considérait que l'information dont il était question à l'Art. 9.2 devait nécessairement être limitée aux activités ou mesures affectant l'état de la zone maritime ou susceptibles de l'affecter.[10] Selon le Royaume-Uni les informations visées par la disposition en

[8] Art. 9.1 : « Les Parties contractantes font en sorte que leurs autorités compétentes soient tenues de mettre à la disposition de toute personne physique ou morale les informations décrites au paragraphe 2 du présent article, en réponse à toute demande raisonnable, sans que ladite personne soit obligée de faire valoir un intérêt, sans frais disproportionnés, le plus rapidement possible et dans un délai de deux mois au plus ».

[9] Art. 9.2 : « Les informations visées au paragraphe 1 du présent article sont constituées par toute information disponible sous forme écrite, visuelle, sonore ou contenue dans des banques de données concernant l'état de la zone maritime et les activités ou les mesures les affectant ou susceptibles de les affecter, ainsi que les activités conduites ou les mesures adoptées conformément à la Convention ».

[10] L'on observera incidemment que le texte français de l'Art. 9.2 de la Convention OSPAR ne semble pas correspondre à la version anglaise. Alors que le texte anglais vise toute information affectant « l'état de la zone maritime », auquel fait référence le pronom personnel « it » (« (…) any available information in written, visual, aural or data-base form on the state of the maritime area, on activities or measures adversely affecting or likely to affect it (…) »), le texte français utilise le pronom personnel « les », ce qui grammaticalement, ne peut renvoyer à « l'état de la zone maritime » (« (…) toute information disponible sous forme écrite, visuelle, sonore ou contenue dans des banques de données concernant l'état de la zone maritime et les activités ou les mesures les affectant ou susceptibles de les affecter (…) »). Logiquement, le texte français devrait se lire : « (…) toute information disponible sous forme écrite, visuelle, sonore ou contenue dans

question pouvaient ainsi se rapporter aux déversements éventuels de matières radioactives dans les espaces maritimes mais non au fonctionnement de la centrale en tant que tel.[11]

Sur cette question précise, le différend opposant les parties se rapportait à 14 catégories d'information qui avaient été omises dans la version publiée des deux rapports internes et dont l'Irlande demandait la communication. Il s'agissait d'informations concernant notamment la capacité de production de l'usine MOX et la durée d'existence de celle-ci, les volumes de ventes, les quantités de plutonium sur le site, le nombre d'employés, le prix du combustible MOX, l'existence de contrats d'achats de combustible ainsi que les arrangements entourant les transports de plutonium de et vers Sellafield et le nombre estimé de ces transports.[12] L'opinion exprimée par le tribunal arbitral à ce sujet est très claire : selon lui, aucune des 14 catégories identifiées par l'Irlande ne peut être qualifiée raisonnablement d'information concernant l'état de la zone maritime au sens de la Convention OSPAR.[13] De même, l'Irlande n'a pas démontré que ces 14 points se rapportaient à des activités ou mesures affectant ou susceptibles d'affecter l'état de l'environnement marin.[14]

Il est intéressant de comparer le raisonnement développé par le tribunal arbitral dans l'affaire OSPAR avec celui du TIDM dans l'affaire MOX. Devant le TIDM, l'Irlande n'invoquait pas de disposition semblable à l'Art. 9 de la Convention OSPAR, garantissant de manière précise le droit d'obtenir certaines informations. Elle se basait sur des obligations plus générale; notamment les obligations de coopération visées aux Articles 123 et 197 de la Convention des Nations Unies sur le droit de la mer; l'Art. 123 visant la coopération entre les États riverains d'une mer fermée ou semi-fermée et l'Art. 197 la coopération au plan mondial ou régional. À première vue, il s'agit de dispositions au contenu relativement imprécis. Dans le cas de l'Art. 127, le paragraphe b) enjoint les États concernés de « coordonner l'exercice de leurs droits et l'exécution de leurs obligations concernant la protection et la préservation du milieu marin ». L'Art. 197 est tout aussi général; il dispose que les

(Footnote 10 continued)
des banques de données concernant l'état de la zone maritime et les activités ou les mesures *l'*affectant ou susceptibles de *l'*affecter (…) ».

[11] Access to Information, supra n. 5, par. 153.

[12] Il s'agissait des categories suivantes: « (A) Estimated annual production capacity of the MOX facility; (B) Time taken to reach this capacity; (C) Sales volumes; (D) Probability of achieving higher sales volumes; (E) Probability of being able to win contracts for recycling fuel in "significant quantities"; (F) Estimated sales demand; (G) Percentage of plutonium already on site; (H) Maximum throughput figures; (I) Life span of the MOX facility; (J) Number of employees; (K) Price of MOX fuel; (L) Whether, and to what extent, there are firm contracts to purchase MOX from Sellafield; (M) Arrangements for transport of plutonium to, and MOX from, Sellafield; (N) Likely number of such transports ». *Ibidem*, par. 161.

[13] *Ibidem*, par. 163.

[14] *Ibidem*, par. 179.

> États coopèrent au plan mondial et, le cas échéant, au plan régional, directement ou par l'intermédiaire des organisations internationales compétentes, à la formulation et à l'élaboration de règles et de normes, ainsi que de pratiques et procédures recommandées de caractère international compatibles avec la convention, pour protéger et préserver le milieu marin, compte tenu des particularités régionales.

Pourtant, c'est sur cette obligation de coopération que le TIDM dans l'affaire MOX s'est appuyé pour adopter une mesure conservatoire. En effet, après avoir considéré qu'il n'y avait pas lieu en l'espèce d'adopter les mesures demandées par l'Irlande, le Tribunal ajouta, au par. 82 de son ordonnance du 3 décembre 2001,

> que l'obligation de coopérer constitue, en vertu de la partie XII de la Convention et du droit international général, un principe fondamental en matière de prévention de la pollution du milieu marin et qu'il en découle des droits que le Tribunal peut considérer approprié de préserver conformément à l'article 290 de la Convention.

En d'autres termes, dans le cadre de la prévention de la pollution du milieu marin, les dispositions conventionnelles mentionnées ci-dessus sont l'expression d'un principe coutumier dont découlent des devoirs précis. Sur cette base, le Tribunal considère que

> la prudence et la précaution exigent que l'Irlande et le Royaume-Uni coopèrent en échangeant des informations relatives aux risques ou effets qui pourraient découler ou résulter des opérations de l'usine MOX et qu'ils élaborent des moyens permettant, le cas échéant, d'y faire face.[15]

Comme l'affirme le Juge Treves dans son opinion individuelle, l'obligation de coopération doit ainsi être conjuguée avec celle d'agir avec la diligence requise en vue d'éviter des dommages à l'environnement marin. C'est dans ce cadre que peut être comprise la mesure conservatoire ordonnée par le TIDM qui demande à l'Irlande et au Royaume-Uni de coopérer et, à cet effet, de

> procéder sans retard à des consultations dans le but : a) d'échanger des informations supplémentaires concernant les conséquences possibles, pour la mer d'Irlande, de la mise en service de l'usine MOX; b) de surveiller les risques ou les effets qui pourraient découler ou résulter, pour la mer d'Irlande, des opérations de l'usine MOX; c) d'adopter, le cas échéant, des mesures pour prévenir une pollution du milieu marin pouvant résulter des opérations de l'usine MOX.

Lorsqu'une mesure conservatoire est prescrite par le TIDM, chaque partie à l'instance a, conformément à l'Art. 95.1 du Règlement du Tribunal, l'obligation d'informer au plus tôt ce dernier « des dispositions qu'elle a prises pour mettre en œuvre les mesures conservatoires prescrites » et de présenter « un rapport initial sur les dispositions qu'elle a prises ou qu'elle se propose de prendre pour se conformer sans retard aux mesures prescrites ».[16] Les rapports initiaux transmis par le parties ont été publiés dans le volume « Mémoires, procès-verbaux des

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[15] Usine MOX, supra n. 2, par. 84.

[16] Dans l'ordonnance du 3 décembre 2001, le Tribunal décida que le rapport initial devrait être présenté le 17 décembre 2001 au plus tard.

audiences publiques et documents » relatif à l'affaire de l'usine MOX.[17] À la lecture de ces rapports, l'on apprend notamment que, sur la base de l'ordonnance du Tribunal, l'Irlande a transmis au Royaume-Uni une liste de 55 questions[18] se rapportant aux effets éventuels sur la mer d'Irlande de la mise en service de l'usine MOX ainsi qu'aux mesures prises pour surveiller les effets et les risques qu'entraine pour la mer d'Irlande le fonctionnement de l'usine MOX et pour prévenir la pollution du milieu marin. De plus, quelques unes de ces questions visent des points qui figuraient parmi les 14 catégories d'information dont il était question dans l'arbitrage OSPAR. Cela concerne les questions relatives à la capacité de production de l'usine, à la présence de plutonium sur le site, à la période de fonctionnement de l'usine ainsi qu'aux transports de plutonium de et vers l'usine. Il est vrai qu'au cours des réunions qui ont eu lieu entre les représentants des deux parties après l'ordonnance du 3 décembre 2001, le Royaume-Uni exprima le point de vue selon lequel de nombreux points figurant sur la liste des 55 questions sortaient du cadre de la mesure conservatoire adoptée par le Tribunal ou avaient une nature purement spéculative. Néanmoins, le Royaume-Uni s'engagea à s'efforcer de répondre à 13 de ces questions, identifiées comme nécessitant une réponse urgente par l'Irlande,[19] et l'on notera que l'une d'entre elles (« What is the projected operational life of the MOX plant ? ») est semblable à une des catégories d'informations qui était en litige dans l'arbitrage OSPAR (« Life span of the MOX facility »). Par ailleurs, les questions 31 à 37 portaient sur les arrangements relatifs aux transports de plutonium de et vers l'usine MOX, une information qui faisait également l'objet du contentieux dans l'arbitrage OSPAR. Cependant, contrairement à l'arbitrage OSPAR, la question du transport (maritime) fut bien considérée comme pertinente devant le TIDM et le Tribunal a d'ailleurs pris le soin de consigner l'engagement pris par le Royaume-Uni au cours de l'audience selon lequel il n'y aura pas d'exportation de combustible MOX à partir de l'usine avant octobre 2002.[20] De même, par une lettre du 6 février 2002,[21] l'agent du Royaume-Uni accepta de répondre à une demande d'information de l'Irlande[22] concernant l'éventualité d'un transport de matières radioactives vers l'usine MOX en 2002.

L'on peut dès lors constater le paradoxe suivant : s'agissant des mêmes faits, l'Irlande a pu, devant le TIDM, obtenir, en invoquant des obligations générales de coopérer et de diligence requise, des informations sur certains aspects du fonctionnement de l'usine MOX alors qu'elle n'a pu recevoir ce type d'information,

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[17] TIDM mémoires, procès-verbaux et documents 2001, vol. 9, Usine MOX (Irlande c. Royaume-Uni), mesures conservatoires, pp 880 et s.

[18] *Ibidem*, pp. 887-891 ("Initial and Non-Exhaustive List of Questions put by Ireland to the United Kingdom in the context of the Provisional Measure prescribed by the International Tribunal in its Order of 3 December 2001").

[19] *Ibidem*, p 906.

[20] Usine MOX, supra n. 2, par. 79.

[21] TIDM mémoires, procès-verbaux et documents 2001, vol. 9, Usine MOX (Irlande c. Royaume-Uni), mesures conservatoires, pp 928-929.

[22] *Ibidem*, pp 925-927.

dans le cadre de l'arbitrage OSPAR, sur la base de dispositions conventionnelles imposant pourtant spécifiquement aux États de fournir des informations relatives à l'état de l'environnement marin.

Bien entendu, les raisonnements développés respectivement par le TIDM et par le tribunal arbitral OSPAR ne sont pas identiques, de même que le socle conventionnel de chaque affaire. Devant le TIDM, nul ne contesta le droit de l'Irlande d'invoquer, sur la base des dispositions de la Convention des Nations Unies sur le droit de la mer, les risques que faisait peser sur l'environnement marin le transport de matières radioactives. Par contre, le tribunal arbitral OSPAR décida que les informations relatives au transport ne relevaient pas du champ d'application de l'Art. 9.2 de la Convention OSPAR, sur la base d'une interprétation littérale de l'expression « concernant l'état de la zone maritime et les activités ou les mesures les affectant (« adversely affecting ») ou susceptibles de les affecter » contenue dans ladite disposition. Ceci dit, l'Art. 32.6.a de la Convention OSPAR prévoit que, en cas de différend, le « tribunal arbitral décide selon les règles du droit international, et, en particulier, de la Convention ». A priori, rien n'empêchait donc les parties, dans le cadre de l'arbitrage OSPAR, de se référer aux autres règles conventionnelles liant celles-ci, y compris les dispositions de la Convention de 1982, afin de faciliter l'interprétation de la Convention OSPAR, conformément à l'Art. 31 de la Convention sur le droit des traités (Vienne, 23 mai 1969; ci-après Convention de Vienne),[23] ou d'invoquer l'existence d'obligations additionnelles. Le tribunal a cependant interprété la clause de droit applicable de manière restrictive. Il a estimé qu'il était premièrement tenu d'appliquer la Convention OSPAR et a également affirmé qu'il appliquerait « customary international law and unless and to the extent that the Parties have created a lex specialis ».[24] En d'autres termes, en cas de différence entre une règle coutumière et les dispositions de la Convention OSPAR, ces dernières prévaudront, à l'exception de l'hypothèse d'une règle de *ius cogens*. Par ailleurs, le tribunal arbitral ne considère pas qu'il est compétent pour prendre en compte les obligations conventionnelles découlant d'autres traités liant les parties, sauf lorsque la Convention OSPAR y renvoie expressément. Selon lui, « [i]nterpreting Article 32 (6) (a) otherwise would transform it into an unqualified and comprehensive jurisdictional regime, in which there would be no limit *ratione materiae* to the jurisdiction of a tribunal established under the OSPAR Convention ».

L'on comprend bien que le tribunal arbitral soit uniquement compétent pour répondre à la question qui lui est posée dans le cadre de la Convention OSPAR. L'on n'aperçoit pas pour autant les raisons pour lesquelles le fait d'appliquer des obligations conventionnelles liées à l'objet du litige créerait « an unqualified and comprehensive jurisdictional regime ». Il est par exemple étrange de constater que

[23] Entrée en vigueur le 27 janvier 1980. V. sur ce point le par. 105 de la sentence (Access to Information, supra n. 5) où le tribunal arbitral affirme qu'il peut appliquer « where appropriate, other extant international agreements insofar as they are admissible for purposes of interpretation under Article 31 of the Vienna Convention ».

[24] *Ibidem*, par. 84.

les dispositions de la Convention des Nations Unie sur le droit de la mer ne sont nullement utilisées par le Tribunal arbitral, par exemple pour interpréter l'Art. 9 de la Convention OSPAR, alors que le préambule de cette convention rappelle « les dispositions pertinentes du droit coutumier international contenues dans la XIIème partie de la Convention des Nations Unies sur le droit de la mer et notamment son Art. 197 sur la coopération mondiale et régionale dans la protection et la préservation du milieu marin ». Par ailleurs, la préférence affirmée au principe *lex specialis* pourrait être nuancée. Ainsi, par exemple, comment le tribunal arbitral traiterait-il le cas d'une nouvelle règle coutumière qui rendrait obsolètes les restrictions à l'obligation d'information contenue dans l'Art. 9 de la Convention OSPAR ? Sur ce point, l'Art. 30.3 de la Convention de Vienne, dans l'hypothèse - il est vrai - de traités successifs, donne plutôt la préférence au principe *lex posterior derogat priori.*[25]

Toujours est-il que la démarche adoptée par l'arbitrage OSPAR a pour effet de privilégier les dispositions du traité visé par le différend, en excluant le droit conventionnel et coutumier qui lui est extérieur.

L'on retrouve une approche semblable, *mutatis mutandis*, dans le traitement réservé au principe de précaution par le groupe spécial de l'Organisation mondiale du commerce (OMC) constitué pour traiter de l'affaire relative aux mesures communautaires concernant les viandes et les produits carnés (hormones). En effet, dans cette affaire, le groupe spécial considéra – et cela fut confirmé par l'organe d'appel[26] – que le principe de précaution – dans la mesure où un tel principe existe en droit coutumier international – ne l'emportait pas sur des dispositions conventionnelles (l'Art. 5.1-2 de l'Accord sur l'application des mesures sanitaires et phytosanitaires, Marrakech, 15 avril 1994; ci-après Accord SPS[27]) traduisant ledit principe en des termes plus précis.[28] Il est possible de considérer qu'il y a là, comme dans le cadre de l'arbitrage OSPAR, une

[25] « 3. Lorsque toutes les parties au traité antérieur sont également parties au traité postérieur, sans que le traité antérieur ait pris fin ou que son application ait été suspendue en vertu de l'Art. 59, le traité antérieur ne s'applique que dans la mesure où ses dispositions sont compatibles avec celles du traité postérieur ».

[26] OMC : Communautés Européenne - Mesures communautaires concernant les viandes et les produits carnés (hormones), WT/DS26/AB/R et WT/DS48/AB/R, Rapport de l'Organe d'appel (16 janvier 1998), par. 125.

[27] Accord instituant l'Organisation mondiale du commerce, Annexe 1A, entré en vigueur le 1er janvier 1995.

[28] CE – Hormones, *supra* n. 26, par. 120 : « Les Communautés européennes invoquent aussi le principe de précaution à l'appui de leur allégation selon laquelle les mesures communautaires incriminées sont établies sur la base d'une évaluation des risques. Dans la mesure où ce principe pourrait être considéré comme faisant partie du droit coutumier international *et* pourrait être utilisé pour interpréter l'Art. 5:1 et 2 concernant l'évaluation des risques en tant que règle coutumière d'interprétation du droit international public (au sens de l'Art. 3:2 du Mémorandum d'accord sur le règlement des différends), nous estimons *qu'il ne l'emporterait pas sur l'énoncé explicite de l'Art. 5:1 et 2 indiqué ci-dessus*, étant donné en particulier que ce principe a été incorporé, avec un sens spécifique, à l'Art. 5:7 de l'Accord SPS (…) » (italiques ajoutés).

application du principe « *Lex specialis derogat generali* ». L'on doit cependant ajouter que dans l'affaire traitée au sein de l'OMC, l'Art. 5 de Accord SPS constitue plutôt une dérogation au principe de précaution que sa traduction en des termes plus précis.[29] En vertu de l'Art. 5 de l' Accord SPS, les mesures sanitaires doivent en effet être adoptées sur la base d'une évaluation des risques en tenant compte « des preuves scientifiques disponibles » et lorsque ces preuves scientifiques sont insuffisantes, les mesures ont un caractère provisoire, afin de permettre à l'État concerné de « procéder à une évaluation plus objective du risque ». Cela est sensiblement différent de la formulation du principe de précaution contenue au principe 15 de la déclaration de Rio de 1992.[30] En convenant, par voie de traité, d'une formulation plus restrictive d'un principe de droit international, les États parties au traité sont liés par l'obligation ainsi définie et dès lors ils peuvent difficilement invoquer le principe général coutumier, pour échapper aux modifications qu'ils ont acceptées d'y apporter par voie conventionnelle.

4 L'avis consultatif de la Chambre pour le règlement des différends relatifs aux fonds marins du TIDM

Dans les deux affaires précitées (arbitrage OSPAR et affaire des hormones devant le mécanisme de règlement des différends de l'OMC), la juridiction saisie a écarté l'application d'un principe général en lui préférant une règle conventionnelle qui en précisait les modalités d'application ou qui y portait dérogation. Ce n'est pourtant pas la seule approche envisageable. L'on peut à cet effet se référer à l'avis consultatif rendu le 1er février 2011 par la Chambre pour le règlement des différends relatifs aux fonds marins, présidée par le Juge Treves, et en particulier au raisonnement développé par la Chambre sur l'approche de précaution ainsi que sur

[29] Voir la formulation de l'Art. 5, par. 1,2 et 7 : « 1. Les Membres feront en sorte que leurs mesures sanitaires ou phytosanitaires soient établies sur la base d'une évaluation, selon qu'il sera approprié en fonction des circonstances, des risques pour la santé et la vie des personnes et des animaux ou pour la préservation des végétaux, compte tenu des techniques d'évaluation des risques élaborées par les organisations internationales compétentes. 2. Dans l'évaluation des risques, les Membres tiendront compte des preuves scientifiques disponibles; des procédés et méthodes de production pertinents; des méthodes d'inspection, d'échantillonnage et d'essai pertinentes; (…) 7. Dans les cas où les preuves scientifiques pertinentes seront insuffisantes, un Membre pourra provisoirement adopter des mesures sanitaires ou phytosanitaires sur la base des renseignements pertinents disponibles, y compris ceux qui émanent des organisations internationales compétentes ainsi que ceux qui découlent des mesures sanitaires ou phytosanitaires appliquées par d'autres Membres. Dans de telles circonstances, les Membres s'efforceront d'obtenir les renseignements additionnels nécessaires pour procéder à une évaluation plus objective du risque et examineront en conséquence la mesure sanitaire ou phytosanitaire dans un délai raisonnable ».

[30] « En cas de risque de dommages graves ou irréversibles, l'absence de certitude scientifique absolue ne doit pas servir de prétexte pour remettre à plus tard l'adoption de mesures effectives visant à prévenir la dégradation de l'environnement ».

les évaluations de l'impact sur l'environnement des activités menées dans la « Zone » (à savoir les fonds marins et leur sous-sol au-delà des espaces maritimes soumis à la juridiction des États).

Dans son avis consultatif, la Chambre rappelle le système mis en place par la Convention de 1982 : tout contractant souhaitant mener des activités dans la Zone doit soumettre à l'Autorité internationale des fonds marins une évaluation de l'impact potentiel des activités proposées sur l'environnement.[31] Cette obligation est explicitée dans les règlements adoptés par l'Autorité. Quant à l'État qui patronne le contractant, celui-ci doit, en vertu de l'Art. 139 de la Convention de 1982, « veiller à ce que les activités menées » dans la Zone par des contractants le soient conformément à la partie XI de la Convention de 1982.[32] Il s'agit d'une obligation de comportement, consistant pour l'État concerné à agir avec la diligence requise.

L'obligation de l'État qui patronne un contractant n'est cependant pas limitée à celle consistant à s'assurer que celui-ci respecte ses devoirs en vertu de la Convention et des règlements de l'Autorité. La Chambre précise en effet que l'État contractant assume en outre une obligation directe en la matière, en vertu de l'Art. 206 de la Convention de 1982 et du droit international général.[33] L'Art. 206[34] impose aux États (et non aux contractants), qui « ont de sérieuses raisons de penser que des activités envisagées relevant de leur juridiction ou de leur contrôle risquent d'entraîner une pollution importante ou des modifications considérables et nuisibles du milieu marin », d'évaluer « dans la mesure du possible, les effets potentiels de ces activités sur ce milieu » et de publier ces rapports. Bien qu'il ne soit pas contenu dans la Partie XI de la Convention (concernant la Zone) mais dans la partie XII (concernant la protection et la préservation du milieu marin), la Chambre a logiquement considéré que cette disposition générale était applicable aux activités menées dans la Zone. Par ailleurs, en se référant à la jurisprudence de la CIJ dans l'affaire relative à des *Usines de pâte à papier sur le fleuve Uruguay,* la Chambre a reconnu l'existence d'une obligation coutumière pour les États « de procéder à une évaluation de l'impact sur l'environnement lorsque l'activité

[31] Cf. Sect. 1, par. 7, de l'annexe à l'Accord relatif à l'application de la partie XI de la Convention des Nations Unies sur le droit de la mer (New York, 28 juillet 1994), entré en vigueur le 28 juillet 1996.

[32] Art. 139.1 : « Il incombe aux États parties de veiller à ce que les activités menées dans la zone, que ce soit par eux-mêmes, par leurs entreprises d' État ou par des personnes physiques ou morales possédant leur nationalité ou effectivement contrôlées par eux ou leurs ressortissants, le soient conformément à la présente partie (…) ».

[33] TIDM : Responsabilité et obligations des États qui patronnent des personnes et entités dans le cadre d'activités menées dans la Zone, Chambre pour le règlement des différends relatifs aux fonds marins, avis consultatif (1 février 2011), par. 145.

[34] « Lorsque des États ont de sérieuses raisons de penser que des activités envisagées relevant de leur juridiction ou de leur contrôle risquent d'entraîner une pollution importante ou des modifications considérables et nuisibles du milieu marin, ils évaluent, dans la mesure du possible, les effets potentiels de ces activités sur ce milieu et rendent compte des résultats de ces évaluations de la manière prévue à l'article 205 ».

industrielle projetée risque d'avoir un impact préjudiciable important dans un cadre transfrontière, et en particulier sur une ressource partagée ».[35]

La Chambre évite ainsi d'enfermer son raisonnement dans le cadre des seules dispositions spécifiques de la Partie XI de la Convention. En intégrant à son raisonnement l'obligation générale prévue à l'Art. 206 de la Convention de 1982 ainsi que le droit coutumier, elle durcit l'obligation de l'État patronnant, ce dernier assumant ainsi lui-même l'obligation de procéder à une évaluation de l'impact sur l'environnement lorsque l'activité menée sous son contrôle présente des risques pour l'environnement.

Une démarche similaire est développée par la Chambre en ce qui concerne l'approche de précaution que les États contractants doivent mettre en œuvre à l'égard d'activités menées dans la Zone, en vertu de règlements adoptés par l'Autorité. À ce sujet la Chambre observe que « l'approche de précaution fait aussi partie intégrante des obligations de diligence requise incombant aux États qui patronnent, laquelle est applicable même en dehors du champ d'application des Règlements relatifs aux nodules et sulfures ».[36] La Chambre considère que l'approche de précaution est ainsi subsumée par l'obligation générale de diligence requise « qui exige des États qui patronnent de prendre toutes les mesures appropriées afin de prévenir les dommages qui pourraient résulter des activités des contractants qu'ils patronnent ». Elle précise que cette obligation

> s'applique aux situations où les preuves scientifiques quant à la portée et aux effets négatifs éventuels des activités concernées sont insuffisantes, mais où il existe des indices plausibles de risques potentiels. Un État qui patronne ne remplirait pas son obligation de diligence requise s'il ne tenait pas compte de ces risques.[37]

Comme on le voit, l'obligation de diligence requise, loin d'être une notion vague et dépourvue de valeur pratique, constitue une notion fructifère qui, appliquée à une situation concrète, exige de l'État concerné l'adoption des comportements spécifiques, par exemple l'obligation de procéder à une évaluation de l'impact sur l'environnement d'une activité projetée ou d'adopter une approche de précaution en raison de l'existence de risques pour l'environnement marin.[38] Certes, la mise en œuvre d'obligations générales, telle l'obligation de mener des études d'évaluation, ne

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[35] CIJ : Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), arrêt (20 avril 2010), par. 204 ; cité dans Activités menées dans la Zone, supra n. 33, par. 147.

[36] Activités menées dans la Zone, supra n. 33, par. 131.

[37] *Ibidem*.

[38] V. également Activités menées dans la Zone, supra n. 35, par. 132 : « Le rapport entre l'obligation de diligence requise et l'approche de précaution ressort implicitement de l'ordonnance du 27 août 1999 rendue par le Tribunal international du droit de la mer dans les affaires du *Thon à nageoire bleue (Nouvelle Zélande c. Japon; Australie c. Japon).* Ceci ressort de la déclaration du Tribunal selon laquelle « les parties devraient, dans ces conditions, agir avec prudence et précaution et veiller à ce que des mesures de conservation efficaces soient prises (…) » (*TIDM Recueil 1999*, p. 274, au paragraphe 77) ».

dispose pas de règles écrites qui en préciseraient les modalités d'exécution.[39] Mais sur ce point, l'avis consultatif revêt également une certaine utilité. Ainsi, après avoir constaté que l'Art. 206 de la Convention de 1982 – qui impose aux États de mener des évaluations d'impact - ne donne que quelques indications sur le contenu et la portée de cette obligation, la Chambre constate que « les indications contenues dans les Règlements et notamment les Recommandations [adoptées par l'Autorité et qui s'appliquent aux contractants (non aux États)] permettent de préciser et d'expliciter cette obligation en ce qui concerne les activités menées dans la Zone ».[40] La Chambre adopte ainsi une approche d'inclusion basée sur un enrichissement réciproque entre les principes coutumiers et les obligations générales incluses dans la Convention. Dans le cas d'espéce, 1'application d'une norme générale applicable aux Etats—et prescrivant des études d'impact—pourra s'inspirer des mesures d'exécution d'une règle conventionnelle semblable applicable aux contractants menant des activités dans la zone.

L'idée qui transparaît à la lecture de l'avis de la Chambre, ainsi que de la décision du Tribunal dans l'affaire MOX, est que les obligations générales contenues dans la Convention ont bien une utilité pratique. L'affaire concernant la conservation et l'exploitation durable des stocks d'espadon dans l'océan Pacifique Sud-Est (Chili/Union européenne) soumise à une chambre spécial du Tribunal en 2000 en constitue une antre illustration. Ainsi, les arguments invoqués par le Chili sont essentiellement basés sur les obligations de coopération incluses aux Articles 64[41] et 116 à 119[42] de la Convention.[43]

Certes, lorsque les intérêts des États divergent, il sera souvent difficile d'obtenir un accord entre les États en présence sur l'existence même d'un principe

[39] Le droit international général ne « précise pas la portée et le contenu des évaluations de l'impact sur l'environnement » (Usines de pâte à papier, supra n. 33, par. 205).

[40] Activités menées dans la Zone, supra n. 33, par. 149. Voy. le par 7 de la section 1 de l'annexe à l'Accord de 1994 qui prévoit que « la demande d'approbation d'un plan de travail est accompagnée d'une evaluation de 1'impact potential sur 1'environnement des activitiés proposées... ».

[41] Art. 64.1: « L'État côtier et les autres États dont les ressortissants se livrent dans la région à la pêche de grands migrateurs figurant sur la liste de l'annexe I coopèrent, directement ou par l'intermédiaire des organisations internationales appropriées, afin d'assurer la conservation des espèces en cause et de promouvoir l'exploitation optimale de ces espèces dans l'ensemble de la région, aussi bien dans la zone économique exclusive qu'au-delà de celle-ci. Dans les régions pour lesquelles il n'existe pas d'organisation internationale appropriée, l'État côtier et les autres États dont les ressortissants exploitent ces espèces dans la région coopèrent pour créer une telle organisation et participer à ses travaux ».

[42] Art. 118: « Les États coopèrent à la conservation et à la gestion des ressources biologiques en haute mer. Les États dont les ressortissants exploitent des ressources biologiques différentes situées dans une même zone ou des ressources biologiques identiques négocient en vue de prendre les mesures nécessaires à la conservation des ressources concernées. À cette fin, ils coopèrent, si besoin est, pour créer des organisations de pêche sous-régionales ou régionales ».

[43] TIDM : Conservation et exploitation durable des stocks d'espadon dans l'océan Pacifique Sud-Est (Chili/Union européenne), ordonnance (20 décembre 2000).

coutumier ou sur les modalités de son application. Dès lors, le respect de ces obligations générales suppose bien souvent qu'il soit fait appel à un juge.

Les États et ceux qui les conseillent peuvent parfois éprouver quelques hésitations à invoquer, à l'appui de leur demande, des obligations formulées en des termes généraux. Par exemple, l'Art. 117 de la Convention de 1982 a sans doute une formulation laconique : « Tous les États ont l'obligation de prendre les mesures, applicables à leurs ressortissants, qui peuvent être nécessaires pour assurer la conservation des ressources biologiques de la haute mer, ou de coopérer avec d'autres États à la prise de telles mesures ». L'on ne doit pourtant pas end déduire qu'il est dépourvu d'effet utile dans le domaine des pêcheries et il pourrait servir de base à une réclamation internationale contre des États tiers à une organisation régionale de pêche qui refusent de coopérer avec celle-ci et ne réagissent pas lorsqu'ils sont informés que des navires battant leur pavillon pêchent sans respecter les mesures de conservation édictées par lesdites organisations. À ce propos, l'on observera qu'une conclusion identique peut être adoptée sur la base du principe de l'utilisation non dommageable du territoire.[44]

Dans le même sens, l'on pourrait s'interroger sur la possibilité d'utiliser, comme fondement d'une action internationale, l'Art. 94.1 de la Convention de 1982 qui dispose que tout « État exerce effectivement sa juridiction et son contrôle dans les domaines administratif, technique et social sur les navires battant son pavillon ». À la lumière des développements qui précèdent, l'on ne voit pas ce qui empêcherait un État victime d'une grave pollution de son environnement marin résultant du naufrage d'un navire qui n'a pas fait l'objet d'inspections rigoureuses d'invoquer la responsabilité en droit international public de l'État du pavillon sur la base de cette disposition. Cette constatation est par ailleurs renforcée par le fait que l'Art. 94 est complété, dans les paragraphes suivants, par l'obligation faite aux États d'adopter des mesures destinées à assurer la sécurité en mer et visant

> a) la construction et l'équipement du navire et sa navigabilité; b) la composition, les conditions de travail et la formation des équipages, en tenant compte des instruments internationaux applicables; c) l'emploi des signaux, le bon fonctionnement des communications et la prévention des abordages.[45]

Ces mesures visent à assurer que les navires sont régulièrement inspectés « par un inspecteur maritime qualifié », que « tout navire est confié à un capitaine et à des officiers possédant les qualifications voulues », et que le capitaine et l'équipage « connaissent parfaitement et sont tenus de respecter les règles internationales applicables concernant la sauvegarde de la vie humaine en mer, la prévention des abordages, la prévention, la réduction et la maîtrise de la pollution(…) ».[46]

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[44] Ainsi, l'affaire introduite par le Nicaragua contre le Honduras en 2011 pour « violations de sa souveraineté et dommages importants à l'environnement sur son territoire » est fondée notamment sur l'obligation de ne pas causer de dommages à un autre État ; cf. CIJ, Communiqué de presse n. 2011/40 (22 décembre 2011).

[45] Art. 94 par. 3.

[46] Art. 94 par. 4.

5 Obligations environnementales et droits des particuliers

Si les obligations générales, tel le devoir d'agir avec diligence, recèlent un intérêt pratique pour les États, cela ne signifie pas pour autant que les particuliers ont la possibilité d'y avoir recours. Dans certains cas, lorsqu'un accès à une juridiction internationale leur est ouvert, ils ont certes la possibilité d'invoquer des principes généraux, tel le droit d'accès à une juridiction ou le droit au respect de la vie privée, garanti par la Convention [européenne] de sauvegarde des droits de l'homme et des libertés fondamentales (Rome, 4 novembre 1950).[47] Mais un tel mécanisme requiert la mise en place d'un système international spécifique, garantissant des droits aux particuliers et leur assurant un accès à une juridiction internationale. Devant les juridictions nationales, le succès d'un recours à des principes généraux par des particuliers reste aléatoire. C'est au contraire lorsque la règle internationale est suffisamment claire et précise qu'elle est susceptible de produire un effet direct et d'être utilisée par un particulier.

À ce sujet, l'on notera que la question de l'effet en droit interne de l'Art. 9 de la Convention OSPAR fut abordée – superficiellement il est vrai - dans l'arbitrage OSPAR précité. Ainsi, pour le Royaume-Uni, l'obligation énoncée dans cet article de fournir certaines informations à « toute personne physique et morale » « (…) makes no sense if the obligation on the Contracting Party is to make available specific information on request. This is a treaty. A natural or legal person other than an OSPAR Party has no standing under the Convention ».[48] Selon cet État, l'Irlande aurait pu, en tant que personne visée par la convention, invoquer le droit qui lui était ainsi reconnu dans l'ordre juridique britannique et introduire un recours devant les juridictions internes. C'est uniquement dans la mesure où la législation du Royaume-Uni était défaillante et ne met pas en œuvre l'Art. 9 de la Convention OSPAR, qu'un recours international était envisageable.[49]

Le tribunal arbitral ne s'est pas prononcé sur ce point. L'argument du Royaume-Uni est cependant intéressant. En réservant le bénéfice de la clause concernant la fourniture d'informations aux seules parties à la Convention OSPAR, le Royaume-Uni considère que les particuliers n'ont pas la possibilité d'invoquer les dispositions de la Convention OSPAR. Du reste, comme le fait observer l'Irlande, la convention n'a pas été incorporée en droit anglais et dès lors, dans un État dualiste comme le Royaume-Uni, ne peut être invoquée devant ses juridictions internes.[50] L'argument du Royaume-Uni est logique en ce sens que l'Art. 9 n'énonce pas une obligation claire, précise, conférant un droit aux particuliers. Il impose en effet une obligation

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[47] Entrée en vigueur le 3 Septembre 1953, tel que amendée par le Protocole N° 11 (Strasbourg, 11 mai 1994), entré en vigueur le 1er novembre 1998 et le Protocole N° 14 (Strasbourg, 13 mai 2004), entré en vigueur le 1er juin 2010. Sur l'examen par la Cour européenne des droits de l'homme d'affaires mettant en cause des questions de droit de la mer, v. Treves 2010.

[48] Access to Information, supra n. 5, par. 114.

[49] *Ibidem*, par. 116.

[50] *Ibidem*, par. 113.

aux Parties contractantes. C'est également le cas, par exemple, de l'obligation prévue à l'Art. 4.1 de la Convention sur l'accès à l'information, la participation du public au processus décisionnel et à l'accès à la justice en matière d'information (Aarhus, 25 juin 1998; ci-après Convention d'Aarhus),[51] qui dispose que chaque « Partie fait en sorte que, sous réserve des paragraphes suivants du présent article, les autorités publiques mettent à la disposition du public, dans le cadre de leur législation nationale, les informations sur l'environnement qui leur sont demandées (…) ». Toutefois, il faut souligner que, même si l'Art. 9 de la Convention OSPAR (ou l'Art. 4 de la Convention d'Aarhus) ne dispose vraisemblablement pas d'un effet direct, il contient cependant une règle énoncée au bénéfice de particuliers. L'Art. 9 impose en effet aux Parties contractantes de répondre positivement aux demandes d'informations de « toute personne physique et morale », cette expression se référant assurément aux particuliers.

En matière d'environnement, l'on peut trouver des dispositions dans la Convention de 1982 qui sont libellées en des termes précis, qui énoncent des droits au profit de particuliers et sont susceptibles d'être invoqués par ceux-ci devant une juridiction interne. Par exemple, dans le cas d'infraction aux lois et règlements applicables ou aux règles et normes internationales visant à prévenir, réduire et maîtriser la pollution par les navires, commise au-delà de sa mer territoriale par un navire étranger, l'Art. 228.2 dispose qu'il « ne peut être engagé de poursuites à l'encontre des navires étrangers après l'expiration d'un délai de trois ans à compter de la date de l'infraction ». Une disposition du même ordre est prévue à l'Art. 230.1 selon lequel « [s]eules des peines pécuniaires peuvent être infligées en cas d'infraction aux lois et règlements nationaux ou aux règles et normes internationales applicables visant à prévenir, réduire et maîtriser la pollution du milieu marin, qui ont été commises par des navires étrangers au-delà de la mer territoriale ».

Certes, la question de savoir si de telles dispositions ont un effet direct en droit interne reste posée et fera sans doute à l'avenir l'objet de décisions judiciaires. D'ores et déjà, il faut bien constater que l'arrêt rendu par l'alors Cour de Justice des Communautés européennes (CJCE) le 3 juin 2008 dans l'affaire « Intertanko »[52] est peu favorable à l'effet direct de la Convention de 1982.[53] Selon l'arrêt précité, en effet, « la convention [de 1982] ne met pas en place des règles destinées à s'appliquer directement et immédiatement aux particuliers et à conférer à ces derniers des droits ou des libertés susceptibles d'être invoqués à l'encontre des États (…) ». La décision n'explicite toutefois pas de manière convaincante les raisons pour lesquelles elle adopte une position aussi tranchée s'agissant des 320 articles et IX annexes que compte la Convention.

[51] Entrée en vigueur le 30 octobre 2001.

[52] CJCE : The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v. Secretary of State for Transport, C-308/06, arrêt (3 juin 2008).

[53] Voir, par exemple, Gautier 2009.

La notion d'applicabilité directe constitue une arme redoutable qui permet aux personnes privées de réclamer aux juges l'application d'obligations internationales. L'on comprend dès lors que les juridictions adoptent une attitude prudente à son sujet. Mais au-delà des concepts auxquels il est fait référence -applicabilité directe ou effet direct- ce qui est ici en jeu est le respect en droit interne d'obligations internationalement convenues. Lorsqu'une norme internationale claire, précise, et conférant certains droits aux particuliers, a été régulièrement introduite dans le droit interne d'un État, ladite norme lie logiquement les organes – y compris le pouvoir judiciaire – de cet État. Et si ceux-ci ne respectent pas la règle convenue, la responsabilité internationale de l'État sera engagée. Dès lors, l'on ne voit pas les raisons pour lesquelles les juridictions d'un État écarteraient d'emblée l'application de la règle internationale ou refuseraient que celle-ci soit invoquée par des particuliers. Par exemple, dans l'arrêt « Poulsen et Diva Navigation »,[54] la CJCE appliqua les règles relatives à la nationalité du navire en observant simplement « qu'en vertu du droit international un bateau n'a en principe qu'une seule nationalité, à savoir celle de l'État dans lequel il est enregistré (…) ». Elle constata ainsi que « [d]e cette règle, il découle qu'un État membre ne peut pas traiter comme un bateau battant son pavillon un bateau qui se trouve déjà enregistré dans un État tiers et qui, partant, a la nationalité de cet État ».[55] Indépendamment de la question relative à l'effet direct de l'Art. 92 de la Convention de 1982,[56] la juridiction appliqua simplement la règle de droit international. En vertu de la même démarche, il est somme toute logique qu'un juge interne applique les Articles 228 ou 230 dans le cadre de litiges mettant en cause des particuliers, que ces dispositions soient ou non considérées comme « directement applicables ».

6 Conclusion

On a pu le constater, les obligations générales contenues dans la Convention de 1982 ainsi que les principes qui les sous-tendent ne sont pas des règles éthérées. Ils ont au contraire une portée pratique et un des mérites de Tullio Treves est d'avoir développé cette intuition. Ainsi, le devoir d'agir avec la diligence requise s'inscrira dans un contexte donné et, en fonction des circonstances, imposera à l'État d'adopter un comportement précis, par exemple en procédant à une évaluation de l'impact de ses activités sur l'environnement. Par ailleurs, si des règles conventionnelles et des principes généraux coutumiers existent parallèlement, ceux-ci ne s'excluent pas nécessairement mais peuvent au contraire s'enrichir

[54] CJCE : Anklagemyndigheden c. Peter Michael Poulsen et Diva Navigation Corp., C-286/90, arrêt (24 novembre 1992).

[55] *Ibidem*, par. 13 et 14.

[56] Art. 92 par. 1 : « Les navires naviguent sous le pavillon d'un seul État et sont soumis, sauf dans les cas exceptionnels expressément prévus par des traités internationaux ou par la convention, à sa juridiction exclusive en haute mer ».

mutuellement. L'intérêt de l'avis consultatif rendu le 1er février 2011 par la Chambre pour le règlement des différends relatifs aux fonds marins, présidée par le Juge Treves, est d'avoir démontré l'importance de principes généraux dans un domaine par ailleurs fort technique. L'on peut en conclure que les règles générales en matière de droit de l'environnement ont bien un effet utile et offrent un matériau susceptible d'être utilisé par les États.

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The International Court of Justice and International Environmental Law

José Juste-Ruiz

1 Introduction

As with many other aspects the practice of International Environmental Law in the field of dispute settlement shows particular features.

As a general trend, States have evidenced their preference for non-contentious alternative procedures such as the "compliance mechanisms" included in many modern environmental treaties.[1] However, with time, a growing number of environmental disputes have been submitted to judicial or arbitral settlement, thus giving rise to a growing environmental jurisprudence.

In so far as contentious procedures are concerned, some of the existing jurisdictions are only open to States (International Court of Justice, ICJ), while others may receive claims from other parties (International Tribunal for the Law of the Sea, ITLOS) or even from individuals (Human Rights Courts). Thus, the International Court of Justice (ICJ) is bound to share the field with other competing jurisdictions challenging its judicial monopoly in this specialized sector of international law.

In order to give an early response to that challenge, in 1993 the ICJ constituted a Chamber for Environmental Matters composed of seven Judges of the Court. The Court's communiqué released on 19 July 1993 stated that the Chamber was constituted pursuant to Article 26.1 of its Statute allowing it to establish chambers for dealing with particular categories of cases. Taking into account that two out of seven pending cases in its docket had important implications for international law concerning matters relating to the environment, the Court declared:

[1] Treves et al. 2009.

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> In view of the developments in the field of environmental law and protection which have taken place in the last few years, and considering that it should be prepared to the fullest possible extent to deal with any environmental case falling within its jurisdiction, the Court has now deemed it appropriate to establish a seven-member Chamber for Environmental Matters composed as follows: Judges Schwebel, Bedjaoui, Evensen, Shahabuddeen, Weeramantry, Ranjeva and Herczegh.

The Chamber was periodically reconstituted and its composition renewed on several occasions until 2006 when, in view that in its 13 years of existence no State had requested that a case be dealt with by it, the Court decided not to hold elections for a bench to the said Chamber.

The unsuccessful destiny of the ICJ's environmental Chamber contrasts with the increasing involvement of the full Court in cases related to such matters. After its well-known seminal *dictum* in the 1949 Judgment on the Corfu Channel case that "every State has an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States",[2] the ICJ has been confronted with distinct aspects of international environmental law principally concerning transboundary issues. The matters involved in these cases typically concern transboundary pollution, the protection of land and marine natural resources, the environmental sustainability of development projects, the impact of nuclear weapons testing or use on the environment, and industrial uses of international watercourses.

It is also interesting to note that, in all environmental contentious cases brought before the ICJ, the alleged bases of its jurisdiction were grounded on legal instruments other than multilateral environmental agreements (MEAs). That shows that the dispute settlement provisions of MEAs, which do not provide for compulsory jurisdictional procedures, are of little use for triggering judicial adjudication.

2 Frustrated Cases

Some of the environmental cases brought before the ICJ were frustrated either because it did not have jurisdiction in the matter (as with the 1974 and 1995 Nuclear Tests and the 1998 Fisheries Jurisdiction Judgments) or because the parties had withdrawn the case following an extra-jurisdictional settlement (as with the 1992 Judgment concerning certain phosphate lands in Nauru).

[2] ICJ: Corfu Channel (United Kingdom v. Albania), Judgment (9 April 1949), p. 22. Although this case was not one in which international environmental law was at issue, it is interesting to note that the principle of *sic utere tuo ut alienum non laedas,* derived from Roman law, and applied in the *Trail Smelter* arbitration of 1938, was confirmed by the Court.

2.1 The Nuclear Tests Cases

During the period from 1966 to 1972, the French Government carried out a series of atmospheric nuclear tests centered in Mururoa in the South Pacific. On 9 May 1973, Australia and New Zealand introduced parallel applications instituting proceedings against France, asking the Court to declare that the conduct of nuclear tests giving rise to radioactive fallout constituted a violation of their rights under international law. In addition, the Applicants asked the Court to indicate interim measures of protection requesting that France refrain from conducting any further nuclear tests that gave rise to radioactive fallout while the Court was seized with the case.

Both the Australian and the New Zealand submissions were grounded on similar arguments proclaiming their rights to be free from atmospheric nuclear testing producing the deposit of radioactive fallout in their territories and air space and causing pollution of the high seas, as well as interfering with ships and aircraft in violation of the freedom of the high seas.[3] Although the pleadings in both cases relied heavily on the damage done to the environment by nuclear tests, it is true that the claimants' main arguments were based on alleged infringements of sovereignty rather than on environmental damage.[4]

By an order of 22 June 1973, the Court indicated provisional measures affirming in particular that "the French Government should avoid nuclear tests causing the deposit of radioactive fallout on the territory" of the States concerned.[5]

However, in its 1974 Judgment on the merits, after having found that France had unilaterally "undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific",[6] the Court declared that "the claim of New Zealand no longer has any object and that the Court is therefore not called upon to give a decision thereon."[7] The Court's declaration that the case was moot[8] was nonetheless accompanied by the further observation that, if France's commitments were not complied with, "the Applicant could request an examination of the situation in accordance with the provisions of the Statute".[9]

That is precisely what happened in 1995 when, following France's announcement that it would conduct a series of eight nuclear weapons tests in the South Pacific, New Zealand introduced before the Court a request for an examination of the situation. The request was ultimately dismissed under the consideration that the

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[3] See ICJ: Nuclear Tests (Australia v. France), Application Instituting Proceedings (9 May 1973), para 49 and ICJ: Nuclear Tests (New Zealand v. France), Application Instituting Proceedings (9 May 1973), para 28.

[4] Fitzmaurice 1996, pp. 296–297.

[5] ICJ: Nuclear Tests (New Zealand v. France), Order (22 June 1973), para 36.

[6] ICJ: Nuclear Tests (New Zealand v. France), Judgment (20 December 1974), para 55.

[7] Ibidem, para 65

[8] Juste Ruiz 1977, pp. 358–374.

[9] Nuclear Tests (20 December 1974), supra n. 6, para 63.

nuclear tests conducted by France were not atmospheric but underground and that, therefore, the provisions of para 63 of the 1974 Judgment did not apply.

In dealing with the claimant's contentions, the Court addressed some relevant issues of international environmental law. The existence of "obligations of States to respect and protect the natural environment" was explicitly recognized[10] and the principle of prevention was at least implicitly considered by the Court as reflecting customary law.[11] In contrast, the Court avoided taking a position on two other questions, namely the obligation not to cause damage to the marine environment resulting from radioactive pollution and the requirement that an environmental impact assessment be conducted prior to the authorization of the nuclear weapons tests. With respect to the precautionary principle, the Court showed a clear determination not to examine the claimant's arguments on the matter.[12]

2.2 The Case Concerning Certain Phosphate Lands in Nauru

On 19 May 1989, Nauru filed in the Registry of the Court an Application instituting proceedings against Australia in respect of a "dispute … over the rehabilitation of certain phosphate lands [in Nauru] worked out before Nauruan independence."

In its Application Nauru claimed that the respondent State had breached its obligations concerning inter alia "the principle of general international law that a State which is responsible for the administration of territory is under an obligation not to bring about changes in the condition of the territory which will cause irreparable damage to, or substantially prejudice, the existing legal interest of another State in respect of that territory."[13] The case had important bearings on some environmental issues such as the protection of soils and the non-exhaustion of natural resources alleged by Nauru as resulting from phosphate mining carried out while its territory was administered by Australia.

On 26 June 1992, the Court pronounced a Judgment rejecting the Australian preliminary objections to its jurisdiction. However, following the notification by the Parties that a settlement had been reached, the Court placed on record the discontinuance of the proceedings by an Order of 13 September 1993. Thus, the Court did not have the opportunity to address the points of international environmental law raised in this case.

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[10] Ibidem, para 64.

[11] Sands 1992, p. 463.

[12] In contrast, dissenting Judges Weeramantry and Palmer endorsed the customary character of conducting EIA and considered that the precautionary principle had "increasing support as part of the international law of the environment" (Weeramantry) or that "it may be a principle of customary international law relating to the environment" (Palmer).

[13] ICJ: Certain Phosphate Lands in Nauru (Nauru v. Australia), Application (19 May 1989), p. 30.

2.3 The Fisheries Jurisdiction Case

On 28 March 1995, Spain instituted proceedings against Canada in respect of a dispute relating to the pursuit, boarding, and seizure on the high seas, on 9 March 1995, of a fishing vessel—the *Estai*—flying the Spanish flag. Spain affirmed that the subject-matter of the dispute was Canada's lack of title to act on the high seas against fishing vessels flying the Spanish flag. In contrast, Canada contended that the dispute arose out of and concerned fisheries "conservation and management measures" taken by Canada and the enforcement of such measures, which were excluded from its new Declaration of acceptance of the compulsory jurisdiction of the Court made on 10 May 1994.

In its Judgment of 4 December 1998, the Court construed the dispute as one referring to fisheries management and conservation and not to the exercise of enforcement powers against foreign ships fishing in the high seas. Consequently, it declared that the dispute was excluded from its jurisdiction by virtue of the Canadian reservation to its Declaration of acceptance of the compulsory jurisdiction of the Court (as amended in 1994). As a result of its lack of subject-matter jurisdiction in the case, the underlying relevant issues concerning environmental and natural resources aspects of the conflict over fisheries conservation and management were not addressed by the Court.[14]

3 Adjudicated Cases

In more recent times, the ICJ has exercised jurisdiction over several environmentally related cases. Its findings have emphasized the importance of environmental matters in modern international law.

3.1 The 1996 Advisory Opinion on the Legality of Nuclear Weapons

The first instance when the ICJ has considered in-depth substantial issues of international environmental law was the 1996 consultative opinion on the legality of the threat or use of nuclear weapons. This opinion was requested by UN General Assembly Resolution 49/57, filed on 6 January 1995.[15]

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[14] See Juste Ruiz 1999, pp. 141–154.

[15] ICJ: Legality of the Threat or Use of Nuclear Weapons, Request for Advisory Op. (6 January 1995). A previous request for an Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* was filed with the ICJ by the World Health Organization on 14 May 1993. The question on which the Court was invited to give its opinion explicitly referred

Although the question put to the Court made no explicit reference to the environmental impact of the use of nuclear weapons, specific references were made by States that took part in the proceedings before the Court to some international treaties and other instruments, including the Additional Protocol I of 1977 to the Geneva Conventions of 1949, with the argument that the use of nuclear weapons would be unlawful under these legal instruments with regard to their prescription on the protection and safeguarding of the environment. In its Advisory Opinion, the Court made important contributions to IEL, especially by affirming that:

> The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.[16]

However, when the Court came to the legal core of its Advisory Opinion it relied mostly on the Law of Armed Conflict and Humanitarian Law and not on international environmental law. The Court nonetheless "noted" that

> Articles 35, paragraph 3, and 55 of Additional Protocol I provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals.[17]

The Court also referred to General Assembly resolution 47/37 of 25 November 1992 on the Protection of the Environment in Times of Armed Conflict, which affirms that "destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law". It also recalled its previous declarations in the 1995 Order on the Nuclear Tests cases, according to which its findings in the case were made "without prejudice to the obligations of States to respect and protect the natural environment' (*Order of 22 September 1995, I.C.J. Reports 1995,* p. 306, para 64)".[18]

(Footnote 15 continued)
to "environmental effects of the use of nuclear weapons" (ICJ: Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Request for Advisory Op. (3 September 1993). However, considering that the question submitted to the Court by the WHO did not "fall within the WHO's functions", the Court decided to decline the request for an Advisory Opinion (ICJ: Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Op. (8 July 1996), para 22).

[16] Ibidem, para 29.

[17] Ibidem, para 31.

[18] Ibidem, para 32. The Court indicated that the GA resolution quoted is "of interest in this context" (because) it affirms the general view according to which environmental considerations constitute one of the elements to be taken into account in the implementation of the principles of the law applicable in armed conflict".

Thus, in spite of the Court's emphatic comments concerning the growing threats to the environment, the potential catastrophic effects of nuclear weapons for present and future generations, and its "potential to destroy all civilizations and the entire ecosystem of the planet",[19] its conclusions on the legal effects of these findings were ultimately quite minimalist. In fact, the Court declared that the general obligation to protect the environment during armed conflicts were "powerful constraints" that shall be taken into account by States when assessing what is necessary and proportionate in the pursuit of legitimate military objectives.[20] But, in the opinion of the Court, these environmental constraints did not entail a formal prohibition of using nuclear weapons:

> The Court thus finds that while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.[21]

However, as Judge Owada pointed out in an academic lecture, "the final conclusions reached by the Court, as contained in its *dispositif*, makes no explicit reference to environmental law".[22]

3.2 *The Judgment Concerning the Gabčíkovo-Nagymaros Project*

The proceedings in this case were instituted on 2 July 1993 by a joint notification, by Hungary and Slovakia, of a Special Agreement, signed at Brussels on 7 April 1993.

The case arose out of the conclusion between Czechoslovakia and Hungary of a treaty "concerning the construction and operation of the Gabčíkovo-Nagymaros System of Locks" on the Danube River (hereinafter called the "1977 Treaty"). The purpose of the 1977 Treaty was the construction of a large dam project on the Danube which had four main objectives: to generate power, to control floods, to enhance navigability on the river, and to preserve the ecosystem of the island Delta. As a result of increasing criticism about its economic and environmental impact, Hungary, in 1989, suspended its work on the project. After unfruitful attempts to bring Slovakia, the successor of the former Czechoslovakia in the area

[19] Ibidem, para 35.

[20] Ibidem, paras 30–31.

[21] Ibidem, para 33. This crucial statement of the Court in its advisory opinion was strongly contested by dissenting Judge Weeramantry (Ibidem, Dissenting Opinion of Judge Weeramantry, pp. 502–503), while dissenting Judge Koroma considered it as a missed opportunity to ensure the protection of the human environment (Ibidem, Dissenting Opinion of Judge Koroma, p. 581.).

[22] Owada 2006, p. 20.

concerned, to agree to put an end to the 1977 Treaty, in 1989 Hungary abandoned the work on the Project and, on 19 May 1992, it announced the termination of the 1977 Treaty and related instruments.

Although the substance of the case involved general aspects of international law and the law of treaties, both Parties evoked arguments based on environmental legal considerations which were particularly crucial in the case of Hungary.[23] It presented five arguments, all of them relying more or less extensively on environmental grounds, in support of the lawfulness of its termination of the treaty: a state of necessity, impossibility of performance, a fundamental change of circumstances, a material breach by Czechoslovakia, and the development of new norms of international environmental law.[24] Two of these arguments are particularly noteworthy from the point of view of international environmental law.

The first substantial environmental legal argument put forward by Hungary was the existence of a "state of ecological necessity",[25] which would have permitted Hungary, without incurring international responsibility, to suspend and abandon works that it was committed to perform in accordance with the 1977 Treaty and related instruments. On this point, the Court considered that the state of necessity was "a ground recognized by customary international law".[26] It also acknowledged that the concerns expressed by Hungary for its natural environment in the region affected by the Gabčíkovo-Nagymaros Project related to an "essential interest" of that State.[27] It was of the view, however, that the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they "imminent"; and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted.[28]

Another legal argument relied upon by Hungary was that it was entitled to terminate the 1977 Treaty because new requirements of international law "for the protection of the environment precluded performance of the Treaty".[29] On this point, the Court acknowledged that neither of the Parties had contended that "new peremptory norms of environmental law had emerged since the conclusion of the 1997 Treaty". But it pointed out that these newly developed norms, although relevant, did not contain specific obligations of performance. They only required the parties, in carrying out their obligations, to take them into consideration:

> newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application

[23] See Fitzmaurice 1996, p. 311.

[24] ICJ: Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment (25 September 1997), para 92.

[25] Ibidem, para 40.

[26] Ibidem, para 51.

[27] Ibidem, para 53.

[28] Ibidem, para 57.

[29] Ibidem, para 111.

> of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan.[30]

Coming to the legal consequences of these findings, the Court noted that the Project's impact upon and its implications for the environment were of necessity a key issue,[31] and that in order to evaluate the environmental risks and take precautionary measures, current standards must be taken into consideration:

> The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty's conclusion … The Court recognizes that both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures, but they fundamentally disagree on the consequences this has for the joint Project.[32]

These very general formulations of the need to assess environmental risks did not bring the Court to affirm the obligation to proceed to an environmental impact assessment (EIA) before potentially damaging activities are authorized, let alone to specify the content and scope of the said procedure. However, the Court noted that environmental risks have to be assessed on a continuous basis and that, "in order to evaluate the environmental risks, current standards must be taken into consideration."[33] Moreover, with respect to the required "precautionary measures", the Judgment does not clarify if they are tantamount to the "precautionary principle" claimed by Hungary.[34] As emphasized by one author: "the majority failed to ever expressly mention, let alone address the status or possible application of the precautionary principle."[35] In the same author's opinion, this lack of consideration in the Court's reasoning has had a negative impact on the willingness of other international tribunals and bodies to use and develop the precautionary principle.[36]

Finally, the Court expressed its deep concerns related to the protection of the environment and the need to take into consideration the "concept" of sustainable development:

> The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage. Throughout the ages, mankind has, for economic and other reasons,

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[30] Ibidem, para 112.

[31] Ibidem, para 140.

[32] Ibidem, paras 112 and 113.

[33] Ibidem, para 140.

[34] Ibidem, para 97.

[35] Howley 2009, p. 12.

[36] Ibidem.

> constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.[37]

This passage recognizes the utility of the notion of "sustainable development" as a useful tool in balancing environmental protection and economic development. But the respective actions of the Parties were not judged against an international sustainable development standard. Rather, the Parties were merely required to "look afresh" at the environmental impact of the Gabčíkovo plant, while the principle of sustainable development was not found to dictate a particular outcome. This part of the Court's reasoning was strongly opposed in the separate opinion of Judge Weeramantry.[38]

In sum, as a commentator on the Judgment has written, the ICJ's remarks "tend to confirm the customary nature of at least part of IEL, again, without referring to any specific norm".[39] The Court recognized that new emerging rules of environmental law should have been taken into consideration when agreeing to adapt the project, but they did not impose on the parties any specific obligation of performance. In conclusion, the Court upheld the ongoing validity of the 1977 Treaty and the consequential obligation of the parties to abide by its provisions and negotiate an agreed solution:

> What is required in the present case by the rule *pacta sunt servanda,* as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the cooperative context of the Treaty (…).[40]

The agreed solution recommended by the Court was not adhered to. Thus, on 3 September 1998, Slovakia filed in the Registry of the International Court of Justice a request for an additional Judgment in the Gabčíkovo-Nagymaros Project case, relating to the construction and operation of dams on the River Danube for the production of electricity, flood control, and the improvement of navigation. The case is currently pending before the Court.

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[37] Gabčíkovo-Nagymaros, supra n. 24, para 140.

[38] Judge Weeramantry affirmed that "sustainable development" was not merely a "concept" but a "principle with normative value" (Ibidem, Separate Opinion of Vice-President Weeramantry, p. 88).

[39] Viñuales 2008–2009, p. 232.

[40] Gabčíkovo-Nagymaros, supra n. 24, para 142.

3.3 The Judgment Concerning Navigational and Related Rights and the Order Concerning Activities Carried Out by Nicaragua in the Border Area

Two recent cases brought by Costa Rica against Nicaragua, concerning navigational and territorial disputes on the border area, have relevant environmental aspects.

On 29 September 2005, Costa Rica filed an Application against Nicaragua with regard to a dispute concerning its navigational and other rights on the San Juan River. It was not contended that within the terms of the Treaty of Limits of 15 April 1958, as interpreted by the Cleveland arbitral award of 1998, Nicaragua had sovereign jurisdiction over the waters of the San Juan River whereas Costa Rica had navigational commercial rights on the lower course of the river where the border between the two countries is located at the right bank (i.e., the Costa Rican side).[41]

The core of the dispute submitted to the ICJ related primarily to the extent of the regulatory powers of Nicaragua, in pursuance *inter alia* of environmentally related goals, with respect to the navigational rights of Costa Rica.

The Court affirmed that the powers of Nicaragua to regulate the exercise by Costa Rica of its freedom of navigation were not unlimited, being tempered by the rights and obligations of the Parties.[42] Among the characteristics that a regulation is to have in order to satisfy such limitations, the Court mentioned that it "must have a legitimate purpose", such as "law enforcement and environmental protection" and "protection of resources and the environment":

> The Court considers that, over the course of the century and a half since the 1858 Treaty was concluded, the interests which are to be protected through regulation in the public interest may well have changed in ways that could never have been anticipated by the Parties at the time: protecting the environment is a notable example. As will appear from the rulings made later in this Judgment (see paragraphs 104, 109, 118, 127 and 141), Nicaragua, in adopting certain measures which have been challenged, in the Court's opinion, is pursuing the legitimate purpose of protecting the environment.[43]

In responding specifically to the various and very detailed claims concerning the regulatory powers of Nicaragua and the navigational rights of Costa Rica, the Judgment repeatedly refers to environmental protection as a legitimate reason for the requirements established. But, in so doing, the Court did not examine in depth any of the concrete grounds alleged by Nicaragua relating to environmental protection. Surprisingly, the Judgment does not even take into consideration the claim by Nicaragua that it had "the right to dredge the San Juan in order to return the flow of water to that obtaining in 1858 even if this affects the flow of water to other

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[41] ICJ: Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment (13 July 2009), para 30.

[42] Ibidem, para 87.

[43] Ibidem, para 89.

present day recipients of this flow such as the Colorado River."[44] With respect to the claim relating to the subsistence fishing rights of local populations, the Court concluded that "Costa Rica has a customary right, but that right would be submitted to any regulatory power of Nicaragua adopted for proper purposes, particularly for the protection of resources and the environment".[45]

On 18 November 2010, Costa Rica instituted proceedings against Nicaragua relating to alleged territorial violations and breaches of Costa Rica's rights under several international law instruments, including the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat (the Ramsar Convention). On the same day, it also submitted a request for the indication of provisional measures imposing on Nicaragua specific restrictions related to the construction of a canal affecting Costa Rica's claimed territory in the area of "el caño" and calling for the suspension of the dredging on the San Juan River in Nicaragua.

The legal arguments of Costa Rica relied heavily on environmental grounds, based on the consideration that the activities by Nicaragua, both in its own territory and in the disputed border area of "el caño", would affect "the flow of the Colorado River in Costa Rica" and would cause further damage to Costa Rican "wetlands and national wildlife protected areas located in the region".[46] The submission by Nicaragua affirmed its title over the territory and asserted that the works undertaken, aimed at improving the navigability of the river, were only authorized after an environmental impact assessment had been duly completed.[47] It asked the Court to dismiss the request for provisional measures filed by Costa Rica.

The Court acquiesced to the first provisional measure requested by Costa Rica concerning the works in the area of "el caño". Having observed that, in the disputed border area, Costa Rica and Nicaragua have respectively designated, under the Ramsar Convention, the "Humedal Caribe Noreste" and the "Refugio de Vida Silvestre Río San Juan" as wetlands of international importance, the Court considered that, pending delivery of the Judgment on the merits, "Costa Rica must be in a position to avoid irreparable prejudice being caused" to that part of the "Humedal Caribe Noreste" wetland where the disputed territory is situated. It found that, for this purpose, "Costa Rica must be able to dispatch civilian personnel charged with the protection of the environment to the said territory, including the *caño*, but only insofar as it is necessary to ensure that no such prejudice be caused".[48] It added that "Costa Rica shall consult with the Secretariat of the Ramsar Convention in regard to these actions, give Nicaragua prior notice of them and use its best endeavors to find common solutions with Nicaragua in this respect".[49]

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[44] Ibidem, para 13.

[45] Ibidem, para141.

[46] ICJ: Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Order (8 March 2011), paras 5 and 9.

[47] Ibidem, paras 38–41.

[48] Ibidem, para 80.

[49] Ibidem, paras 79–80.

As to the second request by Nicaragua, concerning the suspension of dredging operations in the San Juan River, the Court recognized that "the right to protect the environment" made plausible the right claimed by Costa Rica to request such a suspension.[50] However, as it could not be concluded at this stage from the evidence adduced by the Parties that the dredging created a risk of irreparable prejudice to Costa Rica's environment, or that the risk would be imminent, the provisional measure requested by Costa Rica should not be indicated.[51] The merits of the case are currently pending before the ICJ.

3.4 The Judgment Concerning Pulp Mills on the River Uruguay

The River Uruguay forms a border between Argentina and Uruguay and its use is regulated by the Statute of the Uruguay River, a bilateral treaty entered into by the two countries in 1975 (the "Statute").

In the early 2000s, the Uruguayan government, in pursuance of a long-standing strategic development plan, granted permission to ENCE, a Spanish Company, and Botnia, a Finish Company, to build a pulp mill near the Uruguayan city of Fray Bentos, on the River Uruguay, facing the Argentinian city of Gualeyguachú. Construction of the mill started in 2005, thus provoking strong reactions from people in Argentina who persistently blocked road transit over the nearby international bridge between the two countries. In March 2006, the Spanish company ENCE announced its intention not to build the mill; the second project, called Orion (Botnia), has already been built and has been operative since 9 November 2007.

After months of unsuccessful negotiations with Uruguay, Argentina introduced an Application before the ICJ on 4 May 2006, claiming that the Uruguayan government had violated the 1975 Statute and the other rules of international law to which the Statute referred. Argentina also sought a provisional measures order from the ICJ, suspending the construction of the pulp mill arguing that such a suspension was necessary to preserve its rights because the potential consequences of the mill's operation—harm to public health and the river environment—could not be made good with financial compensation. In turn, Uruguay initiated a complaint before an Arbitral Tribunal of MERCOSUR which found that the blockage by protesters was incompatible with Argentina's obligations concerning freedom of transit. However, as the arbitral award did not require Argentina to put an end to the blockades, Uruguay sought provisional measures before the ICJ to that end. Neither request for provisional measures introduced by Argentina and by

[50] Ibidem, para 59.

[51] Ibidem, para 82.

Uruguay were granted by the Court by the corresponding Orders of 13 July 2006[52] and 23 January 2007.[53]

During the phase on the merits of the case, Argentina's principal claims were that, by authorizing the construction of two pulp mills without the prior consent of Argentina, Uruguay had breached the obligations incumbent upon it under the 1995 Statute and the other rules of international law to which it refers. The alleged breaches, refuted by Uruguay, concerned *inter alia* the obligation of prior notification and other procedures prescribed and, with respect to the environment:

> the obligation to take all necessary measures to preserve the aquatic environment and prevent pollution and the obligation to protect biodiversity and fisheries, including the obligation to prepare a full and objective environmental impact study (and) the obligation to co-operate in the prevention of pollution and the protection of biodiversity and of fisheries.[54]

The merits of the case concerned two distinct but interrelated sectors of international law, namely, the law of international watercourses and international environmental law.

With respect to environmental matters, the principal step forward is the recognition by the Court that the obligation to undertake an environmental impact assessment, where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, may now be considered "a requirement under general international law". It further found that general international law does not prescribe the scope or content of such assessments, and considered that, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.

> 204 (…) In this sense, the obligation to protect and preserve, under Article 41 *(a)* of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.
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> 205. The Court observes that neither the 1975 Statute nor general international law specify the scope and content of an environmental impact assessment. It points out moreover that Argentina and Uruguay are not parties to the Espoo Convention. Finally, the Court notes that the other instrument to which Argentina refers in support of its arguments, namely, the UNEP Goals and Principles, is not binding on the Parties, but, as guidelines issued by an international technical body, has to be taken into account by each Party in accordance with Article 41 *(a)* in adopting measures within its domestic regulatory framework. Moreover, this instrument provides only that the "environmental effects in an

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[52] ICJ: Pulp Mills on the River Uruguay (Argentina v. Uruguay), Order (13 July 2006), p. 113.

[53] ICJ: Pulp Mills on the River Uruguay (Argentina v. Uruguay), Order (23 January 2007), p. 3.

[54] ICJ: Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment (20 April 2010), para 22.

> EIA should be assessed with a degree of detail commensurate with their likely environmental significance" (Principle 5) without giving any indication of minimum core components of the assessment. Consequently, it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment.
>
> The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.

The Judgment evaluates the scope of the EIA that was carried out, Uruguay's consideration of alternative sites for the pulp mills, and the extent of public participation provided to populations likely to be affected in both countries. Somewhat surprisingly, given the emphasis on public consultation in modern treaties such as the Espoo and Aarhus Conventions, the Court did not find that this included a legal obligation to consult the affected populations, although it noted that the consultation had in fact taken place.

Another relevant aspect of the Judgment is the remarkable level of detail in the Court's review of the evidence submitted on Uruguay's compliance with its obligation to prevent pollution and preserve the aquatic environment. The Court examined the technology used to determine whether it met the BAT standard. It appraised the effects of the Botnia mill on water quality, comparing "a vast amount" of scientific data and analysis produced before and after the plant started operations, for a number of specific pollutants. However, as some dissenting Judges pointed out, it is doubtful whether the Court, composed of legal experts, had the appropriate technical qualifications to conduct such a scientific review without external help.[55]

The Judgment's contribution to the field of environmental law is, nonetheless, overshadowed by the Court's self-imposed limitations with respect to the extent of its jurisdiction under Article 60 of the 1975 Statute and to the scope of the applicable law. With regard to the extent of the Court's jurisdiction, Uruguay contended, and the Court agreed, that it was narrowly limited to the interpretation or application of the 1975 Statute. This decision excluded Argentina's claims of air, noise, and visual pollution; except air pollution affecting the river's water quality. With regard to the applicable law, reference in Article 41 to "applicable international agreements"[56] was not considered by the Court as a benchmark for

[55] See Ibidem, Joint dissenting opinions of Judges Al-Kasawneh and Simma, paras 2–17; Dissenting opinion of Judge Ad Hoc Vinuesa, para 72; Separate opinion of Judge Cançado Trindade, paras 149–151 and the Declaration of Judge Yusuf, paras 1–14.

[56] The conventions invoked were: 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (the "CITES Convention"), the 1971 Ramsar Convention on Wetlands of International Importance (the "Ramsar Convention"), the 1992 United Nations

evaluating compliance, thus finding that the environmental agreements evoked by Argentina were outside its jurisdiction and not applicable.

> The Court concludes that there is no basis in the text of Article 41 of the 1975 Statute for the contention that it constitutes a "referral clause". Consequently, the various multilateral conventions relied on by Argentina are not, as such, incorporated in the 1975 Statute. For that reason, they do not fall within the scope of the compromissory clause and therefore the Court has no jurisdiction to rule whether Uruguay has complied with its obligations thereunder.[57]

In addition, the Court gave very limited weight to other soft law instruments invoked for the purposes of interpreting the provisions of the 1997 Statute. As a result, the environmental principles at stake, such as the precautionary approach and the polluter pays principle, remained undefined and projected little light on the interpretation and application of the 1977 Statute, whereas the principle of public participation was discarded altogether.

Following the *summa divisio* proposed by Uruguay between procedural and substantive obligations, the ICJ held that, by not informing CARU of its plans to construct the mills before it issued its environmental authorizations, Uruguay breached its procedural obligations and "disregarded the whole of the co-operation mechanisms provided for in Articles 7–12 of the (…) Statute". In terms of a remedy, as suggested by the Application by Uruguay, it considered that the declaration of this breach by the ICJ constituted appropriate satisfaction. In contrast, the ICJ did not uphold any of Argentina's claims that Uruguay had breached four different substantive obligations in relation to the environmental well-being of the river, namely: to contribute to the optimum and rational utilization of the river; to ensure that the management of the soil and woodland did not impair the quality of the waters; to co-ordinate measures to avoid changes in the ecological balance; and to prevent pollution and preserve the aquatic environment. In summary, the ICJ held that:

> there is no conclusive evidence in the record to show that Uruguay has not acted with the requisite degree of due diligence or that the discharges of effluent from the (…) [Botnia] mill have had deleterious effect or caused harm to living resources or to the quality of the water or ecological balance of the river since it started its operations in November 2007.

In sum, as to the unsettled environmental aspects of the case, the Court came back to the starting point by sending the Parties to negotiate through CARU in order to solve the problems that may arise in the future, without feeling the need to resort to the judicial settlement of disputes provided for in Article 60 of the Statute until the present case was brought before the Court.[58]

(Footnote 56 continued)
Convention on Biological Diversity (the "Biodiversity Convention"), and the 2001 Stockholm Convention on Persistent Organic Pollutants (the "POPs Convention").

[57] ICJ: Pulp Mills (20 April 2010), supra n. 54, para 63.

[58] Ibidem, para 281.

4 Conclusions

The ICJ's environmental case law has grown dramatically in the last few years. Currently there are a significant number of environmental cases pending before the Court.

The jurisprudence of the ICJ shows its deep concern regarding the value and importance of the environment for present and future generations and the risks imposed on it by human activities that could bring mankind to the brink of its survival. However, in the opinion of the Court, most emerging norms relating to the protection of the environment are important constraints to be taken into consideration by States but not always, or not yet, positive rules of international law.

In taking this approach, the Court is conditioned by some structural elements: first, at least in contentious procedures, it must look more closely at the claims of the Parties than to the needs of the international community; second, it must keep within the limits of its judicial function which does not include the "revolutionary" creation of international law; finally, with respect to the often highly sensitive issues involved in environmental matters, it must consider the presumed receipt of its decisions by States parties to the Statute of the Court (and especially by the big world powers).

In completing its jurisdictional environmental record, the Court has made positive contributions to the development of this new branch of International Law. It has repeatedly proclaimed the obligation of States to protect the environment; it has declared that the general obligation to prevent environmental damage covers not only damage to other States but also to areas beyond national jurisdiction; it has emphasized the importance of the surveillance and monitoring of environmental risks, thus affirming that the obligation to proceed to an environmental impact assessment before risky activities are authorized may now be considered as a requirement under general international law.

But, at the same time, the Court has faced some important obstacles in developing its environmental case law. It has experienced great difficulties in dealing with the scientific aspects often involved in environmental litigation and especially in assigning the burden of proof concerning alleged environmental risks of damages, an area where problems relating to proof are rampant. In some cases, the Court's reasoning is caught in an inescapable paradox: whereas environmental law is based on prevention, the Court's findings are based only on actual harm. This is clearly not in line with the "precautionary measures" that the Court itself considers to be required by current environmental law.

But it is at the normative level where the Court's dicta are more ambiguous and weak. So far, its jurisprudence shows a certain reluctance to adjudicate environmental cases in the light of environmental law alone. Considering the norms are "emerging", the Court tends to settle cases in the light of other more consolidated sectoral norms of international law, such as the law of armed conflict, the law of treaties, the law of State responsibility for wrongful acts, or even the law of international watercourses. The body of rules relating to the environment seems to

have for the Court a lesser degree of relevance since, in the Court's recurrent opinion, they express powerful constraints that shall be taken into account by States but do not contain specific obligations of performance.

In addition, the Court has often construed, in a very restrictive manner, the scope of its jurisdiction and the applicable law, thus being not very inclined to take into account (even for merely interpretative purposes) the prescriptions of relevant multilateral environmental treaties. The same elusive approach has been shown with respect to the norms of "soft law" which are often not recognized by the Court as being relevant for the purposes of adjudication. Lastly, the Court is particularly reluctant to identify new emerging "principles" of international environmental law, such as the "precautionary principle" and the principle of "public participation". As to the principle of "sustainable development", it has framed it as only a "concept" (not a norm) aptly explaining the conundrum between the environment and development.

This contribution of the ICJ may appear relatively modest in the light of the numerous and far-reaching treaties and conventions that have shaped the development of international environmental law since the 1970s. The Court's findings have been criticized by academia as being conservative or unhelpful, since the Court does not adopt progressive legal interpretations leading to the development of international environmental law. Such an overly cautious approach by the ICJ to the emerging body of international law on the environment is in contrast with the more dynamic and committed stance taken by other competing courts such as the International Tribunal for the Law of the Sea or the European Court of Human Rights.

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Implementing Part XII of the 1982 UN Law of the Sea Convention and the Role of International Courts

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1 Introduction

The United Nations Law of the Sea Convention (Montego Bay, 10 December 1982; hereinafter LOS Convention)[1] stands out as one of the major achievements in international law for many reasons, amongst which include Part XII on the protection and preservation of the marine environment.[2] A key provision of Part XII is Article 192 which creates a broad and unqualified duty for all states to protect and preserve the marine environment. Beyond Part XII, the protection and preservation of the marine environment is interwoven throughout the LOS Convention. Since 1982, many new international and regional instruments related to the protection and preservation of the marine environment, including marine living resources, have been adopted reflecting the mounting environmental challenges for international law to address. For example, there has been increased attention by international law scholars to emerging issues such as the greater protection of the high seas or areas beyond national jurisdiction, climate change, deep seabed mining and others.

The continued importance of marine environmental concerns and the rapid development of new challenges necessarily call into question the ability of international law to effectively address them, which includes the role of international tribunals in the implementation and progressive development of international law. In this context, Part XV of the LOS Convention and its provisions on compulsory dispute settlement provides a powerful legal tool for both ensuring the

[1] Entered into force on 14 November 1994.
[2] Anderson 1995.

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effective implementation of existing rights and obligations under the Convention as well as in contributing to the progressive development of international law for the protection and preservation of the marine environment.

With the exception of a few notable cases, international tribunals moved slowly in developing a corpus of substantive international law for the protection of the environment in general and very little specifically for the marine environment. Against this background, Part XV should have provided a mandate to international tribunals to enhance the implementation of environmental obligations as well as to actively contribute to the progressive development of international law. Unfortunately, the few cases that have been brought pursuant to the compulsory dispute settlement provisions of Part XV may have weakened this mandate. The problem of the parallel competence of other courts, even when not itself compulsory in nature, has pre-empted the compulsory jurisdiction of Part XV tribunals in a number of cases.

This article will review the cases involving international environmental law that have been brought before international judicial bodies, including those brought pursuant to the compulsory dispute provisions of the LOS Convention. The article will critically assess the existing corpus of case law on the implementation of Part XII and related provisions for the protection and preservation of the marine environment and the progressive development of the law of the sea.

2 The 1982 United Nations Law of the Sea Convention

2.1 Part XII on the Protection and Preservation of the Marine Environment

The LOS Convention represents the first codification and progressive development of the law of the sea.[3] Part XII on the protection and preservation of the marine environment marked the first comprehensive regime for the protection and preservation of the marine environment.[4] It was directly influenced by the historic Action Plan for the Human Environment adopted during the 1972 Stockholm Conference,[5] which provided the "starting points" for several provisions of Part XII.[6] However, of particular significance were Articles 192 and 194 of the Convention, which established a universal codification of the duty for *all* States to

[3] In general see Churchill and Lowe 1999.

[4] McConnell and Gold 1991.

[5] Stockholm Conference Report, General Principles for the Assessment and Control of Marine Pollution, Annex III (Stockholm 1972).

[6] Rosenne and Yankov 1991. The Stockholm Action Plan was based on the earlier work of the Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP).

protect and preserve the marine environment.[7] Instead of the piecemeal approach that had characterised the international framework for protection of the marine environment, these two provisions established a clear overarching general obligation for all Parties.

Article 192 provides the general obligation that all states *have the obligation to protect and preserve the marine environment*, and, as stated by the authoritative Virginia Commentaries, this "is an essential component of the comprehensive approach in Part XII to the protection and preservation of the marine environment."[8] The language is unqualified, clear and without sectoral or spatial limits. The broad language would apply to State activities in all areas of the ocean, including the high seas or areas beyond national jurisdiction, subject to specific rights and duties under the Convention.[9] Furthermore, as pointed out in the Virginia Commentaries, the provision applies to all States and not simply to State Parties.[10] Moreover, the sovereign right of states to exploit their natural resources, as affirmed in Article 193, is limited by the duty to protect and preserve the marine environment. Part XII also delineates more detailed activity-based obligations for States in relation to the protection of the marine environment. For example, Article 194 is particularly detailed providing that all States are under an obligation to take all measures to prevent, reduce and control the pollution of the marine environment from any source consistent with the Convention(Article 194.1), subject to the best practicable means at their disposal and in accordance with their capabilities; and that States are also obliged to prevent transboundary pollution from activities under their control or from incidents of pollution that take place within their jurisdiction.

Other obligations provided under Part XII include the obligation of states to adopt laws and regulations to prevent the pollution of the marine environment from land-based sources (Article 207), seabed activities (Article 208), dumping (Article 210), vessel-source pollution (Article 211) and atmospheric pollution (Article 212). In addition to the obligation to adopt laws and regulations States are also obligated to enforce these laws and regulations for land-based sources of pollution (Article 213), seabed activities (Article 214), dumping (Article 216), vessel sources of pollution (Article 217)[11] and atmospheric pollution (Article 222). State responsibility for the protection of the marine environment is further reinforced through the express liability provision in Article 235.1. Furthermore, states are mandated to ensure that their national legal systems provide recourse to "prompt and adequate" compensation or other relief for damage caused by pollution (Article 235.2).

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[7] Article 192 of the LOS Convention generally established that "[a]ll States have the duty to preserve and protect the marine environment." See in general McConnell and Gold 1991; Charney 1995; Miles 1997; Boyle 1997; Van Dyke 2004.

[8] Nordquist et al. 1991, p. 36.

[9] Ibidem, p. 43.

[10] Ibidem, p. 40.

[11] The obligation to enforce laws and regulations for vessel sources of pollution belongs to the flag State.

However, provisions related to the protection of the marine environment are not limited to those found in Part XII. The responsibility of States to protect the marine environment is found in other parts of the LOS Convention. For example, notwithstanding the freedom to fish in the high seas, the LOS Convention places limits on these rights. Article 117 lays down the duty of all States individually, or in cooperation with other States, to take the necessary measures in respect of their nationals for the conservation of living resources in the high seas. Part XV clearly includes high seas fisheries disputes within its scope of application. Article 297, which delineates the limitations to the compulsory jurisdiction in section 2, only excludes disputes of a coastal State in exercising its sovereign rights over marine living resources in its exclusive economic zone (EEZ). This, however, does not exclude the application of compulsory dispute settlement to other activities which are harmful to the marine environment.[12]

2.2 Compulsory Dispute Settlement Under Part XV of the LOS Convention

Tommy Koh, the eminent President of UNCLOS III, in heralding the adoption of the LOS Convention as the "constitution for the oceans" also pointed to the need for compulsory dispute settlement provisions for the effective implementation of the new Convention.[13] Part XV, and its provisions on compulsory dispute settlement, were described as the "cement" of the Convention.[14] The compulsory force of Part XV was expected to provide for the "strengthening of the international legal order."[15] Fortified with compulsory competence, international dispute settlement fora would have less concern over the delicate problem of "sovereignty."[16] According to Bernard Oxman, one of the architects of the LOS Convention, "[t]he primary function of the Convention is to lay down basic substantive principles and rules regarding the rights and duties of states concerning the sea. From this perspective, compulsory jurisdiction under the LOS Convention is designed to ensure both authoritative articulation of the meaning of the public order established by the Convention and compliance with its substantive principles and rules."[17] Furthermore, Oxman stated that "[c]ompulsory jurisdiction is central both to realizing and to accommodating two of the most important goals of the

[12] Klein 2005.

[13] Statements by President Tommy Koh on 6 and 11 December 1982 at the final session of the Conference at Montego Bay, printed in The Law of the Sea: United Nations Convention on the Law of the Sea, United Nations (1991).

[14] Boyle 1997, p. 38.

[15] Anderson 1995, p. 326.

[16] Oxman 2001, p. 279.

[17] Ibidem, p. 279.

Convention: protecting navigation and protecting the environment."[18] He further underlined that compulsory dispute settlement is an integral part of the regime of the LOS Convention.[19]

2.3 A More Expansive Application of Compulsory Dispute Settlement for the Protection of the Marine Environment

The scope of application of Part XII of the Convention and the duty of States to protect the marine environment should not be limited to the traditional threats to the marine environment known at the time when the LOS Convention was negotiated. New threats to the marine environment such as climate change,[20] together with related activities such as geo-engineering activities in the high seas to mitigate the effects of climate change,[21] sound pollution,[22] bio-prospecting and deep-sea mining are examples.[23] Herein lies the importance of Part XII and the compulsory dispute provisions in Part XV. The LOS Convention, deemed to be "comprehensive" in 1982, does not specifically address all issues related to the marine environment. However, the expansive and unrestricted language of Article 192 should operate to include *all* threats to the marine environment within the context of Article 192. Judge Treves has written that "(…) within the scope of the Convention is the fact that the mechanism for the settlement of disputes may, through interpretation, in encompassing within conventional rules situations not envisaged by the negotiators and not explicitly included in the Convention."[24]

Moreover, the nature of the traditional threats has further evolved during the 30 years since the Convention. For example, while the protection of the high seas was somewhat addressed in the LOS Convention, not all developments since 1982 are fully reflected.[25] One of these developments is the priority given to marine

[18] Ibidem, p. 287. See also Boyle 1997, p. 46.

[19] Oxman 2001, p. 287. In his article Oxman is highly critical of the Arbitral Tribunal in the *Bluefin Tuna Case* finding that it lacked jurisdiction to decide the merits of the case under the compulsory jurisdiction provisions of the LOS Convention, deferring instead to the non-compulsory dispute settlement provisions of the Convention for the Conservation of Southern Bluefin Tuna, concluded between Australia, New Zealand and Japan (see infra Sect. 3.2.1).

[20] Doelle 2006.

[21] Verlaan 2009; Rayfuse et al. 2008.

[22] Papanicolopulu 2008.

[23] Rayfuse and Warner 2008.

[24] Treves 2010, pp. 51–53. Treves further observes that the LOS Convention did not foresee all issues related to the law of the sea. He groups these into two broad categories: those that were summarily addressed in the Convention, such as straddling and highly migratory fish stocks or underwater cultural heritage, and the second category encompassing entirely new issues such as genetic resources.

[25] Ibidem, pp. 53–54.

protected areas ("MPA") as methods for the protection of the marine environment on the high seas or areas beyond national jurisdiction.[26] With the exception of "special areas" the LOS Convention does not address MPAs. The Convention on Biological Diversity (Rio de Janerio, 22 May 1992; hereinafter CBD)[27] is the principal global legal instrument for promoting high seas MPAs. Specifically, Article 5 expressly obliges Contracting Parties to co-operate in conservation and sustainable use with other Contracting Parties, as far as possible, either "directly" or through competent international organisations, for areas *beyond national jurisdiction.*[28] However, the establishment of MPAs in the high seas raises a host of legal questions, particularly that of enforcement jurisdiction.

The regulation of fisheries activities is an important objective of establishing high seas MPAs. In this regard, the 1995 Fish Stocks Agreement[29] was an important milestone in international fisheries law, particularly with regard to the high seas. Its scope of application includes areas beyond national jurisdiction, including provisions for high seas enforcement and compulsory dispute settlement (Article 3.1). However, a gap remains for regulating other non-fishing activities in MPAs beyond national jurisdiction. There is a growing trend for the establishment of MPAs in the high seas, such as the Pelagos Sanctuary jointly established by France, Italy and Monaco pursuant to the Protocol on Specially Protected Areas of Mediterranean Importance (SPAMI)[30] and the first network of high seas MPAs in the North-East Atlantic Sea.[31] The common dilemma faced by States is how to legally enforce regulatory measures against third-party States. The compulsory dispute provisions of Part XV, which apply without exception to Part XII, could provide the necessary mortar to fill this legal gap. The question of

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[26] Scovazzi 2004.

[27] Entered into force on 29 December 1993. The Cartagena Protocol on Biosafety (Montreal, 29 January 2000) entered into force on 11 September 2003. It regulates the transboundary movement of living modified organisms (LMOs) resulting from modern biotechnology.

[28] A number of important COP decisions have been adopted for the establihsment of high seas MPAs. Specifically, in 2003 the Parties adopted a decision, together with a detailed work programme, to establish by 2012 a network of comprehensive, effectively managed and ecologically representative national and regional systems of marine protected areas to contribute to achieving the objectives of the Convention and the objective set by the 2002 Johannesburg Plan of Implementation (CBD, COP 7, Decision VII/28 (2003). However, during the COP 10 held in Nagoya, Japan in 2010 the Parties recognised that the 2012 target would not be met and revised this with the Aichi Targets that included extending the 2003 mandate for establishing a network of marine protected areas from 2012 to 2020. See, Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets, UN Doc. UNEP/CBD/COP/10/27 (20 January 2011), Decision X/II, Annex, para 7.

[29] 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 (4 August 1995), entered into force on 12 December 2002.

[30] Scovazzi 2006.

[31] In September 2010, OSPAR ministers from 15 European nations established the world's first network of marine protected areas on the high seas. See O'Leary et al. 2012; Ribeiro 2010.

the protection of the global commons, such as the high seas, as an obligation *erga omnes,* is an important issue that could very well be developed in an appropriate case brought under the compulsory dispute provisions of Part XV.[32] A broad interpretation of Article 192 of the LOS Convention to include enforcement rights against third-party States would be a significant contribution to the protection of the global commons and would enhance the implementation of Part XII of the Convention.[33]

3 International Adjudication for the Protection of the Environment

3.1 Non-Compulsory International Adjudication of Environmental Disputes

The importance of third-party dispute resolution for the elaboration of international environmental law was demonstrated early on with the historic 1893 *Pacific Fur Seals Arbitration* between the United States and the United Kingdom.[34] This was followed with the often cited and landmark 1941 arbitral award in the *Trail Smelter case*, which held that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein,"[35] which was an extension of the Roman law of *sic utere iure tuo ut alterum no laedus*. This important limitation on sovereignty was based on the interest not to harm the interests of others by the activities of neighbouring States. This principle has been integrated in many international law instruments, including the LOS Convention and judicial decisions.

The role of international courts in the development of international law is necessarily limited by the nature of international law, which is principally derived from the will of States as 'sovereign' powers, or as Oxman describes it, the "Westphalian conception" which is the primacy of state sovereignty.[36] This limitation is

[32] The concept of obligations *erga onmes* was pronounced by the ICJ in a dictum in the *Barcelona Traction* case (ICJ: Barcelona Traction, Light And Power Company, Limited (Belgium v. Spain) (New Application: 1962), Judgment (5 February 1970). In general see Birnie and Boyle, 2002, pp. 196–197; Sands 2003, pp. 188–189; Charney 1991, p. 166.

[33] Klein 2005, p. 148 posits that the broad nature of Articles 192 and 193 could apply as a residual category for activities not specifically provided for under the Convention, and furthermore that such broad principles could provide "considerable scope for the jurisdiction of courts and tribunals constituted under Part XV."

[34] Arbitral Tribunal: Award between the United States and the United Kingdom relating to the Rights of Jurisdiction of United States in the Bering's Sea and the Preservation of Fur Seals (15 August 1893).

[35] Arbitral Tribunal: Trail Smelter (United States/Canada), Award (11 March 1941). See also Bratspies and Miller 2006.

[36] Oxman 2001, p. 278.

particularly pronounced in international environmental law where multilateral agreements are the product of protracted negotiations creating what Sands has described as a "high degree of compromise, or 'fudge'" where the international judiciary must then interpret vague norms and rules.[37] In identifying five "features that distinguish environmental matters from other areas, and which pose particular challenges to international courts and tribunals faced with resolving disputes having an environmental component, Sands listed the reluctance of States to refer environmental matters to international adjudication, preferring, instead, non-contentious procedures."[38]

The following cases demonstrate the inherent weakness of the consent-based dispute settlement approach to the development of international environmental law.

3.1.1 Nuclear Tests Cases

The reluctance of the international judiciary to decide environmental cases was reflected early on in the 1970s with the *Nuclear Tests cases*.[39] Australia and New Zealand individually brought cases before the International Court of Justice (ICJ) against France for its atmospheric nuclear testing in the South Pacific. The Governments of Australia and New Zealand requested the ICJ to declare that the continued atmospheric nuclear testing conducted by France in the South Pacific Ocean was inconsistent with the "applicable rules of international law" and further requested the ICJ to issue an order to halt further nuclear testing. The Court rejected the case on the ostensible ground that the public commitments made by the French President against further atmospheric nuclear testing had fulfilled the objective of the claims by both Australia and New Zealand. The Court concluded as a consequence that there was no dispute to be decided.[40] The *Nuclear Tests cases* could have provided the ICJ with an opportunity to elaborate upon the rule applied in the *Trail Smelter* Arbitral Award including whether this duty applied to "potential" damage in addition to actual damage.

The ICJ had another opportunity to revisit the important issues raised by nuclear testing when New Zealand brought a case before the ICJ with a request for an Advisory Opinion. In 1995, New Zealand once again challenged France before the ICJ for its nuclear testing activities in the South Pacific. While rejecting its own jurisdiction over the case the ICJ, nevertheless, acknowledged the importance of the environment stating that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings,

[37] Sands 2008, p. 3.

[38] Ibidem, p. 4.

[39] ICJ: Nuclear Tests (Australia v. France), Judgment (20 December 1974); Nuclear Tests (New Zealand v. France), Judgment (20 December 1974).

[40] Ibidem, pp. 270–274 (Australia v. France) and pp. 473–477 (New Zealand v. France).

including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."[41]

Nonetheless, the very narrow and restrictive approach of the ICJ in rejecting New Zealand's application for an Advisory Opinion signalled the reluctance of the consent-based mechanism of international dispute settlement to take on the challenges of the environment. The reluctance on the part of the ICJ was criticised as a "missed opportunity" for the Court to make a substantive contribution to the development of international environmental law.[42] The *Nuclear Tests cases* underscored the limitation of the consent-based system of the judicial resolution of international issues with important environmental ramifications.[43]

3.1.2 Gabčìkovo–Nagymaros Case

The ICJ was provided with another occasion to contribute to the progressive development of international environmental law in the *Gabčíkovo–Nagymaros* case, brought by Slovakia against Hungary for the alleged breach by the latter of a treaty concluded in 1977 with Czechoslovakia.[44] Hungary justified its unilateral suspension of the construction of a series of locks along the Danube on environmental grounds and introduced a new concept of "ecological state of necessity." This novel concept of "ecological necessity" was based on the customary international law of "state of necessity" as defined in Article 33 of the Draft Articles on State Responsibility prepared by the International Law Commission. In this sense, transboundary harm was not invoked as a ground for damages or an injunction but as an affirmative defence to a lack of treaty performance.

To its credit, the Court took an important step in recognising that the natural environment was an "essential interest" of the State within the meaning of Article 33.[45] However, the Court's use of the lack of scientific certainty as to the impact of

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[41] ICJ: Legality of the Threat or Use of Nuclear Weapons, Advisory Op. (8 July 1996), para 29.

[42] Klein 2009, p. 137.

[43] Taylor 1997, p. 240. The author notes, however, that despite the failure of the Court to contribute to the development of international law, the proceedings nevertheless contributed to a shortening of the original duration of the nuclear tests and promoted an understanding to be reached between the two States.

[44] ICJ: Gabčíkovo–Nagymaros Project (Hungary/Slovakia), Judgment (25 September 1997).

[45] The ICJ identified the key elements of "state of necessity" based on Article 33 of the Draft Articles on State Responsibility to be when an "essential interest of the State" is threatened by a "grave and imminent peril" and that the otherwise wrongful act was "the only means" of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity". Those conditions "reflect customary international law." (ibidem, pp. 40–41).

the dam on the natural environment of the Danube as a factor against Hungary's decision to suspend the project was in direct contradiction with the emerging principle of precaution adopted in Principle 15 of the Rio Declaration.[46] Nevertheless, the Court made some concessions in stating that "in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage."[47]

The case is often cited due to the eloquent separate opinion on sustainable development and environmental law authored by Judge Weeremantry in which he pronounced sustainable development to be a principle of international law.[48]

3.1.3 Case Concerning Fisheries Jurisdiction

In the *Case concerning Fisheries Jurisdiction* (*Spain v. Canada*),[49] the ICJ ultimately found that it lacked jurisdiction to adjudicate the dispute between Spain and Canada concerning the latter's seizure of Spanish fishing vessels on the high seas. The Court, nonetheless, agreed with Canada's broad interpretation of the meaning of "measures" finding enforcement measures taken on the high seas to be consistent with Article 22.1.*f* of the 1995 Fish Stocks Agreement even though the underlying Canadian law was not based upon it. Had the Court exercised jurisdiction over the case it would have established a strong legal precedent for future conservation measures, especially in the high seas.

3.1.4 Pulp Mills Case

The *Pulp Mills Case* was brought by Argentina against the Eastern Republic of Uruguay for the planned construction of one pulp mill and the actual construction of another along the eastern coast of the River Uruguay.[50] The case raised a

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[46] Ibidem, p. 42. The Court also found that even if a "state of ecological necessity" existed it would not provide grounds to terminate a treaty but can only be invoked to excuse or exonerate the State from responsibility in performing the treaty during the state of necessity. Once the state of necessity ends, the duty to comply with treaty obligations revives (ibidem, p. 63).

[47] Ibidem, p. 78.

[48] Ibidem, Separate Opinion of Judge Weeramantry, p. 88.

[49] ICJ: Fisheries Jurisdiction (Spain v. Canada), Judgment (4 December 1998), paras 66 and 70. Spain brought the case against Canada when Canada seised Spanish fishing vessels in the area of the high seas adjacent to Canadian waters. Canada seised the Spanish vessels on the high seas based on the Canadian Coastal Fisheries Protection Act ("CFPA"). Spain challenged the actions of Canada as illegal unilateral acts in an area beyond its national jurisdiction. Canada justified its seizure of the fishing vessels and use of force pursuant to the CFPA as a "conservation and management measure".

[50] ICJ: Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment (20 April 2010).

host of important environmental issues arising from the terms of the 1975 Statute of the River Uruguay concluded between the two States as well as international environmental law in general. Among its claims, Argentina asserted that Uruguay had violated the terms of the 1975 Statute by failing to take all necessary measures to preserve the aquatic environment, to prevent pollution, to protect biodiversity and fisheries, as well as to prepare a full and objective environmental impact study. Argentina further claimed that Uruguay had not fulfilled its obligation to co-operate in the prevention of pollution and the protection of biodiversity and of fisheries, and had breached these obligations thereby causing damages. Argentina also argued that the provisions on the protection of the environment were substantively linked to obligations undertaken in international environmental treaties.

The Judgment of the Court was of a mixed character. On the positive side, the Court provided an important articulation of the "due diligence" obligations of states. The Court also found that environmental impact assessments (EIAs) were a requirement under customary international law when the proposed industrial activity may threaten to have a significant adverse impact in a transboundary context.[51] However, the Court qualified this by stating that the content of environmental impact assessments should be determined by domestic legislation and not by international law, rejecting Argentina's argument that public participation was a requirement for EIAs under international law.[52] The Court also rejected Argentina's argument that the precautionary approach shifted the burden of proof to Uruguay to show that the pulp mill to be constructed would not cause significant harm onto the environment. The Court also rejected Argentina's argument that the 1975 Statute required compliance with other international environmental agreements finding that the reference to other international environmental agreements was not a "referral clause" and did not create a separate substantive obligation.[53]

The Court's judgment was controversial and raised strong voices of dissent among its own cadre. Judges Al-Khasawneh and Simma, in a jointly authored dissent, were harshly critical of the Court's judgment and expressed concern that the judgment would cast doubts on its ability to handle complex scientific issues.[54]

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[51] Ibidem, pp. 60–61. See also, Payne 2010.

[52] Pulp Mills, supra n. 50, p. 63.

[53] Ibidem, pp. 27–29.

[54] The judges criticised the Court's poor handling of the complex scientific evidence by not using experts, noting that the "Court has approached it in a way that will increase doubts in the international legal community whether it, as an institution, is well-placed to tackle complex scientific questions" (ibidem, Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, p. 2). See also, Sandoval Coustasse and Sweeney-Samuelson 2011.

3.2 *Compulsory Jurisdiction: The International Adjudication of the Protection and Preservation of the Marine Environment*

The LOS Convention entered into force in 1994 bringing to life the much-anticipated compulsory dispute settlement mechanism of Part XV.[55] While the ICJ has addressed numerous cases involving the law of the sea, these have centred on maritime delimitation matters and not on the protection of the marine environment. This fact alone demonstrates the significance of Part XV of the Convention. The compulsory dispute settlement provisions, considered to be essential components of Part XII, reflected the expectation that international adjudication would take an active and even a "bold" role in ensuring State responsibility in meeting obligations under the LOS Convention, as expressly required in Article 235. This necessarily includes the judicial development of principles and rules of international environmental law related to the protection and preservation of the marine environment as an interrelated space constituting a whole.[56]

Part XV provides for a choice of forum from among the International Tribunal for the Law of the Sea (ITLOS), a specialised body created by the Convention, the ICJ, an arbitral tribunal constituted in accordance with Annex VII of the Convention, and a special arbitral tribunal constituted in accordance with Annex VIII.[57] There have been four cases brought for alleged violations of Part XII obligations as well as provisions related to the conservation of marine living resources. Unfortunately, the promise in Part XV to promote the implementation of Part XII and related provisions has been shaken by the problem of parallel jurisdiction with other dispute settlement bodies.

3.2.1 Southern Bluefin Tuna Case

The *Southern Bluefin Tuna* (SBT) case[58] marked the first request for provisional measures brought before the ITLOS under Article 290 of the LOS Convention and the first application for compulsory dispute resolution by an Annex VII Arbitral Tribunal under Part XV.[59] It should have been the inaugural case for establishing

[55] Charney 1996.

[56] The Preamble to the LOS Convention states "*Conscious* that the problems of ocean space are closely interrelated and to be considered as a whole."

[57] Article 287. Judge Shigeru Oda was particularly critical of the creation of the ITLOS as a judicial body to rival the well-established ICJ (Oda 1993; Oda 1995). Disagreeing with Judge Oda's concerns over the "cafeteria-style" selection of forums see Boyle 1997, p. 41

[58] ITLOS: Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Order (27 August 1999) and UNCLOS Arbitral Tribunal: Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Decision (4 August 2000).

[59] Kwiatkowska 2001.

compulsory jurisdiction as a strong legal mechanism for promoting the protection of living marine resources and the development of principles and rules of international law for the protection of the marine environment through a robust implementation of the LOS Convention. Unfortunately, the complexity of international law with its competing instruments and fora struck an unexpected blow to these early aspirations.

The dispute arose following a disagreement over Japan's implementation of an experimental fishing programme for the Southern Bluefin Tuna. Australia and New Zealand brought a request for provisional measures before the ITLOS pending the constitution of the Annex VII tribunal. Rejecting Japan's objections that it lacked jurisdiction the ITLOS found that both it and the Arbitral VII Tribunal to be constituted had *prima facie* jurisdiction and proceeded to grant the provisional measures. The Annex VII arbitral tribunal, in turn, in a rare stance ruled against its own jurisdiction for deciding the merits of the case.[60] The Tribunal found that the Convention for the Conservation of Southern Bluefin Tuna (Camberra, 10 May 1993, hereinafter CCSBT),[61] concluded among the Parties, included a provision that legally overrode Part XV of the LOS Convention, even though the provision made no reference to Part XV.

Much has been written on the surprising and disappointing final outcome of this case.[62] Both New Zealand and Australia had specifically requested findings that Japan had breached its obligations under Articles 64, 116–119 of the LOS Convention for the conservation and management of SBT stock with reference to the requirements of the precautionary principles and a failure to cooperate. The case could have firmly established the role of Part XV in promoting the implementation of the LOS Convention for the conservation of living resources and the protection of the marine environment. In fact, ITLOS proved to have been much bolder than the Annex VII Tribunal, not only because it accepted jurisdiction but because it proceeded to issue provisional orders for the continued protection of the SBT stock. Although criticised for its terse justification and the fact that it avoided making express reference to the precautionary approach,[63] the Tribunal, within the limited scope afforded by Article 290.1, nevertheless, demonstrated an effort to implement conservation principles. The same cannot be said for the Annex VII arbitral tribunal, however, which succumbed to the "Wesphalian conception" of

[60] Kwiatkowska (2001, p. 240) notes that "(…) the Award is the first time that an arbitral tribunal has declined to exercise jurisdiction over the merits of an inter-state dispute".

[61] Entered into force on 20 May 1994.

[62] For example, Oxman 2001, p. 278; Kwiatkowska 2001; Cole and Hoyle 2003; Stephens 2004.

[63] In his separate opinion, Judge Tullio Treves expressed his regret that the Order was not more explicit on the application of the precautionary approach in relation to the question of "urgency" in this case. The "urgency" was not the risk of the collapse of the SBT stock during the period of time between the provisional orders and the decision of the merits, but rather that the provisional order aimed at preventing the further deterioration of the stock. In this respect, the Tribunal had in fact based its decision on the application of the precautionary approach without having expressly said so (ITLOS: Southern Bluefin Tuna, supra n. 58, Separate Opinion of Judge Treves, para 8). Many authors have commented on the "implicit" application of the precautionary approach or principle in the Tribunal's Order. See also, Rashbrooke 2004, pp. 523–524.

international law. In deciding that the "non-compulsory" dispute settlement provision in the CCSBT superseded the compulsory provisions of Part XV of the LOS Convention, the Annex VII Arbitral Tribunal may have weakened the great potential held by Part XV for the judicial enforcement of the obligations for the protection of the marine environment and the conservation of living resources, as well as for developing principles of international environmental law.

3.2.2 MOX Plant Case

The MOX Plant Case[64] presented another opportunity to apply the compulsory dispute settlement provisions under Part XV of the LOS Convention for the protection of the marine environment. Ireland filed an application with ITLOS for provisional measures against the United Kingdom under Article 290.5 of the LOS Convention pending the establishment of an Annex VII arbitral tribunal.[65] The request for provisional measures was based on the failure of the United Kingdom to suspend the authorisation for the operation of a MOX Plant located in Sellafield, along the Irish Sea coast, and the international shipment of radioactive materials. Ireland alleged that the actions of the United Kingdom had violated Articles 123, 192 to 194, 197, 206, 207, 211, 212 and 213 of the LOS Convention, as well as general international law.[66] With the exception of Article 123, the remaining Articles are found in Part XII of the Convention.

ITLOS rejected the arguments of the United Kingdom that the case concerned the application and interpretation of other regional agreements, specifically the

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[64] ITLOS: MOX Plant (Ireland v. United Kingdom), Order (3 December 2001).

[65] Specifically, Ireland requested the Tribunal to grant provisional measures for the United Kingdom to stop authorisation for the MOX plant, for the United Kingdom to ensure that no movements of radioactive substances are made into or out of the area over which it exercises sovereignty or any radioactive substances or materials or wastes which are associated with the operation of, or activities preparatory to the operation of, the MOX plant, for the United Kingdom to ensure that no action of any kind is taken which might aggravate, extend or render more difficult a solution to the dispute submitted to the Annex VII tribunal, and for the United Kingdom to ensure that no action is taken which might prejudice the rights of Ireland in respect of the carrying out of any decision on the merits that the Annex VII tribunal may render. See Kwiatkowska 2003.

[66] Ireland instituted arbitration proceedings against the UK for its failure to provide information under the OSPAR Convention. Based on this, the Annex VII Arbitral Tribunal found that it lacked competence to decide the case, as the OSPAR Convention had no provisions authorising dispute settlement by ITLOS or any other ad hoc dispute settlement mechanism under the LOS Convention. Arbitration proceedings on the issue of access to information under Article 9 of the OPSAR Convention were instituted by Ireland against the United Kingdom in the Permanent Court of Arbitration. See PCA Arbitral Tribunal: Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom), Award (2 July 2003). The Arbitral Tribunal accepted jurisdiction over the case but ultimately found that the information requested by Ireland in relation to the MOX Plant did not meet the requirements of Article 9.2 of the OSPAR.

OSPAR Convention,[67] the Treaty establishing the European Community (EC Treaty) and the Treaty establishing the European Atomic Energy Community (Euratom Treaty), and ruled that it had *prima facie* jurisdiction over the case for purposes of deciding the provisional measures.[68] ITLOS found it did have jurisdiction under article 290(5) of the LOS Convention rejecting the arguments asserted by the United Kingdom. And while the Tribunal did not address the Irish arguments regarding Article 123 the Tribunal did issue an order for the Parties to co-operate stating that *the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under part XII of the Convention and general information law*.[69] The Tribunal did not find there to be adequate urgency to adopt the provisional measures as requested by Ireland given the short time until the Arbitration Tribunal would hear the case on the merits. However, in its order for the Parties to cooperate the Tribunal made an implicit reference to the precautionary principle stating that *prudence and caution require that Ireland and the United Kingdom cooperate in exchanging information concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them, as appropriate*.[70]

The case on the merits of the *MOX Plant* dispute was submitted to the Permanent Court of Arbitration in The Hague.[71] However, in the face of the potential exclusive competence of the European Community and the pre-emptory jurisdiction of the European Court of Justice the Tribunal decided to suspend proceedings in the case.[72] Once again the problem of parallel jurisdiction intervened to the prejudice of Part XV. The European Court of Justice was seised of the case

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[67] Convention for the Protection of the Marine Environment of the North-East Atlantic (Paris, 22 September 1992), entered into force on 25 March 1998. MOX plant, supra n. 64 paras. 48–53.

[68] Judge Treves in his separate opinion expressed his view that the Order should have been more explicit in explaining the underlying reasons why Article 282 of the Convention did not prevent the Tribunal from exercising jurisdiction even if other regional agreements, such as OSPAR and the EC, were implicated in the case. He stated that "In interpreting Article 282, such preference must be balanced not by the general idea that limitations to sovereignty cannot be presumed or that States may not be presumed to accept submission to adjudication without their consent, which may be relevant in interpreting Articles 281 and 283, but by the general freedom of States to utilise whichever means of compulsory adjudication are available under treaties in force for them." Furthermore, he reasoned that "(…) the application of Article 282 in order to conclude that *prima facie* the Annex VII arbitral tribunal lacked jurisdiction would have had the consequence that a dispute concerning the application or interpretation of the Convention would have been left to be considered in separate parts by different courts or tribunals, and taken away from the only tribunal competent to deal with it in its entirety. It may be argued that such a consequence would have been incompatible with the very purpose of Article 282, seen in the context of Part XV of the Convention (MOX Plant, supra n. 64, Separate Opinion of Judge Treves, paras 4–6).

[69] Ibidem, para 82.

[70] Ibidem, para 84.

[71] Access to Information, supra n. 66.

[72] Statement of the President (2003). www.pca-cpa.org/upload/files/STATEMENT%20BY%20THE%20PRESIDENT.pdf. Accessed 15 June 2012.

and rendered a judgment against Ireland ruling that by bringing the case before ITLOS and the Arbitral VII Tribunal Ireland had violated the provisions on the exclusive jurisdiction of the EC.[73]

3.2.3 Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)

On 20 December 2000, by agreement, Chile and the European Commission brought the Swordfish Dispute case before the Special Chamber formed at ITLOS to address the claims brought by Chile against the EC.[74] The case was prompted by an initial case brought by the EC against Chile at the World Trade Organisation (WTO), where the European Commission challenged Chile's national laws regulating swordfish fishing in its EEZ and high seas as being discriminatory protectionist measures. In response, Chile, exercising the compulsory jurisdiction provisions of Part XV of the LOS Convention, petitioned ITLOS challenging EC fishing activities as being in violation of the provisions for the conservation of living resources under the Convention, specifically Articles 116–119, and its duty to cooperate under Article 64. Ultimately, the two cases were settled amicably between the Parties.

In this case, the availability of Part XV played an influential role in bringing the Parties to the negotiating table. In particular, as noted by one author, the availability of ITLOS as a forum for dispute resolution provided Chile with important legal leverage over the powerful EC.[75]

3.2.4 Land Reclamation Case

In 2003, Malaysia brought a request before the ITLOS for provisional measures against Singapore pending the constitution of an Annex VII Arbitral Tribunal. Malaysia sought to prevent Singapore from further land reclamation activities in the Strait of Jahor on the grounds that such activities constituted a breach by Singapore of its obligations under Articles 123, 192, 194, 198, 200, 204, 205, 206 and 210 of the LOS Convention, and the precautionary principle. The Tribunal did

[73] The European Commission instituted proceedings against Ireland before the European Court of Justice on the grounds that Ireland had failed to fulfil its obligations under Articles 10 and 292 of the EC Treaty and Articles 192 and 193 of EURATOM by instituting dispute settlement proceedings before the ITLOS and the PCA. The European Court of Justice found that Ireland had violated its obligations as claimed by the European Commission, ECJ: Commission of the European Communities v. Ireland, C-459/03, Judgment (30 May 2006).

[74] ITLOS: Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union), Order (20 December 2000).

[75] Granger 2008, pp. 1318–1322. See also Orellana 2002, p. 58.

not find the requisite environmental urgency necessary to grant Malaysia's requests. The Tribunal did find, on the other hand, that there had been inadequate cooperation between the two Parties and in a unanimous decision it issued a provisional measures that *inter alia* directed the parties to cooperate. This order included the prompt establishment of a group of independent experts.[76] The Tribunal did not directly order Singapore to desist from its land reclamation activities but directed Singapore "not to conduct its land reclamation in ways that might cause irreparable prejudice to the rights of Malaysia or serious harm to the marine environment, taking especially into account the reports of the group of independent experts."[77] Furthermore, once again the Tribunal implicitly applied the precautionary principle by stating that:

> *Considering* that, given the possible implications of land reclamation on the marine environment, prudence and caution require that Malaysia and Singapore establish mechanisms for exchanging information and assessing the risks or effects of land reclamation works and devising ways to deal with them in the areas concerned.[78]

3.2.5 Seabed Disputes Chamber Advisory Opinion

The first Advisory Opinion issued by the Seabed Disputes Chamber of ITLOS in 2011[79] has importance beyond the scope of Part XI of the Convention and the case in question. Notwithstanding its non-binding character, the opinion has provided an important contribution to the implementation of the provisions related to the protection of the marine environment under the Convention and customary international law. The Chamber was requested to provide its opinion on three questions concerning the state sponsorship of private entity activities in the Area. In relation to the protection of the marine environment, referring to the ICJ Judgment in the *Pulp Mills case*, the Chamber stated that State "responsibility to ensure" as provided for in Article 139.1 of the LOS Convention was a "due diligence" obligation. An important contribution by the Chamber was in articulating the elements of "due diligence" under international environmental law, which included *inter alia* the application of the precautionary approach even if not required under the applicable regulations, best environmental practices and the use

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[76] The Group of experts was given the mandate to conduct a study on the impact of the land reclamation activities of Singapore including the proposed measures against any adverse effects, to prepare a report and also to engage in a regular exchange of information. The provisional measures provided by ITLOS serves as the basis for the settlement agreement signed by the Parties before the Permanent Court of Arbitration. Malaysia v. Singapore Award (Settlement Agreement, 26 April 2005), available at http://www.pca-cpa.org.

[77] ITLOS: Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Order (8 October 2003), operative part, n. 2.

[78] Ibidem, para 99.

[79] ITLOS: Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Seabed Disputes Chamber, Advisory Op. (1 February 2011).

of environmental impact assessments. A particularly important observation made by the Chamber was in relation to the right of each State to claim compensation "in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area (…)".[80] As observed by Freestone "[t]he Chamber's unanimous opinion sets the highest standards of due diligence and endorses a legal obligation to apply precaution, best environmental practices, and EIA."[81]

4 Conclusion

The role of international tribunals in the development of international environmental law in general has been slow and with mixed output. The ICJ has missed historical opportunities, such as in the *Nuclear Test cases,* to establish a strong role for the international judiciary. In subsequent cases, the ICJ has attempted to contribute to the progressive development of international environmental law without perhaps upsetting the delicate Westphalian foundation of its jurisdiction. Its recognition of the environment as an essential state interest in the *Gabčíkovo–Nagymaros* judgment is clearly significant. But, as reflected in the brief overview of the case law, the ICJ has hesitated from taking bold decisions in favour of the protection of the environment. In this context, for purposes of the marine environment, Part XII of the LOS Convention coupled with the compulsory dispute settlement provisions should have augured a new phase for international courts in the dynamic implementation and progressive development of international law for the protection and preservation of the marine environment.

The very purpose of the compulsory dispute resolution provisions in Part XV was to give international judicial bodies the legal mandate to take an active role in the implementation of the Convention. Compulsory jurisdiction should have strengthened the international legal system, including providing an international forum for ensuring that States meet their obligation under the LOS Convention to protect and preserve the marine environment and its marine living resources. The broad language of Article 192, coupled with the inclusion of Part XII in the compulsory dispute provisions of the Convention, gives international tribunals the legal foundation to clarify and develop legal obligations and principles related to activities which are harmful to the marine environment that are either not expressly covered under the Convention or need further elaboration. For example, the Seabed Chamber's statement that the protection of the high seas is an *erga omnes* obligation has great importance in the ongoing debates concerning the enforcement of obligations against third-party States in the high seas and could lay the foundation for a case brought pursuant to Part XV. The implicit application of

[80] Ibidem, para 180.

[81] Freestone 2011.

the precautionary approach by ITLOS in the *Southern Bluefin Tuna* case is in stark contrast to that of the ICJ in the *Pulp Mills* case.

Unfortunately, the trend towards the dilution of the potential force of compulsory jurisdiction because of the parallel or pre-emptive jurisdiction of another international judicial body risks marginalising the role of international courts in the implementation of the LOS Convention for the protection of the marine environment as provided for in Part XII of the Convention. Whereas the handful of cases brought before ITLOS under the limited scope of the provisional measures of Part XV provided a glimmer of the strong role that international tribunals could and should play in the implementation and progressive development of Part XII and related provisions for protection and preservation of the marine environment.

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The Duty of Environmental Impact Assessment in the First ITLOS Chamber's Advisory Opinion: Towards the Supremacy of the General Rule to Protect and Preserve the Marine Environment as a Common Value?

Laura Pineschi

1 The Notion of Environmental Impact Assessment and Its Status in International Law

Environmental impact assessment (EIA)[1] is recognized by a number of national legislations as a fundamental environmental policy tool to ensure sustainable development. At the international level, several initiatives have been undertaken to induce States to adopt, develop, and expand EIA procedures in their mutual relations to assess the harmful impacts of certain activities on the environment of another State or of areas beyond national jurisdiction. As a result, one or more provisions on EIA have been included in various multilateral treaties. Nevertheless, no global treaty has been concluded on this subject[2] and to agree on specific undertakings has never been an easy endeavor. Only at the regional level have binding instruments for a comprehensive regulation of EIA been adopted.[3]

Different stages of development may also be noticed in the legal regimes governing activities in areas beyond national jurisdiction, i.e., the international

[1] "EIA means an examination, analysis and assessment of planned activities with a view to ensuring environmentally sound and sustainable development", UNEP Goals and Principles of Environmental Impact Assessment (hereinafter: UNEP Goals and Principles), Governing Council decision 14/25 (16 January 1987), UN Doc. UNEP/GC/DEC/14/25 (17 June1987), Appendix, para 1.

[2] On this gap see Knox 2003, p. 153 ff.

[3] See e.g. the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991, entered into force on 10 September 1997); the Protocol on Strategic Environmental Assessment (Kiev, 21 May 2003, entered into force on 11 July 2010); and the European Union directives concerning the assessment of the effects of certain public and private projects (or plans and programmes) on the environment.

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seabed area (hereinafter the Area), Antarctica, and outer space. A detailed regulation of EIA may be found in Annex I to the Protocol on environmental protection to the Antarctic Treaty (Madrid, 4 October 1991; hereinafter PEPAT)[4] and in other instruments of the so-called Antarctic Treaty system.[5] Less elaborated provisions are set out in Part XII of the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; hereinafter UNCLOS),[6] which provides a general framework for the protection and preservation of the marine environment; in the Agreement relating to the Implementation of Part XI of the UNCLOS (New York, 28 July 1994)[7]; and—as far as deep seabed mining activities are concerned—in the so-called Mining Code, a comprehensive set of rules issued by the International Seabed Authority (hereinafter the Authority) to regulate prospecting and exploration of marine minerals in the Area.[8] No specific provisions on EIA are incorporated in the five United Nations space treaties,[9] which were adopted when "environmental considerations were not among the highest-ranking items on agendas in any field of human endeavour, definitely not in the space sector".[10]

As to general international law, EIA has always been acknowledged as a corollary of the principle of prevention, according to which States are required to use all the means at their disposal to ensure that activities which take place within their jurisdiction or control do not cause significant damage to the environment of other

[4] Entered into force on 14 January 1998.

[5] This regime originates from the Antarctic Treaty (Washington, 1 December 1959, entered into force on 23 June 1961), related conventions and recommendations by the so-called Antarctic Treaty Consultative Parties (ATCPs) adopted under Article IX of the Antarctic Treaty.

[6] Entered into force on 16 November 1994. On EIA obligations under UNCLOS see Kong 2011.

[7] Entered into force on 28 July 1996.

[8] The Mining Code (this expression may be found in the Authority's website) includes the Recommendations for the Guidance of Contractors for the Assessment of the Possible Environmental Impacts arising from Exploration for Polymetallic Nodules in the Area (hereinafter the Recommendations), UN Doc. ISBA/7/LTC/1/Rev.1 (13 February 2002); the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (RPN), UN Doc. ISBA/6/A/18 (13 July 2000); and the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (RPS), UN Doc. ISBA/16/A/12/Rev.1 (7 May 2010). No specific code for the exploitation of marine minerals has been adopted so far. For a definition of the various phases of deep seabed mining, namely prospecting, exploration and exploitation, see RPN and RPS, Regulation I. On the environmental impact of seabed mining activities in general and in international law in particular, see Treves 1978, Markussen 1994, Lenoble 2000, Treves 2000, Warner 2009. On EIA and the authority see Le Gurun 2008.

[9] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (New York, 19 December, 1966, entered into force on 10 October 1967); Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (New York, 19 December 1967, entered into force on 3 December 1968); Convention on International Liability for Damage Caused by Space Objects (New York, 29 November 1971, entered into force on 1st September 1972); Convention on Registration of Objects Launched into Outer Space (New York, 12 November 1974, entered into force on 15 September 1976); Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (New York, 5 December 1979, entered into force on 11 July 1984).

[10] Viikari 2008 p. 272.

States or of areas beyond the limits of national jurisdiction.[11] More controversial has been the debate on the existence of a customary duty of EIA. In particular, two arguments have been emphasized in the academic literature: lack of consensus among States on the exact content of the EIA obligation and no convincing evidence of *opinion juris*.[12]

Any further discussion on this issue has become obsolete after the authoritative recognition of the customary nature of the obligation of EIA by the International Court of Justice (ICJ) in the *Pulp Mills* case[13] and by the Chamber of the International Tribunal for the Law of the Sea (the Chamber), chaired by Judge Tullio Treves, in its advisory opinion of 1 February 2011.[14]

The former pronounced in relation to industrial activities posing the risk of an adverse impact on resources shared by two States:

> (…) it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.[15]

The latter confirmed the ruling of the ICJ with particular reference to the detrimental impact that certain activities in the commons can produce on the environment:

> (…) the obligation to conduct an EIA in a transboundary context is a general obligation under customary international law that covers activities having an impact on the environment of areas beyond national jurisdiction, including resources that are common heritage of mankind.[16]

In the same ruling, the Chamber also provides some basic guidelines on the scope and content of the obligation of EIA for deep seabed mining operations and its correct implementation. These guidelines deserve special consideration.

In order to better understand the Chamber's contribution to turning a myth into reality,[17] the following paragraphs will focus on three specific issues: the scope of the obligation of prior EIA *ratione materiae* (i.e.: which activities in the Area fall

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[11] The customary nature of the principle of prevention has been explicitly recognized by the International Court of Justice in 2010, in the *Pulp Mills* case, ICJ: Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment (20 April 2010), para 101. On EIA obligations and international environmental law see in particular: Bastmeijer and Koivurova 2008, Craik 2008, Birnie et al 2009, Lagshaw 2012, Sands 2012.

[12] See Bastmeijer and Koivurova 2008, pp. 355–357.

[13] Pulp Mills, supra n. 11, para 101. For a comment see Boyle 2001.

[14] ITLOS: Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Seabed Dispute Chamber, Advisory Op. (1 February 2011). On the advisory opinion see, in particular: Freestone 2011, French 2011, Plakopkefalos 2011 and Vromman 2012.

[15] Pulp Mills, supra n. 11, para 204.

[16] Activities in the Area, supra n. 14, para 148.

[17] The allusion to Knox 2002, p. 291 ff. is deliberate.

under this duty?), the scope of the obligation of prior EIA *ratione personae* (i.e.: are developing sponsoring States[18] subjected to less burdensome duties?) and the functional relationship of the EIA obligation with the duty of co-operation with potentially affected States. On a more general level, the main purpose of this chapter is to stress the unprecedented recognition by an international tribunal of the special role played by the general obligation to protect and preserve the environment when competing interests in a particularly vulnerable area beyond national jurisdiction are at stake.

2 The ITLOS Chamber's Opinion: The Scope of the Obligation of EIA *Ratione Materiae*

The definition of the threshold beyond which the EIA process should apply is one of the most controversial issues in States' practice and the academic literature. Article 206 of the UNCLOS, which deals with the "assessment of potential effects of activities", provides for a duty of EIA for "planned activities" under the jurisdiction or control of States Parties which "may cause substantial pollution of or significant and harmful changes to the marine environment". No indication may be found as to what is meant by "substantial pollution" and "significant and harmful changes". And while other binding instruments—such as the Espoo Convention—list activities requiring EIA,[19] or—like the PEPAT—use screening criteria based on different stages,[20] UNCLOS does not.

To give more precise scope and content to EIA for activities in the Area, the Chamber refers to three instruments of the Mining Code, i.e. the Recommendations, the RPN, and the RPS.[21] In particular, the RPN and the RPS require the applicant to submit "a preliminary assessment of the possible impact of the proposed *exploration activities* on the marine environment"[22] as a condition to receiving the approval of the plan of work for exploration by the Authority. More specific provisions regulate *prospecting*, which "(…) shall not be undertaken if substantial evidence indicates the risk of serious harm to the marine environment" (Regulation 2.2). As a result, taking into account the definition of "serious harm to the marine environment" under Regulation 1 (f), which has the same content in both the RPN and the RPS, prospecting could be started only if it was proven that the activity would not involve:

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[18] On the notion of "sponsorship", see Activities in the Area, supra n. 14, para 74 ff.

[19] Espoo Convention, Appendix I.

[20] PEPAT, Article 8 and Annex I.

[21] Activities in the Area, supra n. 14, para 149.

[22] RPN, Regulation 18.*c*; RPS, Regulation 20.1.*c*.

> (…) a significant adverse change in the marine environment determined according to the rules, regulations and procedures adopted by the Authority on the basis of internationally recognized standards and practices.[23]

More detailed provisions on EIA for *exploration* activities have been developed in the Recommendations, which were approved two years after the adoption of the RPN to give contractors some guidance for the assessment of the possible environmental impacts arising from *exploration* for polymetallic nodules in the Area. The Recommendations exclude certain activities from the obligation of EIA, as they have "no potential for causing serious harm to the marine environment",[24] and explicitly list activities requiring EIA. The latter include:

> (a) Dredging to collect nodules for on-land studies for mining and/or processing;
> (b) Use of special equipment to study the reaction of the sediment to disturbances made by collecting devices or running gears;
> (c) Testing of collection systems and equipment.[25]

No definition of "serious harm" may be found in the Recommendations; nevertheless, the specific enumeration of exploration activities requiring EIA excludes unilateral interpretations, as the "threshold" of seriousness requiring EIA has already been determined at the international level.

As correctly stressed in one of the first comments to the Chamber's opinion, the bold reference to the relevant Regulations and Recommendations issued by the Authority marks a major departure from the judgment in the *Pulp Mills* case, where the ICJ held that the specific content of the EIA required in each case is to be determined by national legislations.[26] Indeed, it has been observed that: "[t]his approach possibly leads the way to a wider understanding of the content of the EIA; an understanding that looks towards international bodies for the definition of the content of the EIA, thus working towards a global and not a narrow localised approach".[27] As a result, it could be added, a limited margin of appreciation is left to contractors and sponsoring States to determine activities requiring EIA. Discretion is left to the latter only in the adoption of laws, regulations, and administrative measures to ensure that the contractor fulfills its obligation to conduct an EIA.[28] Furthermore, when deciding what measures are reasonably appropriate, sponsoring States "(…) must take into account, objectively, the relevant options in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole."[29]

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[23] Further limitations may be found under RPS, Regulation 2.3.

[24] Recommendations, para IV.A.9.

[25] Ibidem, para IV.A.10.

[26] Pulp Mills, supra n. 11, para 205.

[27] Plakopkefalos 2011, p. 7.

[28] Activities in the Area, supra n. 14, para 227 ff.

[29] Ibidem, para 230.

This assertion is worth stressing: if sponsoring States are instrumental for the fulfillment of the benefit of the humankind, the interest of the international community (not the national one) is the fundamental yardstick to be taken into account at all levels of the decision-making process. In addition, if the adequacy of national measures is to be assessed on a case-by-case basis (for no measure is reasonable simply because of its adoption), the Chamber implicitly paves the way to international scrutiny on the consistency of national measures with the interests of humankind.

The Chamber has particular consideration for the general obligation to protect and preserve the marine environment (UNCLOS, Article 192). This is another element in the Chamber's reasoning which contributes to better understanding the scope and content of the EIA obligation. The Chamber does not explicitly acknowledge the supremacy of this obligation with respect to competing rights of sponsoring States. However, it refers to this obligation as the main parameter to be taken into account in assessing the duties of sponsoring States in respect of activities which are "among the most hazardous to the environment."[30] This characterization is made by the same Chamber having regard to both their specific nature and the extreme environmental vulnerability of the area where they are carried out. This approach is evident when the Chamber pronounces on the meaning of "activities in the Area" and excludes any restrictive interpretation which could exempt sponsoring States from responsibility for activities particularly hazardous for the environment.[31] But the most far-reaching consequence of the special consideration given to the obligation to protect and preserve the marine environment is the characterization of the precautionary approach as a binding and direct obligation for sponsoring States.[32]

Indeed, here, the Chamber goes a step further than the ICJ did in the *Pulp Mills* case.[33] In the Chamber's opinion EIA is not expressly acknowledged as an instrument of precaution. Nevertheless, it is truly incongruous and unreasonable to conclude that EIA and precaution are to be considered as separate and unrelated undertakings, when both are characterized by the Chamber as a direct and binding obligation for sponsoring States and an integral part of their due diligence obligation.[34]

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[30] Ibidem, para 97.

[31] Ibidem, paras 94–97.

[32] Ibidem, para 127.

[33] Perplexity has been expressed as the ICJ considers the EIA obligation exclusively with regard to the principle of prevention and not as a requirement of precaution; see e.g. Kerbrat and Maljean-Dubois 2011, p. 67.

[34] Activities in the Area, supra n. 14, p. 72 and para 125 ff.

3 The Scope of the Obligation of EIA *Ratione Personae*

In the Chamber's opinion, *all* sponsoring States (i.e. developed and developing States) are under a direct obligation to conduct an EIA and a due diligence obligation to ensure compliance by the contractor with his obligation to conduct an EIA.[35] Exceptions are allowed, provided that derogations are specifically set forth by the applicable provisions. As an example, the Chamber mentions Principle 15 of the Rio Declaration, which requires States to apply the precautionary approach "according to their capabilities".[36]

This criterion of feasibility entails that States are expected to assess environmental risks by resorting to economic and technological means consistent with their stage of development.[37] It can also be observed, however, that Article 202.*c* of the UNCLOS provides for a duty of solidarity, which requires States Parties to "provide appropriate assistance", in particular to developing States, in the preparation of EIAs. The prevention of environmental harm caused by ultra-hazardous activities in areas beyond any national jurisdiction is an interest shared by all States; as a result, international assistance aimed at remedying the weaknesses of EIA regulations in sponsoring States should be developed and encouraged.[38] Furthermore, the Chamber characterizes the adoption of appropriate laws and regulations on EIA as a mandatory requirement both for developed and developing countries. In recent years, steps have been taken toward the strengthening of EIA regulations and capacity in developing countries and countries in transition[39]; nevertheless, EIA is not mandatory in many developing countries.[40] The ruling of the Chamber could accelerate the evolution of State practice and prompt sponsoring States to enact and implement effectively appropriate legislative and administrative measures on EIA.

Finally, if the Chamber admits that "the obligation to apply the precautionary approach may be stricter for the developed than for developing sponsoring States" it also strongly emphasizes that "[t]he reference to different capabilities in the Rio Declaration does not (…) apply to the obligation to follow 'best environmental practices'."[41] Again, the special consideration for the general obligation to protect and preserve the marine environment is in the forefront of the Chamber's reasoning:

> The spread of sponsoring States 'of convenience' would jeopardize uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind.[42]

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[35] Ibidem, p. 72.

[36] Ibidem.

[37] See e.g. Boisson de Chazournes 2002, p. 82.

[38] See e.g. Activities in the Area, supra n. 14, para 163.

[39] See Bastmeijer and Koivurova 2008, p. 380 ss.

[40] See e.g. Wood 2003.

[41] Activities in the Area, supra n. 14, para 161.

[42] Ibidem, para 159.

As far as the due diligence obligation is concerned, *all* sponsoring States (developed and developing countries) are under the duty to adopt appropriate laws, regulations, and administrative measures. However, the purpose is different from the direct obligation to conduct an EIA, i.e. to ensure the contractor's compliance with its EIA obligations. One wonders whether a developing State may exercise effective control over a foreign contractor, which is sometimes a multinational corporation using advanced technologies. Obviously, each situation is to be assessed on a case-by-case basis; nevertheless, the Chamber observes, the sponsoring State may choose among various means, such as "enforcement mechanisms for active supervision" and "penalties for non-compliance by such contractors."[43] What really matters is that the sponsoring State makes all necessary efforts to adopt and enforce measures of control, under its national legislation, which are proportional to the risks associated with the mining activities planned by the contractor.

Furthermore, in the Chamber's opinion, the reasonableness of the commitment required from the sponsoring State is strengthened by the characterization of the due diligence obligation as an obligation of means, rather than an obligation of result.[44] Important consequences flow from this assumption with regard to the State's responsibility. The sponsoring State is not responsible for environmental harm if it has fulfilled its due diligence obligations: "Where the sponsoring State has met its obligations, damage caused by the sponsored contractor does not give rise to the sponsoring State's liability."[45]

If no damage has occurred, but the sponsoring State has failed to meet its due diligence obligations, this omission can be characterized as an internationally wrongful act under the general regime of State responsibility.[46]

Any further discussion on the relationship between the contractor and the sponsoring State's liabilities would go beyond the scope of this short comment.[47] Suffice here to stress, on the one hand, that these considerations are useful to underscore the significant role played by EIA in determining whether the sponsoring State failed to behave in a manner consistent with the required degree of due diligence. On the other hand, both the RPN and the RPS contain provisions to ensure that the applicant is financially and technically capable of responding to any incident or activity which causes serious harm to the marine environment.[48] In addition, according to Annex 4 (Standard clauses for exploration contract) to the RPN and the RPS, "The Contractor shall maintain appropriate insurance policies with internationally recognized carriers, in accordance with generally accepted

[43] Ibidem, pp. 74–75.

[44] Ibidem, para 110.

[45] Ibidem, p. 73.

[46] Ibidem.

[47] For further considerations see Handl 2011, p. 211 ff. For a general survey on international instruments regulating compensation for damage resulting from activities of exploration and exploitation of mineral resources located in the seabed falling under national jurisdiction, see Scovazzi 2012.

[48] RPN, Regulation 12.5.c and 12.7.c and RPS, Regulation 13.4.c and 13.6.c.

international maritime practice" (Sect. 16.5). Nevertheless, neither the RPN nor the RPS provide for an explicit connection between the obligation of EIA and the requirement of a specific guarantee for adequate compensation for environmental damage caused by planned activities like, for instance, Article 20 of the Resolution on Responsibility and Liability under International Law for Environmental Damage, adopted by the *Institut de Droit International* in 1997.[49]

4 The Obligation of EIA and Duties of Co-operation

All *ad hoc* binding instruments on EIA require States Parties (Espoo Convention, Articles 3–6) or member States[50] to comply with duties of co-operation with other potentially affected parties or member States if planned activities risk causing an adverse impact on their environment.[51]

Information is the first step of the duties of co-operation. These include, as well, consultation and negotiations in good faith with the aim to arrive at an agreement, not to acquire the consent of the potentially affected State before the undertaking or the carrying on of a certain activity. In other words, the latter State is not vested with a right of veto.[52] Nevertheless, to reconcile competing interests, the views of the potentially affected State should be taken in due account by the State of origin when adopting its final decision (EIA Directive, Article 8; Espoo Convention, Article 6.1). In addition to the information given to other States, public participation is envisaged by certain instruments. As a result, States under the duty to conduct prior EIA must ensure that individuals of potentially affected member States (EIA directive, Article 7.3) or States Parties (Espoo Convention, Articles 2.6 and 3.8) are informed of the proposed activity and given the opportunity to submit their comments.

Also under the PEPAT duties of co-operation are associated with the obligation to conduct an EIA.[53] Nevertheless, unlike the EIA directive and the Espoo

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[49] "The submission of a proposed activity to EIA does not in itself exempt from responsibility for harm alone or civil liability if the assessed impact exceeds the limit judged acceptable. EIA may require that a specific guarantee be given for adequate compensation should the case arise". www.idi-iil.org/idiE/resolutionsE/1997_str_03_en.PDF. Accessed 3 February 2012.

[50] Directive 2011/92/EU of the European Parliament and of the Council (13 December 2011), on the Assessment of the Effects of Certain Public and Private Projects on the Environment (Codification), Article 7, hereinafter EIA directive.

[51] In principle, binding instruments are silent about the rights of potentially affected third States. However, both the UNEP Goals and Principles and the Draft articles on Prevention of Transboundary Harm from Hazardous Activities, adopted by the International Law Commission in 2001 (UN Doc. 56/10), broadly refer to any State which is likely to be significantly affected by a proposed activity (UNEP Goals and Principles, Principle 12; ILC Draft Articles, Article 2.e).

[52] See Lake Lanoux arbitration (France v. Spain), Award (16 November 1957). International Law Reports 24: 139.

[53] PEPAT, Annex I, Article 3.4.

Convention, the PEPAT does not characterize notification, information, and consultation as reciprocal duties, but instead as obligations *erga omnes partes*. This is a correct approach, consistent with the special responsibility undertaken by the ATCPs for the comprehensive protection of Antarctica, as a Special Conservation Area.[54] It could be contended that the common interests of the international community in Antarctica are protected by a narrow group of States. However, it is also true that the PEPAT is open to accession by all Members of the United Nations[55] and that transparency is sufficiently provided by States Parties to the PEPAT (information on the draft EIAs has been always made available on the Antarctic Secretariat's website).[56]

With regard to deep sea mining, the UNCLOS contains no specific regulation of the duties of notification, information, and consultation associated with EIA. An obligation of transparency is provided for under Article 206, which is to be read in conjunction with Article 205: States Parties are required to communicate the results of EIAs "to the competent international organizations, which should make them available to States". Starting from the assumption that "harm to the marine environment is a matter of global interest", some scholars infer from this broad obligation of transparency that "all States have equal access to information respecting potential harms."[57] More specific obligations are provided for under the RPN and the RPS, where information concerning "a preliminary assessment of the possible impact of the proposed exploration activities on the marine environment" and a description of "proposed measures for the prevention, reduction and control of pollution and other hazards, as well as possible impacts, to the marine environment" are to be submitted for approval of the plan of work for exploration (Regulation 18).

In its ruling, the Chamber deals with EIA obligation only incidentally as a necessary part of environmental cooperation duties. In particular, it recalls that in accordance with the customary duty to conduct an EIA:

> (…) it may be considered that environmental impact assessments should be included in the system of consultations and prior notifications set out in article 142 of the Convention with respect to 'resource deposits in the Area which lie across limits of national jurisdiction'.[58]

Article 142 of the UNCLOS deals with a specific issue: it aims to protect the interests of coastal States with regard to resources that straddle between the Area and their continental shelf. Environmental concerns are specifically taken into account. Consultations will be triggered with the States concerned "with a view to

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[54] Ibidem, Preamble, para 5.

[55] Ibidem, Article 22.2 and Antarctic Treaty, Article XIII.1.

[56] www.ats.aq. Accessed 15 February 2012. Comments of other Parties can be drawn from the official documents of the Antarctic Treaty consultative meetings and the Committee on Environmental Protection.

[57] Craik 2008, p. 145.

[58] Activities in the Area, supra n. 14, para 148.

avoiding infringement of such rights and interests" (Article 142.2) and coastal States are entitled

> (…) to take such measures consistent with the relevant provisions of Part XII as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline, or related interests from pollution or threat thereof or from other hazardous occurrences resulting from or caused by any activities in the Area (Article 142.3).

The significance of the *dictum* of the Chamber is not to be underestimated. First, the express inclusion of EIA under the duties of notification and consultation provided for under Article 142.2 of the UNCLOS fills a gap of the Convention and gives a more specific content to these obligations. Second, increased transparency in the planning of mining activities in the Area is ensured and potentially affected coastal States are enabled to play a more active and meaningful role during consultations: they can put forward their concerns, make comments on planned activities, and propose alternatives on the basis of the EIA prepared by the sponsoring State. Third, going beyond the limited scope of Article 142 of the UNCLOS, it should be recalled that in various parts of its opinion the Chamber emphasizes the obligation of sponsoring States "(…) to assist the Authority in its task of controlling activities in the Area"[59] and "to cooperate with the Authority in the establishment and implementation of impact assessments".[60] In particular, the Chamber mentions the obligation of contractors and sponsoring States to "cooperate with the Authority in the establishment of monitoring programs to evaluate the impact of deep seabed mining on the marine environment".[61]

On a more general level, the content of certain duties of co-operation associated with the obligation to conduct an EIA (e.g., consultation with the public concerned, outcome of the decision-making process) remains unclear. Very broad conclusions may be inferred from the Chamber's particular consideration for the general obligation to protect and preserve the marine environment coupled with the recognition of the special role played by the Authority in the protection of the environmental interests of humankind.[62] Against this background, a sponsoring State's omission to notify the Authority of the risks of adverse impact on the marine environment of certain planned activities, or its refusal to enter into consultation with the Authority if requested would be manifestly inconsistent with the general obligation to co-operate with the Authority in good faith. But beyond these broad speculations, it is unreasonable to expect the Chamber to fill gaps which require a specific regulation.

[59] Ibidem, para 124.

[60] Ibidem, para 142.

[61] Ibidem, para 143.

[62] Ibidem, para 180.

5 Conclusions

If one starts from the assumption that the international regulation of EIA is "still in its infancy",[63] the light shed by the Chamber's opinion on certain controversial aspects of the obligation of EIA in a common area is unprecedented.

In particular, the opinion has the merit of offering an authoritative assessment of the content of this obligation, and above all of considering the purpose of this obligation in its right perspective. The Chamber takes account of the different capabilities of individual States in controlling environmental risks, but the effective protection of the marine environment remains its primary concern. Basic clarifications on the scope of the obligation to conduct an EIA highlight a number of positive duties for sponsoring States. Indeed, the very obligation to adopt specific laws, regulations, and administrative measures and to establish enforcement mechanisms for active supervision means that any formalistic approach is excluded. The characterization of the EIA obligation as a customary rule that covers activities undertaken in areas beyond national jurisdiction extends its application to States that are not Parties to the UNCLOS.

On a more general level, the prominent role that the general obligation to protect and preserve the marine environment plays in the Chamber's ruling deserves special emphasis. On the one hand, this obligation is considered by the Chamber as an integral feature of the general principle of the "common heritage of mankind". Normally, the emphasis on the *rights* of all States to have access to the resources of the deep seabed overshadows the fact that the concern for environmental protection has always been inherent to this notion.[64] The protection of the marine environment is characterized by the Chamber as a common value, to be taken into account for the proper application of the principle of the common heritage of mankind. As a result, the traditional approach based on the general principle of prevention of transboundary pollution is replaced by the consideration of the protection of the marine environment as a community interest, which has in the principle of the common heritage of mankind a specific source of *rights* and *duties* of all States. On the other hand, the Chamber does not explicitly acknowledge the supremacy of the obligation to protect and preserve the marine environment with respect to competing mining rights of sponsoring States. Nevertheless, the practical result of its reasoning is that potential conflicts between mining rights and the general obligation to protect and preserve the marine environment are to be solved by giving priority, at the interpretative level, to the

[63] Woodliffe 2002, p. 145. Positive evolutions are expected by three pending cases before the International Court of Justice: Construction of a Road in Costa Rica along the San Juan River (Nicaragua *v.* Costa Rica); Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); and Aerial Herbicide Spraying (Ecuador *v.* Colombia).

[64] See e.g. Declaration of Principles Governing the Seabed and Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction, General Assembly Resolution 2749 (XXV) (17 December 1970), para 11. See also: Kiss 1982, Dupuy 1983, Mahmoudi 2000, Brunnée 2007, Warner 2009, Tanaka 2011.

values underlying this obligation. From this perspective, the Chamber's opinion could be considered as an authoritative precedent for the characterization of the obligation to protect and preserve the marine environment from large-scale interferences as a peremptory rule of international law.[65]

A number of questions on certain controversial issues remain unanswered; this enhances the role that the Authority is called upon to play in the aftermath of the Chamber's opinion. On the one hand, the Authority has primary responsibility in the adoption of appropriate rules, regulations. and procedures for the protection of the marine environment and the prevention of pollution from activities in the Area (UNCLOS, Articles 145 and 209). While the Mining Code is still under development,[66] the Authority should seriously take into account the urgent need for a comprehensive regime, based on a coordinated strategy "among sectoral bodies for improved integrated management and ecosystem approaches", as the Secretary-General of the United Nations[67] and academic writers[68] have invoked. On the other hand, a genuine adherence to the Chamber's ruling requires the Authority to effectively exercise its role of custodian of the common heritage of mankind, actively watching over the conduct of States Parties to the UNCLOS which are planning mining activities in the Area and their effective compliance with their international environmental obligations.

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[65] The peremptory character of certain norms of international environmental law is controversial; nevertheless, a positive development in this direction cannot be ruled out. See Orakhelashvili 2006, p. 65.

[66] See Draft Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, Doc. ISBA/18/C/WP.1 (24 October 2011). On the efforts of the Authority to ensure a comprehensive regulatory framework for the protection of the marine environment see Scovazzi 2009, p. 349 ff.

[67] Oceans and the Law of the Sea. Report of the Secretary-General, Doc. A/66/70/Add.2 (29 August 2011), para 177.

[68] See e.g., Knox 2003, p. 660 ff.

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Remarks on the Role of *Ex Curia* Scientific Experts in International Environmental Disputes

Francesca Romanin Jacur

"Dove vai? … son cipolle!"
Da una storiella toscana

1 Introduction

The relationship between natural science[1] and law dates back to times of old and raises theoretical epistemic reflections as well as technical and specific questions with which international judges and arbitrators are nowadays increasingly confronted.

Environmental cases may be brought to different international adjudicating bodies: permanent courts and *ad hoc* tribunals, investment arbitration, human rights and compensation commissions, compliance committees, to name the more relevant.

In environmental disputes, the disciplines of science and law are very close to one another and require the judge to manage their interaction and to achieve a correct understanding of their decisive elements. One of the tools which the judiciary has to understand and manage the scientific dimension of these disputes is by appointing experts.[2] Ideally, judges and experts are in an intertwined but autonomous relation in which questions of fact are dominions of the expert, and legal issues fall within competence of the judge. However, practice has shown situations where the boundaries between these two categories are blurring. In these

[1] In this paper 'science' is used *stricto sensu* to refer to the field of 'natural' disciplines, such as chemistry, biology, physics and not of 'social' sciences.

[2] It is not our intention here to examine other factors that contribute to the formation of the judge's opinion, such as parties' experts, amici curiae, on-site visits and, recently, satellite information.

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cases, it might be difficult for adjudicators to refrain from taking a position on scientific matters and vice versa.[3]

This, in turn, leads to a major concern as to whether "there is a risk that the resort to an expert opinion may take away the role of the judge as the arbiter of fact and therefore undermine the court's judicial function".[4] The fear of this risk is, in my view, the main reason behind the reluctance of some international judiciaries to appoint experts.[5]

It is indeed crucial to ensure that the dispute is decided by the judiciary body whose competence the parties have consented to, otherwise the legitimacy of the judgment could be undermined.

This essay focuses on the procedural aspects of the relationship between the judiciary and its—directly or indirectly appointed—experts. First, it makes a survey of the relevant rules in the governing instruments of the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), the World Trade Organization (WTO) Dispute Settlement, and the Permanent Court of Arbitration (PCA) Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (hereinafter PCA Environmental Rules).[6] Thereafter, experiences are extracted from the case law and some reflections are made on ways to strengthen the legitimacy and effectiveness of environmental dispute resolution in this regard.

2 The Scientific Dimension of Environmental Disputes

There are different ways in which science is involved in environment-related disputes.

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[3] Foster 2009, p. 404: "even the best efforts to prevent expert engagement in legal aspects of a case will not always be effective"; Riddell and Plant 2009, p. 329: "in some circumstances the expert cannot avoid making some assumptions about the value of certain facts in presenting their opinion." Judges Simma and Al-Khasawneh, in their dissenting opinion in the Pulp Mills case, recognise that experts may be "drawn into questions of legal interpretation". ICJ: Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment (20 April 2010), Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, para 16.

[4] Pulp Mills, supra n. 3, Declaration of Judge Yusuf, para 10. Judge Yusuf's reasoned answer is in the negative.

[5] Other relevant motives are the costs of appointing experts and the different perspectives between common and civil law judges on the need for experts. Payne 2011, p. 1194. Foster 2009, p. 405. Romano 2011, p. 1: "Generally, in common law legal systems experts tend to be brought to the courtroom by the parties (experts ex parte), while in civil law legal systems experts are more often than not court-appointed." Judge Simma in his intervention at the American Society of International Law, March 2012, confirmed that this "clash" took place in the Pulp Mills case.

[6] PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, www.pca-cpa.org. Accessed 25 April 2012.

Activities under the jurisdiction of a State may pose risks to the environment or natural resources of another State. The adjudicator should decide whether a State is polluting a river (as in the Pulp Mills case) or is unduly changing its course (as in the Indus Waters Kishenganga Arbitration)[7] or, indeed, is over-exploiting endangered or protected species (such as in the ICJ and ITLOS cases concerning whales and tuna stocks).[8]

Further, science allegedly provides the basis for the adoption of national regulatory measures to protect the environment. Another State—negatively impacted in its trade or investment interests—would typically claim that these measures constitute disguised restrictions on trade and/or violate the host State's international obligations relating to foreign investment protection.[9] In these cases, it will be decisive to determine the entity and the amount of polluting agents, to assess environmental standards, to evaluate the effective existence and acceptability of certain risks, to analyse and compare scientific data and so forth. Scientific considerations will be a crucial element in the decision determining if pollution has occurred, if a measure was legitimately adopted, if the exception clauses of trade agreements[10] apply or if the requirements set by the relevant investment treaty have been met.[11]

These kinds of disputes are recently 'blooming' on the dockets of international dispute settlement bodies. On the ICJ docket there are three pending environmental cases entailing scientific aspects: The aerial herbicide spraying (Ecuador v. Colombia), Whaling in the Antarctic (Australia v. Japan), and Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica). Furthermore, a case concerning the establishment of a marine-protected area has been brought to arbitration according to UNCLOS Annex VII (Mauritius v. The United Kingdom of Great Britain and Northern Ireland), and another pending arbitral case is the Indus Arbitration.

Judge Weeramantry authoritatively warned that: "International law must keep abreast of science, or will watch helplessly from the sidelines while unrestrained technology transgresses all social controls".[12] In line with this statement, science needs to be adequately considered by international courts and tribunals. Even

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[7] PCA Arbitral Tribunal: Indus Waters Kishenganga Arbitration (Pakistan v. India).

[8] ICJ: Whaling in the Antarctic (Australia v. Japan); ITLOS: Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures.

[9] See, for example, NAFTA/UNCITRAL: S.D. Myers, Inc. v. Canada, Award (13 November 2000); NAFTA: Chemtura Corporation v. Canada, Award (2 August 2010); NAFTA/UNCITRAL: Glamis Gold, Ltd. V. United States, Award, (8 June 2009).

[10] See Agreement Establishing the World Trade Organisation (Marrakesh, 15 April 1994; hereinafter WTO Agreement), entered into force on 1 January 1995: Annex 1A, General Agreement on Tariffs and Trade (GATT), Article XX (b), Agreement on Technical Barriers to Trade (TBT), Article 2.2; Agreement on Sanitary and Phytosanitary Measures (hereinafter SPS Agreement).

[11] See Lévesque 2009; Wälde and Kolo 2001, p. 846: "It is unlikely that courts or arbitrators will find a compensable expropriation in cases where governments issue environmental regulation for legitimate purposes, in accordance with the state of scientific knowledge (…)".

[12] Weeramantry 2005, p. 19.

though uncertainty is an intrinsic character of this discipline and scientific experts may have their own bias,[13] and therefore science is not always objective and infallible, it is nonetheless a source of legitimacy. Acknowledging from the outset the limits of science and its experts strengthens the need to rely on the process through which scientific advice is received and urges the respective roles of adjudicators and their experts to be defined.

In respect of the parties' consent, only the Bench is legitimately entitled to decide on the case. As experts should refrain from 'value' judgments, the judge, likewise, should not decide on the scientific validity of experts' arguments but make an "objective assessment of the matter".[14]

If adequately taken into account in the decision-making process that leads to the judgment, science will work as a legitimating factor otherwise, if not handled effectively, it may also become a trap and weaken the perceived authority of a judicial body.[15]

3 *Ex Curia* Experts in the Governing Instruments of International Dispute Settlement Bodies

Judicial bodies may resort to expert advice according to a general principle of procedure, even when this opportunity is not expressly recognised by their governing rules.[16] In some cases, ICSID tribunals have appointed experts in the absence of an express provision;[17] generally, however, provisions allowing the tribunal to be supported by expert advice are included in their governing instruments.[18] This practice should be welcomed as it avoids doubts in case parties dissent with the decision of the Bench to appoint experts.[19]

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[13] Pauwelyn 2006, p. 246.

[14] WTO Agreement, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter DSU), Article 11.

[15] Pauwelyn 2006, p. 252: "as long as the panel remains in control of the adjudicating process, to ask for advice remains a beneficial thing. It ensures that the most knowledgeable people have a word to say in the outcome of the dispute. Asking for advice only confirms the professionalism and legitimacy of the tribunal concerned and the decision it finally makes."

[16] White 1965, p. 80; Amerasinghe 2005, p. 306; Tams 2006, p. 1110. Contra see Sandifer 1939, p. 233.

[17] See, for example, ICSID: S.A.R.L. Benvenuti & Bonfant v. Congo, ARB 77/2, Award (26 June 1981); Liberian Eastern Timber Corporation (LETCO) v. Liberia, ARB 83/2, Award (31 March 1986); American Manufacturing & Trading, Inc (AMT) v. Zaire, ARB/93/1, Award (21 February 1997).

[18] See, for example, Article 14 of the Rules of Procedure for the 'IJzeren Rijn' Arbitration under the auspices of the PCA: Iron Rhine ("IJzeren Rijn") Railway (Belgium/Netherlands).

[19] This case might arise particularly concerning arbitral tribunals considering that the parties pay the costs of experts, and in cases entailing complex scientific aspects, these costs may become considerable. The costs for experts under the ICJ are considered as 'unforeseen expenditures' and are covered by the funds of the Court; under WTO they are borne by the WTO budget.

3.1 The International Court of Justice

Article 50 of the ICJ Statute reads as follows: "The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion." According to this provision, the ICJ has a wide margin of discretion, in terms of autonomy, because the parties cannot interfere with its decision, or the timing thereof, as the Court may decide to appoint experts at any phase of the procedure.

Further flexibility relates to the range of options given to the Court on the kind of expert body, individual or group, it is willing to appoint.

The procedural aspects of experts' appointment are regulated by Article 67 of the Rules of the Court prescribing that the Court, "if it considers it necessary", shall "after hearing the parties", issue an order to appoint the experts directly or indicate the modalities for their nomination. The order shall define the subject matter of the expert opinion and the procedure to be followed in carrying out their mandate. Experts appointed may be required to make a solemn declaration. Parties shall be informed of the experts' opinion and shall be given the opportunity to comment thereon. The expert advice is not binding on the Court.[20]

Another means for the Court to receive expert knowledge is by appointing assessors. They are appointed by secret ballot and by majority vote of the Bench and take part in the Court's deliberation, without the right to vote.[21] Assessors have never been appointed to date.

3.2 The International Tribunal for the Law of the Sea

Experts may be appointed by ITLOS according to the provisions of Article 289 of the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; hereinafter UNCLOS):[22]

> In any dispute involving scientific or technical matters, a court or tribunal (…) may, at the request of a party or *proprio motu*, select in consultation with the parties no fewer than two scientific or technical experts chosen preferably from the relevant list prepared in accordance with Annex VIII, article 2, to sit with the court or tribunal but without the right to vote.

Many similarities exist with the ICJ model, but some innovative features merit being highlighted.[23] Experts may be appointed not only *proprio motu* but also at

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[20] For a detailed analysis of Article 50, see Tams 2006; Riddell 2009.

[21] Statute of the ICJ, Article 30. See also Articles 9 and 21 of the Rules of the Court.

[22] Entered into force on 14 November 1994.

[23] Article 82 of ITLOS Rules of Procedure recalls Article 50 of the ICJ Statute. For a detailed comparison, see Treves 1998.

the request of a party, and the order should be made before the end of the written procedure, although if appropriate also subsequently.[24] Other distinguishing elements are that experts should number at least two and should be selected in consultation with the parties, 'preferably' from a list. As personal requirements they have to be independent and enjoy the highest reputation for fairness, competence and integrity.[25] Experts—like the assessors of the ICJ—sit on the bench without the right to vote, they take part in the deliberations and may also be consulted by the Drafting Committee.[26]

In order to allow experts to have a comprehensive knowledge of the case, copies of the written pleadings and other relevant documents shall be sent to them "in good time before the beginning of the deliberations".[27]

3.3 The World Trade Organization

The WTO dispute settlement is articulated in two levels of jurisdiction: the panels and the Appellate Body (AB), whose competence is limited to reviewing the law. As the AB cannot review facts, only panels may request an advisory report in writing from an expert review group "with respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute."[28]

Appointed experts have to meet specific requirements. First of all, they shall have "professional standing and experience in the field in question". Secondly, they shall not be citizens of the parties involved in the dispute.[29] Experts act in their personal capacities and are not to receive instructions from their governments or international organisations.

As for the procedural rules, the establishment of the expert group takes place under the panel's authority, which decides, *proprio motu* or on a party request, if the scientific advice is needed.[30] This broad discretion is limited with regard to disputes entailing scientific matters brought under the Sanitary and Phytosanitary (SPS) Agreement: in such cases the panel 'should' seek *ex curia* experts' advice and they are selected 'in consultation with the parties to the dispute'.[31]

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[24] Article 15.1 ITLOS Rules of Procedure.

[25] Ibidem, para 3.

[26] Resolution on the Internal Judicial Practice of the Tribunal, adopted on 31 October 1997, Article 10.

[27] Ibidem.

[28] DSU, Article 13.2.

[29] Ibidem, Appendix 4, Article 2.3. Only in very exceptional circumstances or when the expertise cannot be otherwise acquired can this requirement be waived.

[30] Ibidem, Article 1.

[31] SPS Agreement, Article 11.2.

The panel then establishes the terms of reference and the detailed working procedures for the expert group. In carrying out their mandate, experts have a broad discretion: they can rely on 'any source they deem appropriate' in seeking information[32] and if the sources are within a Member's jurisdiction, the State shall cooperate 'promptly and fully' and comply with the requests that the experts consider 'necessary and appropriate'.[33]

Once the information is gathered, the parties to the dispute shall have access thereto. Moreover, they have the opportunity to comment on a draft report, and their comments should be taken into account in the final version of the report that will be submitted to them and to the panel.[34]

As we shall see, practice has added to this written phase an oral phase of experts' consultation.[35]

3.4 The PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment

Arbitral tribunals generally adopt their own rules of procedure once they are established. In doing so, they can rely on already established models.

The PCA, willing to address the peculiar aspects of environmental dispute resolution, has adopted a set of rules, the PCA Environmental Rules, based on the United Nations Commission on International Trade Law (UNCITRAL) model but specifically tailored to facilitate the effective settlement of environmental disputes.[36]

With regard to the appointment of arbitrators, the Secretary-General of the PCA makes available to the parties a "list of persons considered to have expertise in the subject-matters of the dispute" from which they can choose the arbitrators.[37] Similarly, the Secretary-General also provides a list of scientific and technical experts.[38] None of these lists are binding for the parties who are free to choose other persons.

In order to help arbitrators achieve a correct and comprehensive knowledge of the scientific dimension of the case in question:

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[32] The WTO rules allow extensive discretion to the experts in relying on whatever source of information they choose, possibly even other experts. This broad discretion has been criticised as being too far-fetched. See Pauwelyn 2006, p. 244.

[33] DSU, Appendix 4, Article 4. Special rules are provided in the case of confidential information.

[34] DSU, Appendix 4, Article 6.

[35] See infra.

[36] Ratliff 2001.

[37] PCA Optional Rules, Article 6.

[38] Ibidem, Article 27.5.

> The arbitral tribunal may request the parties jointly or separately to provide a non-technical document summarizing and explaining the background to any scientific, technical or other specialized information which the arbitral tribunal considers to be necessary to understand fully the matters of the dispute.[39]

On the basis of the knowledge acquired from this document, the arbitrators will be in a more informed position to take the decision on whether to appoint their scientific experts.

The procedure is divided into a written and an oral phase. First of all, the arbitrators will seek the 'views' of the parties and then give them 'notice' with regard to the appointment of experts. One or more experts may be appointed and they are required to answer in writing to specific issues identified by the tribunal. A copy of the terms of reference according to which the experts are to carry out their mandate shall be made available to the parties. With regard to the relation between the parties and the experts in this evidentiary phase, the Rules require the parties to cooperate actively with the experts, expressly determining obligations to provide any relevant information and produce documents or goods for inspection.[40]

Once the report is drafted, a copy thereof shall be communicated to the parties who have the right to examine the documents on which the report is based and they can express their respective opinions in writing. Here ends the written and mandatory phase of the experts' task.

The oral phase only takes place if one of the parties requests a hearing to interrogate the expert and presents its own expert witnesses.[41]

This overview shows that rules governing experts' advice gathering under these judiciary bodies are fairly similar in their fundamental features. Common elements are the discretion of the Bench to decide on the need to resort to experts, the advisory nature of their advice and the basic procedural rules to govern their mandate. There are also developments from the earlier model of the ICJ to the more recently negotiated provisions found in the ITLOS, WTO and PCA rules.

In the next part, we will see that these provisions are rarely applied although some alternative developments with regard to experts' advice have taken place.

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[39] Ibidem, Article 24.4. As highlighted by Ratliff 2001, who participated in the drafting of the Rules, the aim of this provision is also to assist the arbitrators "in determining whether experts need to be consulted".

[40] A party can invoke the confidentiality of information or documents by explaining to the tribunal its reasons. The tribunal can then decide whether to accept in whole or in part the request of the party and has also the option of appointing a special 'confidentiality advisor', who should "report to it, on the basis of the confidential information, on specific issues designated by the arbitral tribunal without disclosing the confidential information either to the party from whom the confidential information does not originate or to the arbitral tribunal" (Ibidem, Article 15.4-6).

[41] Ibidem, Article 27.4.

4 Adjudicators' Attitude Toward Experts in Practice

Different approaches are adopted by courts and tribunals with regard to experts' advice.

While the ICJ has adopted a passive approach[42] that has recently been strongly criticised by the doctrine and even by its own judges,[43] other jurisdictions demonstrate greater willingness to consult experts, although in ways not expressly envisaged in their governing instruments.

In the case concerning Land Reclamation (Malaysia v. Singapore), ITLOS, upon Malaysia's request for provisional measures to preserve the marine environment, ordered the parties to establish an independent group of experts with the mandate to study the effects of the land reclamation issues at the heart of the dispute and to suggest appropriate measures to deal with any adverse effects thereof. This *sui generis* type of provisional measure, different from those requested by Malaysia,[44] shows a hybrid recourse to experts' advice: the Tribunal orders the establishment of an independent group of experts, it sets the time limit within which the study shall be made (in this case within 1 year), and requires the parties to take into account the experts' report. On the other side, the Tribunal, trusting the cooperative behaviour shown by the parties during the proceedings,[45] delegates them the authority to establish the group of experts. The dispute was later settled by an arbitral tribunal with an award on agreed terms in which the parties agreed that the recommendations of the group of experts "provide the basis for an amicable, full and final settlement of the said dispute".[46]

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[42] The first time experts appeared before the ICJ was in the Corfu Channel case (ICJ: Corfu Channel (United Kingdom v. Albania), Judgment (9 April 1949). The Court decided, first, to hear experts nominated by the parties and then to appoint a committee of experts. The second time experts were appointed was in the Gulf of Maine case, an 'extremely heavy and technical' maritime delimitation dispute. In this dispute, the report of the expert was annexed to the judgment (ICJ: Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States), Chamber, Judgment (12 October 1984). In the merits phase of Military and Paramilitary activities, although discussed during the deliberations, the Court did not resort to external assistance. See Rosenne 2003, p. 128 and p. 181. In its first environmental dispute, the Gabčíkovo-Nagymaros case, the Court was faced with a great deal of scientific materials; it stated that it gave careful attention to it but finally did not take a position on scientific questions (ICJ: Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment (25 September 1997). This position has been criticized, see Foster 2012, p. 407.

[43] Mackenzie et al. 2010a, p. 37: "(…) the Court's reluctance to engage in assertive cross-examination of agents and witnesses restricts its fact-finding capabilities, and detracts from the persuasive strength of some of its decisions." Kerbrat and Maljean-Dubois 2011; Payne 2011 and Pulp Mills, supra n. 3, Al-Khasawneh and Simma Dissenting Opinion.

[44] According to Article 89. 5 of its Rules, ITLOS may prescribe provisional measures different in whole or in part from the ones requested. See Treves 2003.

[45] ITLOS: Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Order (8 October 2003), paras 76 ff., in particular para 98.

[46] PCA/UNCLOS: Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v. Singapore), Award (1 September 2005).

This 'dispute-management' approach provides successful experience in handling an environmental dispute entailing scientific elements.[47]

A similar approach is found in the Iron Rhine Railway dispute where the parties, upon the suggestion of the arbitral tribunal, established a committee of independent experts to determine the costs of reactivating the railway route in question and adequate measures to achieve compliance with the required levels of environmental protection. In the award, the tribunal explicitly considered that "These issues are appropriately left to technical experts."[48]

In the Indus Arbitration, although it did not appoint experts, the tribunal also adopted an active approach by conducting two on-site visits and receiving parties' experts briefing during such visits.[49]

The active consultation of experts is made by WTO panels, even against the will of the parties.[50] Departing from the plain reading of the DSU provisions that refer to 'expert groups', panels have consistently preferred to appoint individual experts presumably to streamline and speed up the procedure, even despite the express request of a party for an expert group.[51] Another reason behind the appointment of individual experts may also be that the advice of a single scientist is easier for the panel to override compared to the one of a group of experts, which may acquire a *de facto* binding nature. This solution eventually defends the competence of the panel against the risk of experts' 'erosion'.[52]

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[47] Mackenzie et al. 2010a, p. 68: "The tribunal's provisional measures jurisdiction offers the possibility for innovative approaches, particularly as regards protection of the marine environment from serious harm. It is also noteworthy that in its provisional measures cases, the Tribunal appears to promote a dispute-management approach (…)." Stephens 2009, p. 242: "The *Straits of Johor* case indicates ITLOS's continued awareness of environmental considerations. (…) ITLOS showed greater willingness to become involved in the detailed modalities of environmental dispute resolution through a high degree of curial supervision of the settlement process. This appears to have been successful in inducing the parties to establish cooperative, science-based, arrangements to assess the extent of the environmental risks involved, and to devise jointly agreed solutions."

[48] PCA Arbitral Tribunal: Iron Rhine ("IJzeren Rijn") Railway (Belgium/Netherlands), Award (24 May 2005), para 235.

[49] PCA Arbitral Tribunal: Indus Waters Kishenganga Arbitration (Pakistan v. India), Press release (22 June 2011). Moreover, in the order on the interim measures, the Tribunal relied on direct evidence gathered during these visits to evaluate whether a certain construction of the dam would irreversibly affect the flow of the river Indus and therefore create a significant risk of prejudice to the final solution of the dispute. PCA Arbitral Tribunal: Indus Waters Kishenganga Arbitration (Pakistan v. India), Order (23 September 2011), para 142.

[50] See, for an example, WTO: United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R, Appellate Body Report (12 October 1998).

[51] WTO: Canada—Continued Suspension of Obligations in the EC—Hormones Dispute, WT/DS321/AB/R, Appellate Body Report (16 October 2008).

[52] Pauwelyn 2006, p. 251. For sharp criticism of this practice, see Eliason 2009, p. 381.

5 Ensuring the Procedural Legitimacy of Experts' Participation

The risk of the 'erosion' of the judiciary's jurisdiction can be minimised, when not avoided, through appropriate procedural rules ensuring that the scientific contribution of experts is achieved according to due process throughout the evidentiary phase.[53]

As regards the parties, they should be given the opportunity to comment on the appointment of experts, and to review the subject matter on which the experts are consulted. Moreover, parties should be able to comment on experts' conclusions. The lack of the Parties' involvement and effective participation in the examination of scientific evidence has been strongly criticised in the Pulp Mills case.[54] The other side of the coin is a noteworthy practice adopted in several cases by WTO panels. Here an additional oral phase has been introduced: all actors involved (the panel, the Parties, their respective experts and third parties) participate in an informal joint meeting to consult and discuss the scientific aspects of the dispute.[55]

As for the judiciary, due process and transparency should be ensured throughout the decision-making process. The adjudicator should properly identify the extent of the scientific matter at stake and then accordingly carefully pose the questions to the experts, making sure that those do not overlap with the central legal points of the dispute. The judiciary should then avoid any second-guessing of scientific matters.[56]

The judiciary should appropriately set the relevant standard of proof required in order to allow parties and *ex curia* experts to know the amount of evidence necessary to prove a certain fact. This aspect has been highlighted by Judge Greenwood in his Separate Opinion in the Pulp Mills case.[57] In the absence of clear terms in this regard, troubling doubts remain as to whether the evidence

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[53] For a discussion on the legitimacy of international dispute settlement bodies, see Treves 2008.

[54] Pulp Mills, supra n. 3, Dissenting Opinion of Judges Al-Khasawneh and Simma, para 17: "in a case concerning complex scientific evidence and where, even in the submissions of the Parties, a high degree of scientific uncertainty subsists, it would have been imperative that an expert consultation, in full public view and with the participation of the Parties, take place."

[55] Foster 2009, p. 394: "Direct consultation of independent experts may also help to round out an otherwise adversarial and binary representation of a case, potentially softening a dispute as well as bringing greater clarity and completeness to the overall picture. Most of all, such processes provide the best opportunity for a court or tribunal to come fully to grips with the science."

[56] See the management of scientific evidence in the NAFTA/UNCITRAL: Methanex Corporation v. United States, Final Award on Jurisdiction and Merits (3 August 2005), para 101.

[57] Pulp Mills, supra n. 3, Separate Opinion of Judge Greenwood, paras 25 and 26: "(…) the nature of environmental disputes is such that the application of the higher standard of proof would have the effect of making it all but impossible for a State to discharge the burden of proof. Accordingly, I believe that Argentina was required to establish the facts which it asserted only on the balance of probabilities (sometimes described as the balance of the evidence)."

provided was effectively insufficient or whether the court was unable to adequately assess it and accordingly come to an informed decision on the facts.

Transparency should also be reflected in the final judgment or award. The reasoning of the judiciary should be spelled out clearly, showing how certain conclusions were reached and the contribution of the experts.[58] Moreover, as in the practice of the ICJ in the Gulf of Maine case and of the arbitral tribunal in the Strait of Johor case, the report should be annexed to the final judgment or award.

A reflection should also be devoted to the trend of 'building' specific capacities within the bench. In other fields of international law, such as human rights and criminal law, a diversity of expertise among adjudicators is emerging as a criterion for their selection. This model has been endorsed in the PCA Optional Rules and could be used in other dispute settlement bodies.[59] However, it should also be considered that the special environmental chambers established by the ICJ and ITLOS did not have much success. A more far-reaching proposal that has been envisaged, with regard to WTO dispute settlement, is to have a scientist on the panel when complex scientific cases are to be decided.[60]

As for the experts, neutrality and expertise are essential. Peer review is, in my view, a reliable instrument to ensure the credibility of experts under these perspectives. In situations in which experts with comparable qualifications expose different or conflicting views on a certain scientific matter, how can the adjudicator take a position on the disputed arguments?[61] In such a case, only a third scientific expert could have the epistemic means to take a position with the appropriate awareness. In order to strengthen the 'expertise' of a group of experts, it has been interestingly suggested that an ex curia experts' group may be formed as follows: parties appoint, respectively, their experts and then these experts nominate additional experts, reflecting the practice in arbitral tribunals.[62]

The accountability of experts is also important and shortcomings in this regard have been lamented in the ICJ practice of experts '*phantômes*'.[63] Accountability

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[58] Foster 2012, p. 147: "particularly necessary where a tribunal decides to adopt the same views as an expert."

[59] Mackenzie et al. 2010b, p. 171: "Although it might be difficult to apply similar requirements to the ICJ, other courts or tribunals may consider the beneficial aspects of similar developments, especially considering that environmental matters are likely to be increasingly considered in international disputes."

[60] Pauwelyn 2006, p. 256. See also Ratliff 2001, p. 894 in favour of panels of environmental law experts and scientists: "nowhere more than in international environmental law are jurists and scientists with expert knowledge needed".

[61] Orellana 2006, p. 55: "Where accusations of 'junk science'—or even 'anti science'—confront one another in the arena of international dispute settlement, adjudicators are placed in the midst of an impossible conundrum."

[62] In Pauwelyn's view, this procedure would in the long-term lead to the appointment of the best experts, based on their own selection process (see Pauwelyn 2006, p. 247).

[63] Pulp Mills, supra n. 3, Dissenting Opinion of Judges Al-Khasawneh and Simma, para 14: "Under circumstances such as in the present case, adopting such a practice *(of expert fantômes)* would deprive the Court of the above-mentioned advantages of transparency, openness,

can be ensured by the publication of their final report and, as already mentioned, by having the report annexed to the judicial decision.

The transparency and disclosure of potential conflicts of interest among experts should also be considered. Once again the Pulp Mills case provides an example in which the experts, although in this case *ex parte*, were part of the International Finance Corporation (IFC), which happened to be also one of the institutions involved in financing the construction of the Pulp mill.[64]

In this regard, the WTO Rules of Conduct provide that experts, like panelists, "shall be independent and impartial, shall avoid direct or indirect conflicts of interest."[65] Moreover, in the Appellate Body's words:

> Scientific experts and the manner in which their opinions are solicited and evaluated can have a significant bearing on a panel's consideration of the evidence (…), especially in cases (…) involving highly complex scientific issues. Fairness and impartiality in the decision-making process are fundamental guarantees of due process. Those guarantees would not be respected where the decision-makers appoint and consult experts who are not independent or impartial. Such appointments and consultations compromise a panel's ability to act as an independent adjudicator.[66]

6 Concluding Thoughts

In light of recent judgments and awards by international courts and tribunals dealing with scientific matters and in view of future environmental-related disputes entailing the consideration of scientific issues, the judiciaries involved should adopt an active dispute-management approach and be open to seek experts' advice when necessary.

Considering the inherent difficulties in making a clear-cut separation between the fields of science and law, this proactive attitude should be combined with self restraint, both by experts and by the judiciary, each one respecting the epistemic autonomy of the other's discipline.

The combination of these restrained approaches coupled with strengthened due process guarantees and transparency may reduce the 'trespassing' risk on both sides and provide for more legitimate and effective decisions.

(Footnote 63 continued)
procedural fairness, and the ability of the Parties to comment upon or otherwise assist the Court in understanding the evidence before it."

[64] Obviously, some scepticism can arise with regard to their objectivity in assessing the scientific aspect of the dispute. See Kerbrat and Maljean-Dubois 2011, p. 69.

[65] Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DSB/RC/1 (96-5267) (11 December 1996), Section II.

[66] WTO: United States—Continued Suspension of Obligations in the EC—Hormones dispute, WT/DS320/AB/R, Appellate Body Report (16 October 2008), para 436.

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La contribution des mécanismes de contrôle et de suivi au développement du droit international: le cas du Projet du Canal de Bystroe dans le cadre de la Convention d'Espoo

Sabrina Urbinati

1 Introduction

En juin 2011, une mise en garde a été adressée à l'Ukraine par la 5ème Réunion des Parties à la Convention sur l'évaluation de l'impact sur l'environnement dans un contexte transfrontière[1] (Espoo, 25 février 1991; ci-après Convention d'Espoo). Cette mise en garde concerne le respect par l'Ukraine des obligations conventionnelles, dans la construction d'une voie de navigation en eau profonde, entre le Danube et la mer Noire dans le secteur ukrainien du delta de ce fleuve (ci-après Projet du Canal de Bystroe) et elle n'est que le dernier développement dans ce cas.

Le cas du Projet du Canal de Bystroe voit la Roumanie s'opposer à l'Ukraine dans le cadre du mécanisme de contrôle et de suivi établi sous la Convention d'Espoo. L'Ukraine veut réaliser le Projet du Canal de Bystroe et la Roumanie demande qu'une procédure d'évaluation d'impact transfrontière, concernant ce projet, soit établie ainsi qu'il est prévu par la Convention d'Espoo. La Roumanie a saisi le Comité d'application (ci-après Comité) une première fois en 2004 et puis en 2007. La Réunion des Parties, avant celle de 2011, avait déjà adopté une décision sur le cas d'espèce en 2008. Toujours dans le cadre de la Convention d'Espoo, la réalisation du Projet du Canal de Bystroe a fait l'objet d'une procédure d'enquête entre 2004 et 2006.

Le cas du Projet du Canal de Bystroe a fait l'objet aussi de rapports, recommandations et déclarations de la part du Parlement et de la Commission européens,

[1] Entrée en vigueur le 10 septembre 1997.

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de l'Assemblée Parlementaire du Conseil de l'Europe, d'autres mécanismes d'application de conventions et de programmes internationaux de protection de l'environnement, qui ont tous exprimé leur inquiétude au sujet de la réalisation du projet et des risques pour l'environnement. Parmi ces mécanismes et programmes rappelons celui de la Convention sur l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement (Aarhus, 25 juin 1998),[2] celui de la Convention relative aux zones humides d'importance internationale, particulièrement comme habitats des oiseaux d'eau (Ramsar, 2 février 1971),[3] la Commission internationale pour la protection du Danube, le Comité permanent de la Convention relative à la conservation de la vie sauvage et du milieu naturel de l'Europe (Berne, 19 septembre 1979),[4] le Comité intergouvernemental pour la protection du patrimoine mondial culturel et naturel et le programme de l'UNESCO "L'homme et la biosphère" (MAB).[5]

Des États, comme l'Allemagne et les États-Unis, et des Organisations Non-Gouvernementales nationales (*Environmental People Law*) et internationales (*Danube Environmental Forum* et *World Wildlife Fund*), actives dans le domaine de la protection de l'environnement, ont exprimé leur préoccupation au regard de la réalisation du Projet du Canal de Bystroe.[6]

Le but de la présente étude n'est pas de démontrer laquelle des parties intéressées a raison ou si le Projet du Canal de Bystroe est ou non dangereux pour l'environnement, mais elle se borne à montrer comment les mécanismes de contrôle et de suivi contribuent au développement du droit international en ce qui concerne la question du respect des obligations. Le cas du Projet du Canal de Bystroe n'est qu'une bonne excuse, pour ce faire. Nous étudierons comment le mécanisme de contrôle et de suivi de la Convention d'Espoo a analysé la situation de non-respect de l'Ukraine, en a compris les raisons et est en train de guider cet État vers la correcte application des dispositions conventionnelles. Pour ce faire et dans un souci de clarté, il convient d'illustrer, dans un premier temps et très brièvement, le cadre juridique établi par la Convention d'Espoo dans lequel le cas d'espèce se déroule (2), pour dans un second temps, décrire les faits, la succession des diverses procédures et les mesures que la Réunion des Parties a indiquées à l'Ukraine pour lui permettre d'appliquer correctement la Convention d'Espoo (3).

[2] Entrée en vigueur le 30 octobre 2001.

[3] Entrée en vigueur le 21 décembre 1975.

[4] Entrée en vigueur le 1er janvier 1982.

[5] Aurescu 2010, pp. 270–276.

[6] Aurescu 2010, p. 277.

2 Le cadre juridique établi par la Convention d'Espoo

La Convention d'Espoo prévoit que les États recourent, au début du processus décisionnel et en tout cas avant l'adoption de la décision définitive, à l'évaluation de l'impact de toute activité susceptible de produire un effet transfrontière préjudiciable important sur l'environnement. Cette Convention a été élaborée en considération du fait que les activités économiques ont presque toujours des incidences réciproques et des conséquences négatives sur l'environnement.[7] Dans ce cadre il est fondamental que les États adoptent des politiques à caractère anticipatif et coopèrent entre eux afin de prévenir, atténuer et surveiller tout impact préjudiciable important sur l'environnement, notamment dans un contexte transfrontière.[8]

2.1 Les principales obligations

La Convention d'Espoo prévoit une série d'obligations visant à l'établissement d'une procédure d'évaluation d'impact transfrontière sur l'environnement. Un État Partie (ci-après Partie d'origine) doit recourir à cette procédure lorsqu'il veut réaliser,[9] sur son territoire, une activité susceptible d'avoir un impact transfrontière préjudiciable sur l'environnement d'un autre État Partie (ci-après Partie touchée). Dans son Appendice I, la Convention donne une liste d'activités présumées avoir un tel impact et, dans son Appendice III, fixe des directives générales concernant les critères pour déterminer si une activité (autre que celles figurant sur ladite liste) est susceptible d'avoir un impact transfrontière préjudiciable sur l'environnement.[10]

La Partie d'origine doit notifier,[11] à toutes les Parties qui pourraient être touchées, son intention de réaliser une activité susceptible d'avoir un impact préjudiciable important sur leur environnement[12] et permettre au public des zones

[7] Préambule de le Convention d'Espoo.

[8] Préambule de la Convention d'Espoo et son Art. 2.1.

[9] « Les évaluations de l'impact sur l'environnement doivent être effectuées au moins au stade du projet de l'activité proposée », Art. 2.7 de la Convention d'Espoo.

[10] Art. 2.2 et 3 de la Convention d'Espoo. Pour établir si des activités, qui ne figurent pas à l'Appendice I, sont susceptibles d'avoir un impact transfrontière préjudiciable important, l'Art. 2.5 de la Convention prévoit que les Parties concernées engagent des discussions pendant lesquelles sont utilisés les critères établis dans l'Appendice III de la Convention d'Espoo.

[11] Art. 2.4 et Art. 3 de la Convention d'Espoo. La Partie d'origine doit procéder à la notification au plus tard au même moment de l'avis à son propre public.

[12] La Partie touchée doit, dans le délai y spécifié, en accuser réception et communiquer si elle a l'intention de participer ou non à la procédure d'évaluation d'impact environnemental transfrontière. (Art. 3.3 et 3.4 de la Convention d'Espoo). Lorsque la Partie touchée décide de participer elle doit fournir toute information, raisonnablement obtenue, au sujet de l'environnement relevant de sa juridiction et susceptible d'être touché, nécessaire pour constituer le dossier d'évaluation d'impact sur l'environnement. Art. 3.6 de la Convention d'Espoo.

intéressées, au-delà de sa propre juridiction, de participer à la procédure d'évaluation d'impact d'une façon équivalente à celle qu'elle offre à son propre public.[13] La Partie touchée, qui n'a pas été notifiée, peut prendre l'initiative de contacter la Partie d'origine afin d'engager des discussions visant à établir si un impact transfrontière préjudiciable important est probable.[14]

Après avoir procédé à la notification, la Partie d'origine doit établir un dossier d'évaluation de l'impact transfrontière[15] et le soumettre à la Partie touchée et à son public, afin de leur donner la possibilité de formuler des observations et des objections. Par la suite, le dossier d'évaluation d'impact, les observations et les objections du public et de la Partie touchée doivent être portés à l'attention de l'autorité de la Partie d'origine avant qu'une décision définitive soit adoptée.[16] En outre, les Parties concernées doivent engager des consultations au sujet de l'impact et des mesures qui pourraient être adoptées afin de le réduire ou de l'éliminer.[17]

Les résultats de l'évaluation de l'impact sur l'environnement, son dossier, toute observation et objection du public, ainsi que les conclusions des consultations, doivent être dûment pris en compte par la Partie d'origine au moment de l'adoption de sa décision définitive. Une fois adoptée, celle-ci, accompagnée des motifs et des considérations sur lesquels elle repose, doit être communiquée à la Partie intéressée.[18]

La Convention d'Espoo prévoit, en outre, la possibilité pour ses Parties de conclure des accords bilatéraux ou multilatéraux ou d'autres arrangements afin de s'acquitter des obligations conventionnelles.[19]

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[13] Art. 2.6 de la Convention d'Espoo. Voir également l'Art. 3.8 de la Convention d'Espoo, qui prévoit que « Les Parties concernées veillent à ce que le public de la Partie touchée, dans les zones susceptibles d'être touchées, soit informé de l'activité proposée et ait la possibilité de formuler des observations ou des objections à son sujet et à ce que ces observations ou objections soient transmises à l'autorité compétente de la Partie d'origine, soit directement, soit, s'il y a lieu, par l'intermédiaire de la Partie d'origine ».

[14] Art. 3.7 de la Convention d'Espoo. Lorsque par ces discussions les deux États établissent que l'activité intéressée produira un tel effet, les deux États devront appliquer la Convention d'Espoo. En revanche, lorsque les États n'arrivent pas à trouver un accord sur ce point ils pourront confier la décision à une commission d'enquête suivant l'Appendice IV de la Convention ou à une autre méthode, afin de régler cette question.

[15] Les renseignements minimaux que ce dossier doit contenir sont établis à l'Appendice II de la Convention d'Espoo.

[16] Art. 4 de la Convention d'Espoo.

[17] Les consultations devront avoir une durée raisonnable. Elles pourront porter sur: des solutions de remplacement, y compris l'"option zero"; des mesures visant à atténuer tout impact transfrontière préjudiciable important; la procédure qui pourrait être suivie pour surveiller les effets de ces mesures; d'autres formes d'assistance mutuelle; toute autre question pertinente. Art. 5 de la Convention d'Espoo.

[18] Art. 6 de la Convention d'Espoo.

[19] Art. 8 de la Convention d'Espoo.

Finalement, afin d'identifier exactement le rôle de la procédure d'évaluation d'impact prévue par la Convention d'Espoo, il convient de rappeler les mots utilisées par le Comité:

> (…) la mise en route des procédures prévues par la Convention n'empêche pas la Partie d'origine d'entreprendre les activités proposées après avoir mis en œuvre les procédures transfrontières, à condition que leurs résultats soient dûment pris en compte dans la décision définitive.[20]

2.2 Le mécanisme de contrôle et de suivi

Le mécanisme de contrôle et de suivi de la Convention d'Espoo a été adopté en 2004 par la 3ème Réunion des Parties.[21] Le mécanisme en question a pour objectif de constater l'existence de situations, potentielles ou avérées, de non-respect et d'aider les États Parties à mettre correctement en œuvre les dispositions conventionnelles.

L'organe principal du mécanisme en question est le Comité, composé par des représentants de huit Parties.[22] Celui-ci cherche à comprendre les raisons qui ont porté ou pourraient porter un État Partie à une situation de non-respect et formule des conclusions et recommandations pour la Réunion des Parties, qui décide les mesures appropriées pour ramener l'État Partie défaillant à accomplir régulièrement et correctement ses obligations.

La procédure du mécanisme en question peut être déclenchée[23] de trois façons différentes: par un État Partie qui s'inquiète de la façon dont une autre Partie accomplit ses obligations; par une Partie à l'égard d'elle-même, lorsqu'elle se rend compte que nonobstant tous ses efforts elle ne peut ou elle ne pourra pas s'acquitter de ses engagements; par le Comité à l'égard d'un État Partie qu'il considère en état de non-respect par rapport à l'accomplissement de ses obligations.

Afin de comprendre les raisons de la situation potentielle ou avérée de non-respect et d'aider la Partie intéressée à s'acquitter correctement de ses obligations, le Comité peut demander des informations, collecter des renseignements sur le territoire de l'État Partie concerné, examiner toute donnée transmise par le Secrétariat au sujet de la situation en question et solliciter les services d'experts

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[20] Conclusions et recommandations formulées comme suite à une communication de la Roumanie concernant l'Ukraine (EIA/IC/S/1), NU Doc. ECE/MP.EIA/2008/6 (27 février 2008), deuxième partie du par. 50.

[21] Décision III/2 – Examen du respect des obligations, dans Rapport de la troisième Réunion, NU Doc. ECE/MP.EIA/6 (13 septembre 2004). Voir aussi Fasoli 2009, pp. 181–203; Jendrośka 2009, pp. 319–335; Urbinati 2009.

[22] Décision III/2, supra n. 21, par. 1.

[23] *Ibidem*, par. 5 et 6.

scientifiques ou d'autres avis techniques, ou consulter d'autres sources pertinentes, selon qu'il conviendra.[24]

Une fois étudiée la situation de non-respect, le Comité fait rapport à la Réunion des Parties qui, ainsi que déjà annoncé, est l'organe député à adopter les mesures de caractère général nécessaires afin d'obtenir le respect des dispositions de la Convention et les mesures pour aider la Partie défaillante.[25]

Comme tous les mécanismes de contrôle et de suivi, celui en examen a un caractère non conflictuel et est orienté vers l'assistance des États Parties en difficulté. À ce propos, il convient de souligner qu'il est sans préjudice des dispositions conventionnelles relatives au règlement des différends et qu'une question, examinée dans le cadre de la procédure d'enquête prévue par la Convention d'Espoo, ne peut pas faire l'objet d'une communication devant le Comité.[26]

3 Le cas du Projet du Canal de Bystroe

Les faits du cas d'espèce débutent en 1998 lorsque l'Ukraine a commencé à développer le Projet du Canal de Bystroe,[27] à savoir la construction d'une voie de navigation en eau profonde entre le Danube et la mer Noire dans le secteur ukrainien du delta de ce fleuve. Ce canal devait être réalisé en deux phases distinctes faisant l'objet de deux procédures d'autorisation différentes. En 2002, l'Ukraine a annoncé le début de l'étude de faisabilité de la première phase et en mai 2004, a initié les travaux pour sa réalisation. Les derniers jours de 2007, l'Ukraine a autorisé l'initiation des travaux relatifs à la deuxième phase.

Depuis 2002 la Roumanie, qui s'attendait à être impliquée dans une procédure d'évaluation d'impact transfrontière établie sur la base de la Convention d'Espoo, a à plusieurs reprises tenté d'établir un contact avec l'Ukraine qui procédait dans la réalisation de son projet sans se préoccuper d'initier la procédure en question. À ce propos, il convient de rappeler que, au début de la procédure du mécanisme de contrôle et de suivi, l'Ukraine a déclaré qu'elle n'avait pas considéré la construction du Canal de Bystroe comme une activité pouvant impliquer l'application de la Convention d'Espoo.

En 2004, lors du début des travaux concernant la première phase du projet, la Roumanie a d'abord saisi le Comité et puis, en application de l'Art. 3.7 de la Convention d'Espoo, a demandé la constitution d'une commission d'enquête. Sur la base de l'avis rendu par cette dernière en 2006, la Roumanie s'attendait, encore une fois, que l'Ukraine donne application aux dispositions de la Convention d'Espoo mais, devant son inertie, elle a saisi le Comité à nouveau en 2007. En

[24] *Ibidem,* par. 7.

[25] *Ibidem*, par. 12 et 13.

[26] Décision III/2, supra n. 21, par. 15.

[27] Aurescu 2010, pp. 266–269.

effet, la première communication n'avait pas eu de suite, étant donné que la même question avait été soumise à la commission d'enquête.[28]

Après l'examen du Comité qui a établi que l'Ukraine se trouvait en situation de non-respect, en 2008, la 4ème Réunion des Parties a adopté une première décision en demandant à l'Ukraine, d'une part, de revenir sur les travaux déjà accomplis et les décisions déjà adoptées et, de l'autre, d'établir les mesures nécessaires pour se conformer à la Convention d'Espoo. La Réunion des Parties a demandé au Comité de suivre l'application de ces mesures et de lui faire rapport à sa session suivante.

En 2011, après avoir étudié ce rapport, la 5ème Réunion des Parties a adressé à l'Ukraine la mise en garde, à laquelle nous avons fait référence dans l'introduction de la présente étude. Elle s'est aussi félicité avec l'Ukraine des progrès accomplis et, en même temps, a exprimé son inquiétude vis-à-vis de certaines activités qu'elle avait réalisées et qui, à son avis, menaçaient l'application de la Convention. Finalement la Réunion des Parties a demandé au Comité de continuer à suivre le cas.

3.1 L'avis de la commission d'enquête

Ainsi que déjà annoncé, en 2004, la Roumanie a demandé la constitution d'une commission d'enquête afin d'établir si la construction du Canal de Bystroe pouvait avoir un impact transfrontière préjudiciable important et, donc, était une activité qui pouvait être réalisée seulement après le déroulement de la procédure d'évaluation d'impact environnemental prévue par la Convention d'Espoo.

Dans son avis définitif, rendu le 10 juillet 2006, la Commission d'enquête a conclu à l'unanimité :

> (…) that a significant adverse transboundary impact is likely and thus the provisions of the UNECE Convention on Environmental Impact Assessment in a Transboundary Context (…) apply. This means in concrete terms that Ukraine is expected to send a notification about the Canal to Romania and that the procedure in the Convention should start including communication between the Parties and public participation in the two Parties concerned should be held.[29]

Néanmoins, l'Ukraine n'a pas interrompu les travaux de la première phase et a poursuivi les procédures et les études liées à la réalisation de la deuxième phase du projet, jusqu'à adopter la décision de commencer les travaux de la deuxième phase.

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[28] Suite à la constitution de la commission d'enquête, le Comité a décidé, sur la base du par. 15 de la Décision III/2, qu'il ne pouvait plus donner suite à la première communication de l'Ukraine. Rapport sur les travaux de la sixième réunion du Comité de l'application, NU Doc. MP.EIA/WG.1/2005/3 (1er février 2005), par. 14.

[29] Espoo Inquiry Commission, Report on the Likely Significant Adverse Transboundary Impacts of the Danube Black Sea Navigation Route at the Border of Romania and the Ukraine (July, 2006), p. 7.

3.2 *L'examen du Comité et l'adoption de la première décision de la Réunion des Parties*

Le 23 janvier 2007 la Roumanie a saisi pour la deuxième fois le Comité, qui a vérifié si l'Ukraine était en situation de non-respect par rapport à la construction du Canal de Bystroe. Il a présenté ses conclusions et ses recommandations[30] en 2008, à la 4ème Réunion des Parties. Certaines de ces conclusions concernaient le droit ukrainien sur l'évaluation d'impact environnemental en général et d'autres visaient directement les deux phases du Projet du Canal de Bystroe.

Dans ses conclusions concernant le droit ukrainien, le Comité a signalé que « la disposition constitutionnelle visant à appliquer directement les accords internationaux est insuffisante aux fins de la bonne mise en œuvre de la Convention en l'absence de dispositions plus détaillées dans la législation nationale ».[31] En outre, dans le même document, le Comité a affirmé qu'il estimait que :

> le cadre réglementaire national ukrainien régissant les autorisations de projets et les EIE [Évaluation d'Impact Environnemental] est extrêmement complexe. En particulier, il est difficile d'identifier, parmi les diverses procédures qui se succèdent, celle dont le résultat doit être considéré comme la "décision d'autoriser une activité proposée" (…). Qui plus est, il semble qu'aucun cadre juridique clair ne régisse les procédures d'EIE transfrontières.[32]

De plus, le Comité a établi que, bien que l'Ukraine avait un système national d'évaluation d'impact environnemental, elle n'avait pas pris les mesures juridiques, administratives ou autres, nécessaires pour mettre en œuvre les dispositions de la Convention d'Espoo et notamment l'Art. 2.2, qui prévoit l'établissement d'une procédure d'évaluation d'impact sur l'environnement permettant la participation du public et la constitution du dossier d'évaluation de l'impact sur l'environnement.[33] Le Comité a ainsi évalué que cette situation était la raison du fait que l'Ukraine n'avait pas initié la procédure d'évaluation d'impact transfrontière avec la Roumanie, notamment par rapport à sa première phase, qui à l'époque avait déjà débuté.[34]

Finalement, le Comité a considéré que, dans un tel cadre, il était primordial que les fonctionnaires ukrainiens comprennent suffisamment bien les obligations de la Convention d'Espoo.[35]

Pour ce qui est des conclusions du Comité au sujet de la première phase des travaux, il a affirmé que si, d'une part, l'autorisation et l'initiation de sa réalisation

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[30] Conclusions et recommandations, supra n. 20.

[31] *Ibidem*, par. 59.

[32] *Ibidem*, par. 36.

[33] Rapport de la quatrième réunion des Parties à la Convention sur l'évaluation de l'impact sur l'environnement dans un contexte transfrontière, NU Doc. ECE/MP.EIA/10 (28 juillet 2008), Annexe I (ci-après Rapport quatrième réunion des Parties), par. 65.

[34] *Ibidem*, Annexe I, par. 66.

[35] *Ibidem*, Annexe I, par. 67.

ne pouvaient pas être considérées comme un non-respect manifeste de la Convention, car l'Ukraine avait jugé que le projet ne risquait pas d'avoir un impact transfrontière préjudiciable important, d'autre part, ce Pays « aurait dû suspendre le projet, y compris la maintenance et l'exploitation, immédiatement après que la Roumanie [ait] demandé la création d'une commission d'enquête, en août 2004 ».[36] En outre, le Comité a affirmé qu'après l'avis de la commission l'Ukraine aurait dû également suspendre les travaux de maintenance et d'exploitation dans l'attente de l'achèvement des procédures prévues par la Convention. Finalement, le Comité a estimé que le fait que l'Ukraine n'avait pas notifié la Roumanie immédiatement après l'avis de la commission d'enquête, devait être considéré comme un non-respect de la Convention.[37]

Pour ce qui est de la deuxième phase des travaux de réalisation du projet, le Comité a estimé que l'Ukraine était en situation de non-respect par rapport à l'Art. 3 de la Convention d'Espoo, pour avoir informé la Roumanie trop tard et de façon insuffisante après l'avis de la commission d'enquête. En outre, étant donné que l'Ukraine avait déjà pris la décision d'initier les travaux de la deuxième phase du projet, le Comité a considéré qu'elle était en situation de non-respect aussi par rapport aux autres dispositions de la Convention d'Espoo, comme par exemple l'Art. 4, qui prévoit l'établissement du dossier d'évaluation d'impact, la possibilité pour la Partie touchée de présenter des observations et faire des commentaires et la tenue de consultations entre la Partie d'origine et la Partie touchée.[38]

Sur la base de ces conclusions, le Comité a formulé des recommandations à la 4ème Réunion des Parties, qui, après les avoir accueillies presque intégralement, a adopté la décision IV/2[39] contenant des mesures qui intéressaient directement les activités de réalisation du Projet du Canal de Bystroe et d'autres visant le droit interne ukrainien.

Dans le premier type de mesures la Réunion des Parties a adressé une déclaration de non-respect à l'Ukraine par rapport aux Art. 2, 3 et 4 de la Convention d'Espoo et, notamment, à l'obligation générale d'instaurer une procédure d'évaluation d'impact sur l'environnement dans un contexte transfrontière, de notifier l'intention d'initier ladite procédure, de donner la possibilité au public roumain d'y participer, ainsi que de constituer et transmettre à la Roumanie le dossier d'évaluation d'impact sur l'environnement au sujet de la réalisation des deux phases du Projet du Canal de Bystroe. En même temps, la Réunion des Parties a exhorté l'Ukraine à annuler la décision définitive concernant l'exécution de la deuxième phase du Projet du Canal de Bystroe et à ne pas l'exécuter sans avoir respecté pleinement les dispositions de la Convention.[40] Finalement, la Réunion des Parties

[36] *Ibidem*, Annexe I, par. 69.

[37] *Ibidem*, Annexe I, par. 69.

[38] *Ibidem*, Annexe I, par. 71.

[39] Décision IV/2 – Examen du respect des obligations, dans Rapport quatrième Réunion des Parties, supra n. 33.

[40] Décision IV/2, supra n. 39, par. 8 et 9.

a décidé d'adresser une mise en garde qui devait devenir effective le 31 octobre 2008 « à moins que le Gouvernement ukrainien n'arrête les travaux, n'abroge la décision finale et ne prenne les mesures nécessaires pour respecter les dispositions applicables de la Convention ».[41]

Pour ce qui est des mesures concernant le droit ukrainien, la Réunion des Parties, en accueillant l'évaluation du Comité selon laquelle la législation et la réglementation internes de l'Ukraine n'appliquant pas la Convention d'Espoo, a décidé de confier la réalisation d'une étude concernant ses mesures juridiques, administratives et autres à un expert indépendant, afin d'aider ce Pays à comprendre où son droit interne actuel était défaillant. Sur la base de cette étude l'Ukraine devait rédiger une stratégie, assortie d'un calendrier d'exécution, d'activités de formation et autres, pour créer un système conforme aux obligations de la Convention d'Espoo. Finalement, la Réunion des Parties a invité l'Ukraine à engager des négociations avec les États Parties voisins afin d'élaborer des accords bilatéraux ou autres arrangements visant à appuyer la mise en œuvre de la Convention.[42]

3.3 Le suivi de la première décision de la Réunion des Parties et sa deuxième décision

Pendant le déroulement de la procédure de suivi, le Comité a surveillé les activités réalisées par l'Ukraine afin de mettre en œuvre les mesures adoptées par la Réunion des Parties dans sa décision VI/2.

Pour ce qui est des mesures concernant directement la réalisation du Projet du Canal de Bystroe, le Comité a constaté que l'Ukraine ne s'était pas conformée à toutes les conditions imposées par la Réunion des Parties, mais qu'elle avait néanmoins procédé à l'annulation de la décision de commencer la deuxième phase et qu'elle avait arrêté les travaux de celle-ci. Sur la base de ces informations, malheureusement, le Comité a décidé de ne pas rendre effective la mise en garde.[43]

Dans ses réunions suivantes, le Comité a néanmoins constaté que la situation de non-respect de l'Ukraine se poursuivait.[44] En effet, sur la base des nouvelles

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[41] *Ibidem*, par. 10.

[42] *Ibidem*, par. 11, 12 et 14.

[43] Rapport du Comité d'application sur sa quinzième session, NU Doc. ECE/MP.EIA/IC/2008/2 (4 décembre 2008), par. 22-34, Rapport du Comité d'application sur sa dix-septième session, NU Doc. ECE/MP.EIA/IC/2009/4 (22 octobre 2009) (ci-après Rapport dix-septième Comité), par. 15 et 16 et Rapport sur les activités du Comité d'application, NU Doc. ECE/MP.EIA/2011/4 (23 mars 2011) (ci-après Rapport Comité), par. 16.

[44] Rapport dix-septième Comité, supra n. 43, par. 13: « Comme suite aux délibérations de sa seizième session (ECE/MP.EIA/IC/2009/2, par. 9 à 18), et compte tenu de ce qui précède, le Comité a décidé ce qui suit: a) La poursuite des travaux au titre de la phase I du projet est contraire aux obligations qu'il a imposées en décidant que la mise en garde ne devrait pas être

informations, il recevait la confirmation que les travaux de la première phase avaient été poursuivis et que l'Ukraine avait initié ceux de la deuxième phase. Ainsi le Comité a décidé de communiquer cette situation à la Réunion suivante des Parties en recommandant qu'elle donne effet à la mise en garde adressée à l'Ukraine lors de la réunion précédente ou qu'elle en formule une nouvelle.[45]

Pour ce qui est des mesures concernant le droit ukrainien, il convient de rappeler les résultats de l'étude[46] de l'expert indépendant, chargé par la Réunion des Parties d'examiner le système ukrainien d'évaluation d'impact environnemental et formuler des recommandations pour que l'Ukraine élabore une stratégie pour rendre son droit interne conforme à la Convention d'Espoo. L'expert indépendant a, premièrement, relevé l'insuffisance du mécanisme d'adaptation du droit ukrainien par rapport à la Convention et la nécessité que l'Ukraine adopte des dispositions plus détaillées dans sa législation nationale, précisant « (…) les rôles et les responsabilités des différents acteurs, les procédures à appliquer et tous les autres points qui, pour que la législation soit efficace, devraient normalement être clairement définis ».[47] Deuxièmement, l'expert indépendant a confronté le système d'évaluation d'impact environnemental ukrainien avec des critères[48] établis sur la base des dispositions de la Convention d'Espoo. Cette confrontation a permis à l'expert indépendant d'affirmer que le système d'évaluation d'impact environnemental ukrainien ne répondait qu'au premier de ces critères, à savoir l'existence d'une procédure nationale d'évaluation d'impact environnemental antérieure à la

(Footnote 44 continued)
effective (ECE/MP.EIA/IC/2008/2, par. 31), et constitue une violation continue de la Convention, comme indiqué aux paragraphes 69 b et 73 de ses conclusions et recommandations (ECE/MP.EIA/10, décision IV/2, annexe I); b) L'exécution de travaux au titre de la phase II du projet constitue une infraction supplémentaire aux obligations qui incombent à l'Ukraine au titre de la Convention, parce que la procédure d'évaluation de l'impact transfrontière sur l'environnement pour la mise au point du projet en grandeur réelle (phases I et II) est en cours et que, selon la déclaration du Gouvernement ukrainien, aucune décision définitive n'a encore été prise au sujet de la phase II ».

[45] Rapport dix-septième Comité, supra n. 43, par. 16 et Rapport Comité, supra n. 43, par. 16.

[46] Examen indépendant des mesures juridiques, administratives et autres prises par l'Ukraine pour appliquer les dispositions de la Convention, NU Doc. ECE/MP.EIA/IC/2009/5 (2 juillet 2009).

[47] *Ibidem*, par. 36 et 37.

[48] *Ibidem*, encadré 1, p. 3 : « A. Existence d'une procédure nationale d'EIE antérieure à la prise de décisions, centrée sur les activités importantes pour l'environnement, comprenant une participation du public et la constitution d'un dossier spécifique et dont les conclusions sont prises en compte lors de la mise en œuvre de la décision (art. 2.2, 2.3, 4.1 et 6.1); B. Existence, calendrier et contenu d'un mécanisme de notification des Parties touchées (art. 2.4, 3.1 et 3.2); C. Possibilité, pour les Parties touchées, de participer à une procédure permettant de déterminer le contenu du dossier de l'EIE (procédure de délimitation du champ de l'évaluation) (art. 2.11); D. Fourniture d'information aux Parties touchées, en particulier fourniture en temps voulu du dossier de l'EIE et de renseignements relatifs à la décision définitive (art. 3.5, 4.2, 6.2 et 6.3); E. Possibilités données au public, y compris le public des Parties touchées, de participer à l'EIE (art. 2.6 et 3.8); F. Mécanisme de consultation concernant le dossier de l'EIE et prise en compte des résultats de ces consultations lors de la décision définitive (art. 5 et 6.1) ».

prise de décision, centrée sur les activités importantes pour l'environnement, comprenant une participation du public et la constitution d'un dossier spécifique et dont les conclusions sont prises en compte lors de la mise en œuvre de la décision. Ainsi, il a recommandé à l'Ukraine, premièrement, d'établir quelle est « l'autorité chargée de superviser la mise en œuvre de la Convention et comment se dotera-t-elle des pouvoirs et des ressources administratifs dont elle aura besoin pour mener à bien sa tâche »[49]et, deuxièmement, de déterminer s'il y aura

> une démarche ou une procédure séparée pour les activités qui ont un impact transfrontière sur l'environnement, ou les réformes engagées porteront-elles au contraire sur l'ensemble du système de façon à le rendre davantage compatible avec les dispositions de la Convention.[50]

En outre, l'expert indépendant a proposé,[51] pour que l'Ukraine puisse établir un système d'évaluation d'impact sur l'environnement respectueux de la Convention, premièrement, qu'elle fasse en sorte que le Conseil des ministres ukrainien adopte une résolution sur les procédures d'évaluation d'impact environnemental, afin de conférer à cet instrument un statut relativement plus élevé que celui d'un règlement technique, « (…) tout en évitant les débats politiques de haut niveau qui accompagnent d'ordinaire le travail législatif »[52] et, deuxièmement, qu'elle accomplisse un effort de création de capacités.[53]

Par la suite l'Ukraine a présenté au Comité sa stratégie,[54] assortie d'un calendrier et de notes explicatives. Cette stratégie avait été rédigée non seulement grâce à l'étude de l'expert indépendant, qui vient d'être illustrée, mais aussi sur la base d'observations contenues dans un projet de la Commission européenne dont le but était d'assister l'Ukraine dans l'application des Conventions d'Espoo et d'Aarhus.[55] Ce projet avait permis de mettre en avant deux problèmes importants du système d'évaluation d'impact environnemental: premièrement, la procédure, dans la plupart des cas, était menée par l'initiateur de l'activité et non par les autorités publiques, qui n'intervenaient qu'après la participation du public et donc très tardivement; deuxièmement, l'examen environnemental conduit par les autorités publiques se limitait au contrôle de la licéité de l'activité proposée. En outre le projet de la Commission européenne avait permis d'établir réellement

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[49] *Ibidem*, p. 22.

[50] Examen indépendant, supra n. 46.

[51] *Ibidem*, pp. 22-25.

[52] *Ibidem*, p. 25.

[53] *Ibidem*, p. 26 où il est précisé que cet effort consiste à: « a) Développer une pratique nationale et créer des réseaux d'institutions spécialisés dans les EIE (établissement de liens entre les divers secteurs), y compris avec les réseaux internationaux; b) Promouvoir l'analyse et la réflexion critique sur le système interne (surveillance, évaluation des EIE, etc.); c) Favoriser les processus internationaux de transformation des systèmes d'EIE et promouvoir des solutions nationales inspirées de l'expérience internationale ».

[54] Adoptée par le Conseil ukrainien des ministres le 6 janvier 2010.

[55] Support to Ukraine to Implement the Espoo and Aarhus Conventions (August 2010).

l'acte de la procédure ukrainienne qui pouvait être assimilé à la décision définitive, prévue par l'Art. 6 de la Convention d'Espoo.[56]

Au moment de sa présentation au Comité, la stratégie était assortie d'un calendrier ambitieux, auquel rapidement l'Ukraine a commencé à surseoir à cause d'une réforme administrative générale.[57] En outre, l'Ukraine a par la suite procédé à l'adoption de lois et mesures qui allaient à l'encontre de la réalisation de sa stratégie et qui semblaient diminuer la capacité du cadre législatif ukrainien à garantir le respect de la Convention d'Espoo.[58] Le Comité n'a pas manqué de manifester son inquiétude et de signaler à l'Ukraine la nécessité d'adopter aussi d'autres mesures contribuant à appliquer correctement la Convention dans son droit interne, à savoir l'établissement, d'une part, d'un cadre juridique pour la participation en général du public, et non seulement lorsqu'une activité produit des effets transfrontières, et, d'autre part, d'un mécanisme de vérification préliminaire pour déterminer si les travaux pour la réalisation d'un projet auront des effets transfrontières.[59]

En ce qui concerne la négociation d'accords bilatéraux et d'autres arrangements avec les États voisins pour l'application de la Convention, l'Ukraine, après avoir initialement eu un comportement ambigüe, a pu présenter au Comité des résultats satisfaisants, juste avant la 5ème Réunion des Parties, qui a eu lieu en juin 2011.

Cet organe a encore une fois adopté des mesures particulières concernant directement le cas du Projet du Canal de Bystroe et d'autres plus générales visant le droit ukrainien.[60] En ce qui concerne le premier type de mesures, sur la base des constatations du Comité rappelées auparavant, la Réunion des Parties a déclaré en vigueur la mise en garde adressée au Gouvernement ukrainien à sa réunion précédente. Pour ce qui est du deuxième type de mesures, la Réunion des Parties, après avoir félicité l'Ukraine de la stratégie adoptée et l'initiation des négociations visant à conclure des accords bilatéraux avec les États voisins, a manifesté sa préoccupation pour l'insuffisance des progrès réalisés dans l'application de la première et pour l'adoption de mesures allant apparemment à son encontre. Finalement, la Réunion des Parties a demandé à l'Ukraine de faire rapport tous les ans au Comité au sujet de son application des dispositions de la Convention d'Espoo et de ses mesures. Elle s'est également offerte pour donner des conseils techniques afin d'aider l'Ukraine à conformer sa législation avec ledit instrument conventionnel.

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[56] Rapport du Comité d'application sur sa dix-huitième session, NU Doc. ECE/MP.EIA/IC/2010/2 (19 mars 2010), par. 8.

[57] Rapport du Comité d'application sur sa vingtième session, NU Doc. ECE/MP.EIA/IC/2011/2, (25 janvier 2011), par. 5.

[58] *Ibidem*, par. 8.

[59] Rapport Comité, supra n. 43, par. 26.

[60] Décision V/4 – Examen du respect des obligations in Rapport de la Réunion des Parties sur les travaux de sa cinquième session, NU Doc. ECE/MP.EIA/15 (16 août 2011).

Le Comité est ainsi resté en charge du suivi de la situation de non-respect et continue d'étudier les rapports de l'Ukraine sur ses avancements dans la mise en œuvre des mesures adoptées par la Réunion des Parties, jusqu'au moment ou ce Pays se trouvera en situation de respect.

4 Conclusion

Sur la base de la description du déroulement du mécanisme de contrôle et de suivi de la Convention d'Espoo dans le cas du Projet du Canal de Bystroe et des mesures appliquées par la Réunion des Parties à l'Ukraine, notons qu'il est possible de diviser celles-ci en deux types. Les mesures appartenant au premier type visent à arrêter la situation de non-respect, afin de rétablir le respect des obligations. Celles appartenant au deuxième type prévoient les corrections nécessaires pour conformer le droit interne ukrainien aux dispositions de la Convention d'Espoo. Il semble possible d'affirmer que le premier type de mesures représente le soin pour les symptômes et que le deuxième type est le traitement de la maladie.

À notre avis, c'est grâce à ce deuxième type de mesures que les mécanismes de contrôle et de suivi contribuent au développement du droit international. En effet, par ces mesures ils élargissent les perspectives données par les mécanismes traditionnels du droit international, tels que la responsabilité pour fait internationalement illicite,[61] le droit des traités[62] et le règlement des différends internationaux.[63] Bien que les résultats visés par les mesures du premier type coïncident avec ceux des mécanismes qui viennent d'être mentionnés, ceux des mesures du deuxième type vont au delà des limites de la responsabilité internationale, du droit des traités et des règlements des différends.[64] En effet, le deuxième type de mesures cherche à corriger en profondeur les raisons à la base de la situation de non-respect, par exemple par le biais d'une réforme du droit interne de l'État défaillant, sans s'arrêter au rétablissement de la situation précédente ou de l'équilibre entre les Parties.

Bien que les mécanismes de contrôle et de suivi contribuent, de par l'adoption des mesures susmentionnées, au développement du droit international, sur la base de l'illustration effectuée du cas du Projet du Canal de Bystroe, il est évident qu'ils ne peuvent rien contre la mauvaise foi d'un État. Il ne nous est pas possible de fermer les yeux et de conclure cette étude sans nous arrêter très brièvement sur le comportement de l'Ukraine. Sur la base de l'ensemble des documents examinés, il est clair que, pendant le déroulement de la procédure du mécanisme de contrôle et

[61] Pineschi 2009, pp. 483–518.

[62] Fitzmaurice 2009, pp. 453–481.

[63] Treves 2009, pp. 499–518.

[64] La responsabilité internationale suit une logique de réparation, du retour à la situation antérieure à la violation. Le droit des traités cherche à retrouver un équilibre dans les rapports entre les Parties d'un instrument conventionnel. Les règlements des différends visent à résoudre un différend. Urbinati 2009, p. 299.

de suivi, ce Pays n'a fait que gagner du temps pour avancer dans la réalisation du Projet du Canal de Bystroe, afin de mettre le Comité de la Convention d'Espoo, ainsi que tous les autres organismes internationaux et la Communauté internationale, devant le fait accompli. Un comportement similaire a été récemment tenu par l'Uruguay, dans l'affaire des Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay); comportement, malheureusement, avalisé par la Cour internationale de Justice.[65] Notre souhait est que le cas examiné dans la présente étude et celui qui vient d'être cité ne soient pas le point de départ de la création d'une nouvelle règle, qui représenterait sans doute un recul du droit international, celle selon laquelle l'État de mauvaise foi gagne.

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[65] CIJ: Usine de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), ordonnance (13 juillet 2006) et CIJ: Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), arrêt (20 avril 2010).

Part VI
Human Rights

Human Rights Judicial and Semi-Judicial Bodies and Customary International Law on State Responsibility

Stefano Brugnatelli

1 Introductory Remarks

As is well known, State responsibility is today generally ruled by customary international law. No codification convention, as has been the case for the law of treaties with the Vienna Convention of 1969, has so far put in a written and binding form the rules that regulate the matter. In 2001, after a 40-year process, the International Law Commission (ILC) however completed its Draft articles on responsibility of States for internationally wrongful acts[1] (ILC Draft) of which the UN General Assembly has "take[n] note" and whose text it has "recommended to the attention of governments".[2] While not formally binding,[3] and even if a lesser part of its rules appears to relate much more to the so-called *progressive development* of international law rather than to codification activity *strictu sensu*, the ILC Draft represents a well-founded and credible transposition of the existing customary law on State responsibility into a written form.[4] This is also due to the length of its redaction process and to the authority of the Special Rapporteurs appointed over the years.

[1] Yearbook of the International Law Commission, 2001, Vol. II (2), UN Doc. A/CN.4/SER.A/2001/Add.1 (Part2), pp. 26–143.
[2] United Nations General Assembly Resolution n. 56/83, UN Doc. A/RES/56/83 (12 December 2001).
[3] As is well known, the ILC Draft has never been submitted to a Diplomatic conference for its adoption as a binding convention. On the drafting history of the ILC Draft, see: Pellet 2010, pp. 75–87.
[4] Treves 2005, pp. 477–478; Cassese 2005, pp. 243–245; Pellet 2010, pp. 86–87.

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Alongside with a number of core rules relating to the protection of human rights, which are today generally considered to form part of customary international law,[5] international rules relating to the protection of human rights are instead mostly spelled out in international treaties, some of them dealing with human rights protection at a global level, others at a regional level, and still others on a sectoral basis. Almost all of these treaties contain procedures for monitoring compliance with the obligations they spell out. Among those mechanisms, some provide for individual and State complaint procedures before judicial or semi-judicial bodies.

The object of the present contribution is to verify whether those bodies, when called upon to pronounce on alleged violations of the primary rules spelled out in their establishing treaties, play a role in the process of the definition and evolution of the customary law on State responsibility.

2 *Lex Specialis* and State Responsibility

In order to answer the aforementioned question, the main issue which needs to be examined is whether, and to what extent, the judicial and semi-judicial bodies under consideration apply customary law on State responsibility in assessing the responsibility of States parties to the treaties which are the object of their jurisdiction or, and this is the same, wether, and to what extent, customary rules on State responsibility apply to breaches of obligations spelled out in human rights treaties. As long as the answer to that question is in the negative, the case law of the judicial and semi-judicial bodies under consideration could only have a very limited, if not insignificant, impact on the definition and progressive development of the customary *regime* of State responsibility.

International doctrine has for a long time clarified that in no case may the specificity of a particular branch of international law,[6] such as human rights law,

[5] Treves 2005, pp. 195–196; Cassese 2005, pp. 393–396.

[6] The specificity of a particular branch of international law may in fact suggest that, in some ways, that branch is regulated by its own principles, capable of derogating from, or excluding the application of, general customary rules, including secondary customary rules. This constitutes the third meaning of the expression "self-contained regime" which the ILC has found to be used in international practice. According to the ILC, "academic commentary and practice make constant reference to a third notion—'branches of international law'—that are also assumed to function in the manner of self-contained regimes, claiming to be regulated by their own principles." Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission finalized by Martii Koskenniemi, UN Doc. A/CN.4/L.682 (13 April 2006), p. 81, para 152(1); hereinafter "Koskenniemi Report". See also: Treves 2007, pp. 821–875.

per se exclude the application of general customary law on State responsibility.[7] The relation between general customary law and treaty provisions in the field of State responsibility remains regulated, irrespectively of the specificity of the matter ruled by the primary norms contained in the treaty, only by the *lex specialis* principle,[8] as explicitly spelled out in Article 55 of the ILC Draft. Accordingly, customary rules on State responsibility apply to violations of any international treaty, irrespective of its object, to the extent that no special derogation is provided for or can be inferred from a particular treaty rule.

Still, it is possible that a human rights treaty may contain a set of special secondary rules capable of excluding, in whole or in part, the application of the general customary regime.[9] Such a hypothesis appears much more concrete if one considers that most of the human rights treaties in force today contain, along with primary rules relating to the definition of the protected rights, special provisions concerning the consequences of any violation and the enforcement of those primary rules. As long as those special provisions constitute *lex specialis* with respect to the customary *regime* on State responsibility, the relevance of the jurisprudence of the judicial and semi-judicial bodies under consideration would be progressively lessened in the light of the general *regime*.

It is therefore necessary to assess the grade of speciality of those treaty provisions with respect to the customary *regime* of State responsibility. Editorial reasons suggest that the extent of the said assessment should be limited to the three human rights treaties whose judicial or semi-judicial bodies have issued the greatest part of the existing international jurisprudence in the matter of State responsibility for violations of human rights treaties, namely the International Covenant on Civil and Political Rights (New York, 16 December 1966; hereinafter ICCPR)[10] with its first Optional Protocol (New York, 16 December 1966),[11] the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; hereinafter ECHR),[12] and the American

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[7] See, among others, Fourth Report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur. In: Yearbook of the International Law Commission, 1992, Vol. II (1), UN Doc. A/CN.4/444 and Add. 1-3, para 105; Pellet 2000, pp. 3–16; Koskenniemi Report, cit., p. 82, para 152(3); Brownlie 2008, p. 530.

[8] On the speciality rule, see: Koskenniemi Report, *supra* n. 6, pp. 34–65, paras 56–122.

[9] Special treaty rules on State responsibility may, in theory, even completely exclude the applicability of customary rules on State responsibility, by way of the insertion of a complete and exhaustive set of secondary conventional rules. This occurrence, together with the exclusion of the possibility of a fallback on the general customary *regime* in the case of the failure of the conventional one, are the main characteristics of what has been defined (see: Simma and Pulkovski 2006, pp. 483–529) as a *self-contained regime*, in the first meaning that the ILC attributes to that expression (Koskenniemi Report, *supra* n. 6, p. 81, para 152(1)).

[10] Entered into force on 23 March 1976.

[11] Entered into force on 23 March 1976.

[12] Entered into force on 3 September 1953, as amended by Protocol No. 11 (Strasbourg, 11 May 1994), entered into force on 1 November 1998 and Protocol No. 14 (Strasbourg, 13 May 2004), entered into force on 1 June 2010.

Convention on Human Rights (San José, 22 November 1969; hereinafter ACHR).[13]

All the mentioned treaties contain a special provision regarding the duty of State parties to afford reparation to the victims of any violations of the rights protected by the convention that they commit (Article 2.3 of the ICCPR, Article 63.1 of the ACHR, and Article 41 of the ECHR).

In addition, as is well known, all the mentioned treaties contain a set of special provisions regarding the possibility of instituting individual or State complaint procedures before, respectively, the Human Rights Committee (HRC), the Inter-American Court of Human Rights (ACtHR), and the European Court of Human Rights (ECtHR), the first body having a semi-judicial character while the second and the third have a completely judicial function.

3 Treaty Norms on Imputation and Reparation and Customary International Law

Firstly, it must be observed that none of the treaties under consideration contains any special provisions relating to the question of whether a State is responsible for a breach. Those treaties do not contain any indication relating to the elements of international responsibility, to the attribution of conduct to a State, to the existence of a breach and to its continuous or composite nature, to complicity and to indirect responsibility, to the circumstances precluding wrongfulness; namely to what is regulated in the first part of the ILC Draft. Accordingly, those matters remain solely governed by the customary international law on State responsibility.[14]

In confirmation thereof, the judicial and semi-judicial bodies under consideration frequently explicitly refer to the customary law on State responsibility in order to assess whether States are responsible for alleged violations of the treaties under their jurisdiction.[15]

The issue is more complicated with regard to the content of the international responsibility of the State.

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[13] Entered into force on 18 July 1978.

[14] Simma and Pulkovski 2010, p. 159.

[15] See, among others: ECtHR; Behrami and Behrami v. France and Saramati v. France, Germany and Norway [GC], 71412/01-78166/01, Decision (2 May 2007), para 34; Blečić v. Croatia [GC], 59532/00, Judgment (8 March 2006), paras 45–48; Ilaşçu and Others v. Russia and Moldova [GC], 48787/99, Judgment (8 July 2004), paras 319–321; ACtHR: Miguel Castro Prison v. Peru, Judgment (25 November 2006), Separate Opinion of Judge Cançado Trinidade, para 32; Ximenes-Lopes v. Brasil, Judgment (4 July 2006), para 86; Velásquez-Rodríguez v. Honduras, Judgment (21 July 1989), para 170; HRC: General Comment n. 31. Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), para 4; S. Jegatheeswara Sarma v. Sri Lanka, 950/2000, Views (16 July 2003), UN Doc. CCPR/C/78/D/950/2000 (31 July 2003), para 9.2.

The aforementioned treaty provisions regulating the duty of State parties to afford reparation to the victims of the violations that they commit appear in fact to deal with the same subject-matter as that regulated by the customary provisions on the content of international responsibility, as codified in part two of the ILC Draft. Their presence in the treaties under consideration might therefore lead to the conclusion that the application of customary rules regulating the content of international responsibility is superseded by those special treaty provisions, in the case of a violation of the primary rules spelled out in ICCPR, ACHR, and ECHR. Nevertheless, when taking a closer look that does not seem to be the case, with only a partial exception in the case of the ECHR, to which I will return in a while.

The wording of Article 2.3 of the ICCPR is *per se* sufficient to exclude its nature as *lex specialis*. In fact, while having been constantly interpreted by the HRC as sanctioning the obligation of member States to afford reparation to the victims of any violation of the rights granted by the Covenant which they commit, the provision does not specify in any way the content of that obligation, therefore appearing to be a mere recollection of the relevant customary rules.[16] While not explicitly referring to customary rules (or to the ILC Draft), the HRC has in fact regularly applied those rules in determining the consequences of violations of the Covenant it has ascertained.[17]

Article 63.1 of the ACHR, while expressly attributing to the ACtHR the power to determine the consequences of any violations of the American Convention it ascertains, also contains a list of those consequences, expressed through quite a different wording from the one used in the ILC Draft (e.g., Article 63.1 of ACHR does not mention satisfaction). In any case, the ACtHR has never identified any consequence emanating from that different wording. On the contrary, the Court has always affirmed that the rule under consideration wholly reflects the customary law on State responsibility. The ACtHR therefore only applies customary rules in establishing the consequences of violations of the ACHR.[18]

Hence, in Loayza Tamayo the ACtHR stated that:

> The applicable law in the matter of reparations is Article 63(1) of the American Convention, which articulates one of the fundamental principles of general international law, repeatedly elaborated upon by the jurisprudence (Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No.9, page 21 and Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, page 29; Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, page 184). This Court has applied this principle (…). When an unlawful act imputable to a State occurs, that State becomes responsible in law for violation of an international norm, with the consequent duty to make reparations.
>
> Reparations is a generic term that covers the various ways a State may make amends for the international responsibility it has incurred (*restitutio in integrum*, payment of compensation, satisfaction, guarantees of non-repetitions among others).

[16] Klein 1999, p. 33.

[17] Cohen-Jonathan 2000, p. 118; Shelton 2005, pp. 183–187.

[18] Tigroudja and Panoussis 2003, pp. 280–281; Cançado Trinidade 2004, p. 67; Caflisch and Cancado Trinidade 2004, pp. 40–41.

> It is a universally recognized principle that the obligation to make reparations ordered by international courts is governed by international law in all of its aspects: its scope, nature, modality, and the determination of beneficiaries.[19]

As anticipated, the situation is slightly different with regard to the ECHR. The wording of its Article 41 appears in fact to derogate from customary rules on State responsibility, as it allows for compensation if restitution is (not only materially, as provided for by customary law, but also) legally impossible under the internal law of the respondent State. Moreover, Article 41 has always been interpreted by the ECtHR as preventing it from ordering the responsible State to adopt specific conduct in order to comply with the secondary obligations flowing from the ascertained violation. Under that interpretation, the Court would only have the authority to award monetary compensation to the victims if the responsible State does not fully repair, by means of its own choosing, the damage it has caused.[20]

Be that as it may, outside the scope of application of Article 41 of the Convention the Court has always applied customary rules in assessing the consequences of the violations it has ascertained, even if not confessing its reliance on the general law as openly and as frequently as the ACtHR.[21]

Some indications can however be found in the Court's jurisprudence. E.g., in Papamichalopoulos the Court, in order to assess the consequences of the violations ascertained, expressly referred to general international law and to the classic jurisprudence of the Permanent Court of International Justice in the Factory at Chorzów case,[22] while in Gürbüz Judges Caflish and Türmen in their separate

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[19] ACtHR: Loayza Tamayo v. Peru, Judgment (27 November 1998), paras 84–86. See also, amongst others: ACtHR: Velásquez-Rodríguez, *supra* n. 15, paras 23–31; Aloeboetoe v. Suriname, Judgment (10 September 1993), para 44; Garrido and Baigorria v. Argentina, Judgment (24 August 1998), para 40; Barrios Altos v. Peru, Judgment (30 September 2001), para 24; Cantoral Benavides v. Peru, Judgment (3 December 2001), para 40; Las Palmeras v. Colombia, Judgment (26 November 2002), para 37.

[20] Pellonpää 1999, pp. 109–112; Cohen-Jonathan 2000, pp. 109–140; Shelton 2005, pp. 198–200, 280–282; Bernhardt 2005, pp. 245–246.

[21] Third Report on State Responsibility by Mr. James Crawford, Special Rapporteur, Addendum 1, UN Doc. A/CN.4/507/Add.1 (15 June 2000), paras 157–158; Flauss 2004, pp. 107–108; Karl 2007, pp. 154–155.

[22] "In this connection, international case-law, of courts or arbitration tribunals, affords the Court a precious source of inspiration; although that case-law concerns more particularly the expropriation of industrial and commercial undertakings, the principles identified in that field are valid for situations such as the one in the instant case. In particular, the Permanent Court of International Justice held as follows in its judgment of 13 September 1928 in the case concerning the factory at Chorzów: '…reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law'". ECtHR: Papamichalopoulos and Others v. Greece,

opinion clearly assumed that the responsibility of member States for the violation of the ECHR is governed by customary rules.[23]

Moreover, when taking a closer look it appears that even Article 41 constitutes *lex specialis* with respect to the customary *regime* of State responsibility only where it allows monetary compensation if restitution is legally, but not materially, impossible.

On the contrary, as long as it excludes the power of the ECtHR to compel member States to adopt specific conduct in order to comply with the secondary obligations flowing from the ascertained violation, Article 41 appears to be only a rule defining the powers of the Court and not a secondary rule concurring with, and derogating from, the general customary *regime* of responsibility. Therefore, the whole set of consequences of internationally wrongful acts as spelled out in part two of the ILC Draft applies to violations of the ECHR, even if the ECtHR is not empowered to compel the responsible States to comply with all the secondary obligations flowing from those violations under customary international law.[24]

This interpretation is firstly confirmed by the very formulation of Article 41, which links the competence of the ECtHR to the fact that *restitutio in integrum* is not, in the specific case, materially or juridically possible, therefore implying the existence and the pre-eminence of that form of reparation.[25]

Moreover, the mentioned interpretation is confirmed by the case law of the ECtHR itself which, in most of the cases where it has affirmed its lack of power to compel the responsible State to adopt specific conduct, has also recalled the obligation of that State to afford reparation in kind to the victim,[26] sometimes in a wording which is clearly inspired by that used by the ILC in the Draft.[27]

This conclusion is relevant to the object of the present contribution especially if coupled with the fact that the ECtHR has recently widened its restrictive interpretation of Article 41 of the ECHR. Even if still convinced of its lack of power to compel responsible States to adopt those specific forms of conduct to comply with the secondary obligations flowing from the ascertained violation, the Court has

(Footnote 22 continued)
14556/89, Judgment (31 October 1995), para 36. See also: ECtHR: Former King of Greece and Others v. Greece [GC], 25701/94, Judgment (28 November 2002), para 75.

[23] ECtHR: Gürbüz v. Turkey, 26050/04, Judgment (11 October 2005), Partially Dissenting Opinion of Judges Caflish and Türmen, pp. 22–23.

[24] Frumer 1996, p. 331; Pirrone 1997, pp. 165–170; Cohen-Jonathan 2000, p. 11; Shelton 2005, p. 282.

[25] Pirrone 1997, p. 159, note 21.

[26] See e.g.: ECtHR: Guerra and Others v. Italy [GC], 14967/89, Judgment (19 February 1998), para 74; Campbell and Cosans v. United Kingdom, 7511/76-7743/76, Judgment (23 March 1983), para 16; Dudgeon v. United Kingdom, 7525/76, Judgment (24 February 1983), para 15; Marckx v. Belgium, 6833/74, Judgment (13 June 1979), para 58.

[27] See e.g.: ECtHR: Assanidze v. Georgia [GC], 71503/01, Judgment (8 April 2004), para 198; Brümarescü v. Turkey [GC], 28342/95, Judgment (23 January 2001), para 19; Scozzari and Giunta v. Italy [GC], 39221/98-41963/98, Judgment (13 July 2000), paras 249–250; Papamichalopoulos, supra n. 22, para 34.

however begun to indicate those forms of conduct in its judgements.[28] As long as those indications are formulated by the Court in the application of the customary rules on State responsibility (which, as has been clarified, are not superseded by special treaty rules, specifically by Article 41), they become relevant in the interpretation, and thus in the process of the definition and evolution, of those customary rules.

4 Treaty Norms on Invocation and Customary International Law

Finally, it remains to clarify whether and to what extent the provisions contained in the ICCPR, in the ACHR, and in the ECHR regarding the possibility of instituting individual or State complaint procedures constitute *leges speciales vis-à-vis* the general *regime* of State responsibility.

As those treaty provisions concern the modalities under which the responsibility of State parties may be asserted, they appear in fact to deal with the same subject-

[28] See e.g., what the Court held in Hirsi (ECtHR: Hirsi, Jamaa and Others v. Italy [GC], 27765/09, Judgment (23 February 2012), paras 209–211) and the other ECtHR Judgments mentioned therein: "Under Article 46 of the Convention, the High Contracting Parties undertake to abide by the final judgment of the Court in the cases to which they are parties, the Committee of Ministers being responsible for supervising the execution of the judgments. This means that when the Court finds a violation, the respondent State is legally bound not only to pay the interested parties the sums awarded in just satisfaction under Article 41, but also to adopt the necessary general and/or, where applicable, individual measures. As the Court's judgments are essentially declaratory in nature, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in order to discharge its legal obligation under Article 46 of the Convention, provided that those means are compatible with the conclusions contained in the Court's judgment. In certain particular situations, however, the Court may find it useful to indicate to the respondent State the type of measures that might be taken in order to put an end to the—often systemic—situation that gave rise to the finding of a violation (see, for example, Öcalan v. Turkey [GC], no. 46221/99, § 210, ECHR 2005-IV, and Popov v. Russia, no. 26853/04, § 263, 13 July 2006). Sometimes the nature of the violation found may be such as to leave no real choice as to the measures required (see Assanidze, cited above, § 198; Aleksanyan v. Russia, no. 46468/06, § 239, 22 December 2008; and Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2) [GC], no. 32772/02, §§ 85 and 88, 30 June 2009). In the instant case the Court considers it necessary to indicate the individual measures required for the execution of the present judgment, without prejudice to the general measures required to prevent other similar violations in the future (see M.S.S., cited above, § 400). The Court has found, inter alia, that the transfer of the applicants exposed them to the risk of being subjected to ill-treatment in Libya and of being arbitrarily repatriated to Somalia and Eritrea. Having regard to the circumstances of the case, the Court considers that the Italian Government must take all possible steps to obtain assurances from the Libyan authorities that the applicants will not be subjected to treatment incompatible with Article 3 of the Convention or arbitrarily repatriated".

matter governed by customary provisions on invocation, as codified in Articles 42 and 48 of the ILC Draft.[29]

However, with regard to treaty rules granting the victims the possibility to institute individual claims procedures, international law doctrine has already clarified that those rules do not overlap with customary rules on invocation and that they cannot thus be considered as *leges speciales* to them.[30] Customary rules on invocation, as codified in Articles 42 and 48 of the ILC Draft, are in fact only meant to regulate the right of States to invoke the responsibility of other States and do not have any bearing on the different matter of whether other subjects, such as individual victims, may invoke that same responsibility. Where such individual claim procedures exist, "the invocation of State responsibility (…) rests on two pillars".[31]

As a consequence, when dealing with individual claim procedures, the HRC, the ACtHR, and the ECtHR apply customary law on State responsibility only when determining the existence of the breach and its consequences. In the field of invocation, they only apply treaty law, their decisions thus having no relevance to the interpretation, definition, and development of customary rules on invocation. Moreover, the aforementioned "two pillars" theory implies that the existence of those treaty-based individual complaint procedures does not hamper the possibility for States parties to directly invoke the international responsibility of the other State parties for breaches of the treaty on the basis of customary rules on invocation.

On the contrary, it has been argued that treaty-based State complaint procedures would be *leges speciales* to customary rules on invocation, therefore excluding the applicability of those rules, as codified in Articles 42 and 48 of the ILC Draft.[32] Upon closer inspection, however, this conclusion does not seem to be entirely sharable.

The treaty rules under consideration appear in fact to be dealing more with the field of the solution of international disputes than with the right of member States to invoke the responsibility of other States parties for violations of the human rights treaties under consideration. Their main effect is in fact to identify particular *fora* where, subject to certain conditions, States parties to the treaty can pursue a solution to a dispute arising from the invocation of the responsibility of one of them for a breach of the obligations spelled out in the treaty, sometimes even limiting States parties' customary freedom of choice concerning that *forum*.[33]

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[29] Simma and Pulkovski 2010, p. 159. Editorial reasons hamper the possibility of examining the different roles of Articles 42 and 48 of the ILC Draft in the case of State responsibility for violations of human rights obligations, so no distinction will be made here. However, the author shares the view of those who argue that, in the field of human rights violations, only Article 48 applies in every case. On this issue see: Gaja 2003, pp. 373–382; Gaja 2010, pp. 11–14.

[30] Simma and Pulkovski 2010, p. 159.

[31] Simma and Pulkovski 2010.

[32] Simma and Pulkovski 2010, p. 160.

[33] On the exclusive or alternative nature of the dispute solution procedures spelled out in the provisions at issue, see: Tams 2005, pp. 279–286.

The customary right to invoke the responsibility of other member States for breaches of the treaty appears to be rather implied, or at least confirmed, by the formulation of the provisions under consideration,[34] which should not therefore be considered as *leges specliales* to customary rules on invocation, as codified in Articles 42 and 48 of the ILC Draft.

If that is the case, then the possibility remains open to take into account the decisions of the judicial and semi-judicial bodies under consideration, in the case of State complaint procedures, as relevant praxis with regard to the interpretation, definition and, at least in relation to Article 48, crystallization of the customary rules on invocation as formulated in the ILC Draft. That appears to be particularly relevant, given the poor existing praxis supporting the rules spelled out in Article 48 of the Draft, especially its subparagraph 2(b).[35]

Such is the case for Denmark v. Turkey, where "a clear distinction has been drawn [by the ECtHR] between the capacity of the applicant State to raise the matter and the interests of the beneficiaries of the obligation".[36]

The same is true for Ireland v. United Kingdom, where the Government of Ireland clearly stated that reparation, if requested, should have been afforded directly to the individual victims of the alleged violations:

> "The President, acting on behalf of the Court, instructed the Registrar to ask the Agent of the Irish Government to indicate 'as soon as possible whether it would be correct to assume, particularly in the light' of certain passages in the Commission's decision on the admissibility of the application and in the verbatim report of the public hearings held in February 1977, 'that [his] Government [were not inviting] the Court, should it find a violation of the Convention, to afford just satisfaction within the meaning of Article 50 (Art. 50)'. This the Registrar did by letter of 8 August 1977. On 14 October 1977, the Agent of the applicant Government replied as follows: '… the applicant Government, while not wishing to interfere with the de bene esse jurisdiction of the Court, have not as an object the obtaining of compensation for any individual person and do not invite the Court to afford just satisfaction under Article 50 (Article 50), of the nature of monetary compensation, to any individual victim of a breach of the Convention…' The Court accordingly considers that it is not necessary to apply Article 50 (Art. 50) in the present case."[37]

We can also say this for the applications submitted by Denmark, Norway, Sweden, and the Netherlands against Greece in 1967, regarding alleged violations committed by Greece against the Greek people, and declared admissible by the European Commission of Human Rights in 1968.[38]

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[34] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries. In: Yearbook of the International Law Commission, 2001, Vol. II (2), UN Doc. A/CN.4/SER.A/2001/Add.1 (Part2), Article 48, para 12; hereinafter "Draft Articles on Responsibility of States"; Brown Weiss 2002, pp. 805–806.

[35] See: Brown Weiss 2002, pp. 805–806; Gattini 2006, pp. 446–448.

[36] Draft Articles on Responsibility of States, *supra* n. 34, Article 48, para 12, citing ECtHR: Denmark v. Turkey, 34382/97, Judgment (5 April 2000), paras 20–23.

[37] ECtHR: Ireland v. United Kingdom, 5310/71, Judgment (18 January 1978), paras 245–246.

[38] ECmHR: Denmark v. Greece, Norway v. Greece, Sweden v. Greece, The Netherlands v. Greece, 3321/67, 3322/67, 3323/67 and 3344/67, Decision (24 January 1968).

One last consideration is necessary. Even if still perfectly possible from a theoretical point of view that the judicial and semi-judicial bodies under consideration apply customary rules on countermeasures, the fact that those bodies are only called upon to deal with breaches of their founding treaties, coupled with the fact that human rights obligations may never be set aside by way of countermeasures,[39] practically excludes the possibility that they may be called upon to apply those customary rules. The issues of countermeasures and of so-called collective countermeasures[40] does not, therefore, appear to be worthy of discussion in the present contribution.

5 Concluding Remarks

In the light of the above, it can be concluded that the three international judicial or semi-judicial human rights bodies taken into consideration usually apply the whole set of customary rules on State responsibility in determining the existence, the consequences, and the inter-State invocation of the responsibility of States parties to those treaties. Their jurisprudence therefore constitutes, by far, the largest and most precious source of praxis in order to assess how the customary rules on State responsibility shall be applied in case of violations of human rights obligations, especially in cases where the rights of the victims of those violations are at stake.

That may be of the outmost importance in cases where the human right violated is itself customary in nature or contained in a treaty which does not provide for effective enforcement mechanisms. In such cases, in the absence of any treaty-based individual claim procedure, the better (or, at least, the only) possibility for individuals to obtain redress would remain inter-State procedures instituted under customary rules on invocation, as spelled out in Articles 42 and 48 of the ILC Draft. In those situations, the case law of HRC, ACHR, and ECtHR in the field of State responsibility, if not considered as a sectoral application of treaty-based rules, may constitute a secure path that may be followed by any other judicial or semi-judicial body called to deal with violations of international obligations in the field of human rights under the customary law of State responsibility.[41]

Of course, that leaves open the question as to how the judicial and semi-judicial bodies under consideration apply, or have applied, the customary rules on State responsibility, and if the special nature of the human rights obligations has led those bodies to assess the content of the secondary customary rules at issue any differently.

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[39] Third Report on State Responsibility by Mr. James Crawford, Special Rapporteur, Addendum 3, UN Doc. A/CN.4/507/Add.3 (18 July 2000), paras 349–351. See also: Boisson de Chazournes 1992, p. 152 ss.; Cassese 2005, pp. 303–305.

[40] Third Report on State Responsibility by Mr. James Crawford, Special Rapporteur, Addendum 4, UN Doc. A/CN.4/507/Add.4 (4 August 2000), paras 386–406.

[41] See, e.g.: ICJ, Ahmadou Sadio Diallo (Guinea v. Democratic Republic of the Congo), Judgment (19 June 2012), paras 13, 24, 33, 40, 49, 56.

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The Vegetarian Diet in Prison: A Human Right? The Case of *Jakóbski v. Poland*

Maria Clara Maffei

1 Introduction

Napoleon, the Berkshire boar protagonist of *Animal Farm* by George Orwell, would be glad (and relieved!) to hear that the proclaimed "more equal" status[1] of pigs has been recognised at least by the Polish authorities. According to the latter, pigs are the only "real" animals among all the other comrades of the farm and among fish as well. Enjoying this singular privilege, only hogs are excluded from the meat-free diet provided for in the Polish prisons, while food derived from other edible animals is considered compatible with a vegetarian diet. These amazing considerations have emerged from the case of *Jakóbski v. Poland*, decided by the European Court of Human Rights (ECtHR) on 7 December 2010.[2]

The case concerns Mr Janusz Jakóbski (the applicant) who, at the time of his application to the ECtHR, was detained in Nowogród Prison, Poland, serving an eight-year prison sentence for rape. He had been previously detained in Goleniów Prison. He alleged that he had been refused a meat-free diet in prison contrary to the prescriptions of his faith and that this was a violation of Article 9 (*Freedom of thought, conscience and religion*) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950, hereinafter ECHR).[3] Being a Buddhist, in Goleniów Prison the applicant had requested a

[1] "All animals are equal but some animals are more equal than others" is the last surviving revised commandment of Animalism from the original seven.

[2] ECtHR: Jakóbski v. Poland, 18429/06, Judgment (7 December 2010).

[3] Entered into force 3 September 1953; the texts of the ECHR and its Protocols are available at http://conventions.coe.int. Accessed 24 August 2011.

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meat-free diet under the rules of the Mahayana school to which he declared he adhered. The meat-free diet was also recommended by the prison dermatologist due to the applicant's health problems. According to the prison's authorities a meat-free diet was not available. The only special diet which could be offered was the "no pork" diet (so-called PK diet). This diet was granted to the applicant for three months. After this period, a prison doctor examined Mr Jakóbski and concluded that the meat-free diet was no longer necessary. The applicant wanted to refuse the meals containing meat products but he was forced to accept them because the refusal of this food would have entailed disciplinary punishment. Also in Nowogród Prison, where the applicant was transferred in 2009, he was refused the meat-free diet he had requested.

According to the ECtHR Poland has violated Article 9 of the ECHR[4] and has to pay the applicant EUR 3,000 in respect of non-pecuniary damage, besides the costs and expenses of the proceeding.

2 Dietary Choices Under Article 9 of the ECHR

A particular diet may constitute an essential aspect of the practise of a certain religion or belief protected under Article 9 of the ECHR. This has been stated on some rare occasions, and sometimes almost incidentally, by the ECtHR[5] and by the European Commission on Human Rights (ECmHR)[6] and was not contested by Poland in this case. The Government however insisted that vegetarianism was not required by Buddhism, not even by the strict Mahayana school. It is interesting to note that Poland grounded its arguments on the *Great Polish Encyclopaedia* and on *Wikipedia*,[7] taking no notice of the holy books quoted by the applicant[8] and of the statements of the Buddhist Mission in Poland in its letters to the prison authorities.[9]

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[4] The applicant also alleged the violation of Article 14 (*Prohibition of discrimination*) of the ECHR in conjunction with Article 9. The ECtHR found that there was no cause for a separate examination of the facts from the standpoint of Article 14 (see Jakóbski, supra n. 2, para 59).

[5] These cases concern mainly *kosher* food for Jews. For instance, as regards the slaughter of animals prescribed by the Jewish religion, the ECtHR observed: "It is not contested that ritual slaughter, as indeed its name indicates, constitutes a rite or '*rite*' (…), whose purpose is to provide Jews with meat from animals slaughtered in accordance with religious prescriptions, which *is an essential aspect of practice of the Jewish religion*"; ECtHR: Cha'are Shalom Ve Tsedek v. France, 27417/95, Judgment (27 June 2000), para 73 (emphasis added).

[6] Paradoxically one of the most significant statements of the ECmHR concerning vegans comes from a decision which does not concern food. In ECmHR: C.W. v. United Kingdom, 18187/91, Decision (10 February 1991), the ECmHR extended the application of Article 9.1 of the ECHR to the convictions of vegans.

[7] Jakóbski, supra n. 2, para 38.

[8] Ibidem, para 35.

[9] Ibidem, paras 11 and 19.

The problem, in this case and in similar ones, is to ascertain to what extent the dietary choices of prisoners must be respected by the prison authorities under Article 9 of the ECHR. In its Judgment the ECtHR did not dwell long on this point. The ECtHR recognised that Article 9 "does not protect every act motivated or inspired by a religion or belief".[10] This means that not all dietary choices deserve protection under Article 9. The criteria to distinguish between the different cases are perhaps to be found in this cryptic sentence of the judgment: "the freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance".[11] Thus, it can be inferred that views that are not cogent, serious, cohesive and important do not fall within the scope of Article 9. Unfortunately the assessment of all these qualities is strictly subjective. Apart from some extreme cases which are easy to exclude from the coverage of Article 9, in many other cases what does not seem important to the ECtHR might be important for the person involved. Even some provocative requests, which may sound ridiculous in the way they are manifested, could be seriously motivated. It is sufficient here to mention for instance the case of Pastafarianism (*alias* the *Church of the Flying Spaghetti Monster*), a burlesque religion born as a reaction to some other contested religious theories, like creationism.[12] The intent of such a "religion" may be considered provocative but "serious", in spite of the desecrating tones which characterise it.

No doubt the assessment of the mentioned characteristics is a particular and difficult activity which must take into account a series of factors including the behaviour of the prisoner. For instance, inmates who claim a vegetarian diet invoking their compassion towards any sentient being and, at the same time, support hunting organisations would lose credibility. But even in this case last-minute conversions cannot be disregarded. In the case of *Jakóbski v. Poland*, the Government insisted on the fact that during his detention the applicant had accepted the PK diet for three months. This was considered evidence that the applicant had subsequently and opportunistically changed his faith "to secure personal advantages".[13] However, changing one's religion (or belief) cannot be considered a negative value; on the contrary, this freedom is explicitly protected under the same Article 9 of the ECHR.

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[10] Ibidem, para 44.

[11] Ibidem.

[12] A recent episode has brought Pastafarianism to the attention of the media. In Austria headgear is allowed in official photos only for confessional reasons. Mr Niko Alm, an Austrain atheist, claimed to be shown on his driving-licence photo wearing a pasta strainer as "religious headgear". According to Mr Alm the strainer was a requirement of his religion, Pastafarianism. After three years and a medical interview to check on his mental health, in July 2011 Mr Alm won his right; see BBC News at www.bbc.co.uk/news/world-europe-14135523. Accessed 21 September 2011.

[13] These are the words used by the Szczecin Prisons Inspector in reply to a complaint from the applicant; see Jakóbski, supra n. 2, para 17.

As stated above, Article 9 and the ECtHR equate freedom of thought, conscience and religion. The case of *Jakóbski v. Poland* concerns the freedom to manifest one's religion. Other elements, besides the refusal to provide vegetarian food, should have corroborated the allegation of a violation of such a freedom, for instance the alleged attitude of the prison authorities towards the religion of the applicant: according to the latter, the guards in the Goleniów prison had thrown some of his religious publications into a toilet.[14] It is however arguable whether, as far as food in prison is concerned, the three categories of freedom (thought, conscience and religion) deserve the same degree of respect. In other words, does a dietary precept imposed by a religion deserve respect more than a dietary choice with no religious connotation? In the case of Mr Jakóbski would the ECtHR have decided differently if the applicant had been vegetarian due just to an ethical choice? The ECtHR seems to barely touch on the subject when it observes that there are situations where decisions like the one to avoid eating meat are taken for reasons other than religious ones.[15] However, this is not the case of Mr Jakóbski whose "decision to adhere to a vegetarian diet can be regarded as motivated or inspired by a religion and was not unreasonable".[16] This is enough for the ECtHR to state that the refusal to provide him with such a diet falls within the scope of Article 9.[17] Thus, without dwelling further on the point, the ECtHR seems to ground its decision essentially on the reasonableness of the requests: once again, it is a very subjective element to assess.

Even though it is true that Article 9 of the ECHR and the ECtHR do not differentiate between freedom of conscience and freedom of religion, the fact that a special dietary regime is requested by a certain religion could simplify things. In this case in fact holy books and religious authorities can be consulted in order to ascertain the existence of alimentary precepts and their compulsory nature. This, however, could also lead to a flowering of self-initiating and self-authenticating religions,[18] the legitimacy of which States have no power to assess.[19] Actually, in the case of *Jakóbski v. Poland* the ECtHR did not consider as relevant whether or not a certain alimentary precept is mandatory while Poland insisted particularly on the point—as mentioned above. The ECtHR's silence perhaps may be explained by considering that an alimentary choice protected under Article 9 might not necessarily be grounded on religious prescriptions but could also derive from "personal" convictions. In this second case, no holy books and no religious authorities could pronounce on the mandatory nature of a certain diet, because

[14] See ibidem, para 13. The Goleniów District Prosecutor however considered that the allegations of the applicant were unfounded (ibidem, para 14).

[15] Ibidem.

[16] Ibidem.

[17] Ibidem.

[18] This problem has been often tackled by the United States Courts as well as by the United States doctrine.

[19] This lack of power has been stated clearly by the ECtHR; see Jakóbski, supra n. 2, para 44.

every person decides by him or herself whether to consider his or her alimentary choice as mandatory or not.

3 Restrictions

Like many other rights protected under the ECHR, also the freedom to manifest one's religion or beliefs may be limited when it is necessary in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others, according to Article 9.2 of the ECHR.

Mr Jakóbski maintained that "observing vegetarianism could not be described as a threat to public safety, health, morals or the rights and freedoms of others".[20] It is possible to subscribe to this statement in principle and it is substantially true when it refers to a person who is free in his or her choices and movements. However, when individuals are under the control or under the responsibility of the State (*e.g.*, prison inmates, hospital patients, school children, etc.), other interests are to be taken into account. In particular, in the case of prisoners, penological interests—including security considerations, maintenance of order, discipline, and budgetary limits—should be balanced against the rights of inmates.

According to the Polish authorities, the refusal to provide a meat-free diet would be justified by "technical conditions in the prison kitchen, the transporting of meals and understaffing in the kitchen".[21] In other words the requested diet for just one person, as in this case, "would have been too expensive (extra costs of hygiene requirements)"[22] and "would have put too much strain on the prison authorities".[23] The ECtHR did not share this point of view, stating that the meals of a vegetarian diet "did not have to be prepared, cooked and served in a prescribed manner nor [had the applicant] required any special products".[24] According to the ECtHR the provision of a vegetarian diet would not have led to "any disruption to the management of the prison or to any decline in the standards of meals served to other prisoners".[25] Thus, the "simplicity" of vegetarian food and the absence of requests for special food are in effect positive factors on one side of the scales. On the other side, the alleged justifications of the Polish authorities did not have equal weight. Thus, in this case the balance between the competing interests of the individual and of the community was not as fair as it

[20] Ibidem, para 34.

[21] Ibidem, para 21.

[22] Ibidem, para 48.

[23] Ibidem, para 23.

[24] Ibidem, para 52. It is however disputable that a vegetarian diet does not require "special products". While it is clear that the "speciality" does not concern the preparation (as might be the case of *kosher* or *halal* food), it is also true that, in order to provide a wholesome and balanced diet, alternative vegetarian food should have specific nutritional characteristics.

[25] Ibidem.

should have been according to the ECtHR,[26] although the latter did not deny that in assessing these interests States do enjoy a certain margin of appreciation.[27] Indeed, in this case in my opinion the interference of the Government with the right guaranteed under Article 9 of the ECHR is hardly defensible. According to Poland "the diet that the applicant had been granted *roughly* corresponded to his religious requirements".[28] In other words, the authorities considered that the balance between the said interests was fair just because the right of the applicant had been roughly respected. Indeed in some cases it may happen that the result of the fair balance is compatible with a "rough" respect of some human rights. In this case, however, if an individual asks for a vegetarian diet, the diet to be provided is either without meat or it is not a vegetarian one. A no-pork diet (which includes beef, veal, poultry, fish and so on) is not a roughly vegetarian diet. It is simply *not* a vegetarian diet, period.

4 Damages

In his application Mr Jakóbski claimed 5,000 euros as non-pecuniary damage.[29]

The ECtHR quantified the non-pecuniary damage suffered by Mr Jakóbski and awarded 3,000 euros.[30] It is not clear however whether this non-pecuniary damage implies a "moral suffering" for being forced to eat meat. It is worth noting that in a previous case[31] concerning the alleged violation of Article 3 (*Prohibition of torture*) of the ECHR, the applicant—another Polish national who had been in custody on charges of attempted murder—had submitted that the conditions of his detention on remand were inhuman and degrading, in particular as regards the refusal to provide him with vegetarian food. In this case, the ECtHR had maintained that "regard being had to the duration and type of the alleged ill-treatment" there was no evidence that such treatment had "reached the threshold of severity required to bring the matter within the ambit of" Article 3. For these reasons the Court had declared that the complaint was manifestly ill-founded.[32] Thus the ECtHR did not exclude that being forced to eat meat products constitutes, for a vegetarian, ill-treatment (which implies *per se* suffering), but more simply it maintained that in that specific case the treatment could not be considered as

[26] Ibidem, para 47.

[27] Ibidem, paras 47 and 54.

[28] Ibidem, para 41 (emphasis added).

[29] Ibidem, para 61.

[30] Ibidem, para 63.

[31] ECtHR: Krowiak v. Poland, 12786/02, Judgment (16 October 2007).

[32] Ibidem, para 34.

torture or inhuman or degrading treatment or punishment under Article 3 of the ECHR.

5 Conclusions

The judgment in the case of *Jakóbski v. Poland* scores a point for the vegetarian cause and especially for those vegetarians who are unable to freely choose their diet as they are temporarily obliged to rely upon the State or a public authority to provide sustenance.

The judgment is however questionable in some respects. As requested, the ECtHR settled the specific case but no objective criteria to identify the dietary choices deserving protection under Article 9 of the ECHR can be inferred from its decision. Moreover, even though the ECtHR excluded that this could be relevant in the case in question, it seems to suggest that there is a further possibility for States to restrict the right guaranteed under Article 9, namely the "financial implications" of a dietary request. Actually, the ECtHR maintained that while it was "prepared to accept that a decision to make special arrangements for one prisoner within the system can have financial implications for the custodial institution and thus indirectly on the quality of treatment of other inmates", it had to "consider whether the State can be said to have struck a fair balance between the interests of the institution, other prisoners and the particular interests of the applicant".[33] It is not clear to what extent financial implications can impinge upon the reasonableness of the request for a particular diet and on the reasonableness of the possible refusal by the authorities. Indeed Poland did not deny "that in a situation where it was possible for a custodial institution to provide for a special diet it should have granted such a diet to the prisoner".[34] This introduces a case-by-case approach which in my opinion does not correspond to the margin of appreciation mentioned by the ECtHR.[35] Poland observed that "since there were nearly 1,200 detainees in Goleniów Prison, the preparation of special meals *for only one person* would have placed an excessive burden on the prison authorities".[36] Unfortunately Mr Jakóbski could not share his detention in Goleniów Prison with any other Buddhist convict. The respect of human rights cannot be so aleatory as participation in a lottery: if inmates are lucky they will draw the "right" prison which can guarantee their rights, otherwise… tough luck!

In conclusion, there is no doubt that a prison is not a restaurant and inmates cannot claim to have menus of their liking or to satisfy their culinary whims: a minimum of affliction is inherent in the concept of punishment itself. However, the

[33] Jakóbski, supra n. 2, para 50.

[34] Ibidem, para 40.

[35] See the already quoted para 47 of Jakóbski, supra n. 2.

[36] Ibidem, para 41 (emphasis added).

judgment of the ECtHR in the case of *Jakóbski v. Poland* reminds us that States have to endeavour to respect dietary choices, at least when they are reasonable and based on a religious belief. This is certainly a small but significant step in the development of international law as regards the protection of the freedom of thought, conscience and religion of all the people who, for some reason, choose to follow dietary regimes different from the dominant one. This may contribute towards paying the same attention to the alimentary choices of people in hospitals, barracks, school lunches, etc., a field in which domestic and international jurisprudence is still limited.

Mesures anti-piraterie en Somalie entre les droits de l'homme et les garanties du droit humanitaire. La contribution de la jurisprudence et de la pratique des mécanismes de contrôle non juridictionnel

Maria Chiara Noto

1 Introduction

Ces dernières années, la piraterie[1] en Somalie, considérée comme *crimen iuris gentium*, est devenue une menace croissante pour la vie humaine en mer et la sécurité de la navigation maritime. Afin de combattre le phénomène, le 2 juin 2008 le Conseil de sécurité des Nations Unies, dans l'exercice des pouvoirs qui lui sont conférés en vertu du chapitre VII de la Charte de San Francisco, a adopté la résolution 1816, qui s'ajoute à une série de mesures visant à limiter les conséquences négatives du conflit armé en Somalie.[2] Avec cette résolution, et avec celles successives ayant pour but de renouveler le mandat, le Conseil de sécurité a autorisé les États membres à adopter des mesures impliquant l'usage de la force

[1] L'art. 15 de la Convention international sur la haute mer (Genève, 29 avril 1958), entrée en vigueur le 30 septembre 1962, contient une définition de la piraterie, reprise intégralement à l'art. 101 de la Convention des Nations Unies sur le droit de la mer (Montego Bay, 10 décembre 1982) (après CNUDM), entrée en vigueur le 14 novembre 1994, selon laquelle sont considérés comme des actes de piraterie: « tout acte illicite de violence ou de détention ou toute déprédation commis par l'équipage ou des passagers d'un navire, agissant à des fins privées, et dirigé contre un autre navire ou aéronef, ou contre des personnes ou des biens à leur bord ». Pour une analyse historique et juridique du phénomène de la piraterie cf., entre autres, Birnie 1987, p. 163; Halberstam 1988, p. 269; Rubin 1989, p. 259, 1998, p. 90; Jesus 2003, p. 363; Torresi 2007, p. 598.

[2] Sur la piraterie en Somalie, v. Guilfoyle 2008, p. 690, 2010, p. 141; Tancredi 2008, p. 937; Caligiuri 2009, p. 1506; Noto 2009, p. 439; Treves 2009, p. 399; Roach 2010, p. 397.

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contre la piraterie en haute mer et dans les eaux territoriales de la Somalie.[3] Bien que la piraterie ne constitue pas une menace directe à la paix et à la sécurité internationale, elle contribue à aggraver la situation en Somalie.[4] Avec l'extension des opérations sur la terre ferme somalienne, le Conseil de sécurité a obligé les États qui coopèrent avec la Somalie à respecter le droit international humanitaire et les droits de l'homme.[5] Cette situation a créé une certaine confusion sur les règles applicables et la relation entre les deux systèmes.[6]

La présente étude vise à analyser les questions qui sous-tendent l'application contextuelle du droit international humanitaire et des droits de l'homme dans les opérations anti-piraterie. Premièrement, on cherchera à identifier le *statut* juridique des pirates qui n'est pas simple à déterminer, sauf dans les cas de flagrant délit. Deuxièmement, nous analyserons le fondement juridique qui justifie l'application contextuelle du droit international humanitaire et des droits de l'homme dans les opérations anti-piraterie. Enfin, sur la base de la jurisprudence de la Cour internationale de justice (CIJ) et la pratique des mécanismes de contrôle non juridictionnel pertinents, nous nous pencherons sur la relation entre le système du droit international humanitaire et celui des droits de l'homme, afin de déterminer le niveau de protection qui s'appliquera, par l'interaction des deux systèmes, aux pirates et aux otages éventuellement capturés.

2 Le statut juridique des pirates

La Somalie est un pays dans lequel sévit un conflit armé interne. Dans ce contexte, les pirates pourraient faire partie de groupes militaires organisés qui recourent à des actes de déprédation pour financer le conflit. Cependant, il semble opportun de distinguer les actes de violence ou de déprédation perpétrés durant un conflit armé et dirigés vers des objectifs militaires, comme la capture des navires qui transportent des armes ou autres biens destinés à l'ennemi, de ceux qui sont dirigés à l'encontre de navires civils étrangers au conflit. Dans le premier cas, en tant qu'actes de stratégie militaire et dirigés vers les ennemis, ils ne peuvent être considérés comme des actes de piraterie. Dans le second cas, les actes de piraterie

[3] Il est opportun de souligner que les eaux territoriales sont assujetties à la juridiction exclusive de l'État côtier. Donc, le crime de piraterie commis dans les eaux territoriales d'un État, bien qu'il soit indexé avec le même *nomen iuris*suit des critères pour l'attribution de la compétence différents par rappport à la piraterie *juris gentium*.

[4] Cf. résolution 1816 (2008), NU doc. S/RES/1816 (2 juin 2008), préambule.

[5] Cf. résolution 1851 (2008), NU doc. S/RES/1851 (16 décembre 2008), par. 6.

[6] En ce qui concerne la relation entre le droit international humanitaire et les droits de l'homme, v. Kolb 1999, p. 57; Meron 2000, p. 239; Gasser 2002, p. 149; Provost 2002, p. 11; Hicks and Weissbrodt 2004, p. 325; Lattanzi 2004, p. 1985; Greppi 2006, p. 801; Gonzales 2007, p. 485; Guellali 2007, p. 439; Pisciotta 2007, p. 67; Orakhelashvili 2008, p. 161; Ben-Naftali 2011, p. 12; Sassoli 2011, p. 34.

sont *crimen juris gentium* et ils seront poursuivis par les tribunaux des États compétents.

Dans le Golfe d'Aden les actes de piraterie et les prises d'otages ne semblent pas des actes attribuables au conflit armé interne. En fait, les pirates arrêtés possèdent des nationalités différentes de celle somalienne et ils attaquent des navires privés qui ne prennent pas partie au conflit. En outre, la Somalie a un gouvernement de transition (*Transnational Federal Government*), mais elle est un *failed State*.[7] Les pirates ne peuvent être considérés membres des forces armées de cet État, parce que depuis 1991 la Somalie n'a pas de flotte et est incapable de fournir un service de patrouille côtière.[8] Enfin, les pirates ne satisfont pas aux critères du droit humanitaire pour être considérés des combattants, car ils ne sont soumis à aucun commandement responsable, ne portent pas de signes distinctifs fixes et reconnaissables à distance, ne respectent pas les normes et les usages de la guerre,[9] comme par exemple l'interdiction de prise d'otages et l'obligation de distinguer entre civils et combattants.

En cas d'actes de piraterie commis en flagrant délit, l'application du droit international humanitaire ne semble pas fondée *de lege lata*, pour les raisons ici exposées. En revanche, les États coopérants doivent arrêter et juger les pirates présumés dans les limites et en conformité avec les normes pour la protection des droits de l'homme. Cette conclusion est confirmée par la pratique des États engagés dans la lutte contre la piraterie dans le golfe d'Aden,[10] lesquels ont conclu des accords pour transférer devant les tribunaux du Kenya et des Seychelles les pirates capturés.[11]

3 La *ratio* de l'application du droit humanitaire et des droits de l'homme dans la résolution 1851 (2008)

Comme déjà mentionné, avec la résolution 1851 (2008), le Conseil de sécurité demande aux États coopérants de respecter le droit international humanitaire et les normes pour la protection des droits de l'homme.[12] Dans ce cadre, il n'y a guère de

[7] Cf. Tancredi 2008, p. 937; Noto 2009, p. 439; Pustorino 2010, p. 1.

[8] Bahar 2007, p. 81.

[9] Ces conditions ont nature coutumière et sont codifiées à l'art. 4, par. 2, de la III Convention relative au traitement des prisonniers de guerre (Genève, 12 août 1949), entrée en vigueur le 21 octobre 1950.

[10] Actuellement, les navires militaires qui agissent au sein du mandat du Conseil de sécurité sont: un groupe de sept navires sous l'égide des forces navales de l'Organisation du Traité de l'Atlantique Nord (OTAN), deux coalitions d'États et une force navale de l'Union européenne (UE).

[11] Nous nous référons, en particulier, aux accords que l'UE a conclus, respectivement, le 6 mars et le 10 novembre 2009, avec le Kenya et les Seychelles, et à l'Accord du 11 décembre 2008 entre la Grand Bretagne et le Kenya. Pour un commentaire, Kontorovich 2009, p. 747; Noto 2009, p. 442.

[12] Supra n. 5.

doutes sur l'applicabilité aux pirates des normes relatives aux droits de l'homme, parce que les actes de piraterie ne peuvent être attribués au conflit armé en Somalie. Par contre, il n'est pas clair pourquoi le Conseil de sécurité a obligé les États coopérant à appliquer le droit international humanitaire. La réponse à cette question n'est guère aisée, car le Conseil de sécurité ne précise pas quelles sont les règles du droit international humanitaire qui s'appliquent aux activités menées pour lutter contre la piraterie. Il est cependant possible de développer quelques réflexions.

Le droit humanitaire s'applique dans les situations de conflit armé[13] et d'occupation militaire.[14] En outre, au regard des spécificités des opérations en mer, revêt une certaine importance le *Manuel sur le droit international applicable aux conflits armés en mer* (Manuel de Sanremo),[15] qui prévoit que, si le Conseil de sécurité décide de recourir à la force armée, ou autorise un ou plus États à l'utiliser, « the rules set out in this document (Manuel de Sanremo) and any other rules of international humanitarian law applicable to armed conflicts at sea shall apply to » (part I, sect. III, par. 9). Par conséquent, il est possible que le Conseil de sécurité, en autorisant les mesures impliquant l'usage de la force contre la piraterie voulait assurer la conformité avec les règles du droit international humanitaire et, en particulier, l'obligation de distinguer entre civils et combattants, ainsi qu'entre objectifs civils et objectifs militaires.[16]

Aux fins de l'application contextuelle du droit international humanitaire et des droits de l'homme, le *statut* des pirates présumés importe moins que l'usage de la force qui, en raison des possibles conséquences, conduit nécessairement à une augmentation du niveau de protection. L'application contextuelle du droit international humanitaire et des droits de l'homme dans les opérations anti-piraterie crée un filet de protection qui renforce les principales garanties de tutelle, non seulement des pirates présumés, mais aussi des personnes impliquées dans les opérations anti-piraterie, comme par exemple, les otages. Toutefois, il y a un problème de coordination entre le droit international humanitaire et les droits de l'homme.

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[13] Dans le droit international il n'existe aucune définition de "conflit armé" généralement reconnue par les États; donc il peut être utile de citer l'arrêt du Tribunal Pénal International pour l'ex-Yougoslavie (TPIY) relatif à l'affaire *Tadić*, selon lequel « (…) un conflit armé existe chaque fois qu'il y a recours à la force armée entre États ou un conflit armé prolongé entre les autorités gouvernementales et des groupes armés organisés ou entre de tels groupes au sein d'un État » (TPIY : Procureur c. Dusko Tadić, Chambre d'appel, IT-94-1-A, arrêt (2 octobre 1995), par. 70).

[14] Sur ce point, cf. Gill 1995, p. 80; Schweigman 2001, p. 179.

[15] Le Manuel de Sanremo a été élaboré, de 1988 à 1994, par des juristes internationaux et des experts navals réunis par l'Institut international de droit humanitaire; cf. International Institute of Humanitarian Law (1995) San Remo Manual on International Law Applicable to Armed Conflicts at Sea, p. 6.

[16] Sur l'application du droit international humanitaire aux pirates somaliens, cf. Passman 2008, p. 1; Guilfoyle 2010, p. 1.

4 Droit humanitaire et droits de l'homme: superpositions et contrapositions

Afin d'identifier correctement la nature de la relation entre le droit international humanitaire et les droits de l'homme, il est nécessaire d'insister brièvement sur les principales différences conceptuelles et les similitudes fonctionnelles entre les deux corps normatifs. Il s'agit de deux systèmes juridiques distincts qui se sont développés en périodes diverses et dont les contenus peuvent apparaître comme différents.[17] Les deux systèmes sont dotés d'organes de surveillance ou de protection, bien qu'avec certaines différenciations. Dans le système du droit international humanitaire les parties belligérantes peuvent désigner une Puissance protectrice ou solliciter l'aide du Comité international de la Croix-Rouge pour contrôler le respect des règles sur les conflits armés. Par contre, le système de protection des droits de l'homme est doté d'organes judiciaires ou semi-judiciaires pour vérifier les possibles violations.

En général, le droit international humanitaire s'applique pendant les conflits armés, l'occupation militaire et, comme dans le cas ici considéré, quand le Conseil de sécurité décide d'autoriser l'usage de la force. Par contre, les règles de protection des droits de l'homme s'appliquent à toute personne soumise à la juridiction d'un État, en temps de paix et, avec certaines limitations,[18] pendant un conflit armé. Malgré ces différences, les droits de l'homme et le droit humanitaire partagent « objectifs, valeurs et terminologie »[19] et l'utilisation des droits de l'homme « est généralement d'une aide appréciable, voire nécessaire, pour déterminer l'état du droit international coutumier en matière humanitaire. On peut en effet considérer que, sur certains points, le droit international humanitaire a fusionné avec la branche du droit touchant les droits de l'homme ».[20] Ainsi, tant le droit humanitaire que les droits de l'homme envisagent le respect des droits fondamentaux (règles communes d'humanité, dans le premier cas; droits fondamentaux, dans le deuxième) et poursuivent l'objectif commun de protéger ces

[17] Pour une synthèse efficace, cf. Greppi 2006, p. 801; Pisciotta 2007, p. 896.

[18] Il s'agit des clauses dérogatoires contenues dans les principaux traités sur les droits humains, comme l'art. 15 de la Convention européenne des droits de l'homme (Rome, 4 novembre 1950; ci-après la Convention européenne), entrée en vigueur le 3 septembre 1953; l'art. 4 du Pacte relatif aux droits civils et politiques (New York, 16 décembre 1966; ci-après le Pacte), entré en vigueur le 23 mars 1976; l'art. 27 de la Convention américaine relative aux droits de l'homme (San José, 22 novembre 1969; ci-après la Convention américaine), entrée en vigueur le 18 juillet 1978.

[19] TPIY: Procureur c. Dragoljub Kunarac, Radomir Kovac et Zoran Vukovic, IT-96-23-T, jugement (22 février 2001), par. 467.

[20] *Ibidem*.

droits en toute situation.[21] Par exemple, le droit à la vie, le droit à ne pas être soumis à la torture ni de subir traitements inhumains ou dégradants, ou l'interdiction d'esclavage sont réglementés par les principaux traités relatifs aux droits de l'homme et, bien qu'avec certaines différences, par les principes généraux du droit international humanitaire, tels que codifiés à l'art. 3 commun aux quatre Conventions de Genève.[22]

L'objectif humanitaire, commun aux deux corps normatifs ici analysés, a poussé la CIJ et les principaux organes de protection des droits de l'homme à interpréter et, dans certains cas, à appliquer les droits de l'homme de manière complémentaire au droit humanitaire.[23] Il est cependant nécessaire de souligner que la jurisprudence et la pratique à laquelle nous nous référerons concerne essentiellement les conflits armés et non pas la lutte contre la piraterie. En outre, il convient de relever que, nonobstant la pratique des mécanismes de contrôle non juridictionnel et la jurisprudence de la CIJ (nombreuse et constante), la base juridique de l'application du droit international humanitaire en temps de paix est controversée. Il s'agit d'une question cruciale, en particulier en ce qui concerne les conflits de faible intensité, la lutte contre le terrorisme international ou toutes les situations dans lesquelles l'emploi de la force n'atteint pas une intensité telle à déterminer l'application du droit international humanitaire.

En ce qui concerne spécifiquement la piraterie, la résolution 1851 (2008) adoptée par le Conseil sécurité des Nation Unies, sous le chapitre VII de la Charte, représente une base juridique solide qui justifie l'application contextuelle du droit international humanitaire et des droits de l'homme. Toutefois, en cas de conflit entre normes, le Conseil de sécurité ne précise pas lequel des deux *corpus* de règles doit prévaloir.

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[21] Parmi les nombreux documents des Nations Unies sur les règles fondamentales d'humanité, cf. Promotion et protection des droits de l'homme, règles d'humanité fondamentales, rapport du Secrétaire général, NU doc. E/CN.4/2004/90 (25 février 2004); Rapport de la sous commission de la lutte contre les mesures discriminatoires et de la protection des minorités, règles humanitaires minimales, NU doc. E/CN.4/1998/87 (5 janvier 1998). Pour un commentaire, voir Pisciotta 2008, p. 896.

[22] Les traités auxquelles nous faisons référence sont la I Convention pour l'amélioration de la condition des blessés et des malades dans les forces armées en campagne, la II Convention pour l'amélioration de l'état des blessés et des malades dans les forces armées sur mer, la III Convention (cf. note 9), la IV Convention sur la protection des personnes civiles en temps de guerre adoptées à Genève, le 12 août 1949, entrées en vigueur le 21 octobre, 1950. L'art. 3 commun aux quatre Conventions de Genève dispose que « sont et demeurent prohibés, en tout temps et en tout lieu, à l'égard des personnes mentionnées ci-dessus: a) les atteintes portées à la vie et à l'intégrité corporelle, notamment le meurtre sous toutes ses formes, les mutilations, les traitements cruels, tortures et supplices; b) les prises d'otages; c) les atteintes à la dignité des personnes, notamment les traitements humiliants et dégradants; d) les condamnations prononcées et les exécutions effectuées sans un jugement préalable, rendu par un tribunal ».

[23] Sur la théorie de la complémentarité entre les droits de l'homme et le droit humanitaire, entre autres, cf. Gonzales 2007, p. 485; Pisciotta 2007, p. 67; Sassoli 2011, p. 34.

5 La relation entre les deux *corpus* normatifs dans la jurisprudence et la pratique des mécanismes de contrôle non juridictionnel

La jurisprudence de la CIJ fournit d'importantes indications sur la relation entre le droit international humanitaire et les droits de l'homme. Dans l'avis consultatif du 9 juillet 2004 sur les conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé,[24] la CIJ identifie trois situations possibles, en vertu desquelles « certains droits peuvent relever exclusivement du droit international humanitaire; d'autres peuvent relever exclusivement des droits de l'homme; d'autres enfin peuvent relever à la fois de ces deux branches du droit international ».[25] Certaines règles du droit international humanitaire ne trouvent pas leur correspondance dans le système des droits de l'homme. En fait, bien que ceux-ci assurent des standards élevés de protection, ils n'envisagent pas certains principes généraux du droit international humanitaire qui, dans la lutte contre la piraterie, peuvent être invoqués; par exemple, l'obligation de porter secours aux blessés, ou l'interdiction des expulsions collectives, l'interdiction des arrestations massives et indiscriminés, ou des restrictions spécifiques sur l'usage de la force armée. D'autres droits sont néanmoins couverts, par les deux *corpus* normatifs comme, par exemple, le droit à la vie ou l'interdiction de la torture.

Dans l'avis consultatif du 8 juillet 1996 sur la licéité de la menace ou de l'emploi d'armes nucléaires,[26] la CIJ a affirmé la spécialité du droit international humanitaire au regard du respect des droits de l'homme. Étant un principe reconnu, le critère de la *lex specialis* est utilisé pour résoudre les antinomies entre les normes dont les dispositions normatives sont complémentaires. Ainsi, en fonction de ce critère, la norme spécifique déroge à la règle générale. En ce qui concerne le droit à la vie dans les situations de conflit armé, la CIJ a déclaré que la *lex specialis*, c'est-à-dire le droit humanitaire, est compétente à établir ce qui, à la lumière de critères tels que la proportionnalité, la nécessité militaire et le principe de distinction entre biens civils et militaires, constitue une privation arbitraire de la vie.[27] Ainsi, en cas d'antinomie entre des normes appartenant aux deux systèmes normatifs qui ne permettent pas une application complémentaire, en fonction du critère de la *lex specialis*, le droit international humanitaire prévaut.[28] Toutefois, cette perspective semble destinée à rester confinée à un niveau théorique. Dans la

[24] CIJ : Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif (9 juillet 2003). Pour un commentaire, cf. Bianchi 2004, p. 343; Pisciotta 2006, p. 736; Zyberi 2007, p. 117.

[25] *Ibidem*, par. 106.

[26] CIJ : Licéité de la menace ou de l'emploi d'armes nucléaires, avis consultatif (8 juillet 1996).

[27] *Ibidem*, par. 25.

[28] *Ibidem*, par. 105.

plupart des cas, il n'existe aucun contraste inconciliable entre les deux *corpus* de règles et, donc, il semble toujours possible de suivre l'application contextuelle.[29]

En ce qui concerne le système des Nations Unies de protection des droits humains, rarement le Comité des droits de l'homme (CDH) a fait référence dans ses communications au droit international humanitaire. Par contre, dans ses observations générales, le CDH a longuement traité de l'application des droits de l'homme durant les conflits armés et la relation entre ceux-ci et le droit international humanitaire.[30] En particulier, dans l'observation générale n. 31, sur « La nature de l'obligation juridique générale imposée aux États parties au Pacte »,[31] le CDH a décrit la relation entre les deux *corpus* de règles en précisant que: « Même si, pour certains droits consacrés par le Pacte, des règles plus spécifiques du droit international humanitaire peuvent être pertinentes aux fins de l'interprétation des droits consacrés par le Pacte, les deux domaines du droit sont complémentaires et ne s'excluent pas l'un l'autre ».[32] En d'autres termes, les règles du Pacte peuvent être interprétées à la lumière des règles plus spécifiques du droit humanitaire et, par conséquent, peut leur être attribué un contenu plus précis et qui mieux protège les individus. Le CDH invite donc les États à appliquer la règle d'interprétation contenue à l'Art. 31.3.c de la Convention sur le droit des traités (Vienne, 23 mai 1969),[33] selon laquelle les dispositions d'un traité doivent être interprétées compte tenu de toute règle pertinente de droit international applicable dans les relations entre les parties.

Dans le cadre des systèmes régionaux de protection des droits de l'homme, les principaux organes juridictionnels, en se référant à la jurisprudence de la CIJ et en s'influençant les uns et les autres, ont joué un rôle important dans la réduction de l'espace entre le droit international humanitaire et les droits de l'homme, afin de protéger les individus en toute situation.[34] En analysant la jurisprudence des organes de protection de droits de l'homme et en la comparant à celle de la CIJ, il faut tenir compte du fait que les premiers ont des limites de compétence plus strictes de celles de la Cour. En fait, les organes de protection des droits de l'homme sont compétents pour vérifier les violations de leurs traités constitutifs par les États parties.

Dans le système américain de protection des de droits de l'homme, il y a une jurisprudence constante de la Commission inter-américaine des droits de l'homme (CommIADH) et de la Cour inter-américaine des droits de l'homme (CIADH) qui fait largement référence au droit humanitaire.[35] En particulier, dans le cas *Avilan*,

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[29] Cf. Pisciotta 2006, p. 736; Zyberi 2007, p.117.

[30] Pour un résumé efficace, cf. Weissbrodt 2010, p. 1185.

[31] NU doc. CCPR/C/21/Rev.1/Add.13 (26 mai 2004).

[32] *Ibidem*, par. 11.

[33] Entrée en vigueur le 27 janvier 1980.

[34] En ce sens, cf. Doswald-Beck and Vité 1993, p. 94; Kolb 1999, p. 57; Trindade 2004, p. 309; Hampson 2008, p. 549; Iguyovwe 2010, p. 11.

[35] En ce qui concerne la jurisprudence de la CommIADH, voir : Arturo Ribòn Avilan et al. c. Colombie, 11.142, rapport 26/97 (30 septembre 1997); Juan Carlos Abella c. Argentine, 11.137, rapport 55/97 (18 novembre 1997); Coard et al. c. États Unis, 10.951, rapport 109/99

la IACommHR a établi que « [i]t is precisely in situations of internal armed conflict that human rights and humanitarian law converge most precisely and reinforce one another. In this specific case (…) the relevant rights (…) are (…) the right to life and physical integrity, rights which are non-derogable even in situations of armed conflict. Both Common Article 3 of the Geneva Conventions and the American Convention guarantee these rights (…) and the CommIADH should apply both bodies of law ».[36] En outre, dans la décision sur la requête de mesures conservatoires adoptée le 12 mars 2002, relatives à l'affaire des détenus de Guantanamo, la CommIADH a établi que « the protections under international human rights and humanitarian law may complement and reinforce one another, sharing as they do a common nucleus of non-derogable rights and a common purpose of promoting human life and dignity ».[37] En d'autres termes, le droit international humanitaire et les droits de l'homme opèrent comme des systèmes de protection des droits complémentaires et connexes qui, malgré leurs différences, convergent dans l'objectif de protéger les individus en tout temps, en se soutenant mutuellement dans leur action, et en créant ainsi un réseau de sécurité. Néanmoins, le droit à la vie est réglé par le droit international humanitaire d'une manière plus faible par rapport aux droits humains, parce qu'il doit s'équilibrer avec la nécessité militaire.[38] Dans la décision sur les mesures de surveillance appliquées aux détenus de Guantanamo, la CommIADH a déclaré que « the test for evaluating the observance of a particular right, such as the right to liberty, in a situation of armed conflict may be distinct from that applicable in time of peace. In such situations, international law, including the jurisprudence of this Commission, dictates that it may be necessary to deduce the applicable *standard* by reference to international humanitarian law as the applicable lex specialis ».[39] Le système inter-américain prévoit des standards élevés de protection comparables à ceux du droit international humanitaire, mais non spécifiques à la matière des conflits armés. En fait, la Convention américaine relative aux droits de l'homme, bien qu'elle soit applicable dans les situations de conflit armé,[40] ne contient aucune disposition qui réglemente ces situations. Dans l'affaire *Abella*, la CommIADH a déclaré que, dans l'exercice de la fonction judiciaire, « the Commission is bound by its Charter-based mandate

(Footnote 35 continued)
(29 septembre 1999). Pour la CIADH, voir : Las Palmeras c. Colombie, arrêt (4 février 2000); Bamaca Velasquez c. Guatemala, arrêt (25 novembre 2000). Par un commentaire, cf. Moir 2003, p. 182; Pisciotta 2006, p. 736; Byron 2007, p. 839; Cassimatis 2007, p. 623; Gonzales 2007, p. 485; Buis 2008, p. 269; Orakhelashvili 2008, p. 168.

[36] Cf. CommIADH : Ribòn Avilan et al. c. Colombie, supra n. 35, par. 174.

[37] CommIADH : Détenus de Guantanamo c. États Unis, PM259-02, rapport (12 mars 2002), alinéa IV. Par un commentaire, cf. Sassoli 2008, p. 599.

[38] Le concept de nécessité militaire est strictement lié à celui de proportionnalité et au principe général selon lequel le droit des parties en conflit de choisir les méthodes et les moyens de guerre n'est pas illimité. Cela signifie que les États peuvent seulement utiliser les moyens et la quantité de force nécessaires pour mettre l'adversaire hors de combat.

[39] Cf. CommIADH : Détenus de Guantanamo v. États Unis, supra n. 37, alinéa IV.

[40] Cf. art. 27 de la Convention américaine.

to give effect to the normative standard which best safeguards the rights of the individual »[41]; cependant, s'il y a des incompatibilités entre le droit international humanitaire et les droits de l'homme, la CommIADH se doit « to give legal effort to the provision(s) of that treaty with the higher standard(s) applicable to the right(s) or freedom(s) in question. If that higher standard is a rule of humanitarian law, the Commission should apply it ».[42] Par exemple, dans l'affaire *Coard*, afin de déterminer si la détention des requérants pouvait être définie comme arbitraire, la CommIADH a utilisé les standards du droit international humanitaire : « [It] is a source of authoritative guidance and provides the specific normative standards which apply to conflict situations ».[43]

La jurisprudence de la Cour européenne des droits de l'homme (CEDH) est plus restrictive que celle développée par le système des Nations Unies de protection des droits de l'homme et par celui inter-américain. Récemment, dans le cas *Géorgie c. Russie,*[44] la CEDH a souligné que « l'article 2 [sur le droit à la vie] doit être interprété dans la mesure du possible à la lumière des principes du droit international, notamment des règles du droit international humanitaire, qui jouent un rôle indispensable et universellement reconnu dans l'atténuation de la sauvagerie et de l'inhumanité des conflits armés ».[45] Cette décision est particulièrement importante parce que, outre à s'être occupée de violations des droits de l'homme pendant les conflits armés, la CEDH s'est arrêtée à analyser la relation juridique entre le droit international humanitaire et les droits de l'homme; en outre, elle a aussi appliqué les standard*s* contenus dans la Convention européenne.[46]

Les organes de protection des droits de l'homme ne sont pas compétents *ipso facto* à appliquer le droit humanitaire mais ils ont utilisé les règles du droit humanitaire comme paramètre d'interprétation des droits de l'homme. Cet emploi du droit international humanitaire a été utile pour renforcer l'efficacité de certaines règles et pour garantir ainsi des standards élevés de protection.

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[41] *Ibidem*.

[42] Cf. CommIADH : Abella c. Argentina, supra n. 35, par. 165.

[43] Cf. CommIADH : Coard et al. c. États Unis, supra n. 35, par. 42.

[44] CEDH : Georgie c. Russie, 38263/08, arrêt (13 décembre 2011).

[45] *Ibidem*, par. 72.

[46] En particulier, dans les affaires Isayeva Yusupova et Bazayeva c. Russie, 57947/00-57948/00-57949/00, arrêt (24 février 2005) et Isayeva c. Russie, 57950/00, arrêt (24 février 2005), la CEDH a précisé que, pendant les conflits armés, la Convention européenne garantit un niveau de protection des droits humains plus haut par rapport au droit humanitaire; en outre, pour évaluer la légalité des opérations, la CEDH a utilisé les standards de proportionnalité contenus dans la Convention européenne. Pour un commentaire, cf. Abresch 2005, p. 741; Alston et al. 2008, p. 183; Gioia 2011, p 201.

6 L'application contextuelle du droit international humanitaire et des droits de l'homme dans les opérations anti-piraterie

Dans les opérations anti-piraterie, surtout celles conduites dans les eaux territoriales et sur la terre ferme en Somalie,[47] il n'est pas facile de distinguer les pirates des civils ou de ceux qui prennent part au conflit armé interne. En cas d'incertitude, les pirates présumés bénéficieront de la protection du droit international humanitaire en attendant que leur statut soit déterminé par le tribunal compétent (art. 5 de la III Convention de Genève).[48] À cet égard, toutefois, il est nécessaire de préciser que, dans le cadre des opérations autorisées par le Conseil de sécurité des Nations Unies, les États qui coopèrent avec la Somalie procèdent à l'arrestation des pirates seulement en cas de flagrant délit, s'il existe donc un niveau élevé de certitude. L'objectif est celui d'éviter de poursuivre en justice des pirates présumés qui, suite au procès pénal, sont libérés pour carence de preuves.

Les opérations anti-piraterie en Somalie se concluent, fréquemment, avec la mise en liberté des pirates. Toutefois, des échanges de tirs entre les navires des pirates et les militaires ont parfois caractérisé ces opérations. Parmi celles-ci, trois ont connu des conséquences dramatiques pour les pirates et les otages détenus à bord. Dans un cas, le 21 janvier 2011 un bateau de la marine coréenne, le *ROK Navy SEAL*, abordait un cargo maltais et libérait les otages à bord. Au cours de l'opération huit pirates furent tués et un otage blessé. Dans un autre cas, le 11 Novembre 2008, un bateau de la marine britannique, le *HMS Curberlan*, s'engageait dans une action à l'encontre de pirates à bord d'un bateau de pêche yéménite, qui coutât la vie à trois des pirates.[49] En ce qui concerne le troisième épisode, le 18 Novembre 2008 un bateau de la marine indienne, l'*INS Tabar*, interceptait un bateau de pêche thaïlandais, avec à bord un groupe de pirates et des otages.[50] Durant les opérations d'abordage, le bateau thaïlandais coulait et certains otages perdaient la vie.

Une fois arrêtés, se pose le problème du transfert des pirates présumés devant un tribunal compétent et de leur soumission à un procès. Théoriquement, il pourrait se poser la question d'une violation du délai raisonnable de détention des pirates sur les navires militaires, parce que, en raison des grandes distances, pour rejoindre les côtes, cela peut prendre plusieurs jours. De fait, pour obvier à ce problème, certains États utilisent des hélicoptères pour transférer rapidement les pirates sur la terre ferme. D'autres États, comme l'Italie, pour valider l'arrestation des pirates, se mettent en vidéocommunication, grâce à internet, avec leur procureur général; les pirates peuvent ainsi être légalement détenus dans des cabines

[47] Les opérations anti-piraterie ont été étendues à la terre ferme de la Somalie, avec la résolution 1851(2008), afin d'identifier les bases logistiques des pirates et libérer les otages détenus.

[48] Cf. note 9.

[49] Cf. Office of Naval Intelligence (ONI), Report, 28 novembre 2008.

[50] Cf. ONI, Report, 14 novembre 2008 et Report, 21 novembre 2008.

du navire pendant toute la durée du voyage. En ce qui concerne la soumission au procès judiciaire des pirates capturés dans la mise en œuvre du mandat contenu dans la résolution 1851 (2008), le 1er mai 2009 l'Office des Nations unies contre la drogue et le crime (ONUDC) et la Commission européenne ont amorcé, avec les États disposés à poursuivre les pirates, le programme « Increase regional capacities to deter, detain and prosecute pirates ».[51] Les principaux objectifs du programme comprennent la révision de la loi nationale sur la piraterie, le support technique et logistique à la police, l'assistance légale aux pirates, l'assurance de la présence de témoins à l'audience, la restructuration des prisons et la formation des juges et des procurateurs. Pour l'heure, le transfert des pirates et leur procès semblent se dérouler dans le respect des droits de l'homme et sous le contrôle attentif des Nations Unies. Compte tenu de cela, nous analyserons par la suite la légalité de l'emploi de la force dans les abordages, en relation avec la protection du droit à la vie des pirates et des otages impliqués dans les opérations. L'abordage des bateaux pirates est, en effet, l'une des phases les plus dangereuses de la lutte contre la piraterie en ce qui concerne la sécurité de la vie en mer; elle échappe aussi facilement au contrôle des Nations Unies.

Le droit à la vie est garanti par les principaux traités pour la protection des droits de l'homme et, à moins que le recours à la force ne soit rendu nécessaire par les circonstances, ne peut être dérogé. Les conditions et les limites de l'emploi de la force militaire - qui ne sont d'ailleurs pas toujours claires - sont contenues dans les règles d'engagement des États et restent une prérogative exclusive de ceux-ci. Toutefois, sur le plan du droit international, il est possible de faire quelques considérations générales.

L'art. 110 de la CNUDM prévoit la possibilité pour un État d'arrêter un bateau pirate. L'abordage peut se dérouler selon une utilisation croissante des mesures armées, en laissant le recours à la force comme dernier recours.[52] En particulier, sauf dans les cas de légitime défense et d'utilisation des armes à fin d'avertissement, les États s'abstiendront, dans la mesure du possible, d'employer les armes de manière offensive, afin de ne pas mettre en danger la sécurité des personnes à bord. En ce sens, la CommIADH, dans l'affaire *Miguel Castro*, a précisé que « the police and other officers in charge of enforcing the law must protect the rights to life, liberty, and security of the person, being able to employ force, only, in case of direct or imminent danger of death or injuries for the agents themselves or other people ».[53] Dans le cadre de la jurisprudence de la CEDH on peut évoquer l'obligation des États de planifier adéquatement leurs opérations de police. Dans l'affaire *McCann*,[54] par exemple, la CEDH a condamné le Royaume Uni pour

[51] Les États impliqués dans le programme sont le Kenya, les Seychelles, la Tanzanie et les régions du Puntland et Somaliland de la Somalie.

[52] En général, l'usage de la force est permis uniquement dans les cas où une embarcation militaire est entravée dans l'exercice de ses fonctions, ou le militaire doit se défendre ou défendre autrui contre une agression.

[53] CIADH: Miguel Castro-Castro Prison c. Pérou, arrêt (25 novembre 2006), par. 228.

[54] CEDH : McCann et al. c. Royaume Uni, 18984/91, arrêt (27 septembre 1975), par. 194.

violation de l'art. 2 sur le droit à la vie en relation à deux terroristes qui ont été tués au cours d'une opération de police. Selon des sources d'intelligence, qui se sont révélées infondées, les terroristes étaient prêts à faire exploser une bombe radio-commandée; pour empêcher l'activation de la bombe, la police a ouvert le feu contre les terroristes, en frappant les mêmes mortellement. Dans ce cas, la CEDH a conclu que le recours à la force aurait dû être soumis à un contrôle plus sévère de l'État, non seulement au regard de la conduite de ses agents, mais aussi dans le cadre de la planification des activités et de l'exécution des opérations effectuées par ceux-ci.

Quand des otages sont impliqués, l'obligation de planification des opérations de secours, afin de réduire le risque de perte de vie, est explicitement prévu par certains instruments internationaux. En particulier, l'art. 3 de la Convention contre la prise d'otages (New York, 17 décembre 1979)[55] prévoit qu'un État partie « prend toutes mesures qu'il juge appropriées pour améliorer le sort de l'otage, notamment pour assurer sa libération et, au besoin, faciliter son départ après sa libération ». En outre, le principe n. 20 des Nations Unies sur l'emploi de la force et des armes par les agents de police[56] prévoit que les États doivent envisager des alternatives possibles à l'emploi de la force comme, par exemple, le recours à la persuasion, la négociation, la médiation, ou les instruments technologiques, afin de limiter les conséquences négatives. En ce qui concerne la jurisprudence, il est peut-être utile de rappeler ici que dans l'affaire *Andronicou et Constantinou*,[57] la CEDH a affirmé que l'opération de police, dans laquelle étaient morts l'otage et le kidnappeur, n'avait pas violé le droit à la vie de ces derniers, parce que les agents avaient tenté de négocier avec le kidnappeur la libération de l'otage et étaient intervenus seulement quand la vie de celui-ci était en grave danger.

Il est également possible de distinguer une obligation positive pour l'État de prévention. À cet égard, dans l'affaire *Finogenov*, la CEDH a statué que « a duty to take specific preventive action […] only if the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of individual or individuals ».[58] En d'autres termes, si un État est conscient de l'existence d'un risque réel et imminent pour la vie des otages, il doit mettre en œuvre, dans le moment le plus opportun, les mesures de prévention, sinon il pourrait être retenu responsable des conséquences découlant de la capture. L'obligation de diligence n'est pas couverte par les traités des droits de l'homme, mais il apparaît que c'est un principe général du droit international humanitaire. Étant donné que le droit international humanitaire est en rapport de *lex specialis* au regard du respect des droits humains, l'obligation de prévention dans la

[55] Entrée en vigueur le 3 juin 1983.

[56] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, NU doc. A/CONF.144/28/Rev.1 (7 septembre 1990).

[57] CEDH : Andronicou et Constantinou c. Chypre, 25052/94, arrêt (9 octobre 1997), par. 171.

[58] CEDH : Finogenov et al. c. Russie, 18299/03, arrêt (18 mars 2010), par. 173 (disponible seulement en anglais).

planification et l'exécution des opérations militaires peut être utilisée par les organes des droits de l'homme comme paramètre d'interprétation afin de renforcer l'efficacité de certaines dispositions de leurs traités constitutifs et, par conséquent, assurer une meilleure protection aux individus intéressés.

7 Conclusions

L'augmentation des incidents de piraterie et la recrudescence de ceux-ci ont poussé le Conseil de sécurité des Nations Unies à élaborer et à adopter rapidement certains mesures coercitives sans précédents, mais conformes, en ligne de principe, avec le droit international humanitaire et les droits de l'homme. Pour l'application contextuelle des *corpus* normatifs ici analysés, il semble moins important de distinguer le statut des pirates présumés, ou l'existence d'un conflit armé, que l'emploi de la force armée qui, en raison des possibles conséquences, comporte une augmentation du seuil de protection.

Pour l'application contextuelle du droit international humanitaire et des droits de l'homme, il ne semble pas suivre le statut des pirates présumés, mais plutôt l'usage de la force, qui peut avoir des conséquences négatives sur les droits fondamentaux. Les mesures pour combattre la piraterie, bien qu'impliquant l'usage de la force, ne peuvent pas atteindre une intensité telle qu'elles déterminent l'application du droit international humanitaire; en même temps, les règles pour la protection des droits de l'homme peuvent réglementer seulement certains aspects des opérations anti-piraterie. L'incertitude sur le droit applicable, toutefois, n'excuse pas les violations des droits humains fondamentaux qui, si commises, ne peuvent rester impunies.

La lutte contre la piraterie exige des mesures efficaces et incisives, mais les États ne peuvent pas ignorer le respect des droits fondamentaux de l'homme et l'application des normes internationales de protection. En fait, une réaction excessive des États contre les pirates, outre le fait qu'elle peut conduire à la violation des droits fondamentaux de l'homme, pourrait comporter, si elle se répète dans le temps, l'érosion progressive de principes fondamentaux du droit international, comme l'interdiction de l'emploi de la force.

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The Inter-American Court of Human Rights and Its Contribution to the Protection of Children's Rights

Fabián Novak

In this article, we will analyze the rulings issued by the Inter-American Court of Human Rights (IACtHR) from 1999 until August 2012, with regard to children.[1] We shall go over the concept of child set forth by the Court, the child's recognition as a subject of (special) rights within international law, the subjects internationally obliged to safeguard them, the guiding principles of child protection and the children's rights that have been studied by this tribunal.[2]

1 Presentation

Although the international community's concern for children began when the Society of Nations appeared in 1919, it was with the Universal Declaration of Human Rights of 10 December 1948[3] that a conviction emerged with regard to the

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[1] See the Geneva Declaration on Children's Rights adopted by the Society of Nations on 26 December 1924.

[2] See Article 25.2 of the Universal Declaration. See Novak and Nahimas 2004, p. 221.

[3] United Nations General Assembly Resolution n. 217(III), UN Doc. A/RES/217(III) (20 November 1959).

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special condition of vulnerability of children requiring specific international regulation and protection.[4]

Thus, on 20 November 1959 the United Nations (UN) General Assembly adopted the Declaration of the Rights of the Child,[5] which despite lacking legally binding effects, does state the recognition of a set of rights, through ten principles, in favor of boys and girls without discrimination, so they can reach their full physical, social, moral, and mental development.

Later, universally binding legal instruments, such as the International Covenant on Civil and Political Rights (New York, 16 December 1966),[6] and the International Covenant on Economic, Social, and Political Rights (New York, 16 December 1966),[7] granted important rights in their favor.[8]

Nevertheless, beyond these general instruments which incorporate some rules on the matter, others which regulate more specific aspects,[9] and those which lack binding effects,[10] the truth is that it was not until 20 November 1989 that the UN General Assembly would adopt the Convention on the Rights of the Child through Resolution 44/25,[11] comprising 193 State parties today. This constitutes the first general universal treaty on this matter which encompasses the entire range of human rights in favor of the child: civil, political, economic, social, and cultural rights.[12]

In addition to this, other regional instruments of protection would appear as were the cases of Europe and America. In America, the American Declaration of

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[4] Carreras 1992, pp. 186–188.

[5] United Nations General Assembly Resolution n. 1386(XIV), UN Doc. A/RES/1386(XIV) (12 December 2001).

[6] Entered into force on 23 March 1976 (Article 41 on 28 March 1979).

[7] Entered into force on 3 January 1976.

[8] In the first case we have Article 24 (right to a name, nationality, special measures of protection by the family, society and the state) and in the second, Article 10 (against economic and social exploitation of children, against employment harmful to their moral or health, etc.), 13 (right to education) and 40 (on free and compulsory primary education).

[9] This is, for instance, the case of Agreement No. 138 of the ILO on the minimum age required to start working from 26 June 1973; Agreement No. 182 of the ILO on the worst means of infantile work and its immediate action for its elimination from 17 June 1999; the Inter-American Convention on Conflict of Laws with regard to adopting minors from 24 May 1984; the Inter-American Convention on the restitution of minors from 15 July 1989, or the Inter-American Convention on International trafficking of minors from 18 March 1994.

[10] Thus we have the Standard Minimum Rules for the United Nations on the Administration of Juvenile Justice (Beijing Rules 1985), the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children (1986), the United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules 1990), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines 1990), among others.

[11] United Nations General Assembly Resolution n. 44/25, UN Doc. A/RES/44/25 (20 November 1989).

[12] To this we add the two Optional Protocols to the Convention on the Involvement of Children in Armed Conflict and on the Rights of the Child on the Sale of Children, Child Prostitution and the Use of Child Pornography of 25 May 2000.

the Rights and Duties of Man (Bogotà, 2 May 1948),[13] the American Convention on Human Rights or "San José Pact" (San José, 22 November 1969)[14] and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, or "San Salvador Protocol" (San Salvador, 17 November 1988)[15] influence this matter, although never with the ampleness of the Convention on the Rights of the Child (New York, 20 November 1989).[16]

The latter, however, has not been an obstacle for the Inter-American Court of Human Rights to start building up uniform and relevant rulings since 1999 for the protection of children in this region, which is precisely the subject matter of a detailed study in this paper and written in honor of our dear teacher and friend, Professor Tullio Treves.

2 The Concept of Child[17]

To begin dealing with the rulings of the Inter-American Court in relation to the rights of the child, we believe it is fundamental to start by establishing what this Tribunal means when it refers to the concept of child.

A particularly relevant starting point on the topic comes from the fact that the Inter-American Court of Human Rights has repeatedly affirmed that the dispositions from the Convention on the Rights of the Child of 1989 form part of customary law and in such sense, should be used by the court to assume certain definitions it contains as its own and to interpret the true sense and scope of the dispositions related to the rights of the child contained in the American Convention on Human Rights of 1969.

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[13] See Article VII of this instrument.

[14] Entered into force on 18 July 1978. Article 19: "Every child has the right to the protection that his status as a minor requires from his family, society and the state."

[15] Entered into force on 16 November 1999. Article 16: "Every child, whatever his parentage, has the right to the protection that his status as a minor by his family, society and state. Every child has the right to grow and under the responsibility of his parents, except in exceptional circumstances, judicially-recognized, the young child should not be separated from his mother. Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his education at higher levels of the education system". See Cárdenas and Román 1985, pp. 87 et seq.

[16] Entered into force on 2 September 1990. These instruments should be accompanied by a set of institutions for the promotion and protection of human rights such as the Inter-American Children's and Adolescents Institute (1924), the Inter-American Commission on Human Rights has a Special Rapporteur on Children and on the Inter-American Court of Human Rights. Gonzalez Espinoza 2006, pp. 181 et seq.

[17] In this paper we will use the terms child(ren), adolescents and minors indistinctly, as per the Beijing Rules, the Tokyo Rules, the Riyadh Guidelines, but also the rulings from the Inter-American Court of Human Rights. García Ramírez 2010, pp. 20–22.

Thus, the Court has stated that:

> The Convention on the Rights of the Child has been ratified by almost all of the member states of the Organization of American States. This wide number of ratifications shows an ample international consensus (*opinio iuris comunis*) in favor of the principles and institutions comprised in said instrument, which reflects the current development in this matter.[18]

From this, the Court concludes that:

> (…) the existence of a "very comprehensive *corpus iuris* on protection of children's rights in International Law (from which the Convention on the Rights of the Child forms part (…)) which must be used as a source of Law by the Tribunal to establish "the content and the scope" of the obligations the state has assumed through article 19 of the American Convention (…).
>
> If this Court resorted to the Convention on the Rights of the Child to set forth what should be understood by child within the framework of a contentious case, the more reason to resort to this convention and other international instruments on this matter when exercising its advisory function, which deals with the interpretation not only of the Convention, but also of other treaties concerning the protection of human rights in the American states.[19]

Precisely with regard to the above stated, the Inter-American Court on Human Rights assumes the definition contained in the Convention on the Rights of the Child of 1989, as its own, expressing the following:

> Article 19 of the American Convention, which mandates the adoption of special protective measures in favor of children, does not define this concept. Article 1 of the Convention on the Rights of the Child points out that "a child [is] every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. (…)
>
> At this point, the Court will not consider the implications of the diverse expressions with which members of the population under the age of eighteen are addressed. In some of the arguments made by the participants in the procedure corresponding to this Opinion, the difference there is between a child and a minor was noted from certain perspectives. For the purpose of this Advisory Opinion, the difference there is between persons above and under 18 years of age. (…)
>
> Definitely, taking into account the international normative and the criterion sustained by the Court in other cases, a "child" comprises every person who has not reached the age of 18.[20]

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[18] IACtHR: Juridical Condition and Human Rights of the Child, Advisory Op. (28 August 2002), para 29. This Advisory Opinion was submitted to the Court by the Inter-American Commission on Human Rights, in order to interpret it Articles 8, 19 and 25 of the Convention.

[19] Ibidem paras 24 and 30. In this same sense, see IACtHR: "Street Children" (Villagrán-Morales et al.) v. Guatemala, Judgment (19 November 1999), para 148: "To establish the contents and scope of this article [19 of the American Convention], [the Court] shall consider the corresponding rules from the Convention on the Rights of the Child (…) since they form part of a very comprehensive international c*orpus iuris* on the protection of children which the Court must respect."

[20] Juridical Condition and Human Rights of the Child, supra n. 18, paras 38, 40 and 42. Years before, in the same sense as the Court had ruled in the: "Article 19 of the Convention does not define what is meant by "child". For its part, the Convention on the Rights of the Child considered as such (Article 1) every human being who has not attained 18 years of age (…). According to these criteria only three of the victims, Julio Roberto Caal Sandoval, Jovito Josué

3 The Child as Subject of (Special) Rights

On the other hand, the Inter-American Court has clearly pointed out that the evolution of the rights of the child has determined that these shall not only be considered "object of protection" by the State, family, and society, but also as true "subjects of rights", far beyond the fact that they lack active procedural capacity in general International Law to defend them.[21]

Specifically, the Court has stated that:

> Becoming an adult entails the possibility of fully exercising rights, also known as the capacity to act. This means that the person may directly and personally exercise his subjective rights as well as fully assume legal obligations and carry out other acts that are of a personal or patrimonial nature. Not everyone possesses this capacity: children, to a great extent, lack this capacity. Those who are unable to exercise their rights are subject to parental authority, or in their absence, to the guardianship or representation. Nonetheless, they are all subjects of rights, holders of inalienable rights which are inherent to the human being.[22]

From this, the recognition that the Court grants the child, international legal personality is very clear, and that his rights of international nature are also inalienable.

Likewise, the Inter-American Court has been very clear in stating that children do not only possess the rights that all human beings do (children and adults) but also "special rights derived from their specific condition" along with their corresponding "specific family, society and State duties."[23]

Finally, the Court has established that the special rights that are granted to those under age in relation to adults do not constitute *per se* a discriminatory act.[24]

4 Subjects Obliged to Provide Special Protection

From the above, we can say that since the child is "subject of special rights derived from his specific condition" there are also specific, family, society, and State duties or obligations of protection.[25]

(Footnote 20 continued)
Juárez Cifuentes and Anstraum Villagrán Morales, had the status of children" ("Street Children" (19 November 1999), supra n. 19, para 188).

[21] Villanueva Castilleja 2005, p. 227.

[22] Juridical Condition and Human Rights of the Child, supra n. 18, para 41.

[23] Ibidem, para 54.

[24] Ibidem, para 55.

[25] See IACtHR: Mapiripán Massacre v. Colombia, Judgment (15 September 2005), para 152. Likewise, see IACtHR: "Juvenile Reeducation Institute" v. Paraguay, Judgment (2 September 2004), para 147; Street Children (19 November 1999), supra n. 19, para 187.

4.1 The Family

Indeed, the Court attributes "the core of child protection" to the family. It recognizes that it is the family that should provide the best protection for children against abuse, neglect and exploitation. Also, the family as a fundamental and natural element of society in charge of the child's primary social integration is entitled to protection by society and the State. This means that as the basic unit of society and the natural means for the development and welfare of all its members, especially children and young people, the family must be helped and protected so that it can fully assume its responsibilities in the community.[26]

Precisely in view of this, the Court held that the State must refrain from undue interference in family relationships and that a child has the right to grow under the responsibility of his parents, who are called to meet his material, emotional and psychological needs, and should not, except in extraordinary circumstances and preferably justified for a limited time, be separated from them.[27]

[26] Juridical Condition and Human Rights of the Child, supra n. 18, paras 62, 66–68. In IACtHR: Chitay Nech et al. v. Guatemala, Judgment (25 May 2010), paras 2, 153, 157–164 and 170, the Court established how the forced disappearance of the indigenous Mayan political leader Chitay Nech, executed by gunmen in Guatemala, involved the failure of the State's duty to protect the family, for such disappearance involved the disintegration of the family of Chitay Nech, making it a monoparental family, hindering the overall development of the children (Eliseo, Estermerio, Pedro, Encarnación and María Rosaura), precluding the coexistence between parents and children. More so, in the case of an Indian family where the parents who transmit their knowledge to their children orally (thus depriving them of their cultural life) are also those who stay with their sons. In IACtHR: Atala Riffo y Niñas v. Chile, Judgment (24 February 2012), para 142, the Court observed that there is no closed concept of family determined in the American Convention much less does it define and protect just one "traditional" model of it. The concept of family life is not uniquely reduced to marriage and it must include other family ties of fact where the parties share a life in common outside the institution of marriage.

[27] Juridical Condition and Human Rights of the Child, supra n. 18, paras 62, 71, 75–77 and 88. The Court has effectively established that separating children from their family constitutes, in some cases, a violation of their right to family. See IACtHR: "Las Dos Erres" Massacre v. Guatemala, Judgment (24 November 2009), paras 2, 179–180, 187, 190 and 198. In this case the minor child Ramiro Osorio (6 years old) during the slaughter of 25 people in the subdivision of Las Dos Erres in December 1982, was kidnapped by the Kaibil (specialist group of the Armed Forces of Guatemala) Santos López Alonso, who took him home, registered him under his surname and his wife's, separating him from his biological family for 18 years without any action from the State to reunify him with his family, after a knowing the fact, which was a clear violation of his right to family. In the same sense, see IACtHR: Gelman v. Uruguay, Judgment (24 February 2011), paras 125–126; Forneron e hija v. Argentina, Judgment (27 April 2012), para 47.

4.2 Society

Similarly, the Inter-American Court has established that the community and society, to which the child belongs, have a duty to protect him and help the family to care for and protect the child, ensuring his physical and mental well-being.[28]

4.3 The State

Finally, the Court has been more precise about the duty of child protection by the State. According to the Court, it implies the duty or obligation to organize the governmental apparatus and, in general, all the structures through which public power is exercised so that it is capable of juridically ensuring the free and full exercise of human rights.[29]

Thus, it has established, among other duties: (a) the State's duty to ensure the child such protection and care necessary to achieve his well-being, taking into account the rights and duties of parents, guardians or other persons responsible for him, (b) the duty to ensure that institutions, services and facilities responsible for the care or protection of children fulfill their functions; (c) the duty to take all appropriate legislative, administrative, and other measures to give effect to the rights of the child enshrined in international instruments, (d) the duty to take measures to the maximum of its available resources to progressively realize their economic, social, and cultural rights and, (e) the duty to promote, in the broadest way, the development and the strength of the family, including the extended family.[30]

5 Guiding Principles for Protection

The Court also affirmed the existence of at least three guiding principles of child protection, specifying their content and scope. These are:

5.1 The Best Interest of the Child

In relation to this guiding principle, enshrined in numerous international instruments, the Inter-American Court noted that it is a regulative principle of all legislation on the rights of the child, now in force and those which may be enacted in

[28] Juridical Condition and Human Rights of the Child, supra n. 18, paras 62 and 67.

[29] García Ramírez 2010, p. 81.

[30] Juridical Condition and Human Rights of the Child, supra n. 18, paras 62–67.

the future.[31] It has also established that this principle applies not only to the regulations issued on the rights of the child but also to decisions and actions undertaken by public or private, courts, administrative authorities, etc., in relation to minors.[32] The Court even extends this principle to the decisions and measures taken by the society or by the family in relation to the child.[33] It is therefore an overarching principle that radiates and regulates all aspects of life and the rights of the child.[34]

The ultimate goal of this principle according to the Court is to safeguard and promote the integral development of children, using their full potential.[35]

On the other hand, the best interests of children are not seen, pondered or updated from the child himself, but from outside: the person responsible for the child, society or the authority in charge of subordinating their behavior and decisions on this precept.[36]

5.2 The Right to Special Protection (Principles of Specificity)

In the field of Human Rights, there is a growing phenomenon or process of specifying the rights, by which treaties and other sources no longer consider the subject of rights in general or abstract form (treated as subject to the "person" or "citizen", for example) but taking into account the different roles or features that people assume or develop in their lives, to achieve better protection.[37]

In this regard, the Court has repeatedly established, as already noted, the need for the State, Society, and the Family to provide "protection or special care" for children, a requirement which stems from the particular situation of weakness and helplessness in which they are found.[38] It has also stated that special protection

[31] Ibidem paras 56 and 57.

[32] Ibidem para 58.

[33] Ibidem para 65.

[34] IACtHR: Girls Yean and Bosico v. Dominican Republic, Judgment (8 September 2005), para 134; IACtHR: "Ituango Massacres" v. Colombia, Judgment (1 July 2006), para 244.

[35] IACtHR: Bulacio v. Argentina, Judgment (18 September 2003), para 134. In the same sense, see IACtHR: Gómez-Paquiyauri Brothers v. Peru, Judgment (8 July 2004), para 163; "Juvenile Reeducation Institute", supra n. 25, para 160; Girls Yean and Bosico, supra n. 34, para 134.

[36] Cillero Bruñol 1998, pp. 75, 79 and 84. It should be added that in Atala Riffo and Niñas v. Chile (24 February 2012), Para 110, the Court dictated that the best interest of the child cannot be used as a recourse to discriminate against the mother or the father because of the sexual orientation of either of them. Therefore, the judge cannot take into consideration this social condition as a factor to make a decision regarding alimony or custody.

[37] García Ramírez and Islas de González Mariscal (2007), pp. 51 et seq. Also (Islas de González Mariscal 2007), p. 1.

[38] Juridical Condition and Human Rights of the Child, supra n. 18, paras 53 and 57; IACtHR: Caracazo v. Venezuela, Judgment (29 August 2002), para 102; "Mapiripán Massacre", supra n. 25, para 152, "Ituango Massacres", supra n. 34, para 244. Also O'Donnel 1988, p. 317.

should be understood as a child's "additional and complementary", right necessary to ensure compliance with the best interests of the child.[39] It has literally established:

> (…) it should be noted that to ensure, as far as possible, the prevalence of the interests of the child, the preamble to the Convention on the Rights of the Child states that it requires "special care", and Article 19 of the Convention stated that it should receive "special measures of protection." In both cases, the need to adopt these measures or care comes from the specific situation in which children are, considering their weakness, immaturity or inexperience. In conclusion, we must weigh not only the requirement of special measures, but also the characteristics of the situation in which the child is.[40]

The aim of this special protection is to achieve the integral development of children, including the physical, mental, and moral aspects.

While this "special protection" at a glance implies a general duty, it acquires a specific and concrete content when analyzing rights or specific situations. Thus, for example, the limitations we impose through the principle of publicity of court proceedings in the case of minors, or the special care or treatment that should be given during the proceedings or judicial proceedings (e.g., special counseling or submission to specific courts other than those for adults). Children also require special care when they are in particularly critical situations, as when they are abandoned, sick, prisoners, refugees, displaced persons in situations of armed conflict, whether trafficked or belonging to certain minorities or indigenous peoples.[41]

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[39] Girls Yean and Bosico, supra n. 34, para 133; "Juvenile Reeducation Institute", supra n. 25, para 147.

[40] Juridical Condition and Human Rights of the Child, supra n. 18, paras 60 and 61. In the same sense, see "Mapiripán Massacre", supra n. 25, para 152: "Article 19 of the Inter-American Convention must be understood as a complementary right that the treaty establishes for human beings who because of their physical and emotional development need special protective measures." Later and in the exact sense, see "Ituango Massacres", supra n. 34, para 244. In IACtHR: Sawhoyamaxa Indigenous Community v. Paraguay, Judgment (29 March 2006), para 177, the Court mandated in regard to children that: "(…) the State must assume its special position as warrantor with great care and responsibility, and that it should take special measures." In this case, the Paraguayan responsibility was established with regard to the Sawhoyamaxa Indians who traditionally inhabited the Paraguayan Chaco, who were deprived from their property of their traditional lands, as a result of which, they were subject to deplorable living conditions that caused their death (including children), malnutrition, situations of lack of health, etc. (para 73).

[41] Thus, in IACtHR: González et al. ("Cotton Field") v. Mexico, Judgment (6 November 2009), paras 2, 165, 167, 403, 404 and 408, the Court established a violation of this principle by considering that Mexico had not complied with its right to provide a citizen special care in favor of the minors Laura Ramos Moárrez 17 years of age and Esmeralda Herrera Monreal, 15 years of age, who were raped, tortured and murdered in a cotton field in Ciudad Juarez, despite the full knowledge of the existence of a pattern of violence against women in that city, which left hundreds of women and girls murdered. Similarly, in IACtHR: Tiu-Tojín v. Guatemala, Judgment (26 November 2008), paras 40, 41, 48 and 50, the Court noted how the internal armed conflict in that country created a scenario to cause a multitude of violations against children, including forced disappearances, especially among the Mayan population (83.3 %) which was

5.3 The Right to Integral Protection

Certainly associated with the two above principles, the Court has affirmed a third guiding principle: the right of children to enjoy development and comprehensive protection, defined as the "child's right to deploy its full potential, access to their ultimate destination and the realization of their life plan."[42]

6 The Rights Analyzed by the Court

Since 1999, the Inter-American Court of Human Rights has had the opportunity to rule on the content and scope of the different rights enshrined in favor of the child. Thus, we have:

6.1 The Right to Life

Since the very beginning, the Court has enshrined the children's right to life in its rulings, whose fulfillment depends on protection of other rights, meaning not only their right not to be deprived of their physical existence, but also the right to a dignified life and to develop a life project in their benefit and in the society to which they belong.[43]

On the former, the Court has emphasized the State's duty to take preventive measures so as to prevent the child from being deprived of his existence by act or omission. The latter can happen for example when the State allows a stigmatization of poor children or "street children" in the sense that they are likely to commit crimes, when held in adult prisons, or when it tolerates that they live amidst an atmosphere of violence, insecurity, and poor health. In these cases, it is more likely that children will be victims of murder, violence, abuse, and death.[44]

(Footnote 41 continued)
precisely what happened to Josefa Tiu Tojín less than a month old and her mother, arrested by the army and taken to a military base, after which nothing else was ever heard of them. Finally, this principle was also violated in "Las Dos Erres" Massacre, supra n. 27, paras 213–216.

[42] Beloff 2007, p. 272. Also González Contró 2008; Gutiérrez Contreras 2006.

[43] Street Children (19 November 1999), supra n. 19, para 191. This case was based on kidnapping, arbitrary detention (between 10 and 21 h), torture followed by murder by means of gun of three minor children and a fourth one who "lived" on the streets, in hands of members of the Guatemalan National Police (paras 161–170). See also "Juvenile Reeducation Institute", supra n. 25, para 156; Barrios family v. Venezuela, Judgment (24 November 2011), para 68.

[44] See Bulacio, supra n. 35, para 138. This case involves the disappearance of a child under 17 years, Walter David Bulacio, which occurred on April 19, 1991, whose body then appeared buried in a private cemetery, after being arrested by police at a rock concert (para 56). We also

On the latter, the Court has established:

> That respect for the right to life, in relation to children, comprises not only prohibitions, including the *arbitrary deprivation*, under Article 4 of the American Convention on Human Rights, but also involves the obligation to take the necessary measures so the existence of the child develops in *dignity*.[45]

To ensure this existence or worthy life, the Court has stated that the State has an obligation to take positive measures necessary so that children can enjoy all their rights, including economic, social, and cultural rights. Likewise, the State should make every possible effort, steadily and deliberately to ensure children's access to these rights, avoiding setbacks and undue delays.[46]

On the third issue, the Court has held that a denial of the child's right to life entails the elimination of his life project, i.e., the possibility of becoming an adult and developing himself, in his family and within his community.[47] It has also determined that this life project may be limited or destroyed by a situation of vulnerability to which the child is subjected; thus compelling the State to ensure that this situation of vulnerability does not produce said effect.[48]

(Footnote 44 continued)
have Gómez-Paquiyauri Brothers, supra n. 35, para 171. In this case, Raphael Samuel and Emilio Moisés Gómez Paquiyauri were children of 14 and 17 who were illegally and arbitrarily detained, tortured and extrajudicially executed by members of the National Police of Peru. See also "Mapiripán Massacre", supra n. 25, para 162. In this case, the responsibility of Colombia was established in a slaughter that killed about 49 people from the village of Mapiripan, including two minors, also causing the forced internal displacement of the survivors, there being no further judicial clarification or redress for victims (paras 146–148 and 159–163). Also IACtHR: Servellón-García et al. v. Honduras, Judgment (21 September 2006), para 116. In this case it was established that from 1997 to 2005 there was a significant number of juvenile violent deaths in Honduras, including that of Marco Antonio Servellón Garcia, Romy Alexis Betancourth Vasquez, Orlando Alvarez Ríos and Diomedes Obed García Sánchez, in a context characterized by violence and impunity for extrajudicial executions (paras 105–109). Also see "Juvenile Reeducation Institute", supra n. 25, paras 183 and 184. This case consisted in determining the responsibility of Paraguay for the failure to take measures for prevention and minimum security prison in this country, causing death, severe burns and injuries to many people because of three fires that took place there, in addition to detaining 3744 juveniles in an adult prison, violating numerous provisions concerning the treatment of a child which is in conflict with the law. Finally, see Sawhoyamaxa, supra n. 40, para 178.

[45] Juridical Condition and Human Rights of the Child, supra n. 18, para 137 (numeral 7), emphasis by the author.

[46] Ibidem, numeral 8. See also paras 80 and 81. Also, "Ituango Massacres", supra n. 34, para 234. This case established the responsibility of Colombia in relation to the massacres carried out in the town of Ituango, killing some of the people, torture, destruction of livestock and housing, all of which in turn determined the displacement of 702 survivors, including several children whose right to a decent life was disrupted (paras 230–235).

[47] Servellón-García et al. supra n. 44, para 117.

[48] IACtHR: Yakye Axa Indigenous Community v. Paraguay, Judgment (17 June 2005), para 172. In this case, the Yakye Axa indigenous community that ancestrally occupied the Paraguayan Chaco, claimed Paraguay their land, their traditional territory and natural resources, from it which had been deprived by selling them on the London stock exchange in the nineteenth century. This

From the above stated, the Court concludes that the right to life requires the State not only to comply with a negative obligation (i.e., not to deprive the child of that right) but also an affirmative obligation (i.e., adoption of all measures appropriate and necessary to guarantee the child a worthy life).[49]

6.2 The Right to Personal Integrity

On several occasions the Court has established the State's obligation to guarantee the integrity of children, adding the need for applying a higher standard when qualifying actions that threaten their integrity, as in the case of torture or other forms of cruel, inhuman, or degrading treatment.[50]

It has also ruled that States must adopt all appropriate measures to promote physical and psychological recovery and social reintegration of the child if this impairment occurs (violation of his right to integrity).[51] Finally, the Court has ruled on the inability to suspend this right in states of emergency.[52]

The child's right to integrity has been violated in the American region for various reasons,[53] such as by sending the child to adult penitentiaries under infrahuman conditions; for their recruitment to compulsory military service by the Armed Forces (due to accidents arising from the nature of military service, punishments imposed on the recruits, physical exercise that exceeds their endurance)[54]; and by arbitrarily separating the child from his family,[55] etc.[56]

(Footnote 48 continued)
dispossession determined that members of this community (including several children) live in extreme poverty, unable to cultivate and practice their traditional subsistence activities in the claimed area. It also lacked basic minimum services (water, sewage, electricity), which generated cases of anemia and malnutrition (para 50 and following), affecting their life project.

[49] "Juvenile Reeducation Institute", supra n. 25, para 158; IACtHR: Vargas-Areco v. Paraguay, Judgment (26 September 2006), paras 75 and 77.

[50] Gómez-Paquiyauri Brothers, supra n. 35, para 170.

[51] "Mapiripán Massacre", supra n. 25, para 154.

[52] "Juvenile Reeducation Institute", supra n. 25, para 157.

[53] Ibidem, paras 165–177.

[54] Vargas-Areco, supra n. 49, paras 129–131. In this case the responsibility of Paraguay was determined as to the torture and disappearance of the minor child Gerardo Vargas Areco, who tried to abandon the military service several times and was shot to death on one of these attempts.

[55] Gelman, supra n. 27, para 118. The forced separation of a child from his family in order to hand him over to another, implies the violation of his right to psychic and moral integrity, by altering his life project and by generating a severe impact on his being, by discovering that his name, nationality an identity and family relationships were fake.

[56] IACtHR: Serrano-Cruz Sisters v. El Salvador, Judgment (1 March 2005). In this case the Court determined the violation of the right to personal integrity of the relatives of the girls Ernestina and Erlinda Serranos Cruz, who had disappeared without the Salvadorian state determining what had happened, punishing those responsible or searching for the whereabouts of these girls (paras 113–115).

6.3 The Right to Equality and Nondiscrimination

The Inter-American Court has ratified the right that every child has to equality under the law and to enjoy the rights and freedoms that International Law vests in his favor without any discrimination whatsoever. The court has noted that:

> The notion of equality comes directly from the oneness of human nature and is inseparable from the essential dignity of the person. Any situation infringing this renders itself incompatible, namely, by considering a certain group superior and leading it to be treated with privileges, or, conversely, by considering it inferior, the group may be treated with hostility[57] or otherwise be subject to discrimination in the enjoyment of rights which are accorded to others not considered disqualified on such a disadvantage. It is inadmissible to create treatment differences among human beings that do not correspond to their unique and identical nature.[58]

In this regard, the Court has confirmed the obligation to respect the rights of children, without discrimination, regardless of race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, economic, or any other status.

However, it also made clear that child protection entails equalization or correction of the imbalances that may exist in his detriment, which does not imply discrimination. In other words, the idea is to add in order to strengthen and not subtract so as to weaken. Thus, it has stated that "not all differences in treatment may be considered offensive of human dignity in themselves," but only when they lack objective and reasonable justification. If the distinction, noted the Court, does not lead to situations which are contrary to justice, to reason or to the nature of things, then it does not contradict the principle of equality. Moreover, the Court has affirmed that "such distinctions can be an instrument for the protection of those who should be protected, considering the situation of greater or lesser weakness or helplessness in which the children are."[59] Indeed, the special protection that International Law requires for the child is a clear example of this, not being *per se* discriminatory.[60]

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[57] Thus, in Servellón-García et al., supra n. 44, para 112, the Inter-American Court noted that under the principle of equality, "the state can not allow its agents, nor encourage practices in society that reproduce the stigma that poor children and young people are conditioned to crime or necessarily linked to an increased public insecurity. This stigma creates a positive environment for those minor children at risk who face a potential threat of their lives and liberty being unlawfully restricted."

[58] IACtHR: Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica, Advisory Op. (19 January 1984), para 55; Juridical Condition and Human Rights of the Child, supra n. 18, paras 44 and 45.

[59] Juridical Condition and Human Rights of the Child, supra n. 18, paras 46 and 47. In the same sense, see Naturalization Provisions of the Constitution of Costa Rica, supra n. 59, para 57. Here it was noted that there will be no discrimination if the difference in treatment has a legitimate purpose, that is, if not intended for arbitrary, capricious, and despotic or in any way in conflict with the essential oneness and dignity of the human nature.

[60] Juridical Condition and Human Rights of the Child, supra n. 18, para 55.

6.4 The Right to Freedom

On the right to freedom of minors, the Court has held that it can be suspended, but only in an "exceptional manner and for the shortest possible time."[61] In this case, the Court has stated that the State must be more careful and responsible for protecting their lives and integrity, placing children in jails different from those of adults, making sure that the people responsible for these detention centers be properly trained, providing children with the minimum conditions compatible with their dignity, guaranteeing that their rehabilitation will enable them to play a constructive and productive role in society, and providing health care and education in order to ensure that the detention to which children are subjected to does not destroy their life projects, even more if the children come from marginalized sectors of society, because that limits their chances of effective rehabilitation.[62]

The Court also pointed out that the forced removal of children from their families to be given to others, concealing their true identity, is a particular form of forced disappearance of persons, leaving the mystery of their fate or whereabouts or refusal to recognize it,[63] which is consistent with the position adopted by Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006),[64] which refers to "any other form of deprivation of liberty."

6.5 The Right to Identity, Legal Status, Name, and Nationality

Another right affirmed by the decisions of the Court is that of identity. It has pointed out that this right, especially for children, has been recognized by case law and doctrine[65] as an autonomous right, as well as an expression of other rights or as a constituent element thereof. In this sense, the court claims that the right to identity is closely associated with the right to recognition of a legal personality, the right to a name, a nationality, a family and family relationships.[66] Proof of this is

[61] Bulacio, supra n. 35, para 135; Gómez-Paquiyauri Brothers, supra n. 35, para 169. In the same sense, Salado Osuna 2010, pp. 98–99.

[62] "Juvenile Reeducation Institute", supra n. 25, paras 159, 161, and 173–174; Bulacio, supra n. 35, paras 126 and 136; Street Children (19 November 1999), supra n. 19, para 197.

[63] Gelman, supra n. 27, para 132.

[64] Entered into force on 23 December 2010.

[65] See for example Viñas Farre 2010, pp. 57–58.

[66] As in Gelman, supra n. 27, paras 2 and 122, where the disappearance in 1976 by action of Argentine and Uruguayan state agents as part of *Operación Condor*, María Claudia García Iruretagoyena de Gelman and her daughter in her womb, who was given to a family in Uruguay after birth, was described by the Court as a violation of the right to identity, since the girl Maria

that when the State violates the right to identity, it usually implies the violation of the right to a name, nationality, legal personality and family relationships. Therefore, the removal or modification of all or part of the child's right to preserve his identity and the elements that compose it entails the responsibility of the State.[67]

Regarding the right to legal personality, the Court has reaffirmed that every person is entitled to it, that is, to be recognized as subjects of rights and obligations, where a name and nationality are prerequisites of this legal personality. Therefore, when a State denies the nationality or registration of the name to a person, he is placed in a legal limbo, as his existence is not legally recognized, i.e., he has no legal personality, making it more vulnerable against the enforcement of his rights by the State or by individuals.[68]

Regarding the right to a name, the Court has held that it constitutes a basic and essential element of the identity of each person and that States should facilitate their registration and ensure that the person is registered with the name chosen by him or his parents, depending on the time of registration, without any kind of restriction or interference in the decision to choose the name. It also added that the person once registered, must be ensured the ability to preserve and restore his name, concluding that the first and last names are essential to establish a formal link between the different members of the family, society and the State.[69]

On the right to nationality, the Court notes that it is a non-derogable right that allows a person to acquire and exercise the rights pertaining to a political community. It is a natural human state, which is the foundation of an individual's political capacity and part of his civil capacity. For this reason, the Court states that its determination and regulation, are not only the competence of each State, but that International Law imposes certain limits on their discretion to grant it, which in turn are imposed by the need to protect human rights.[70] Thus, not only

(Footnote 66 continued)
Macarena Gelman Garcia Iruretagoyena learnt of her true identity, nationality, name and family relations at the age of 24. And, as stated by the Court: "(…) the abduction of boys and/or girls carried out by state agents to be handed illegitimately to another family for raising, changing his identity and without informing his biological family about his whereabouts, as occurred in this case, is a complex act that involves a series of illegal actions and violations of rights (…)" (para 120).

[67] Serrano-Cruz Sisters v. El Salvador, supra n. 56, para 117.a.

[68] Girls Yean and Bosico, supra n. 34, paras 175–176, 178–180 and 185–187. Here the Court discussed how the denial of birth registration in the registry office of the Dominican Republic of Dilcia Yean and Violeta Bosico along with the Prosecutor's decision confirming the refusal, determined that both girls have no nationality until September 25, 2001, depriving them of all legal protection, despite having been born in the Dominican Republic from Haitian migrant workers.

[69] Ibidem, paras 182–184. In this sense, a child cannot be deprived of his name, as in "Las Dos Erres" Massacre, supra n. 27, paras 192, 195, 198 and 200. Here the six year old Ramiro Osorio Cristales was deprived of the name and surname of his biological parents, to give him the name of his kidnapper, regaining his real name after 21 years. See also Gelman, supra n. 27, para 127.

[70] Girls Yean and Bosico, supra n. 34, paras 136–138.

does it seek to prevent and reduce statelessness but also to provide equal protection to all individuals.[71]

In this regard, the Court holds that when States regulate this right internally, they should refrain from enacting discriminatory regulations that favor statelessness, thus causing the person to be in a situation of extreme vulnerability, for example, when granting a person citizenship is conditioned to his immigration status or when citizenship is denied based on immigration status transmission from parents to children.[72]

6.6 The Right to Due Process

As for the obligation of States to provide appropriate administrative and judicial measures to individuals so they can defend their rights, the Inter-American Court of Human Rights emphasizes the special care that authorities must have when deciding on the rights of children, being essential to recognize and respect differences of treatment corresponding to their age.[73] "Absent those countervailing measures, widely recognized in various stages of the procedure, one could hardly say that those who have a disadvantageous position enjoy a true access to justice and benefit from due legal process under the same conditions as those who do not have those disadvantages."[74] In this sense, the Court has recognized that the right to due process for children entails:

(a) The right of the child who is capable of making his own judgments, of expressing his opinions freely in all matters affecting him, to be heard in any judicial or administrative proceeding, directly or through a representative[75];
(b) The child's right that those involved in decision making processes about his rights, be people with personal and professional competence necessary to identify advisable measures pertaining to the child[76];
(c) The child's right to the establishment of laws, procedures, authorities and institutions specifically for him, when he has violated the criminal laws or is accused or convicted of having violated them[77];

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[71] Ibidem, para 140.

[72] Ibidem, paras 141–142 and 156. At this point we must refer to Argentina, Brazil, Uruguay and Paraguay, that on 7 July 2011, filed a joint request for an advisory opinion for the Court to determine the obligations of the States with regard to measures likely to be taken on children associated with their migratory status. This will no doubt be a great opportunity for the Court to establish certain basic principles of child protection.

[73] Juridical Condition and Human Rights of the Child, supra n. 18, paras 94 and 96.

[74] Ibidem, para 97.

[75] Ibidem, paras 99 and 102.

[76] Ibidem, para 103.

[77] Ibidem, para 109.

(d) The possibility of resorting not only to international conventions but also to non-binding instruments such as the Beijing Rules, the Tokyo Rules and the Riyadh Guidelines, to safeguard the rights of children subjected to different actions by the State[78];
(e) The right to enjoy a set of general and universal procedural principles such as: a judge, an effective remedy, the right to appeal, a competent, independent and impartial judicial body, the presumption of innocence, the right to defense, to be served with a summons, to a reasonable term, protection from self-incrimination, the right to counsel and translator, among others[79];
(f) The right to have his confession or statement evaluated with special care by the judge, as the child may lack, because of his age or other circumstances, the ability required to appreciate or reproduce the facts on which he has made a statement and the consequences of his statement[80];
(g) The right to limit the principle of publicity of trials, respecting the privacy of the child during all the stages of the trial[81]; and
(h) The right of access to alternative dispute resolution, without infringing his rights.[82]

6.7 Economic, Social, and Cultural Rights

In this regard, the Inter-American Court has pointed out that the actions that the State must undertake in the light of the Convention on the Rights of the Child include economic, social and cultural rights, which are mainly part of the right to life and the right to personal integrity of children. In this regard, the Court has contended:

> (…) the full enjoyment of economic, social and cultural rights of children has been linked to the possibilities of the State (…) which should make every possible effort, steadily and deliberately to ensure children's access to these rights alongside their enjoyment, avoiding unjustified delays and setbacks and assigning the greatest resources available to fulfill this.[83]

On the other hand, in the field of economic, social and cultural rights, the Court has emphasized the import of the right to education, noting that this favors the possibility for children to enjoy a dignified life.[84] In this sense, the Court has confirmed the State's duty to guarantee access to free basic education and its

[78] Ibidem, para 116.
[79] Ibidem, paras 119–121, 124–125 and 129.
[80] Ibidem, paras 130 and 131.
[81] Ibidem, para 134.
[82] Ibidem, para 135.
[83] "Juvenile Reeducation Institute", supra n. 25, paras 111 and 149.
[84] Juridical Condition and Human Rights of the Child, supra n. 18, para 84.

sustainability, in particular when it comes to fulfilling the right to basic education with an ethno-educational perspective within indigenous communities.[85]

It has also established that the State's duty extends to providing adequate facilities to develop programs to prevent school dropouts, to respect the cultural identity in the formation of children, among other positive measures.[86]

6.8 International Humanitarian Law

Finally, the Court recalled the obligation of States to respect and ensure respect for the rules of International Humanitarian Law that are applicable to the child, even more taking into account their special vulnerability in situations of armed conflict,[87] particularly the internal ones, insofar as the American region.[88]

7 Remedies

A final noteworthy contribution of the Court, in terms of rights, refers to remedies. In this regard, the Court has developed an extensive, truly innovative, and relevant jurisprudence which can be classified as follows[89]:

(a) In terms of compensation, the Court has considered the concepts of loss of income based on life expectancy (and the victim's work expectations along with his remuneration) and the suffering caused when the child's death occurred, as part of the amount.[90]

[85] IACtHR: Xákmok Kásek Indigenous Community v. Paraguay, Judgment (24 August 2010), para 211. In this case, the responsibility of Paraguay was determined for the situation of nutritional, medical and sanitary vulnerability to which the Indian community was exposed (among them several children) while being dispossessed of their ancestral property, even causing the death of eleven children, alongside the fact that they could not live up to their own culture, their religion, their own language, and thus depriving them of their cultural identity (paras 2, 201, 203, 260, 261 and 263).

[86] Ibidem, paras 213 and 263.

[87] On this issue, see Gómez 2010, pp. 139 and following.

[88] "Mapiripán Massacre", supra n. 25, paras 154 and 156.

[89] With regard to this, see García Ramírez 2010, pp. 87–91.

[90] IACtHR: "Street Children" (Villagrán-Morales et al.) v. Guatemala, Judgment (26 May 2001), paras 79, 81, 84, 88–90; "Juvenile Reeducation Institute", supra n. 25, paras 274, 288, 289, 300–304; Gómez-Paquiyauri Brothers, supra n. 35, paras 206 and 216; Bulacio, supra n. 35, paras 84, 85, 98 and 104; Servellón-García et al., supra n. 44, paras 174, 176, 180 and 185 among others.

(b) In addition, as protective measures for the beneficiaries, the Court has ordered banking investment, the establishment of a foundation or the creation of a trust in order to ensure the integrity of the compensation until it is time to render it to them- when they come of age.[91]
(c) It has also ordered the medical-psychological treatment of child victims[92] or the supply of medicines to preserve the health and life of those at risk[93];
(d) To improve the situation of children associated with the violations, the Court has ordered the opening or reopening of schools and health care centers[94];
(e) It has also provided domestic measures, such as running public awareness campaigns about the protection of stigmatized children,[95] the development of a State policy on children in conflict with the law[96]; it has stressed the need for changes in legislation on birth registration in the registry office[97] as well as the investigation and prosecution at the domestic level of those responsible for violations,[98] or the application of special measures to search for missing children.[99]
(f) Finally, in order to educate the people and the public officials in charge of the custody or protection of minors and in order to prevent future violations (preventive remedy and a non-repetition guarantee), the Court has provided for the development of training programs and staff training in human rights, culture of tolerance and nondiscrimination,[100] naming squares, streets and schools after the victims[101] and the rendering of public tribute to the victims[102] (designation of a day dedicated to children or adolescents who are victims) in order to maintain a collective memory of the events that occurred.

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[91] IACtHR: Aloeboetoe et al. v. Suriname, Judgment (10 September 1993), paras 100–101.

[92] "Juvenile Reeducation Institute", supra n. 25, para 319.

[93] Yakye Axa Indigenous Community, supra n. 48, para 221.

[94] Aloeboetoe et al., supra n. 91, para 96.

[95] Servellón-García et al., supra n. 44, paras 201–202.

[96] "Juvenile Reeducation Institute", supra n. 25, paras 316–317.

[97] Girls Yean and Bosico, supra n. 34, paras 236–251.

[98] "Street Children" (19 November 1999), supra n. 19, paras 196–197; Gómez-Paquiyauri Brothers, supra n. 35, para 76; Servellón-García et al. supra n. 44, paras 125, 154.

[99] Serrano-Cruz Sisters, supra n. 56, paras 183–191.

[100] Bulacio, supra n. 35, para 136; Servellón-García et al., supra n. 44, para 200; Girls Yean and Bosico, supra n. 34, para 242.

[101] "Street Children" (26 May 2001), supra n. 90, para 103; Servellón-García et al., supra n. 44, para 199, etc.

[102] Serrano-Cruz Sisters, supra n. 56, para 196.

8 Concluding Remarks

As is apparent from the above stated, the Inter-American Court of Human Rights has managed to develop relevant case law regarding the protection of children's rights, asserting certain guiding principles, establishing the true meaning and scope of their fundamental rights, as well as devoting effective and innovative remedies.

Nevertheless, the case law is rather recent, built only during the last twelve years, which no doubt will be enriched and strengthened over time, further contributing to the protection of this particularly vulnerable sector of our population.

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International Judges and the Protection of Human Rights at Sea

Irini Papanicolopulu

1 Human Rights and the Law of the Sea

Human rights and the law of the sea are becoming closer. This is due to at least two significant reasons. The first is the widespread attention captured by some cases involving persons at sea, also due to their media coverage. The arrest, trial and conviction of pirates have not only brought to the forefront modern piracy but have also stemmed debate among the international community[1] and among international law scholars.[2] Similarly, the treatment reserved by some coastal States to migrants and asylum seekers trying to reach their coasts by boat has also received extensive coverage and has fuelled discussions on human rights standards to be applied to interception operations.[3]

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[1] Information on piracy and the efforts by United Nations bodies and other organisations to combat this threat to maritime navigation may be found on the dedicated webpage of the Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations (DOALOS) at www.un.org/depts/los/piracy/piracy.htm. Accessed 23 June 2012.

[2] Among the many scholarly works that have been published during recent years, see the contribution by the distinguished scholar honoured by this collection of essays: Treves 2009.

[3] See the report presented to the Parliamentary Assembly of the Council of Europe, Lives lost in the Mediterranean Sea: who is responsible? (23 March 2012). assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf. Accessed 23 June 2012. See also Papastavridis 2010; Trevisanut 2010; Scovazzi 2005.

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The second factor is a more subtle one and consists of increased litigation, before international courts, concerning situations in which the conduct of a State with respect to persons at sea has been examined. This contribution will consider this latter aspect, and in particular the role of international judges in developing mechanisms for ensuring that human rights are also applied at sea.

The need to integrate human rights considerations in activities occurring at sea and involving persons does not stem from any formal incompatibility between the international law of the sea and human rights law. It is rather the consequences of a separate treatment of rules deriving from these two branches of international law. This separate treatment, which is also to be found in a great deal of scholarly writing, is particularly evident in relevant treaties. In fact, legal instruments attached to one field are usually silent with respect to situations governed by the other. Thus, the International Covenant on Civil and Political Rights (New York, 16 December 1966; hereinafter ICCPR)[4] and the International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966; hereinafter ICESCR)[5] do not mention the maritime space. The same is true for the other human rights treaties, including regional instruments such as the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; hereinafter ECHR)[6] and the American Convention on Human Rights (San José, 22 November 1969; hereinafter ACHR).[7] On the other hand, the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; hereinafter UNCLOS),[8] the treaty that regulates most maritime activities and has been defined a "Constitution for the Oceans"[9] does not mention human rights and "is not ordinarily considered a human rights instrument".[10] The UNCLOS provides evidence of the fact that, with few exceptions,[11] the protection of persons at sea and the furtherance of human rights did not constitute a matter for negotiation during the Third United Nations Conference on the Law of the Sea.

It is against this background that the contribution of international judges will be assessed. This paper will start by taking stock of the results reached so far in the protection of human rights at sea, focusing on two main achievements. The first concerns the role played by international judges, and in particular the International

[4] Entered into force on 23 March 1976.

[5] Entered into force on 3 January 1976.

[6] Entered into force on 3 September 1953, as amended by Protocol No. 11 (Strasbourg, 11 May 1994), entered into force on 1 November 1998 and Protocol No. 14 (Strasbourg, 13 May 2004), entered into force on 1 June 2010.

[7] Entered into force on 18 July 1978.

[8] Entered into force on 16 November 1994.

[9] Remarks by Tommy T.B. Koh, President of the Third United Nations Conference on the Law of the Sea, available at www.un.org/depts/los/convention_agreements/texts/koh_english.pdf. Accessed 16 April 2012.

[10] Oxman 1998, p. 401.

[11] Notably Article 98 UNCLOS on the duty to render assistance, and Article 146 UNCLOS on the protection of human life during activities in the International Seabed Area.

Tribunal for the Law of the Sea (ITLOS), in clarifying not only that human rights are not in contrast with the law of the sea, but also that they play a significant role in the settlement of disputes concerning actions at sea that have an impact upon persons. The second result relates to the contribution of the law of the sea to the widening of the notion of jurisdiction in accordance with human rights treaties. Arguably, this has ensured a more uniform and more extensive protection afforded to individuals.

Addressing the interaction between human rights and the law of the sea seems appropriate in a volume that celebrates Professor Tullio Treves in his double capacity as international law scholar and Judge of the ITLOS. Judge Treves was sitting on the bench when the ITLOS, in deciding the *Saiga* case, made the seminal statement that "[c]onsiderations of humanity must apply in the law of the sea, as they do in other areas of international law",[12] thus preventing fragmentation and paving the way for the incorporation of human rights standards in the pursuance of law of the sea activities. In his scholarly capacity, Professor Treves has further developed the issues raised in some of his separate opinions and has been among the first to devote attention to the interaction between human rights and the law of the sea.[13]

2 Taking Stock: "Considerations of Humanity" and the Notion of Jurisdiction

As already mentioned, human rights apply at sea. While this observation may seem to state the obvious, countries have more than once tried to avoid their human rights obligations when a certain activity had taken place at sea. Law of the sea rules have been misread in a wilful attempt to avoid human rights obligations previously accepted by a State. For example, in an effort to avoid scrutiny over its actions, the United States has asserted that human rights obligations do not apply with respect to refugees interdicted at sea and who have not entered the territory of the state.[14] Similarly, Italy has referred to its obligations under the law of the sea to rescue persons in distress at sea in an uncanny effort to avoid the applicability of the ECHR to its push-back operations concerning refugees from Libya.[15] In both cases, it has

[12] ITLOS: M/V "Saiga" (no. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment (1 July 1999), para 155.

[13] See in particular Treves 2010.

[14] IACmHR: The Haitian Centre for Human Rights et al. v. United States, 10.675, Report (13 March 1997) (Haitian Refugees decision), para 119. The United States Supreme Court agreed with the United States Government position (Sale v. Haitian Centers Council, 113 S. Ct. 2549, 2565) but the Inter-American Commission reached a different conclusion with respect to this finding (Haitian Refugees, paras 156–157).

[15] ECtHR: Hirsi Jamaa and Others v. Italy [GC], 27765/09, Judgement (23 February 2012), para 65.

been the task of a judicial or quasi judicial body to condemn this misapplication of the law and to state that human rights apply at sea, as they do on land.

Decisions by international judges have indeed played a major role in checking State conduct and affirming the rule of law, including human rights, in this field. It is noteworthy that this is a transversal concern which has been consistently pursued by human rights bodies, by law of the sea judges and even by other judges. Two tools have been used in this respect: the use of law of the sea notions to define the application of human rights rules, on the one hand, and the use of humanitarian considerations in the interpretation of the substantive and procedural rules of the law of the sea, on the other.

Starting with the latter technique, judges established by treaties dealing with the law of the sea, and especially the ITLOS, have endorsed human rights as part of the criteria guiding the interpretation and application of law of the sea rules, through references to the necessity to take into account "considerations of humanity" in applying the law of the sea or international law. Used in this way, human rights work as a check on the applicability of other rules of international law and the law of the sea, or, in other words, as a factor to be taken into account for the interpretation and application of other rules of law, as provided for in Article 31 Convention on the Law of Treaties (Vienna, 23 May 1969).[16]

Reference to considerations of humanity in the effort to condemn conduct that does not take into account the fundamental human rights of persons involved in maritime activities is not new. In its first decision, the International Court of Justice (ICJ) included "elementary considerations of humanity" within the general principles that obliged Albania to notify vessels of the presence of a minefield in the Corfu Channel.[17] At that time, human rights were still in their infancy and having recourse to this expression may have been a useful way of tackling the discussion about the existence of human rights obligations under customary international law.

Although in the following years the field of human rights was to blossom with the adoption of regional and global treaties, recourse to this expression was again made in 1999 by the ITLOS. In condemning the excessive force used by Guinea in arresting the *Saiga*, a bunkering vessel operating in its exclusive economic zone, the ITLOS stated that "considerations of humanity" must apply at sea as well as on land.[18] In more recent cases, the ITLOS has become bolder and has added "due process" to the standard phraseology. In dealing with the prompt release of the *Juno Trader*, for example, it has affirmed that the "obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of

[16] Entered into force on 27 January 1980.

[17] ICJ: Corfu Channel (Albania v. United Kingdom), Judgment (9 April 1949), p. 22.

[18] Saiga, supra n. 12, para 155. This dictum has been recalled in PCA/UNCLOS: Guyana v. Suriname, Award (17 September 2007) para 405.

law".[19] In another prompt release case concerning the *Tomimaru*, the ITLOS endorsed the interpretation already advanced by Judge Treves in the *Juno Trader* case[20] that the confiscation of a vessel should not "be taken through proceedings inconsistent with international standards of due process of law"[21] and therefore that the ITLOS may take into account human rights relating to procedure in assessing the conduct of a State under Article 292 UNCLOS relating to prompt release.[22]

One may be somewhat puzzled by the reluctance of the ITLOS to employ the phrase "human rights". Whilst some judges have referred to "human rights" in their separate opinions,[23] the ITLOS has apparently gone to great lengths to avoid an express mention. There does not seem to be any reason for such caution, however, since the phrase "considerations of humanity" is commonly understood to refer to human rights obligations.[24]

A second technique used to integrate human rights and law of the sea considerations rests on the use of law of the sea rules to define the scope of human rights obligations. Under this method, human rights bodies, such as the European Court of Human Rights (ECtHR), the Inter-American Commission of Human Rights (IACmHR) and the Committee against Torture (CAT), as well as other international judges such as the Court of Justice of the European Union (ECJ), have had recourse to law of the sea rules, namely those attributing to a State sovereign rights or jurisdiction, in order to define the scope of human rights treaties and to consecrate the applicability of human rights at sea. The law of the sea, through the notion of jurisdiction and its manifold meanings, has permitted the application of human rights treaties to activities taking place at sea, with the consequence that persons at sea are not only vested with substantive rights, but may also have access to an independent judicial or quasi-judicial body for enforcing these rights.[25]

Most human rights treaties provide that States shall grant human rights to individuals under their *jurisdiction*.[26] This clause has prompted a scholarly debate

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[19] ITLOS: "Juno Trader" (Saint Vincent and the Grenadines v. Guinea-Bissau), Judgment (18 December 2004), para 77.

[20] Ibid., Separate Opinion of Judge Treves, para 5.

[21] ITLOS: Tomimaru (Japan v. Russia), Judgment (6 August 2007), para 76.

[22] For a different analysis see ibid., Separate Opinion of Judge Jesus and Separate Opinion of Judge Mensah.

[23] For example, human rights are expressly mentioned in Saiga, supra n. 12, Separate Opinion of Judge Mensah, para 20 and in Juno Trader, Joint Separate Opinion of Judges Mensah and Wolfrum, para 3, and Separate Opinion of Judge Treves, para 5.

[24] Treves 2010, p. 5.

[25] The case law of the ECtHR is reviewed in Tavernier 2003.

[26] Some divergence of scope was initially due to the fact that some treaties refer to the "territory" of the State in order to determine the scope of the substantive rules. For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984; hereinafter Torture Convention), entered into force on 26 June 1987, provides in Article 2 that "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any *territory* under its jurisdiction"

and somewhat conflicting jurisprudence on what is meant by "jurisdiction". There is one point, however, that seems to be well established: jurisdiction provided for in the law of the sea has generally been accepted as a valid basis for the applicability of human rights treaties.[27] This is the case not only with respect to jurisdiction having a "territorial" basis, as in the case of rights of the coastal State in its maritime zones, but also with respect to jurisdiction established on the basis of different titles, such as that of the flag State.[28] In the *Drieman* case, the ECtHR referred to the rights of the coastal State to regulate the exploitation of living resources in its exclusive economic zone and considered that enforcement activities undertaken on this basis brought by the applicants within the State's jurisdiction.[29] Similarly, in the *Salemink* case, relating to the applicability of European Union legislation on social security to a person employed on a platform on the Dutch continental shelf, the ECJ referred to the rights of the coastal State on its continental shelf and its exclusive jurisdiction on platforms thereon in order to establish the applicability of EU legislation.[30] In the *Medvedyev* case, the ECtHR has accepted as a valid basis for the exercise of *de iure* jurisdiction permission given by the flag State to board one of its vessels engaged in drug trafficking and to arrest the persons on board.[31] In the *Hirsi* case, the ECtHR considered that persons on board an Italian military vessel were subject to the jurisdiction of the flag State.[32]

A further interesting element of the relevant case law shows that the notion of jurisdiction in the law of the sea has probably influenced the interpretation of the notion of jurisdiction generally.

Due to the particular legal nature of the sea, most of which does not fall under the exclusive jurisdiction of one state, the exercise of extra-territorial jurisdiction is often the rule. This circumstance has always played in favour of efforts to include extraterritorial acts among those capable of being scrutinised under the

(Footnote 26 continued)
(emphasis added). This divergence has been overcome by the interpretation given by human rights bodies; see, for example, CAT: General Comment No. 2, UN Doc. CAT/C/GC/2 (24 January 2008). For a discussion of the different treaty provisions see Milanovic 2011 and De Sena 2002.

[27] This aspect is explored in detail in Papanicolopulu 2013.

[28] E.g. ECtHR: Banković and others v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, The Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom [GC], 52207/99, Decision (12 December 2001).

[29] ECtHR: Drieman and Others v. Norway, 33678/96, Decision (4 May 2000).

[30] ECJ: A. Salemink v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen [GC], C-347/10, Judgment (17 January 2012).

[31] ECtHR: Medvedyev and Others v. France [GC], 3394/03, Judgment (29 March 2010). Similar considerations were advanced in ECtHR: Rigopoulos v. Spain, 37388/97, Decision (12 January 1999), also relating to the arrest of a vessel involved in drug trafficking, and in ECtHR: Xhavara and Others v. Italy and Albania, 39473/98, Decision (11 January 2001), concerning the sinking of a vessel in the context of migration control operations.

[32] Hirsi, supra n. 15, para 81.

applicable human rights treaties. Even in the *Banković* decision, when the ECtHR probably reached its most territorial-centred interpretation of Article 1 of the ECHR, it encountered no problem in classifying the jurisdiction of the flag state among those instances when there is undoubtedly extraterritorial jurisdiction of a state for the purposes of the ECHR.[33] Flag state jurisdiction is therefore a very useful tool for unhinging the exclusiveness of territorial jurisdiction: if there is one exception, then more can be discerned.

Furthermore, the fact that the law of the sea is comfortable with the existence of unlawful *de facto* jurisdiction is of much practical value in affirming the relevance of the de facto exercise of jurisdiction for the purpose of applying human rights treaties. According to the latest case law of human rights bodies, jurisdiction in this context includes two different aspects of the exercise of power.[34] The first aspect refers to the power attributed by a rule of international law to a State to act in a specific situation, e.g. the right of a State to exercise its sovereignty over the whole of its territory or the right of the coastal State to arrest a vessel that is seriously and wilfully polluting its territorial sea.[35] This is the so-called *de iure* jurisdiction. The second aspect refers to the actual exercise of power by the agents of a state over a person, whether permitted by a rule of international law or not, e.g., in the case where a vessel is boarded and the persons on board are arrested by a State other than the flag state. This is *de facto* jurisdiction. De facto jurisdiction can be either lawful, when it rests upon a permissive rule of international law—and therefore coincides with de iure jurisdiction—or unlawful, when there is no such rule. De facto jurisdiction has consistently been considered as sufficient for the application of human rights standards in maritime cases, regardless of its lawfulness. In the *Women on Waves* case, the ECtHR considered the (unlawful) de facto jurisdiction exercised by a Portuguese navy vessel over a Dutch vessel navigating outside the territorial waters of Portugal.[36] In the *Hirsi* case, the same Court referred to the exercise of power *de iure* and *de facto* by the Italian navy over migrants and asylum seekers interdicted off the coast of Libya.[37] In the *Marine I* case, the CAT stated that Spain "maintained control over the persons on board the *Marine I* from the time the vessel was rescued and throughout the identification and repatriation process" that took place in Mauritania.[38] As in the case of the extraterritorial exercise of jurisdiction, this case law could be invoked also for facts occurring on land, to ground the applicability of human rights treaties in a case involving the unlawful exercise of de facto jurisdiction.

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[33] Banković, supra n. 28, para 73.

[34] ECtHR: Al-Saadoon and Mufdhi v. United Kingdom, 61498/08, Decision (30 June 2009), paras 87–88.

[35] Articles 220.2 and 19.2.h UNCLOS.

[36] ECtHR: Women on Waves and Others v. Portugal, 31276/05, Judgment (3 February 2009).

[37] Hirsi, supra n. 15, para 81. See also the Medvedyev, supra n. 31, para 67.

[38] CAT: J.H.A. v. Spain, 323/2007, Decision (11 November 2008), UN Doc. CAT/C/41/D/323/2007 (21 November 2008), para 8.2.

3 Looking Ahead: Challenges for the Enforcement of Human Rights Obligations by International Judges

The examples detailed above provide evidence of the contribution by international judges to safeguarding the human rights of persons who are at sea. Furthermore, judicial decisions have set the path for a comprehensive treatment of the law of the sea and human rights in this regard, avoiding possible fragmentation and contributing to the promotion of an integrated approach to international law and its different branches.[39]

Looking ahead, it is to be hoped that this trend will fully develop in future decisions. It now seems time to make explicit mention and to rationalise references to human rights in law of the sea jurisprudence. There is nothing in the law of the sea or the UNCLOS to prevent references to human rights treaties. On the contrary, judges deciding under Part XV UNCLOS can take human rights into account in two different ways. On the one hand, human rights are embedded in a number of UNCLOS provisions and can be applied as part of the Convention.[40] They can therefore form the subject-matter of a submission to a court or tribunal under Article 286 UNCLOS. On the other hand, human rights may come into play in deciding cases relating to other issues. Article 293 UNCLOS, echoing Article 311 UNCLOS, provides that any court or tribunal judging on the basis of Part XV UNCLOS "shall apply this Convention and other rules of international law not incompatible with this Convention" and thus ensures the integration of other rules within the UNCLOS regime. Human rights treaties are certainly compatible with the UNCLOS and the same can be said of rules of customary international law providing for the protection of fundamental human rights, such as the right to life,[41] the right not to be subject to inhuman or degrading treatment[42] and procedural rights such as due process.

One of the main future challenges will be to enforce existing human rights obligations at sea. In this respect, the lack of a competent judge may be critical. Existing limitations to the jurisdiction of international courts *ratione loci* and *ratione personae* are significant and an individual may often end up by not having access to any judge.

In the first place, individuals do not, as a rule, have access to law of the sea tribunals.[43] Under the UNCLOS, courts and tribunals having competence under Part XV will usually have competence only in cases involving parties to the Convention. While it is possible that a State or the European Union brings a case against another State for a violation of rules on the treatment of persons, e.g. under

[39] Treves 2007.

[40] See Treves 2010, p. 3.

[41] Article 6 ICCPR; Article 2 ECHR.

[42] Article 7 ICCPR; Torture Convention; Article 3 ECHR.

[43] With the exceptions of disputes submitted to the Seabed Disputes Chamber under Article 187 UNCLOS. See also Article 291 UNCLOS.

Article 73 or Article 146 UNCLOS, in practice this will rarely occur. The cases decided so far show that human rights issues have been generally dealt with only in the ancillary and that, even when the judge has recognised a breach and the ensuing responsibility of a State, this has not always led to compensation for the victims.

In the second place, existing human rights bodies having adjudicatory functions do not have universal competence. It is true that, albeit barred from directly resorting to the ICJ, the ITLOS and other international law tribunals ratione personae, individuals may bring cases to human rights bodies and tribunals. However, access to such bodies may not always be possible or sufficient. In the case of quasi-judicial bodies, these often have limited powers and cannot adopt binding decisions. This is the case for some global human rights treaties, such as the ICCPR, which provide for certain mechanisms, but their decisions are not binding. Access to human rights judges may be difficult ratione loci. There are in fact only three regional systems that allow for individual complaints: the African, American and European systems. While the ECHR has achieved the significant goal that the ECtHR is competent to hear complaints against any State party to the Convention,[44] in the African and American systems access to the judicial mechanism is still disjointed from the acceptance of the substantive obligations.

In concluding this brief overview, it is evident that international judges have played a major role in furthering the protection of human rights at sea. In the silence of relevant treaties, they have regularly and forcefully affirmed the applicability of human rights at sea. This result has been achieved by consistently referring to and combining notions and rules of human rights law and law of the sea, in order to guarantee that persons at sea do not suffer from the non-protection of their rights by the simple fact of being therein. In a noteworthy cross-fertilisation between different areas of international law, the ITLOS statement that "[c]onsiderations of humanity must apply in the law of the sea" is echoed in the recent ECtHR pronouncement that "the special nature of the maritime environment cannot justify an area outside the law".[45]

Much still remains to be done, however, in particular with respect to the enforcement of existing rules and access to judicial mechanisms by individuals. As Professor Treves has remarked, "[t]he resort to human rights or humanitarian considerations and rules in the context of the Law of the Sea is just at a beginning stage".[46] It is only to be hoped that in the future international judges will follow the path established by their predecessors, including the eminent jurist which this collection of essays honours, and will consolidate and further develop rules in this field so as to ensure that the human rights of all persons at sea are safeguarded.

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[44] Article 34 ECHR.

[45] Hirsi, supra n. 15, para 178.

[46] Treves 2010, p. 6.

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Interpreting the ECHR in the Light of "Other" International Instruments: Systemic Integration or Fragmentation of Rules on Treaty Interpretation?

Cesare Pitea

1 The European Court of Human Rights Between Systemic Integration and Fragmentation of Rules on Treaty Interpretation

The European Court of Human Rights (ECtHR) has often been accused of threatening the unity of international law, especially in the framework of the debate on the "proliferation" of international courts and tribunals and the "fragmentation" of international law,[1] to which Professor Tullio Treves has made an invaluable contribution, as a scholar[2] and as an international judge.[3]

[1] See, in particular, The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order. Speech by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations (27 October 2000), www.icj-cij.org/court/index.php?p1=1&p2=3&p3=1. Accessed 29 November 2011. Judge Guillaume referred explicitly to the ECtHR jurisprudence on the validity of territorial reservations to unilateral declarations of acceptance of the Court's jurisdiction as a prominent example of such risks, see ECtHR: Loizidou v. Turkey, 15318/89, Judgment (23 March 1995).

[2] Professor Treves' reflections and distinctive approaches to the "fragmentation debate" are to a great extent systematized in Treves 2007, where most of his previous writings on the topic are cited, together with extensive references to the other significant academic literature.

[3] Apart from contributing to the ITLOS jurisprudence on these issues, Judge Treves has individually contributed to the judicial debate on the topic, for instance, with his Separate Opinion in the *MOX Plant* case (ITLOS: MOX Plant (Ireland v. United Kingdom), Order (3 December 2001)).

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Since the *Golder* judgment[4] the ECtHR has been a pioneering international tribunal in underlying the importance of interpreting international treaties in the broader context of international law and in pointing at the relevance, to this effect, of Article 31.3.c of the Vienna Convention on the Law of Treaties (Vienna, 22 May 1969; hereinafter VCLT).[5] The Court may fairly be considered as a precursor of the International Law Commission (ILC), whose anti-fragmentation "toolkit" singles out this provision, allegedly expressing an interpretative principle of "systemic integration", as the "master-key" to the international law building.[6]

"Systemic integration" is based upon the premise that "whatever their subject matter, treaties are a creation of the international legal system and their operation is predicated upon that fact".[7] Therefore, "international obligations are interpreted by reference to their normative environment ("system")".[8] The principle requires "the integration into the process of legal reasoning—including reasoning by international courts and tribunals—of a sense of coherence and meaningfulness".[9] In other words, it aims at ensuring that international law achieves the minimum degree of material coherence required to be characterized as a legal system and not, as H.L.A. Hart's well known definition suggests, a mere "set of rules".[10]

After *Golder*, the ECtHR has developed an extensive practice in interpreting the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; hereinafter ECHR or "the Convention")[11] by reference to other international law rules and instruments.[12] In the *Demir and Baykara v. Turkey* judgment,[13] the Grand Chamber attempted to systematize the Court's jurisprudence, widely referring to interpretative rules codified in the VCLT.

In doing so, the Court has written a new page of the unfinished book on whether the principles of interpretation used by the ECtHR are an expression of or a

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[4] ECtHR: Golder v. the United Kingdom, 4451/70, Judgment (21 February 1975), para 35.

[5] Entered into force on 27 January 1980. Article 31.3.c VCLT provides as follows: "There shall be taken into account, together with the context: (…) (c) any relevant rules of international law applicable in the relations between the parties". For an early analysis of the relevance of this provision, see Sands 1998.

[6] Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, UN doc. A/CN.4/L.682 (13 April 2006); hereinafter Koskenniemi Report.

[7] Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, UN doc. A/CN.4/L.702 (18 July 2006); hereinafter ILC Fragmentation Report, p. 14.

[8] Koskenniemi Report, supra n. 6, para 413.

[9] Koskenniemi Report, supra n. 6, para 419.

[10] Hart 1961 p. 229.

[11] Entered into force on 3 September 1953, as amended by Protocol No. 11 (Strasbourg, 11 May 1994), entered into force on 1 November 1998 and Protocol No. 14 (Strasbourg, 13 May 2004), entered into force on 1 June 2010.

[12] For an overview, see Forowicz 2010, pp. 47–58.

[13] ECtHR: Demir and Baykara v. Turkey [GC], 34503/97, Judgment (12 November 2008).

deviation from customary international law as codified by Articles 31–33 VCLT. Without aiming to fully represent this complex debate, one may however recall two opposite views on the matter.

According to Giorgio Gaja, writing in 1999, reliance on the VCLT by the ECtHR amounts to a mere standard formula. He claims that "the Court continually refers to the Vienna Convention [on the Law of Treaties] but does not take it seriously".[14] The emphasis placed by the Court on the "special nature" of the Convention as a law-making or normative treaty[15] creating objective and non-reciprocal obligations[16] and its characterization as "a constitutional instrument of European public order (ordre public)"[17] would constitute a deviation from those same rules which the Court allegedly applies. In particular, dynamic (or evolutive) and effective interpretation are singled out as the means (inconsistently) used by the Court to reach judicial policy objectives unattainable through a straightforward application of the VCLT rules on treaty interpretation.[18]

At the other end of the spectrum, one may find the stance recently taken by the International Law Association in the report drafted by Menno Kamminga on the impact of human rights law on general international law.[19] The report acknowledges a principled general preference for a "reconciliation" as opposed to a "fragmentation" approach "if only because it is overwhelmingly in conformity with international practice".[20] As far as treaty interpretation is concerned, the report concludes that, notwithstanding claims about the need for special rules reflecting the special nature of human rights instruments, including the ECHR,

> "[i]t would appear (…) that the principles for the interpretation of human rights treaties that have been relied upon by the European and Inter-American Courts of Human Rights do not differ substantially from the methods of treaty interpretation that are available under general international law, especially if it is assumed that the VCLT is not a complete codification of the customary international law on treaties, including its norms on treaty interpretation."[21]

Against this background, the *Demir and Baykara* judgment may introduce a new element of practice in one direction or another. In doing so it will also help to clarify the scope and legal basis of the principle of systemic integration advocated by the ILC and, increasingly, by scholars.

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[14] Gaja 1999, p. 223. See also Sinclair 1984, pp. 131–133.

[15] ECtHR: Wemhoff v. Germany, 2122/64, Judgment (27 June 1968), para 8.

[16] ECtHR: Ireland v. United Kingdom, 5310/71, Judgment (18 January 1978), para 42.

[17] Loizidou, supra n. 1, para 25.

[18] Gaja 1999, pp. 225–227.

[19] Kamminga 2009.

[20] Ibidem, p. 2. See also Touzé 2011, p. 517 ("les techniques mises en oeuvre [par les organes de protection des droits de l'homme] sont en réalité des déclinations des directives dites traditionnelles d'intérpretation des traités englobées dans une approche plus large fondée sur des finalités subjectives").

[21] Kamminga 2009, p. 10. The conclusion builds substantially upon a review and analysis of the practice and case law made by Christoffersen 2009.

2 *Demir and Baykara v. Turkey*: Towards a Theory of Interpretation of the ECHR in the Light of Other International Instruments

The *Demir and Baykara* case fundamentally raises two issues: whether the freedom of assembly and association protected by Article 11 ECHR applies to municipal civil servants and whether the provision encompasses a right to collective bargaining by trade unions. In answering both questions positively, the Chamber heavily relied on external sources, including treaties which were not binding upon the respondent State.[22]

Following some doctrinal analysis,[23] Turkey criticized the approach of the Chamber, stating that the Convention was not to be interpreted by reference to international obligations to which the respondent in the case had not expressed its consent to be bound.[24]

At least three different arguments are condensed in this exception. The first is the so-called "intentionalist" objection against an objectivist (and evolutive) reading of the ECHR, insofar as it would impose on States Parties certain obligations they did not envisage when negotiating and concluding the Convention.[25] The second relates to the content of the rule codified in Article 31.3.c VCLT, to the extent that it only allows interpretative references to other rules which are "applicable in the relation between the parties". The third points at the (mis)use of interpretive techniques to expand the applicable law and suggests that the "real dispute" at hand was one concerning the European Social Charter, an instrument over which the Court lacks jurisdiction.[26]

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[22] In particular Articles 5 and 6 of the (Revised) European Social Charter (Strasbourg, 3 May 1996, entered into force on 1 July 1999) as interpreted by the relevant monitoring body (the European Committee on Social Rights), see ECtHR: Demir and Baykara v. Turkey, 34503/97, Judgment (21 November 2006).

[23] Renucci 2007.

[24] Demir and Baykara [GC], supra n. 13, paras 53–54 and 61–62.

[25] See Golder, supra n. 4, Separate opinion of Judge Fitzmaurice. Shortly thereafter, however, Fitzmaurice modified his views, admitting that the Convention should be "given a reasonably liberal construction that would also take into consideration manifest changes or developments in the climate of opinion which have occurred since the Convention was concluded", see ECtHR: National Union of Belgian Police v. Belgium, 4464/70, Judgment (27 October 1975), Separate Opinion of Judge Fitzmaurice, para 10.

[26] The use of Article 31.3.c VCLT to incorporate into the interpretative process legal instruments beyond the scope of a court's jurisdiction *ratione materiae* was criticized by judges Higgins and Buergenthal in their separate opinions to the ICJ judgment in the *Oil Platforms* case (ICJ: Oil Platforms (Iran v. United States), Judgment (6 November 2003)). For a similar argument, see PCA Arbitral Tribunal: Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom), Final Award (2 July 2003), paras 93–105.

The Grand Chamber took up the opportunity offered by Turkey to elucidate its "methodology" in interpreting the Convention in the light of other international instruments.[27]

The Court, summarizing well-established principles of its own case law, recalled that, in interpreting the Convention, it "is guided *mainly* by the rules of interpretation provided for in Articles 31–33 of the Vienna Convention on the Law of Treaties".[28] The Convention has to be interpreted "in a manner which renders its rights practical and effective, not theoretical and illusory" and must be read "as a whole (…) in such a way as to promote internal consistency and harmony between its various provisions".[29] Furthermore, by direct reference to Article 31.3.c VCLT, the Court added that it "has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties."[30] Referring to the "living" nature of the Convention and to the need to interpret it in the light of present-day conditions, the Court underlined that, in past decisions, "it has taken account of evolving norms of national and international law in its interpretation of Convention provisions."[31]

In subsequent paragraphs of the judgment, the Court thoroughly reviewed the precedents in which it has used external international sources[32] as interpretative tools, pointing at their differences in scope and in nature,[33] and without establishing any order or hierarchy among them.[34]

The Court then observed that

> "when it considers the object and purpose of the Convention provisions, it also takes into account the international law background to the legal question before it. Being made up of a set of rules and principles that are accepted by the vast majority of States, the *common international* […] *law standards of European States* reflect a reality that the Court cannot

[27] For the purpose of the following discussion, "interpretation" will be intended in its narrower sense of the attribution of a meaning to a semantic expression. Therefore, the relevance of external sources in the application of the Convention (e.g., in the assessment of proportionality of and respect for the margin of appreciation) will be left aside, although it may be considered as constituting an element of the interpretative process in a broader sense.

[28] Demir and Baykara [GC], supra n. 13, para 65, emphasis by the author.

[29] Ibidem, para 66.

[30] Ibidem, para 67.

[31] Ibidem, para 68.

[32] In some cases the judgment also contains references to domestic practices and decisions. The present contribution does not aim to discuss either the appropriateness of such references in this context, or their implications.

[33] In particular, the Court divides its analysis between general international law—a heading under which multilateral human rights treaties are included!—and Council of Europe instruments. Practice covers customary norms, general principles of law, treaties, soft-law instruments, the jurisprudence of international courts and tribunals, and the interpretative practice of supervisory bodies. See Demir and Baykara [GC], supra n. 13, paras 69–75.

[34] Cohen-Jonathan and Flauss 2009, p. 767.

> disregard when it is called upon to clarify the scope of a Convention provision that *more conventional means of interpretation* have not enabled it to establish with a sufficient degree of certainty."[35]

The reasoning concludes as follows:

> 85. The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialized international instruments and from the practice of contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.
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> 86. In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law (…) and show, in a precise area, that there is common ground in modern societies.

3 Systemic Integration Through the Disintegration of Customary Rules on Treaty Interpretation?

At first sight, the Court's theory determines a paradox, at least if one assumes that harmony in material international (human rights) law is one of the objectives pursued.[36]

The Court seemingly admits going beyond the VCLT in treaty interpretation: the very wording of the judgment suggests that the Court resorts "mainly", therefore not exclusively, to the VCLT, feeling free to use "less conventional" means of interpretation when the result of the ordinary interpretative process is unsatisfactory. In other words, the Court seems to be ready to bend generally accepted rules of interpretation to a breaking point and beyond, in order to achieve the coherence of substantive human rights law and an appropriate degree of human rights protection: it allegedly purports to create a "special rule of interpretative connection" between the ECHR and the surrounding normative environment.[37]

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[35] Demir and Baykara [GC], supra n. 13, para 76, emphasis by the author.

[36] Nordeide 2009, p. 573 ("the Court supports the idea of a structural relationship between the Convention and other international law").

[37] This expression is used by Gradoni 2010, pp. 813–814, commenting on the use of Article 31.3.c VCLT by the WTO Panel in the Biotech case (WTO: EC—Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291-293/R, Panel Report (29 September 2006), para 7.70).

In doing so, apart from giving credit to the "fragmentation" approach exposed by Gaja, it seems to contradict the "systemic integration" paradigm. Rules on treaty interpretation are (or should be) among the most resilient fabric ensuring the unity of international law: as long as the methods according to which a conventional text is interpreted are generally shared by the epistemic community of international lawyers, actual divergences as to the results of the interpretative process may be considered inherent in the nature of this legal system. This is especially true if one keeps in mind two considerations. On the one hand, as Jean-Marc Sorel puts it, "la Convention [de Vienne] juxtapose des principes parfois contradictoires qui peuvent aboutir—avec les mêmes instruments—à des conclusions fort éloignées".[38] On the other hand, international law is characterized by institutional and normative pluralism and a reasonable degree of disagreement within it has to be accepted.

Therefore, the coherence of rules on interpretation is a precondition for attaining the objective of systemic integration and the conclusion that the ECtHR is wilfully creating special rules on interpretation is not one that should be reached easily. An attempt at conceptualizing the process followed by the Court against the background, and within the boundaries, of Articles 31–33 VCLT should first be made.

If the analysis moves exclusively from the narrow perspective of Article 31.3.c VCLT, which is often assumed to be the normative reference for the principle of systemic integration, the Court's theory appears to be in sharp contrast to the requirements and conditions set forth therein.[39]

The Court mentions Article 31.3.c VCLT without engaging in a thorough analysis of its content and scope. Had it done so, in line with the prevailing approach of other international tribunals and academic literature, it would have been quite evident that at least some of the international materials referred to for interpretative purposes hardly fall within the notion of "rules of international law applicable in the relations between the parties". This consideration applies especially to soft-law instruments—radically excluded from the scope of Article 31.3.c. VCLT, which refers to binding norms deriving from formal sources of international law[40]—and to treaties which are not binding (at least) on the respondent State in the relevant case.

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[38] Sorel 2006, p. 1332.

[39] Cfr, for instance, Arato 2012, pp. 371–382.

[40] Waldock, Sixth Report on the Law of Treaties, Yearbook of the International Law Commission, vol. II, UN doc. A/CN.4/SER.A/1966/add. 1 (1967), p. 97, para 10. See also Cazala 2009, p. 11 ff; Gardiner 2008, pp. 260–263. In this context, it should be noted that when the Court cites Article 31.3.c VCLT it reformulates its wording as including, besides "rules", also "principles" of international law. However, this semantic divergence does not seem to be decisive, as confirmed by the widespread reliance on "general principles of law" or "principles of customary international law" as permitted interpretative tools, see WTO: United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, Appellate Body Report (12 October 1998), para 158 and footnote 157 (the principle of good faith as a general principle of law and a general principle of international law); PCA Arbitral Tribunal: Apurement

As far as "external" agreements are concerned, the central issue to be settled in the perspective of Article 31.3.c VCLT is whether the rule to be used for interpretation is "applicable in the relations between the parties". This question is probably the most debated aspect of the provision at hand.[41] In the narrowest view, the term "parties" must be interpreted "as requiring consideration of those rules of international law which are applicable in the relations between all parties to the treaty which is being interpreted."[42] The ILC, along with some of the academic literature, has criticized this approach, since it would nullify the effect of the provision in the relations between multilateral regimes,[43] where a perfect coincidence of parties is very unlikely, if not impossible. The ILC has preferred a broader interpretation as requiring that the treaty should at least be binding on the parties to the actual dispute in which the interpretative issue arises. However, the ILC warns that this approach is only suitable for application to synallagmatic treaties not establishing obligations *erga omnes partes*, and thus not to human rights treaties,[44] since otherwise the applicable standard of protection would vary from one party to another, depending on their respective commitment to other treaties.

Be that as it may, soft-law instruments and agreements not "applicable in the relations between the parties" can be relied upon under Article 31.3.c VCLT if they are singled out as evidence of an established customary rule or principle. In this respect, the notion of "common international (…) law standards of European States" used by the Court is to a certain extent akin to that of a regional custom.[45] However, it is doubtful whether the kind and generality of practice and *opinio iuris* normally referred to by the Court is sufficient to conclude that a custom has emerged in every instance in which this concept is used. In most cases, the expression points at an emerging custom[46] or an evolving standard which is not per se sufficient to be taken in account as an established rule.[47]

(Footnote 40 continued)
des comptes entre le Royaume des Pays-Bas et la République Française en application du Protocole du 25 septembre 1991 additionnel à la Convention relative à la protection du Rhin contre la pollution par les chlorures du 3 décembre 1976 (Netherlands/France), Award (12 March 2004), para 103 (rejecting the interpretative relevance of the polluter pays principle on the basis of its status under customary international law and the treaty to be interpreted, rather than because of its nature as a principle). See also Koskenniemi Report, supra n. 6, paras 463–469, pp. 233–237.

[41] See McLachlan 2005, pp. 1313–315.

[42] EC–Biotech, supra n. 37, para 7.70. See also Linderfalk 2008; Cannizzaro 2011, p. 521, and, with some qualifications, McLachlan 2005, p. 315.

[43] Koskenniemi Report, supra n. 6, paras 450 and 470–471, pp. 227–228 and 237–238. Gradoni 2010, p. 812 speaks of "neutralizzazione funzionale" of the principle of systemic integration.

[44] Koskenniemi Report, supra n. 6, para 472, pp. 238–239.

[45] Rietiker 2010, p. 275.

[46] Tzevelekos 2010, p. 654.

[47] Access to Information, supra n. 26, paras 93–105.

The argument then turns to the question whether the exclusion of certain "international materials" from the scope of Article 31.3.c VCLT altogether denies their relevance in the interpretative process.

The answer is certainly in the negative when such materials may qualify as "practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (Article 31.3.b VCLT). A discussion of such a concept goes beyond the scope of the present paper and will not be developed any further. However, as far as the ECHR is concerned, various soft-law instruments elaborated in the context of the Council of Europe, including resolutions adopted without opposition by the Committee of Ministers, conventions not yet in force, and the practice of treaty and expert bodies[48] are eligible for consideration under this heading.

More generally, it is submitted that the specific function of Article 31.3.c VCLT is to *mandate* the interpretative reference to a broadened context, since the rules of international law referred to therein "*shall* be taken into account, together with the context".[49] Accordingly, the provision should not be read as merely allowing such a reference, thus limiting the list of potentially relevant sources. Therefore, the narrow scope of Article 31.3.c VCLT does not prevent the use, for interpretative purposes, of a wider normative environment,[50] including emerging trends in international law.[51]

In particular, in determining the ordinary meaning of an expression, apart from relying on customary law,[52] the interpreter of a conventional text may find

[48] On which, see Polakiewicz 2005.

[49] French 2006, p. 301 ("Article 31(2) and (3) are not discretionary add-ons, but prescriptive and mandatory aspects of the 'general rule'").

[50] Cannizzaro 2011, argues that Article 31.3.c VCLT is only one of the interpretative tools for coordinating legal regimes and describes as "global interpretation" the technique allowing the use of "external sources" beyond the narrowly construed boundaries of this provision (ibidem, p. 522). He underlines that this technique, as much as the "evolutive interpretation", can hardly be characterized as the expression of a single method of interpretation among those explicitly incorporated by Article 31 VCLT (objective, subjective, functional). It is rather a combination of, and a supplement to, each and all of them (ibidem, p. 518).

[51] Although in a different context, a "liberal approach" (French 2006, p. 311) to the interpretative value of unratified treaties has been taken by Judge Treves. In discussing whether the degradation, rather than collapse, of the southern bluefin tuna stock met the urgency test which is necessary to prescribe provisional measures, he pointed at the relevance of 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 (New York, 4 December 1995), entered into force on 11 December 2001, and of the precautionary approach set forth therein. He noted that "[t]he Agreement has not yet come into force and has been signed, but not ratified, by Australia, Japan and New Zealand. It seems, nonetheless, significant for evaluating the trends followed by international law" (ITLOS: Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Order (27 August 1999), Separate Opinion of Judge Treves, para 10).

[52] Koskenniemi Report, supra n. 6, paras 467–468, pp. 235–236 (underlying that "[h]ere it is really immaterial whether a tribunal chooses to invoke Article 31 (3) (c) [VCLT]").

guidance in the sense it assumes in other international instruments[53] and, to a certain extent, regardless of the said instruments being binding (at all, or with respect to the parties to a dispute or to the treaty to be interpreted). The ILC has observed that this approach, adopted in particular in the context of the WTO,[54]

> gives effect to the sense in which certain multilateral treaty notions or concepts, though perhaps not found in treaties with identical membership, are adopted nevertheless widely enough so as to give a good sense of a "common understanding" or a "state of the art" in a particular technical field without necessarily reflecting formal customary law.[55]

The resemblance with the Court's approach and terminology is evident. Indeed, on the assumption that the practice of States is coherent—at least in instruments serving the same object and purpose—this technique is particularly useful (and is indeed used) to ensure harmony in particular areas of international law, such as human rights law,[56] where the purpose of the relevant treaties calls for harmonization through cross-fertilization.[57]

The third and final limb of the argument relates to another debated aspect of the principle of systemic interpretation, namely the critical date at which the normative environment has to be considered when interpreting a conventional provision. In the Court's interpretative theory and practice, this question is easily resolved by reference to the notion of the ECHR as a "living instrument" and therefore to the issue of dynamic (evolutive) interpretation.[58]

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[53] Cazala 2009, pp. 102–103 (evoking analogical interpretation techniques).

[54] See United States—Shrimp, supra n. 40, pp. 48–49, para 130 (referring to the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, entered into force on 16 November 1994, hereinafter UNCLOS), and to the Convention on Biological Diversity (Rio de Janeiro, 5 June 1992, entered into force on 29 December 1993) to include living resources within the meaning of the expression "exhaustible natural resources" under Article XX GATT 1947); United States—Tax Treatment for "Foreign Sales Corporations"—Recourse to Article 21.5 of the DSU by the European Communities, WT/DS108/AB/RW, Appellate Body Report (14 January 2002), paras 141–145 (especially footnote 123) (referring to several bilateral and regional trade agreements to define the meaning of the expression "foreign-source income" in footnote 59 of the Agreement on Subsidies and Countervailing Measures). For a review of WTO practice, see Van Damme 2006. See also ICJ: Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment (25 September 1997), para 140; Access to Information, supra n. 26, dissenting opinion Gavan Griffith QC, paras 9–19 (an unratified treaty may be of "normative and evidentiary value to the extent that regard may be had to it to inform and confirm the content" of the provision to be interpreted).

[55] Koskenniemi Report, supra n. 6, para 472, p. 239. Similarly, McLachlan 2005, p. 315 (other treaties are not used as sources of binding international law, but "as a rather elaborate law dictionary"). In both cases, the approach is seen as a qualification or particular application of Article 31.3.c VCLT. However, the present author considers that this approach may be better justified under Article 31.1 VCLT.

[56] Cazala 2009, p. 103.

[57] See Touzé 2011 (cross-fertilization in human rights law "contribue (…) à un reinforcement de la protection des droits individuels").

[58] The link between systemic integration and evolutive interpretation is often underlined; see in particular, Distefano 2011.

It seems difficult to argue that evolutive interpretation as such is at odds with the VCLT.[59] Reviewing Sir Gerald Fitzmaurice's principle of "contemporaneity",[60] Hugh Thirlway has expressed the view that "where it can be established that it was the intention of the parties that the meaning or scope of a term or expression used in the treaty should follow the development of the law, the treaty must be interpreted as to give effect to that intention."[61] Widely referring to judicial practice, the ILC has concluded that "the treaty language itself (…) provide[s] for the taking into account of future developments"[62] when: the terms used are inherently "not static, but evolutionary"[63] or simply generic,[64] when the object and purpose of the treaty suggests that "the parties have committed themselves to a project of progressive development"[65] and when the obligation concerned is couched in very general terms.[66] Human rights treaties share all of these characters and their evolutive interpretation is in principle compatible with the VLCT.[67]

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[59] For a synthesis of the works of the ILC on the issue within the framework of the codification of the law of treaties, see Distefano 2011, pp. 386–388.

[60] Fitzmaurice 1986, pp. 345–346.

[61] Thirlway 1991, p. 57. With some qualification, the view that "evolutive interpretation" is allowed by the general rule on interpretation, at least in certain circumstances, is shared by the overwhelming majority of scholars cited in the following footnotes. For a recent critical assessment of the issue, see Fitzmaurice 2008, 2009.

[62] Koskenniemi Report, supra n. 6, para 478, p. 242.

[63] ICJ: Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Op. (21 June 1971), para 53.

[64] Koskenniemi Report, supra n. 6, para 478, p. 242, referring to ICJ: Aegean Sea Continental Shelf (Greece v. Turkey), Judgment (19 December 1978), para 78 (a generic term is "intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time"). See also WTO: China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/AB/R, Appellate Body Report (21 December 2009), para 396 (the terms "sound recording" and "distribution" used in China's "are sufficiently generic that what they apply to may change over time").

[65] Gabčíkovo-Nagymaros, supra n. 54, paras 132–147 and Separate Opinion of Judge Weeramantry, pp. 113–115. See also Bernhardt 1999, p. 16. In other cases the ICJ has rather referred to the presumed intention of the parties to give an evolutive meaning to a treaty or certain of its terms (ICJ: Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment (13 July 2009), para 64 and Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment (20 April 2010), para 204). However, it has been observed that such an intention should be primarily inferred from the object and purpose of the treaty (Distefano 2011, p. 394). See also PCA Arbitral Tribunal: Iron Rhine ("IJzeren Rijn") Railway (Belgium/Netherlands), Award (24 May 2005), para 80 ("an evolutive interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose, will be preferred to a strict application of the intertemporal rule").

[66] US—Shrimps, supra n. 40, para 130 (with reference to the expression "necessary to protect human, animal and plant life or health" used in Article XX GATT).

[67] Higgins 2006, pp. 797–798.

The strongest argument against this technique relates to the perils of judicial legislation that it entails.[68] Evolutive interpretation, in separating conventional obligations from the original intention of the Parties, could thus be prejudicial to legal certainty and a rupture in the consensual nature of treaty law.[69]

As far as the argument is generally directed against the compatibility of this technique with general international law, and not against the results it brings in specific cases,[70] some considerations shall be made. The development of the law is part of the judicial mandate of any international tribunal[71] and the progressive reinforcement of human rights protection is a fundamental aspect of the object and purpose of a human rights treaty.[72] Furthermore, one may also argue that, by conferring and progressively deepening and enlarging the competence of a judicial body as the "guardian of a common plan",[73] States Parties to the ECHR have implicitly accepted that they must face the effects of such developments beyond their initial expectations.[74]

Against this background it should be recalled that the power of the ECtHR to interpret the ECHR dynamically is constrained by several factors. In a large sense, it is limited by the Court's need to maintain legitimacy *vis-à-vis* its constituency, primarily the community of States Parties. The Court is aware of this need, for example when it defers to the so-called "consensual interpretation" in examining whether States have overstepped the margin of appreciation they enjoy in applying the Convention. From the narrower perspective of interpretation techniques, the flexibility conferred by the teleological approach is not unfinished. However, far from being limited by the original intention of the Parties, it is defined by the actual text of the Convention: the Court does not read into conventional provisions meanings that textual and contextual elements plainly exclude.[75]

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[68] Hoffman 2009, p. 428 (arguing that the "living instrument" doctrine "is the banner under which the Strasbourg court has assumed power to legislate what they consider to be required by "European public order").

[69] See, generally, Fitzmaurice 2008, pp. 131–153.

[70] Bernhardt 1999, p. 16 ("[n]ot the existence, but the extent of the evolutive or dynamic element in any treaty interpretation is the real problem").

[71] See Treves 2005.

[72] In this respect, the reference in the Preamble to the Convention to the objective of the "further realization of human rights" ("développement des droits de l'homme" in the French text) is often recalled, see Tulkens 2011, p. 534 and Dupuy 2011, p. 133.

[73] Dupuy 2011, p. 125 (arguing that in such cases, i.e., when the international judge "does not simply act as an arbitrator", "the institutional mandate conferred upon the judge will provide him with the necessary authority and legitimacy" to further such a collective plan through interpretation).

[74] Bernhardt 1999, p. 24 (arguing that States have generally accepted evolutive interpretation by the Court "either by acting in conformity with the pronouncement of the Court or by ratifying additional protocols like Protocol No. 1").

[75] See, for example, Wemhoff, supra n. 15; Johnston v. Ireland, 9697/82, Judgment (18 December 1986), para 53; Soering v. the United Kingdom, 14038/88, Judgment (7 July 1989); Pretty v. United Kingdom, 2346/02, Judgment (29 April 2002).

4 Two Tentative Conclusions

The argument condensed in the preceding pages supports the idea that, notwithstanding the "separatist" attitude emerging from the very words used by the Court in *Demir and Baykara v. Turkey*, reliance on various external instruments of international law in interpreting the Convention may be conceptualized within, rather than outside, the boundaries of customary rules on treaty interpretation.

Although the Court, in pursuance of its own "interpretive ethic",[76] undoubtedly bends such rules, these seem to be flexible enough to sustain the stress without breaking.[77] In particular, the specific interpretative needs deriving from the special features of human rights treaties are accommodated through the emphasis placed on the teleological approach, one of the fundamental elements of the general rule of interpretation.[78]

Therefore, the interpretative relevance of a wide array of external instruments of international law, not limited to customary, including regional, and treaty "rules applicable in the relations between the parties" in the sense of Article 31.3.c VCLT, serves a twofold purpose: it fosters the material coherence and effectiveness of international human rights law; and, as much as the so-called "consensual interpretation", it links to objective evidence the inherent dynamism of human rights instruments as legal parameters of State conduct.[79] In justifying an evolutive interpretation by reference to elements ultimately emanating from the international community of States, the Court seeks to balance the ethical push toward the humanization of international law with the preservation of the system as a State-centred legal order.

In this process, the extensive cross-fertilization among different human rights regimes testifies to the support given by the Court to the relevance of systemic integration in treaty interpretation.[80] However, the emphasis placed in recent case law and legal literature on Article 31.3.c VCLT as the "master-key" to promote coherence and harmonization in international law carries the risk of underestimating the broader implications that systemic integration may have: far from being constrained by the narrow terms of Article 31.3.c, it should be constructed as a

[76] Letsas 2010 (arguing that the Court dismisses both intentionalism and textualism to favour a "moral reading" of the Convention's rights).

[77] Villiger 2011, p. 122.

[78] Letsas 2010, p. 514 ("[the general rule of treaty interpretation] is abstract enough to allow for different interpretive 'techniques' or 'methods' depending on the object and purpose of each treaty").

[79] Tulkens 2011, p. 539.

[80] This seems also to suggest the need to pay greater attention to the knowledge of public international law within the Court and the Registry, see Bernhardt 1999, p. 24. According to a recent empirical survey, as of June 2010, only 15 of the 46 judges of the Court (i.e. 32.6 %) had specific professional experience and/or training in public international law, see Forowicz 2010, pp. 368–369.

general principle of interpretation rooted in a plurality of hermeneutic canons and techniques.

In the light of the foregoing, it is fair to suggest that the ECtHR should treat international law on the interpretation of treaties "more carefully", in that it should make an effort to develop its own interpretative methodology and results in harmony with generally accepted rules on treaty interpretation, instead of unnecessarily using language suggesting its intention to move away from them.

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The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures

Cesare P. R. Romano

1 Introductory Remarks

The rule of prior exhaustion of domestic remedies (also known as the "domestic remedies" rule) essentially stipulates that claims of violations of an individual's rights cannot be brought before an international adjudicative body or procedure unless the same claim has first been brought before the competent tribunals of the alleged wrongdoing State, and these judicial remedies have been pursued, without success, as far as permitted by local law and procedures.[1]

The rule is well established in international law and can be considered part of the body of customary international law.[2] Originally, it was applied solely in the context of the espousal of claims and diplomatic protection, acting as a limitation

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[1] In the ELSI case, the rule was succinctly defined by the International Court of Justice. "For an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success" (ICJ: Elettronica Sicula S.p.A. (ELSI) (United States v. Italy), Judgment (20 July 1989), para 59.

[2] Ibidem, para 50. See also ICJ: Interhandel (Switzerland v. United States), Judgment (21 March 1959), p. 27. The International Law Commission has said as much while codifying the customary international law on diplomatic protection. International Law Commission, Draft Articles on Diplomatic Protection, Articles 14 and 15.

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to States' right to diplomatically protect their nationals. However, starting with the second half of the twentieth century, the rule has been applied in a related but substantially different context of disputes between individuals and States (usually the petitioner's State of nationality) within the framework of international human rights procedures.

Nowadays, the rule of exhaustion of domestic remedies is an admissibility criterion of most, and surely every major, human rights adjudicative procedure. Amongst the few exceptions are the Complaints Procedure (Article 26) of the International Labour Organisation,[3] and the Collective Complaints Procedure under the European Social Charter.[4] The rule of prior exhaustion of domestic remedies is also likely to be the most important admissibility criterion.[5] Indeed, as every international human rights practitioner knows, whenever a new case looms on the horizon, the first questions to be asked are: Has the case been brought before a national court? What was the result? Was it appealed? Is there any remedy that could be pursued which was not? In sum, have domestic remedies been exhausted? At the same time, a petitioner's failure to exhaust domestic remedies is usually a State's immediate position and first line of defense. In an overwhelming majority of cases before any human rights body or procedure, States' agents argue that a petition is inadmissible because some domestic remedies have not been exhausted.

A comprehensive overview of the scope of the rule of the exhaustion of domestic remedies, its many exceptions, and the interpretation and implementation of this rule by human rights bodies, at the regional and global level, is beyond the scope of this short essay. Although there is already a fairly substantial bibliography on the issue, we are still missing a completely up-to-date and comprehensive treatise on the matter.[6] This short essay will rather offer a few quick considerations on some selected questions, drawing mostly from the law and practice of the Inter-American Court of Human Rights and the Inter-American Commission, the European Court of Human Rights, and the UN Human Rights Committee, which, collectively, represent the overwhelming majority of international jurisprudence on the matter.

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[3] See Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labour Organisation to examine observance of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), by the Federal Republic of Germany, para 255.

[4] See ECSR: Syndicat des Agrégés de l'Enseignement Supérieur (SAGES) v. France, 26/2004, Decision (7 December 2004), para 12.

[5] In the case of some courts and procedures, such as, for instance, the European Court of Human Rights, the petition must be filed within a certain period (usually 6 months) from the date on which the latest decision has been handed down by the national court. While probably equally paramount, the time-limit rule is in the end subordinate to the rule of the exhaustion of domestic remedies because the time limit only lapses after the remedies have been exhausted.

[6] E.g. Crawford and Grant 2011; Amerasinghe 2004; Cançado Trindade 1983, 2003; Burgorgue-Larsen 2011; Santulli 2005; Schermers 2002; D'Ascoli and Scherr 2006; Gandhi 2001; Pisillo Mazzeschi 2000, 2004; Udombana 2003.

2 The Rationale and Importance of the Rule of Prior Exhaustion of Domestic Remedies

In essence, the domestic remedies rule makes international judicial remedies complementary and subsequent to national ones. In legal theory, the rule could be explained as a corollary of the principle of sovereignty, the ordering principle of the international community. In practice, by sequentially ordering national and international remedies, and only allowing access to international remedies after the exhaustion of domestic remedies, the rule establishes the actual primacy of national remedies.

Furthermore, international judicial remedies are not only subordinate to national ones, but are also structurally separated from them. The reason for their separation has been succinctly stated by the Inter-American Court of Human Rights when it stated that international human rights bodies are not a "fourth level of jurisdiction", seamlessly linked to the usual three levels of jurisdiction in which many national legal systems are structured.[7] Indeed, international bodies cannot review judgments delivered by national courts acting within their own sphere of competence and applying their own appropriate domestic judicial guarantees. They can do so only to the extent that a State has failed in its responsibility to comply with some of its international obligations. Yet, while separate, the two legal realms—the national and the international—are connected by the domestic remedies rule.

Rarely can international judicial bodies be resorted to directly and immediately.[8] There are some steps that almost always need to be taken before that can happen. For instance, and to pick an example outside the human rights sphere, in the case of State-to-State disputes on any matters of international law admissibility is often conditional upon the exhaustion of transactional and negotiated forms of settlement.[9] In sum, international remedies are only contingent, that is to say they are only available after the exhaustion of domestic remedies and their activation is never a certainty.

The subsidiarity of international courts to domestic ones is not only a structural matter, made inevitable by the nature of the international legal system, but also a matter of logical and practical convenience. Logically, it ensures that claims are always first addressed at the lowest possible level of complexity. Without the

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[7] See, e.g. IACtHR: Chaparro Álvarez y Lapo Íñiguez v. Ecuador, Judgment (21 November 2007), paras 19–23. For the ECtHR, see Kemmache v. France (no. 3), 17621/91, Judgment (24 November 1994), para 44.

[8] Besides the above-mentioned exception of the ILO Article 26 procedure, it should be mentioned that the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are not complementary to national courts but rather enjoy primacy over them and can therefore formally require them to relinquish a particular case at any stage of the proceedings. See Statute of the ICTY, Article 9.2; Statute of the ICTR, Article 8.2.

[9] See, e.g., ICJ: Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment (11 June 1998), paras 56–59.

domestic remedies rule an essentially domestic matter would become prematurely internationalized. Practically, domestic courts are generally better placed to determine the facts of, and the law applicable to, any given case, and, where necessary, to enforce an appropriate remedy. Clearly, the local judge is the natural judge. Moreover, having a case pass through the various filters of domestic remedies prior to being adjudicated internationally ensures that the international jurisdiction has all the necessary information on the matter under consideration.[10]

Lastly, the rule has been designed by and for the "benefit of the State", as the Inter-American Court of Human Rights explained in the *Viviana Gallardo* case.[11] It affords the State a fair opportunity of quashing or setting right the alleged violations before those allegations are submitted to an international adjudicative body.[12] Once domestic remedies have been exhausted there is nothing more the State can do to remedy the situation without an external injunction. The eventual finding of a breach can, thus, reliably rest on the finality of the State's actions, which makes it possible to clearly identify the final binding obligations of the State.

3 A Low and Porous Obstacle …

Given the centrality of the domestic remedies rule, one would expect it to be a significant barrier to international adjudication, making international litigation a relatively rare occurrence and preventing most cases from reaching the merits stage. However, in practice it is a rather low and porous obstacle, more a sandbar than a dam.

The rule is riddled with many far-reaching exceptions that have gradually formed a rather ponderous—and somewhat still jumbled—body of law. Most of these exceptions are jurisprudential constructs, as opposed to statutory rules, and,

[10] "(…) [I]t is appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention and that, if an application is nonetheless subsequently brought to Strasbourg, the European Court should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries" (ECtHR: Burden v. the United Kingdom [GC], 13378/05, Judgment (28 April 2008), para 42; see also ECtHR: Varnava and Others v. Turkey [GC], 16064/90 and others, Judgment (19 September 2009), para 164.

[11] ACtHR: Viviana Gallardo et al. v. Costa Rica, Judgment (13 November 1981), para 26; Velásquez Rodríguez v. Honduras, Judgment (29 July 1988), para 61.

[12] E.g. ECtHR: Kudła v. Poland [GC], 30210/96, Judgment (26 October 2000), para 152; Selmouni v. France [GC], 25803/94, Judgment (28 July 1999), para 74. Of course, the assumption is that there is an effective remedy available with respect to the alleged breach at the national level (ibidem, and see also Akdivar and Others v. Turkey [GC], 21893/93, Judgment (16 September 1996), para 65. See also Council of Europe, Recommendation (2004) 6 of 12 May 2004 of the Committee of Ministers to Member States on the Improvement of Domestic Remedies.

time after time, international adjudicatory bodies have shown a propensity to apply it in favor of the petitioners.

Provisions on the domestic remedies rule in international legal instruments tend to be very concise. For instance, the European Convention on Human Rights succinctly states on the topic: "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of inter-national [sic] law (…)".[13] The same concise formula can be found verbatim in all other major international human rights treaties.[14] However, some add to this an important qualifying exception: the rule does not apply when the "application of domestic remedies is unreasonably prolonged".[15]

Of all international human rights instruments the American Convention of Human Rights is the one that goes into the most detail on the exceptions to the rule. Thus, Article 46.2 adds to the aforementioned "unreasonably prolonged"—also referred to as "unwarranted delay"—exception, and includes two more grounds for the exclusion of the rule: when the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have been allegedly violated, and when the party alleging a violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them.[16]

The considerable statutory vagueness of the domestic remedies admissibility criterion has, thus, left international human rights bodies with a large area in which to maneuver. This opportunity has given them the chance to elaborate over the years on the exact scope of the rule and, even more so, on its exceptions, resulting in a sizeable amount of jurisprudence.

Thus, by now, it is universally accepted that domestic remedies must be "available", "effective" and "sufficient". If any of the aforementioned criteria are not met the individual may be excused from the duty to exhaust them. There is also considerable jurisprudence elaborating what those three adjectives, which are nowhere to be found in statutory provisions, exactly mean. Yet, at the same time, while international human rights bodies have gradually specified the exact scope of the rule and created a long and expanding list of exceptions, they have also resisted

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[13] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), entered into force on 3 September 1953, as amended by Protocol No. 11 (Strasbourg, 11 May 1994), entered into force on 1 November 1998 and Protocol No. 14 (Strasbourg, 13 May 2004), entered into force on 1 June 2010, Article 35.

[14] E.g. American Convention on Human Rights (San José, 22 November 1969), entered into force on 18 July 1978, Article 46.1.a.

[15] E.g., International Covenant on Civil and Political Rights (New York, 16 December 1966), entered into force on 23 March 1976, Article 41.1.c (for state v. state communications); Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966), entered into force on 23 March 1976, Articles 2 and 5.2.b (individual communication). African Charter on Human and Peoples' Rights (Banjul, 27 June 1981), entered into force on 21 October 1986, Article 50 (proceedings before the Commission) and Article 56.5.

[16] American Convention on Human Rights, Articles 46.2, a and b.

over-regulating the rule, ultimately waiting to apply it in light of the general legal and political context as well as the personal circumstances of the applicant.[17]

At first sight, the case of the Inter-American system seems to suggest that the domestic remedies rule is not a tremendous obstacle to international adjudication. There, States routinely argue before the Inter-American Court of Human Rights that domestic remedies have not been exhausted. However, after more than 25 years of activity and approximately 150 cases decided, the Court has yet to dismiss a single case based on that argument. Invariably, the Court finds that at least one of the exceptions it has jurisprudentially developed over the years applies.

It is important to note that cases where domestic remedies might indeed not have been exhausted are usually dismissed by the Inter-American Commission and are never heard before the Court. And when cases do reach the Court, the admissibility requirements have already been closely scrutinized and ruled upon by the Commission. However, the Court has long insisted, since its very early days, that when it considers a case, it considers it *in toto*, including reconsidering admissibility questions.[18] Still, it has never found a case inadmissible on the grounds that domestic remedies have not been exhausted.

There are no exact figures available as to how often the Inter-American Commission finds cases inadmissible due to the lack of the exhaustion of remedies. However, one can engage in some extrapolation. Data published in the Commission's 2010 annual report on admissibility and inadmissibility reports published over the period 1997–2010 show that, on average, for every 43 petitions found admissible only 12 are found inadmissible (in 2010, the ratio was 73 admissible to 10 inadmissible).[19] Aside from the exhaustion of domestic remedies, the only other significant admissibility requirement is the filing of the petition within six months from the date on which the party alleging a violation of his rights was notified of the final judgment of the national court (the so-called "six-month" rule). Because the six-month rule is a much more straightforward admissibility criterion and it is relatively easy to predict when a case would fail because of that, thus thwarting filing in the first place, one could reasonably

[17] The European Commission of Human Rights and the Court have frequently underlined the need to apply the rule with some degree of flexibility and without excessive formalism, given the context of protecting (is it supposed to be "protecting petitioners" or "proceedings"?). ECmHR: Lehtinen v. Finland, 39076/97, Decision (14 October 1999), Section 1, "Concerning the search and seizure", citing ECtHR: Cardot v. France, 11069/84, Judgment (19 March 1991), para 34; Van Oosterwijck v. Belgium, 7654/76, Judgment (6 November 1980), para 35; and Akdivar and others, supra n. 12, paras 65–68.

[18] E.g. IACtHR: Velasquez Rodriguez v. Honduras, Judgment (26 June 1987), para 84; Fairén-Garbi and Solís-Corrales v. Honduras v. Honduras, Judgment (26 June 1987), paras 34 and 83; Godínez-Cruz v. Honduras, Judgment (26 June 1987), para 86; Juan Humberto Sánchez v. Honduras, Judgment (23 June 2003), paras 64–69; Exceptions to the Exhaustion of Domestic Remedies (Articles 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion (10 August 1990), para 39.

[19] Annual Report of the Inter-American Commission on Human Rights (2010), Doc. OEA/Ser.L/V/II, Doc. 5, rev. 1 (7 March 2011), hereinafter IACmHR, 2010 Annual Report, p. 37.

conclude that most of those cases found inadmissible were exactly for violations of the domestic remedies rule.[20] Even so, considering that States in the Inter-American system almost always invoke the rule—and some have argued that they abuse the right to invoke it—[21] it seems that States have a success rate of less than 25 % or significantly lower. Not negligible but not a prodigious obstacle either.

That being said, one should not read too much into the number of complaints dismissed on admissibility over the total number of complaints filed (or decided on the merits). Applicants might simply apply a good measure of self-restraint and ethical lawyering and wait to submit a complaint until there is a strong *prima facie* case that domestic remedies have indeed been exhausted.

4 ... But a Wayward Obstacle Nonetheless

Indeed, in practice, the domestic remedies rule is, if not a prodigious obstacle to the international litigation of human rights cases, a wayward obstacle nonetheless. It inhibits the submission of petitions beforehand, rather than thwarting them once they reach the adjudicating body. Most of the exceptions are an international jurisprudential construct, not clearly codified, and because jurisprudence is constantly evolving and shifting, for the petitioner it is often difficult to tell exactly when domestic remedies have been exhausted and whether any exceptions are applicable.

De jure, in international human rights procedure the State has the burden of proving that there are effective and available remedies that could have been pursued by the petitioner but which the petitioner did not pursue. Thus, the Rules of Procedure of the Inter-American Commission, as amended in 2002, provide: "When the petitioner contends that he or she is unable to prove compliance with the requirement indicated in this Article, it shall be up to the State concerned to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record".[22]

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[20] Other grounds for inadmissibility are an anonymous submission; that the violation did not take place at a time when the Convention (or relevant protocol) was in force with respect to the state in question; the same matter is pending for consideration before another international dispute settlement procedure; and that the alleged violation cannot be attributable or imputable to the State in question.

[21] See, Burgorgue-Larsen 2011, p. 136 ff.

[22] Rules of Procedure of the Inter-American Commission on Human Rights, as approved by the Commission at its 109th special session (4–8 December 2000) and amended at its 116th regular period of sessions (7–25 October 2002); hereinafter Inter-American Rules of Procedure, Article 31.3. Substantially, same procedures can be found in the various international human rights procedures. Thus, for instance, in the case of the Rules of Procedure of the Committee of the Convention on the Elimination of Discrimination against Women, Rule 69.6 provides: "If the State party concerned disputes the contention of the author or authors (…) that all available domestic remedies have been exhausted, the State party shall give details of the remedies available to the alleged victim or victims in the particular circumstances of the case."

Similarly, the European Court of Human Rights has, through its jurisprudence, placed the burden to raise non-exhaustion on the State, by asking States contesting exhaustion to point to a domestic remedy which, in the circumstances of the particular case, should have, but had not, been resorted to.[23] Moreover, the European Court of Human Rights has specified that the State must not only satisfy the Court that the remedy was effective, available both in theory and practice at the relevant time, but also frequently asks the State to provide examples of the alleged remedy having been successfully utilized by persons in similar positions to that of the applicant.[24] Placing the burden of proof on the State makes logical sense. The domestic remedies rule exists for the benefit of the State, and, if the State decides to invoke it, the burden should be on the State.

However, the burden of both exhausting the remedies and proving that they have been exhausted, or that the exceptions to the rule are applicable, is first and foremost de facto on the petitioner. Indeed, every human rights body requires petitioners to explain, in detail, in their initial application what steps have been taken at the national level to exhaust remedies. The European Court of Human Rights even has an online tool to help potential applicants assess whether they have an apparently admissible case.[25] Unless the domestic remedies rule has been complied with, at least prima facie, the petition will likely languish in a bureaucratic limbo or face an early and sudden death. The amount of detail and information that is often requested by the secretariats of human rights bodies while processing a petitioner's application can be daunting.

In the case of the Inter-American system, the Commission itself, or its Secretariat, may either decide not to process the petition at all, or to request additional information and documentation until it is satisfied that at least a prima facie case of the exhaustion of domestic remedies, or the applicability of the exceptions, can be made.[26] Only at that point is the petition processed and transmitted to the State for a reply, which will then have an opportunity to raise, in *limine litis*, an objection to admissibility on the grounds of non-exhaustion. And it is only then that the State will have to satisfy the burden of proof. For instance, in 2010 the Inter-American Commission received 364 petitions against Peru, but a decision to process was taken only in 86 of those petitions (about 23 %).[27] In 2010, a total of 1,676 petitions were evaluated by the Commission but there was a decision to process,

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[23] E.g. ECtHR: De Wilde, Ooms and Versyp v. Belgium, 2832/66-2835/66-2899/66, Judgment (18 June 1971), para 60; Deweer v. Belgium, 6903/75, Judgment (27 February 1980), para 26; Kozacioğlu v. Turkey [GC], 2334/03, Judgment (19 February 2009), para 39; Akdivar, supra n. 12, para 68; Dalia v. France, 26102/95, Judgment (19 February 1998), para 38; McFarlane v. Ireland [GC], 31333/06, Judgment (10 September 2010), para 107.

[24] E.g. ECtHR: Kangasluoma v. Finland, 48339/99, Judgment (20 January 2004), paras 46–48.

[25] ECHR, Applicant Check List, www.echr.coe.int/ECHR/EN/Header/Applicants/Apply+to+the+Court/Checklist/. Accessed 2 January 2012.

[26] Inter-American Rules of Procedure, Articles 26 and 29.

[27] IACmHR, 2010 Annual Report, supra n. 19, Chapter III.B.1.(d) and (e).

that is to say to proceed, in only 275 of those petitions (about 16 %).[28] While the Commission does not explain why it declines to process, or why it postpones a decision to process, it is likely that many, if not most, of those petitions are unripe because proceedings are still pending at the national level or some remedies at the national level have not been pursued.

In the case of the Human Rights Committee, to date, out of a total of 2,034 communications considered over its history, about 27 % have been declared inadmissible.[29] Until the late 1980s, the domestic remedies rule was the principal ground for declaring communications inadmissible.[30] Nowadays, the insufficient substantiation of claims has "gradually replaced the exhaustion of domestic remedies as the most frequently applied ground for inadmissibility", but it still comes in as a close second.[31] However, many more applications are simply stalled or not processed because they do not pass the prima facie admissibility screening.[32]

The European Court of Human Rights, which is overwhelmed with tens of thousands of cases, has even less patience. It simply rejects most petitions. In 2010, 84 % of all new applications to the European Court of Human Rights were declared inadmissible (a total of 41,184).[33] Of those, 15 % were rejected precisely because domestic remedies had not been exhausted (a total of 5,144 applications).

5 Conclusion

The rule of the exhaustion of domestic remedies serves important purposes. Besides the important theoretical and systemic considerations at its core, without this modest filter international judicial bodies would be flooded by hundreds of thousands of cases, leading to the collapse of the system.

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[28] Ibidem, (c) and (f).

[29] Human Rights Statistical Survey of Individual Complaints Dealt with by the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (6 April 2011), www2.ohchr.org/english/bodies/hrc/docs/SURVEYCCPR101.xls. Accessed 2 January 2012.

[30] Tyagi 2011, p. 498. The other grounds for inadmissibility in the case of the Human Rights Committee are that the violation did not take place at a time when the Covenant and First Optional Protocol were in force for the relevant state; claims are not substantiated; that the petition was filed anonymously, or could be considered to be an abuse of the right of submission or is otherwise incompatible with the provisions of the Covenant; and that the same matter is simultaneously pending before any another international procedure of investigation.

[31] Tyagi 2011, p. 498; Möller and de Zayas 2009, p. 91.

[32] "A high number of communications are received per year in respect of which complainants are advised that further information would be needed before their communications could be registered for consideration by the Committee, or that their cases cannot be dealt with by the Committee (…). A record of this correspondence is kept by the secretariat of OHCHR." (Report of the Human Rights Committee (2010–2011), A/66/40 (Vol. I), para 99.

[33] ECtHR, Applicant Check List: Facts and Figures.

However, international human rights bodies have gradually lengthened the list of exceptions, thereby limiting the rule's practical import. They have applied it with a considerable degree of flexibility, taking into consideration specific circumstances, and in general favoring petitioners. Yet, it is debatable whether the net effects are entirely desirable and whether the rule, as it is currently interpreted in general by international human rights bodies, is optimally tuned. Most of all, there is a dire need for greater clarity as to the exact scope of the rule and its exceptions. This problem is rapidly becoming evident to everyone working with and within these bodies.

During February 2010, a High Level Conference on the Future of the European Court of Human Rights was convened in Interlaken, Switzerland to address the concern of the constant growth of an already massive docket of cases. In the final declaration, the Conference "stresse[d] the importance of ensuring the clarity and consistency of the Court's case-law",[34] calling for, in particular, "a uniform and rigorous application of the criteria concerning admissibility" and inviting the Court to "make maximum use of the procedural tools (…) at its disposal".[35] Recognizing that there is confusing and ponderous case-law on the point, the Conference, under the heading "Filtering", called upon the "State Parties and the Court to ensure that comprehensive and objective information is provided to potential applicants on the Convention and the Court's case-law, in particular on the application procedures and admissibility criteria".[36] The follow-up conference, in Izmir, Turkey, in 2011, repeated the call, adding that "(…) admissibility criteria are an essential tool in managing the Court's caseload and in giving practical effect to the principle of subsidiarity".[37]

Recently, the High Level Conference on the Future of the European Court of Human Rights invited the European Court to "(…) develop its case law on the exhaustion of domestic remedies (…)".[38] Yet, as we have seen, jurisprudential elaboration is not the solution to the problem but probably a cause.

In response to the Interlaken prompt, at the end of 2011 the Registrar of the Court issued a revised Practical Guide on Admissibility Criteria,[39] with the explicitly stated aim of reducing the number of clearly inadmissible cases that reach the Court, and to ensure that those applications that warrant examination on

[34] High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration (19 February 2010), p. 2, (4). See also ibidem Action Plan, E.9.(b).

[35] Ibidem, at 2, (5).

[36] Ibidem, Action Plan, C.6.(a).

[37] High Level Conference on the Future of the European Court of Human Rights, Izmir Declaration (27 April 2011), p. 2, para 4.

[38] High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration (20 April 2012), para 15. g.

[39] European Court on Human Rights, Practical Guide on Admissibility Criteria (2009, rev. 2011), www.echr.coe.int/ECHR/EN/Header/Case-Law/Case-law+analysis/Admissibility+guide/. Accessed 2 January 2012.

the merits pass the admissibility test.[40] The 92-page guide covers all aspects of admissibility, dedicating only six of them to the rule of the exhaustion of domestic remedies. It makes extensive reference to the Court's decisions on the aspects of the rule. While the Guide is well documented, it does little to dispel the doubts as to the scope of the rule and its exceptions. It is at the same time both too concise and too thick. Moreover, the Guide has been penned by the Department of the Jurisconsult of the Court, and its legal value is on a par with scholarly literature and, for that matter, adds very little clarification to the rule and its exceptions.[41] Steps like these could help, but what really is needed here is greater certainty. This certainty must come at the risk of less flexibility in the application of the rule, and only with documents of a higher legal value can international bodies provide parties with a sufficient level of confidence so as to be able to predict how the body would decide on the rule of the exhaustion of domestic remedies in any given case.[42]

Thus, for instance, in the case of the Inter-American system, the Inter-American Court of Human Rights could be asked to issue an advisory opinion on the matter. This would not be entirely unprecedented. In 1989, the Commission requested an Advisory Opinion on the "Exceptions to the Exhaustion of Domestic Remedies".[43] However, that request was limited to asking whether indigent persons and persons who are unable to find legal representation due to a general fear in the legal community are still required to exhaust domestic remedies.

Likewise, the Human Rights Committee should consider issuing a General Comment on Article 2 of Protocol 1, which enshrines the domestic remedies rule. Thus, far it has adopted 34 general comments in 30 years, including comments on procedural issues such as the reporting obligations of States, and it could again contribute by clarifying this important aspect of human rights law. In the end, an amendment to the rules of procedure of these bodies, spelling out clearly the scope of the rule and its exceptions, would be the best option. It does not necessarily need to become a straitjacket. A clause leaving the body a certain margin of discretion, in special circumstances, could be written in. However, the rule in its current incarnation is neither an effective filter, letting way too many cases

[40] Ibidem, p. 7, para 3.

[41] It is well known that in international jurisprudence there is no strict rule similar to the *stare decisis* principle that binds courts in Common Law countries to precedents. International courts rather follow the notion of *jurisprudence constante*, typical of the Civil Law legal tradition. The Louisiana Supreme Court, the Court of a hybrid common law–civil law state, holds that the principal difference between the two legal doctrines is that while a single decision can provide sufficient foundation for *stare decisis*, it takes a series of cases, *all in accord*, to form the basis for *jurisprudence constante*. See Louisiana Supreme Court: Willis-Knighton Med. Ctr. v. Caddo-Shreveport Sales & Use Tax Comm'n., 903 So.2d 107, at n. 17 (La. 2005) (Opinion no. 2004-C-0473).

[42] For a contrary opinion, and a pleading for greater flexibility, at least in the case of the African Commission on Human and Peoples' Rights, see Udombana 2003.

[43] IACtHr: Exceptions to the Exhaustion of Domestic Remedies, cit.

through, nor an obstacle clearly delineated, making it impossible for the parties, individuals or State, to responsibly approach it.

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The Experiences of the European and Inter-American Courts of Human Rights with the International Standards on the Protection of Fundamental Rights in Times of Emergency

Francesco Seatzu

1 Introductory Remarks on the International Standards on the Protection of Human Rights in States of Emergency

This article aims to assess and subsequently compare and contrast the contribution of the European Court of Human Rights (ECtHR) with that of the Inter-American Court of Human Rights (ACtHR) to the widespread and success of non-legally binding standards, guidelines, and general principles on the protection of human rights in war and States of emergency. An empirical analysis of the compliance of the judicial decisions and advisory opinions by the two regional human rights courts in Europe and the Americas with these standards—that is a comparative study of the influence of such instruments of soft law on the case law of the ECtHR and the ACtHR—should be undertaken throughout the article, following a short background to the Paris Minimum Standards of Human Rights Norms in a State of Emergency, the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights and the Queensland Guidelines for Bodies Monitoring Respect for Human Rights During States of Emergency (hereinafter the "Queensland Guidelines").

It is worth recalling, at the outset, that, since the early 1980s, a wide and rather heterogeneous range of international standards on the protection of fundamental rights in states of emergency exists within the international community. In this section, the historical origins and the main features of those standards that are objectively the most useful in interpreting and applying the non-derogation articles in the [European] Convention for the Protection of Human Rights and

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Fundamental Freedoms (Rome, 4 November 1950; hereinafter ECHR),[1] and the American Convention on Human Rights (San José, 22 November 1969; hereinafter ACHR)[2] are briefly outlined below.

The first modern (non-legally binding) international standard for the protection of non-derogable rights in public emergencies was adopted, in 1984, by consensus during the 61st Conference of the International Law Association (ILA), after six - years of study by an ad hoc subcommittee of the ILA and two further years of revision by the full Committee on the Enforcement of Human Rights Law.[3] The most noteworthy aspect of these standards is their relevant expansion and detailed elaboration of a wide range of non-derogable rights, including certain social and economic rights.[4] The Paris Minimum Standards of Human Rights Norms in a State of Emergency (hereinafter the "Paris Minimum Standards", as they are usually called), were the inspiration of Dr. Chowdhury and the explanation thereof was mainly the result of his professional activity.[5] According to this author, these standards were meant for academics and professionals directly involved in the case law of the supervisory bodies of the main international human rights treaties. Being strongly founded on previous studies on the subject by a number of highly distinguished scholars and practitioners, such as notably Professor Higgins, Professor Hartman, Judge Buergenthal, and on the study of the International Commission of Jurists, the Paris Minimum standards were not therefore created *ex nihilo*.[6] They include 16 articles setting out the non-derogable rights and freedoms to which individuals remain entitled even in public emergencies. These standards are divided into three main parts concerning, respectively: (a) the declaration, duration and control of a state of emergency; (b) general principles to preserve the protection of individuals in times of public emergency; (c) non-derogable rights and freedoms. Like the Siracusa Principles[7] the Paris Minimum Standards contain several recommendations for national authorities such as maintaining the jurisdiction of the ordinary courts to adjudicate complaints that non-derogable rights have been breached, and the involvement of the legislature in the review of the necessity for specific derogation measures.[8]

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[1] Entered into force on 3 September 1953, as amended by Protocol No. 11 (Strasbourg, 11 May 1994), entered into force on 1 November 1998 and Protocol No. 14 (Strasbourg, 13 May 2004), entered into force on 1 June 2010.

[2] Entered into force on 18 July 1978.

[3] For a commentary see Lillich 1985, p. 1072 ff.

[4] See Fitzpatrick 1994, p. 72.

[5] This is the acknowledgement of Professor Richard Lillich in the forward to this Chowdhury 1989 publication.

[6] See Lillich 1985, p. 1072.

[7] UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN.4/1985/4 (28 September 1984). www.unhcr.org/refworld/docid/4672bc122.html. Accessed 29 June 2012.

[8] Chowdhury 1989.

The Paris Minimum Standards—currently the most comprehensive and perhaps even the most authoritative, but not also the only non-binding rules of international law directed to national authorities and regional human rights courts concerning the interpretation of fundamental rights in states of emergency—do not restrict their scope of application to narrowly and formally defined "emergencies". Therefore, any exceptional situation of crisis or public danger (imminent or actual) that affects the entire population of the area and represents a threat to the organized life of the community of which the state is composed can be qualified as a "public emergency".[9] In so doing, the drafters of the Paris Minimum Standards wisely avoided dealing with the difficulties which are always inherent in any attempt to define "states of emergency", notably that the marque of public emergency applies to several human rights abuses although these may occur in different contexts. Moreover, they also avoided dealing with the objective ambiguity of the effectiveness requirement that is both multifaceted, since at least six aspects of effectiveness may be identified,[10] and elusive, because there are in reality small successes in each of these categories.[11]

Unsurprisingly, the same approach may be found in other non-binding international legal instruments that deal with the problems of monitoring human rights abuses in states of emergency such as the Siracusa Principles, adopted by the UN Commission on Human Rights in 1984 in response to concerns that limitation clauses in the International Covenant on Civil and Political Rights (New York, 16 December 1966; hereinafter ICCPR)[12] were "interpreted and applied in a manner consistent with the objects and purpose of the Covenant" and "to the concerns about the violation of individual human rights which may occur when a state acts to protect the public good by restricting the rights of an individual"; and the Queensland Guidelines approved in Brisbane in 1990 at the 64th conference of the ILA' s Committee on Enforcement of Human Rights Law to assist human rights bodies in monitoring states of emergency and complement, on the enforcement side, the substantive provisions of the Paris Minimum Standards.

2 The Inexperience of the European Court of Human Rights in Dealing with International Principles and Guidelines on the Protection of Human Rights in States of Emergency

Article 15 allows the Contracting States to take measures derogating from their obligations under the Convention in respect of the guaranteed fundamental freedoms in a time of war or other emergencies (including natural disasters, terrorism

[9] Paris Minimum Standards, at section A, para 1 (b), in Lillich 1985.

[10] See Fitzpatrick 1994, p. 223.

[11] Ibidem, p. 223.

[12] Entered into force on 23 March 1976.

and public health emergencies) threatening the life of the nation. Moreover, article 15 recognized that there are certain basic human rights that cannot be suspended during any kind of emergency, be it war or civil insurrection or an armed rebellion. These rights are so basic that to suspend them destroys the basis of a civilized State and the rule of law. Indeed, they are so fundamental to the human personality that without them human life is either not possible (e.g. the protection of the right to life) or civilized life becomes meaningless or impossible (e.g. freedom from cruel treatment and torture, the right to a fair trial).

Article 15.1 provides:

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

The second paragraph of Article 15 enumerates the provisions of the ECHR from which no derogation can be made under any circumstances, not even under those indicated in the first paragraph: the provisions are non-derogable.

Article 15 was drafted primarily during early 1950. Having the longest case law concerning public emergencies, it has had a noteworthy influence on the content of the derogation clauses in other more recent international human rights treaties such as notably Article 27 of the ACHR. Curiously enough, Article 15 of the ECHR does not, however, contain a fully operative rule that gives effect to or properly describes the conditions for derogating from the ECHR obligations. On the contrary, its wording leaves several uncertainties as to the meaning and operational character of numerous expressions used therein. For example, some uncertainties arise from the expressions "time of war", "public emergency threatening the life of the nation" and "derogations strictly required by the exigencies of the situation", as has been repeatedly pointed out by numerous commentators. Further uncertainties concern the question of whether the severity or the nature of an economic or financial crisis would justify a derogation under Article 15. Moreover, uncertainty is inherent in the requirement that in addition to the public proclamation of an emergency, there is a duty to communicate, to the other States parties, the exercise of any derogation through the Secretary General of the Council of Europe, but it fails to indicate what are the implications as a matter of law if the notification requirement is not fulfilled.

The fact that Article 15 is so ambiguous concerning these and other respects,[13] the ECtHR would indeed benefit from referring to the above-named and much more detailed international standards and guidelines as major (if not indispensable) resources for its interpretation. In fact, although in themselves they are not legally binding, these instruments—since they contain several clarifications of issues such as the threshold of severity to meet the definition of a public emergency justifying the suspension of rights, the meaning of the requirement that any measure seeking

[13] See *inter alia* Cataldi 2011, p. 558 ff; Viarengo 2005, p. 905 ff.

to limit a freedom or right should be prescribed by law, the meaning of the requirements of necessity and proportionality that are elements common to limitation and derogation powers, and the identification of rights that are functionally non-derogable—may provide valuable recommendations to the ECtHR for the application of Article 15 of the ECHR. Moreover, such guidelines, standards and general principles may also help this court in distinguishing between measures capable of dealing with a crisis as might be permitted under the rights-specific limitation provisions of the ECHR on the one hand, and the exceptional measure of derogating from rights under Article 15 and 'to the extent strictly required by the exigencies of the situation' on the other. In particular the Queensland Guidelines can be useful because: "Each monitor could improve its effectiveness against abuses associated with states of emergency by responding to the Guidelines most pertinent to its work, without necessarily undertaking a major redirection of its operations specifically toward states of emergency", as Joan Fitzpatrick lucidly observed. *Mutatis mutandis*, the same conclusion applies to the report of the Special Rapporteur to the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Mrs. Questiaux (hereinafter the Questiaux Report),[14] that encompasses a typology of the different possible "deviations": a formal emergency not notified to the international supervisory organs; a permanent emergency, based on the continued prolongation in time of the formal requirements of the emergency; a complex emergency, involving the confusion of legal regimes through the partial suspension of constitutional guarantees and the issuing of a large volume of "decrees"; and, finally, an institutionalized emergency, where the transitional emergency regime is extended with the purpose of returning to democracy.

The following query is then whether the ECtHR in its case law under Article 15 has already referred to the Paris Minimum Standards, the Queensland Guidelines, the Questiaux Report, or other international standards/guidelines on the protection of fundamental rights in periods of emergency as interpretative aids to this provision. In other words, the query is now whether the ECtHR has ever scrutinized, in the light of these rules and instruments, measures taken by the states parties in periods of public emergency. In order to answer this question, an investigation of the most relevant judicial decisions by the ECtHR on the application of Article 15 will be undertaken below.

In the ground-breaking case of *Lawless v. Ireland*, which concerned the applicant's extra-judicial detention from 13 July to 11 December 1957, the ECtHR confirmed the determination by the European Commission of Human Rights (hereinafter the ECmHR) that Article 15 must be interpreted in the light of "its natural and customary" meaning, but did not refer to sources of law outside the ECHR system, namely the Paris Minimum Standards, to support its decision. The reason for this was that: "the natural and customary meaning of the words 'public

[14] Report of the Special Rapporteur Mrs. N. Questiaux, U.N. ESCOR, Commission on Human Rights, 35th Session, Agenda Item 10, UN Doc. E/CN.4/Sub.2/1982/15 (1982).

emergency threatening the life of the nation' is sufficiently clear since they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed".[15] More specifically, in the same decision, which was the first by the ECtHR on the existence of a state of emergency under Article 15, this court held that the existence of an "emergency" could be reasonably (and easily) deduced from the level of violence that takes place in a country and the difficulty the government has in controlling it.

A similar pattern emerges from an Irish case (Ireland v. the United Kingdom) where the ECtHR first recalled the *Handyside* case regarding the restrictions on its powers of review[16] and subsequently provided that these restrictions "are particularly apparent where Article 15 is concerned", since it "falls in the first place to each Contracting State, with its responsibility for "the life of (its) nation" to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency".[17] Furthermore, in the case of *Silver and Others v. United Kingdom*, the Court did not refer to the above-mentioned principles and guidelines when it explained its understanding of the phrase "necessity in a democratic society" in Article 15.[18] Nevertheless, in *Ireland v. United Kingdom*, which was the first judgment given by the ECtHR concerning an inter-state case, the Court felt that it was necessary to indicate that the "strictly required" standards in Article 15 are different from the ordinary standard of "necessity" (or "proportionality") that is found in some provisions of the ECHR. In particular, it held that the stricter standard of necessity is justified in the context of Article 15 of the ECHR not by the importance of the right at stake, but by the aim of the measure (that is to take a State outside the human rights regime).[19] It also maintained that any derogation measure should fulfill the following five fundamental requirements: (1) the measures should be connected to the emergency (i.e., they should at first sight be suitable to reduce the threat or crisis); (2) the measures should be used as long as there is a temporary limit; (3) the measures should be used only as long as they are indispensable; (4) the degree to which measures deviate from international human rights standards should be in proportion to the severity of the threat; (5) effective safeguards should be implemented to avoid any abuse of emergency powers. Moreover, the idea that the above-mentioned international standards for the protection of human rights in war or states of emergency are not indispensable tools of interpretation of Article 15 can be (implicitly) derived from the case of *Ireland v. UK* where the ECtHR held that: "the national authorities are in principle in a better position than the international judge to decide both on the presence of such emergency and on the nature

[15] ECtHR: Lawless v. Ireland (no. 3), 332/57, Judgment (7 July 1961), para 28.

[16] ECtHR: Handyside v. United Kingdom, 5493/72, Judgment (7 December 1976).

[17] ECtHR: Ireland v. United Kingdom, 5310/71, Judgment (18 January 1978), para 207.

[18] ECtHR: Silver and Others v. United Kingdom, 5947/72 et al., Judgment (25 March 1983).

[19] Ireland v. United Kingdom, supra n. 17, para 207.

and scope of derogations necessary to avert it, by reasons of their direct and continuous contact with pressing needs of the moment".[20] Furthermore, an analogous line of reasoning is found in the *Brannigan v. United Kingdom* case, which concerned the special powers of arrest and detention that had been used in Northern Ireland since 1974. Reaffirming the interpretative approach from the Irish case, the ECtHR held that: "it falls to each Contracting State, with its responsibility for 'the life of (its) nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency".[21] It has been rightly observed by Anna Lena Svensson McCarthy that this court did so without even discussing the various arguments against this approach that had been put forward by both NGOs, notably Amnesty International, and the applicants. According to the applicants it would: "be inconsistent with" Article 15.2 "if, in derogating from safeguards recognised as essential for the protection of non-derogable rights (…), the national authorities were to be afforded a wide margin of appreciation", and this "was especially so where the emergency was of a quasi-permanent nature such as that existing in Northern Ireland".[22] However, in a case (the "Greek Case") where it held that there was no public emergency threatening the life of the nation—where a coup d'État had occurred in Greece in 1967 and the Greek Military had suspended parts of the Constitution and relied upon derogations—the ECmHR suggested that the decisions of national authorities on the presence of an emergency and on the nature and scope of derogations indispensable to avert it can eventually be challenged and scrutinized.[23] More recently, in the case of *A. and Others v. the United Kingdom*, while acknowledging that: "the national authorities enjoy a wide margin of appreciation under Article 15 in assessing whether the life of their nation is threatened by a public emergency", the Court observed that: "(…) it is striking that the United Kingdom was the only Convention State to have lodged a derogation in response to the danger from al'Qaeda, although other States were also the subject of threats".[24] But the question is then the following: are these statements sufficient to constitute a "revirement de jurisprudence"? In other words, are they sufficient to limit the application of the margin of appreciation doctrine in the context of Article 15? The tenor, specificity and brevity of these assertions indicate that this is indeed not the case. The same conclusion is indirectly suggested by the consequences that arise from the description of the ECtHR on what constitutes a "public emergency threatening the life of the nation".

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[20] Ibidem, para 207.

[21] ECtHR: Brannigan and McBride v. United Kingdom, 14553/89-14554/89, Judgment (26 May 1993), para 43.

[22] Ibidem, para 41.

[23] ECmHR: Denmark, Norway, Sweden and the Netherlands v. Greece, 3321/67-3322/67-3323/67-3344/67, Report (05 November 1969).

[24] ECtHR: A. and Others v. United Kingdom [GC], 3455/05, Judgment (19 February 2009), para 180.

3 The Experience of the Inter-American Court of Human Rights in Dealing with International Principles and Guidelines on the Protection of Human Rights in the States of Emergency

The ACHR expressly indicates that there may be emergency situations in which derogations from ACHR rights may be justified. Derogations are addressed in Article 27 of the ACHR. Article 27.1 provides:

> 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 present 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 the ground of race, color, sex, language, religion, or social origin.

Being aimed at establishing precise restrictions on States' actions and allowing the international community to identify abuses of the privilege, Article 27 is of paramount importance for the system of the protection of human rights under the ACHR. Its terms regulate the measures which are open to states parties in the most critical of human rights situations, war and public emergencies.

States parties are obliged to guarantee that their rules on states of emergency are in full conformity with all the requirements of the ACHR. While not questioning the right of states parties to derogate from certain obligations in periods of public emergency, the ACtHR always demands that they withdraw the derogations as soon as possible.[25] In other words, when derogating from the ACHR, the ultimate objective of the state should be to return to normality as soon as possible. In fact, it is inherent in theory and practice that the declaration of an emergency represents a temporary measure.[26] Indeed, the temporary character of the exception works as an essential safeguard for democracy.

If considered from a comparative perspective with the ECtHR, one might easily discover that the ACtHR has occasionally referred, as interpretative tools of Article 27, to instruments of soft law concerning the protection of fundamental rights in periods of public emergency. This approach was justified by this court with the rule, in Article 27, which provides that measures taken by a state party, when they satisfy the requirements of the ACHR, should not be "inconsistent with its other obligations under international law". As noted above, at least in abstract, this rule may alternatively be interpreted as only referring to the obligations

[25] See, inter alia, ACmHR: Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser.L/V/II.62, doc. 10 rev. 3 (29 November 1983), p. 117.

[26] However, surprisingly, in the *Belmarsh* case, that concerned the legality of the indefinite detention of the applicants in Belmarsh Prison, London, under sect. 23 of the Anti-Terrorism, Crime and Security Act 2001, the ECtHR declared that an emergency under Article 15 does not necessarily have to be temporary (A. and Others, supra n. 24).

contained in "instruments of hard" law, such as multilateral and bilateral treaties, customary law, and a limited number of the great United Nations declarations whose provisions may, in whole or in part, reflect customary law; or as also referring to "soft" law, such as the general principles, guidelines, and standards on the protection of human rights in states of emergency.

It is inherent in theory and practice that the ACtHR (or the ACmHR) cannot consider a case merely on the basis of an alleged breach of the state party's "other obligations under international law". Such obligations only become relevant once a substantive right under the ACHR has been invoked. In that situation, the supervisory organs of the ACHR will be inclined to refer to provisions of international law that may be readily implied from the terms of the Convention. For example, in the case of *Juan Carlos Abella v. Argentina* the ACmHR considered whether 30 h of confrontation among 42 armed persons inside a military barracks and units of the Argentine military sent to recapture the barracks was an armed conflict to which both the ACHR and humanitarian law treaties apply.[27] The ACmHR (fortunately, in our view) held that this question should be resolved not only by reference to Article 27, but also by reference to the humanitarian law conventions because they apply in a time of war.[28] The ACmHR supplied several arguments to support this line of reasoning. First, it held that any reference to conventions such as the ACHR alone was not sufficient to deal with conflicts of growing significance.[29] Second, it stated that, in the case of internal armed conflicts, there was convergence between Article 3 common to the four Geneva Conventions and the ACmHR since both international humanitarian law and Article 4 of the ACHR expressly forbid summary executions.[30] Finally, the ACmHR maintained that there were two possible legal bases that indirectly impose on the Commission the application of international humanitarian law treaties. On the one hand, Article 29(b)—that demands the application of the principle *pro homine*—might indirectly oblige the ACmHR to apply international humanitarian law as expounded by the International Committee of the Red Cross (ICRC) insofar as that provision encompasses "the higher standard(s) applicable to the right(s) or freedom(s) in question".[31] On the other hand, Article 27 prescribes consistency with "other obligations under international law." The ACmHR concluded that when reviewing the legality of acts of derogation adopted during a state of emergency, it "should conclude that these derogation measures are in violation of the State Parties' obligations under both the American Convention and the humanitarian law treaties."[32] Therefore, "the Commission must necessarily

[27] ACmHR: Juan Carlos Abella v. Argentina, Case 11.137, Report N° 55/97 (18 November 1997).

[28] Ibidem, para 162.

[29] Ibidem, para 162.

[30] Ibidem, para 164.

[31] Ibidem, paras 165–166.

[32] *Amplius* Burgorgue-Larsen and Úbeda de Torres 2011, p. 164, n. 80.

look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance", given that otherwise its jurisdiction would be significantly limited, even non-existent.[33]

A further confirmation of this approach characterized by the use of diverse external sources in the interpretation of rights guaranteed by the ACHR can be found in the ground-breaking *Las Palmeras* case concerning Colombia.[34] In its decision the ACtHR held that it lacked the competence directly to apply the Geneva Conventions, although it could use them to assist its interpretation of the ACHR provisions.[35] Given this approach, a state party that purports to derogate from obligations under the ACHR that are also required by another treaty would be in violation of both articles. Accordingly, a state could not adopt measures under Article 27 that might breach provisions in other human rights treaties to which it is a party, for example, that such other treaty encompasses no derogation provision or has a stricter derogation provision forbidding derogations from some rights for which derogation is allowed under Article 27.

In the leading case of *Zambrano-Vélez,* in order to show that the particularities of the use of armed forces to control serious social unrest were related more to the phenomenon of widespread criminal delinquency, the ACtHR referred to sources of law outside the Inter-American system, namely the Turku Declaration concerning the minimum humanitarian standards applicable in a state of emergency.[36] Whether and in what way "soft" law may be considered by the ACtHR (or the ACmHR) is highly controversial to say the least. In so doing the ACtHR parallels the approach adopted by the ACmHR in the *Abella* case with regard to the principle of *pro homine*. According to that approach, insofar as Article 27.3 (which expressly encompasses the principle *pro homine*) refers to "the higher standard(s) applicable to the right(s) or freedom(s) in question (the non-derogable rights)", it indirectly demands the supervisory organs of the ACHR to apply international humanitarian law, including those norms such as the Turku Declaration, etc., that do not represent "hard law", but are a central element of the normative framework as a whole as states' acts are measured against these rules.

Nevertheless, as even a quick look at the case law of the ACtHR on Article 27 shows, there are also some notable exceptions to this approach. For example, one exception to the use of external sources of law for supporting a purposive interpretation of Article 27 is in the leading case of *Neira and others* v. *Peru* relating to the disappearance of Victor Neira Alegria, Edgar Zenteno Escobar, and William Zenteno Escobar.[37] These people were detained in prison, as defendants, as alleged perpetrators of terrorism, and disappeared at the time when the armed forces took

[33] Ibidem, p. 164.

[34] ACtHR: Las Palmeras v. Colombia, Judgment (4 February 2000).

[35] Ibidem, paras 32–33.

[36] ACtHR: Zambrano-Vélez et al. v. Ecuador, Judgment (4 July 2007), para 51.

[37] ACtHR: Neira et al. v. Peru, Judgment (11 December 1991) (preliminary objections); Judgment (19 January 1995) (Merits); and Judgment (19 September 1996) (Reparations).

control of the penal institutions. For this reason, the ACmHR rightly alleged a violation of Article 5.2 of the ACHR relating to human dignity and personal integrity. Although the General Assembly of the UN adopted a consensus resolution on principles to protect persons under detention,[38] and extensive studies of this topic have been conducted by the International Commission of Jurists,[39] the International Law Association (ILA),[40] and the authors of the Siracusa Principles, the ACtHR, nevertheless, did not refer to them as interpretative aids to Article 27. However, in so doing the ACtHR missed a good opportunity to hold (persuasively) that provisions on procedural safeguards, including the remedy of habeas corpus, which are increasingly considered as evidence of the good faith of governments, should be considered as being virtually non-derogable in emergency circumstances. Another exception is in the *Ricardo Baena* case that concerned the unlawful dismissal of 270 civil servants.[41] As Amaya Ubeda de Torres and Laurence Burgorgue-Larsen lucidly observed, in this case the ACtHR reached its conclusion on its competence to monitor compliance with judgments again without referring to external sources of law (the ECHR) for supporting its interpretation, but it did so only: "through recourse to international custom, plus all available interpretation techniques, be they historical (…) or purposive (…)".[42]

4 Concluding Remarks

Will there be a reversal in the ECtHR's approach perhaps inspired by the Inter-American case law?

Prima facie, at least, the answer to this query should be positive. Indeed, this reversal is to be reasonably expected if we take into account the strong similarities between Article 15 of the ECHR and Article 27 of the ACHR in general and, more in particular, the substantial coincidence of their aims and regulatory principles. Nevertheless, there are also several arguments of equal weight but much more numerous that may lead to a different (in the sense of a negative) answer. Let us then look at these arguments, most of them already recalled above, according to their relevance in practice.

The first argument is that contrary to the ECHR, the ACHR has adopted a casuistic approach in Article 27.2 by listing the situations—war, public danger or other emergencies that threaten the independence or security of the State—in

[38] General Assembly Resolution, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Doc. A/RES/43/173 (9 December 1988).

[39] Official website http://www.icj.org.

[40] ILA, Declaration of International Law Principles on Internally Displaced Persons (29 July 2000). www.unhcr.org/refworld/docid/42808e5b4.html. Accessed 30 December 2011.

[41] IACtHR: Baena Ricardo et al. v. Panama, Judgment (2 February 2001).

[42] Burgorgue-Larsen and Úbeda de Torres 2011, p. 179.

which the suspension, normally on a provisional basis, may occur without those situations being entirely comparable or all of them being exceptional situations that threaten the life of the nation.[43] In fact, the threat to a State's independence or security may be interpreted in a way that requires less strict conditions than the above.[44] The second argument is that the catalog of non-derogable rights in the ACHR has two significant features that distinguish it from the analogous catalog in the ECHR. Although each of the treaties forbids the suspension of certain freedoms even during a national emergency, the catalog of rights in the non-derogable category is much more comprehensive in the ACHR than in the ECHR.[45] In addition, only the ACHR indicates that judicial guarantees for the protection of these absolute rights are non-derogable. The third argument is that the ECtHR has refused (somewhat too firmly) to extend its constructive method of interpretation to the use of international humanitarian law rules that it expressly fails to incorporate within its technique of purposive interpretation.[46] As has been pointed out by Alan Green, although the: "ECtHR's rationale in Lawless has been subject to substantial criticism, yet the decision has never been over-ruled, but rather, has been endorsed."[47] The fourth argument is that, unlike the ECtHR, both the ACtHR and ACmHR were reluctant for a number of reasons, including the fear of the inability of states parties to redress major violations and the fear that the states parties' traditional reluctance to make a commitment to effective human rights enforcement may become an insuperable obstacle to a rigorous interpretation of the derogation provisions, to grant to the latter a wide margin of appreciation in decisions relating to states of public emergency.[48] The fifth argument is that also in the Inter-American jurisprudence on non-derogation rights there are some judicial decisions such as the ground-breaking cases of Neira and others and Ricardo Baena which significantly omit to recall, as interpretative tools of this article, non-binding "soft-law" documents concerning the protection of fundamental rights in states of emergency.[49] The sixth and final argument is that the doctrine of the ACmHR and the ACtHR's jurisprudence has grown and developed in a socio-

[43] Faùndez Ledesma 2008, p. 92.

[44] Ibidem, p. 73.

[45] Ibidem, pp. 50–51.

[46] Accordingly, see also the recent Chechen cases where the ECtHR dealt with a non-international armed conflict, but discussed only violations of human rights, not IHL, see ECtHR: Isayeva Yusupova et Bazayeva v. Russia, 57947/00-57948/00-57949/00, Judgment (24 February 2005). *Amplius*, Lube 2005, p. 742, n. 23; Sassoli and Olson 2008, pp. 600–601.

[47] See Greene 2011, p. 1777, who also added that: "the Lawless case (…) does not successfully answer whether the issue of the existence of emergency is up to the legal or political spheres to decide".

[48] Faùndez Ledesma 2008, p. 58 who, starting from the observation: "(…) that a State may exercise a margin of appreciation in applying the Convention is not expressly found in the American Convention", concludes that the margin of appreciation doctrine: "(…) must be treated there, if not warily, at least with much caution".

[49] See supra, Section 3.

economic environment characterized by dictatorships which is peculiar to South America.[50]

Thus, for all these reasons, it seems hard to imagine that the ECtHR will align itself with the ACtHR's jurisprudence on non-derogable rights. In other words, it seems unlikely that the ECtHR will take, at least in the forthcoming future, a more positive attitude with respect to the role of non-binding sources of international humanitarian law (like the Paris Minimum Standards, the Turku Declaration or the Siracusa Principles) as possible guides for the interpretation of Article 15 of the ECHR.

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[50] Burgorgue-Larsen and Úbeda de Torres 2011, p. 174.

Recent Trends in International Investment Arbitration and the Protection of Human Rights in the Public Services Sector

Attila Tanzi

1 Preliminary Remarks

Over the last few years, a growing number of disputes relating to the management of public services have taken place between foreign investors and States where this investment is received.[1] The applicable normative system has widened, also involving the protection of the environment and human rights.[2]

The different areas of international law which are applicable to the kinds of disputes under consideration are aimed at protecting interests that may appear to contrast each other. The following analysis looks at the interpretative tools promoting compatibility between rules belonging to the relevant different normative regimes in the light of recent arbitral case law and of the general rules on the interpretation of treaties as codified in the Vienna Convention on the Law of Treaties (hereinafter the Vienna Convention),[3] whose validity as customary law

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[1] Peterson and Grey 2003, Reisman and Arsanjani 2004, pp. 328–343, Schreuer 2004, pp. 231–256, Franck 2004–2005, pp. 1521–1625, Solanes and Jouravlev 2007, van Harten 2007, pp. 371–394, Choudhury 2008, pp. 775–832, Kaushal 2009, 491–534, Simma and Kill 2009, pp. 678–707, Peterson 2009, Sattar 2010, pp. 51–73, Schill 2010, pp. 3–37, Dupuy et al. 2009 and recently Simma 2011, pp. 573–596.

[2] With reference to access to water, the United Nations (UN) General Assembly Resolution on the Human Right to Water and Sanitation, UN Doc. A/RES/64/292 (28 July 2010).

[3] Entered into force on 27 January 1980.

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has been recently confirmed by the International Law Commission (ILC) in its study on the fragmentation of international law.[4]

2 Conflicts and Attempts at Harmonization within International Jurisdictions

As to the different international jurisdictions which have competence concerning the kinds of disputes at issue, on the one hand one finds international arbitral tribunals, mainly those within the framework of the ICSID system, and, on the other, international human rights courts with special consideration being given to the IACHR and the ECHR. It is to be noted how in both cases the defendant is always the State being sued by private individuals or companies under international law. The State is required at one and the same time to give protection to the foreign investor in charge of a public service and to the basic human rights of members of the population who are the beneficiaries of such services.

Elements of harmonization between investment law and human rights law may be detected in recent arbitral investment case law. In fact in the latter sector, the relevance of the conduct of claimants is coming into play more prominently through international standards which are subject to codification, although they are mainly of a soft-law nature.[5] Obviously, it is not for arbitral tribunals to determine the liability of foreign investors; however, such standards appear to be increasingly relevant in assessing the behavior of the host State in light of the principles of good faith and proportionality under international law.

3 Conflicts Between and Attempts at Harmonizing the Different Regimes Which Are Applicable in Foreign Investment Disputes

Traditionally, treaty-based investment arbitration—mainly under BITs and NAFTA—[6] have primarily promoted the economic rights of foreign investors over the host State's sovereign power and duty to pursue the general interests of its population. However, over the last few decades a growing number of international instruments, addressing both host States and foreign investors, provide elements that may be useful with a view to finding a balance between the protection of

[4] Report of the Study Group of the ILC on Fragmentation of international law: difficulties arising from the diversification and expansion of international law, UN Doc. A/CN.4/L.702 (18 July 2006), para 11 (hereinafter ILC Report on Fragmentation).

[5] See infra nn. 10–12 and 60.

[6] Entered into force on 1 January 1994.

economic activities and the protection of human rights. Attention must be paid to those conventional provisions requiring investors to be more sensitive to the impact of their activities in the host State and giving the host State the power to adopt appropriate measures in this regard.

Similar provisions are slowly appearing at the bilateral level[7] while, more generally, one may recall the General Comments of the Committee on Economic, Social and Cultural Rights (CESCR), established by the 1966 International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966; hereinafter ICESCR)[8]; the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador, 17 November 1988; hereinafter Protocol of San Salvador)[9]; the UN Global Compact[10]; the Report of the Special Rapporteur, Hadji Guissé, on the guidelines for the realization of the right to drinking water supply and sanitation[11]; the Principles for Private Sector Participation in Infrastructure of the Organisation for Economic Co-operation and Development (OECD)[12]; and the Report of the Special Representative of the Secretary-General, John Ruggie, on the issue of human rights and transnational corporations and other business enterprises, "Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators".[13]

In light of the above instuments, it does seem possible to find a legal balance between the protection of the economic rights of foreign investors and the protection of human rights along the lines of the legal translation of the principle of the ethical, social and political *accountability* of all actors operating in the public services sector. The emerging trend seems to be one of a gradual definition of the standards of conduct of all the parties involved, in terms of *due diligence*,[14] on a case-by-case basis. It is to be hoped that in the future arbitration panels will pay more attention to the definition of the thresholds of due diligence for host States also in relation to the conduct of foreign enterprises in the light of the principle of proportionality, as one of the main factors for assessing the legality of regulatory measures adopted by host States vis-à-vis foreign investors in the field of public services.

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[7] As already included in some BITs (see the 2004 US Model BIT, *infra* footnote 49, as well as Article 1114.1 of the NAFTA). See Mann et al. 2006; Jacob 2010, pp. 9 and 38.

[8] Entered into force on 3 January 1976.

[9] Entered into force on 16 November 1999.

[10] Announced by the then Secretary-General Kofi Annan at the Economic Global Forum of Davos on 31 January 1999 and officially launched in New York on 26 July 2000, www.un.org.

[11] UN Doc. ONU E/CN.4/Sub.2/2005/25 (11 July 2005).

[12] OECD (2007) Principles for Private Sector Participation in Infrastructure, www.oecd.org/dataoecd/41/33/38309896.pdf. Accessed on 11 October 2011.

[13] UN Doc. A/HRC/17/31 (21 March 2011).

[14] See generally on due diligence, Barnidge 2006, pp. 81–121.

4 Emerging Trends in Investment Arbitration Case Law on the Point at Issue

4.1 Implicit Trends

One main reason for the lack of references to human rights law in traditional investment arbitration awards may be found in the fact that the defendant States have usually been reluctant to rely on defences of this kind. This may also be due to their intention to avoid fuelling arguments for potential applications against them on human rights grounds before national courts and international human rights courts. However, one may make the case that in recent investment arbitration awards public interest concerns related to basic human rights are increasingly gaining ground, even when this is not explicitly stated.

One such example may be found in the ICSID award in the *Biwater* case on water and sanitation services.[15] The fact that the defendant State had not referred to its international engagements in the field of human rights may be the main reason why the arbitrators did not expressly mention them in their *ratio decidendi*. However, it may be noted how, by way of an *obiter dictum*, the Tribunal felt the need to emphasize that "[w]ater and sanitation services are vitally important".[16]

One may make the case that in this award considerations pertaining to the State's obligations arising from international human rights law contributed to the rejection of the claimant's request for indemnity. This line of reasoning was followed by other scholars[17] when commenting upon the *Azurix* case,[18] also on water services, in explaining the reason why the Tribunal had awarded compensation of $ 165 million instead of the $ 570 requested by the applicant. The same would apply to the *Compañía de Aguas* case[19] in which Argentina was ordered to pay $ 99 million instead of the claimed $ 380.

Similar considerations may lie behind at least part of the reasoning which led the Tribunal in the *Glamis Gold* case to deny all the claimant's claims.[20] There, a Canadian mining enterprise alleged that the USA had breached the prohibition of expropriation and the obligation of fair and equitable treatment through a number

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[15] ICSID: Biwater Gauff (Tanzania) Limited v. Tanzania, ARB/05/22, Award (24 July 2008). See Peterson 2009, p. 31.

[16] Ibidem, para 434.

[17] Thielbörger 2009, p. 498.

[18] ICSID: Azurix Corp. v. Argentina, ARB/01/12, Award (14 July 2006). The Tribunal concluded that the measures adopted by the Government did not constitute an illicit expropriation, referring also to the ECHR (ECtHR: James and others v. United Kingdom, 8793/79, Judgment (21 February 1986). See also ICSID: LG&E Capital Corp. and LG&E International Corp. v. Argentina Republic, ARB/02/1, Decision on Liability (3 October 2006).

[19] ICSID: Compañía de Aguas del Aconquija S.A. (formerly Compagnie Générale des Eaux) and Vivendi Universal S.A. v. Argentina, ARB/97/3, Decision on Annulment (20 August 2007).

[20] NAFTA/UNCITRAL: Glamis Gold Ltd v. United States of America, Award (8 June 2009).

of measures adopted for the protection of the environment. In particular, the claimant complained of the conditions imposed by the State of California on the mining project "Imperiale" in order to protect territory near sacred sites of native Americans. Apart from relying on the financial proportionality of the measures required to realize the project, in relation to the rule of fair and equitable treatment, the Tribunal recognized the legality of all the measures that imposed significant burdens on the foreign enterprise also taking into account environmental law considerations and the rights of the indigenous people.[21]

4.2 Some Explicit Trends

4.2.1 The SPP Case

Investment arbitration case law also shows more manifest indications in the direction implicitly inferred above. To that end, one may recall the ICSID *SPP* award,[22] which expressly connected the international obligations owed by host States *vis-à-vis* foreign investors with obligations stemming from legal sources different from the applicable BIT. The case in point concerned the annulment by the Governement of Egypt of a concession for the tourist urbanization of an area near a cultural site protected by the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (Paris, 23 November 1972; hereinafter UNESCO Convention).[23] Although the Tribunal found that the project contrasted with the above-mentioned Convention, since the latter was not in force in Egypt at the time of the annulment of the contract, such a measure could not be found to be justified by the Convention. However, by applying the UNESCO Convention from the date of its validity in Egypt, the Tribunal dismissed the claim of compensation from that date onwards.

One could make the case that the Tribunal found that there was a *relationship of conflict* (using the terminology of the ILC Report on Fragmentation)[24] between the international rules on the protection of foreign investment and those on the protection of public interests of a cultural nature and gave priority to the latter. However, an ICSID Tribunal, while being the competent *forum* for investment disputes, should interpret and apply the relevant BIT rules taking into account all pertinent rules which are applicable between the host State and that of the nationality of the claimant, including the general principles of good faith, equity, reciprocity and due diligence, as a yardstick for assessing the legality of the host

[21] See, especially, ibidem, pp. 4 and 329–353.

[22] ICSID: Southern Pacific Properties (Middle East) Limited v. Egypt, ARB/84/3, Award (20 May 1992).

[23] Entered into force on 17 December 1975.

[24] ILC Report on Fragmentation, n. 4 supra p. 8.

State's conduct toward the foreign investor. Accordingly, the Tribunal can be said to have interpreted and applied the BIT and the UNESCO Convention according to a *relation of interpretation* and not to one of *conflict* between each other, still following the ILC reasoning and terminology.

4.2.2 The Suez Case

The last *Suez* decision of 2010 on liability[25] appears to mark a turning point in the case law on the subject. In the first place, one should single out the balanced character of its findings, as it seems to have favorably addressed both the economic interests of the foreign investors and the public interest of the host State. Indeed, the Tribunal did not avoid the relevance of human rights law in connection with public services, which had been invoked by Argentina in its defence (as well as by five NGOs admitted to the proceedings as *amici curiae*).[26] The claimants alleged a violation of the prohibition of expropriation, a violation of the obligation to give full protection and security to the investments and a violation of the obligation of fair and equitable treatment under the relevant BITs between Argentina and the States of nationality of the claimants, namely Spain, France and the United States. The claims referred to a host of governmental measures, from the freezing of tariffs to the termination of the Concession Contract.

4.2.3 The Relevance of International Arrangements on Human Rights when Dealing with the Necessity Defence

The issue under consideration has been most extensively dealt with by the Tribunal in connection with the necessity defence raised by Argentina and the five NGOs. It is well known that the arbitral case law on this point is contradictory, particularly in many awards relating to the 2001 Argentinian crisis. While the innovative element in the case at issue was the connection with the human rights obligations, the arbitrators confirmed the prevailing restrictive attitude toward the necessity defence. In particular, the Tribunal dismissed it by affirming that the regulatory measures adopted in contrast with the BITs were not the only means to protect the essential interests of the State, while the economic crisis could be considered, at least in part, as a consequence of the conduct of the government.[27]

The necessity defence was counterproductive for Argentina as it only emphasized the obligations of due diligence of the host State toward the foreign investor

[25] ICSID: Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina, ARB/03/19, Decision on Liability (30 July 2010).

[26] Recently, Levine 2011, pp. 220–224.

[27] Suez, supra n. 25, paras 264 ff.

and its population at the same time.[28] Indeed, the Tribunal affirmed that "Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive (…) Argentina could have respected both types of obligations".[29]

4.2.4 … with Respect to the Obligation of Fair and Equitable Treatment

Aside from the necessity defence, the decision addressed the issue of the relevance of human rights obligations for the "primary" legality or illegality of the measures adopted by the host State with respect to the applicable investment law. On that score, it looked for the possibility of a balanced interpretation leading, here again, to compatibility between the two branches of international law in question. The arbitrators appropriately referred to Article 31.1. of the Vienna Convention, according to which the provisions of a treaty must be interpreted "in the light of its object and purpose", concluding that the purpose of the three applicable BITs is not limited to the protection of foreign investment, as such, but they "pursue the broader goals of heightened economic cooperation between the two States concerned with a view toward achieving increased economic prosperity or development".[30] Along those lines, the Tribunal also affirmed that "in interpreting the meaning of fair and equitable treatment [… it] must balance the legitimate and reasonable expectations of the Claimants with Argentina's right to regulate the provision of a vital public service".[31]

One may regret that the decision did not refer to Article 31.3.c, according to which the provisions of a treaty should be interpreted taking into account "any relevant rules of international law applicable in the relations between the parties". The reason for that could be that the claimants were not (and could not be) parties to the relevant human rights treaties. However, the arbitrators could have easily sidestepped this objection in light of the fact that the claimants were subject to the proceedings and the substantive applicable law of the BITs concluded by their States of nationality. Moreover, the commitments from which the claimants derived their rights were undertaken by their States of nationality at the international level; hence, the relevant BITs should be interpreted and applied taking into account all the international rules applicable to the relations between the host State and the State of nationality of the claimants. Besides, one can make the case that the Tribunal had already decided along these lines in relation to the necessity defence.[32]

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[28] Ibidem, para 262.

[29] Ibidem.

[30] Ibidem, para 218.

[31] Ibidem, para 236.

[32] Ibidem, para 262.

Be that as it may, the arbitrators concluded that the measures adopted by Argentina had breached the obligation of fair and equitable treatment.[33] It is worth noting that, with regard to the legitimate concern of the host State to afford the right to water to its population, the decision suggested that Argentina could balance its obligations under the BITs and human rights treaties by adopting alternative measures which were compatible with the regulatory framework of the concession contract.[34]

4.2.5 …and with Respect to the Prohibition of Illicit Expropriation

The issue of expropriation was considered by the arbitrators with little explicit reference to public interest aspects.[35] First, the Tribunal found that even though the governmental measures complained of[36] had diminished the value of the investment, they did not amount to expropriation,[37] in line with the ICSID precedents in the gas supply cases of *CME*,[38] *CMS*,[39] and *LG&E*.[40]

The Tribunal found that the termination of the concession contract by the Argentinian authorities did not constitute an act of expropriation, either. The arbitrators followed the precedent in the *Siemens* case,[41] stating that the non-execution of a contract by a State may only constitute an internationally wrongful act when the State exercises its sovereign powers.[42] Paradoxically, on the point at issue the decision was favorable to the defendant State by disregarding the public nature of its conduct vis-à-vis a concession on public services stating that, since it had acted only as a contracting party, the claim was of a merely contractual nature,[43] and therefore the Tribunal did not have jurisdiction in that matter.

Nonetheless, the Tribunal did not avoid the question of the termination of the concession contract and considered whether it constituted a breach of the BITs. First, the arbitrators considered the Argentinian argument according to which it "had a responsibility to assure the continuation of a public service that was vital to the health and well being of its population"[44] with regard to the intention of the

[33] Ibidem, para 238.

[34] Ibidem, para 235.

[35] Ibidem, para 43.

[36] Ibidem.

[37] Ibidem.

[38] UNCITRAL: CME Czech Republic B.V. (The Netherlands) v. Czech Republic, Partial Award (13 September 2001).

[39] ICSID: CMS Gas Transmission Company v. Argentina, ARB/01/08, Award (12 May 2005).

[40] LG&E, supra n. 18.

[41] ICSID: Siemens A.G. v. Argentina, ARB/02/8, Award (6 February 2007).

[42] ICSID: Suez, supra n. 25, para 153.

[43] Ibidem.

[44] Ibidem, para 202.

foreign investors, the shareholders of AASA, to abandon the concession. The Tribunal considered that "AASA's request (…) may have been a factor in prompting Argentina's decision to (…) terminate the Concession",[45] also stressing that Argentina "had the ultimate responsibility to provide vital water and waste water services to the population".[46] Argentina's original refusal to terminate the concession upon a proposal by the applicants was thus considered to be justified.[47]

Second, the Tribunal considered the question of the water pollution invoked by Argentina as a possible justification for the termination of the concession contract and verified whether Argentina's termination of the contract could be considered as a breach of the standards of fair and equitable treatment under the applicable BITs. The arbitrators concluded that Argentina's conduct was legal also taking into account indications of the presence of dangerous nitrates in the water.[48]

4.3 Concluding Considerations Concerning the Suez Case

Three considerations arise from the *Suez* case in connection with striking a balance between the private interests of foreign investors and the public interests of the host State.

First, this decision strengthens the reasoning based on the proportion between the adverse effect on foreign investors and the benefits for the public interest deriving from the governmental measures complained of,[49] in line with the *Glamis Gold*,[50] *Azurix*,[51] *LG&E*[52] and *Tecmed* cases[53] as well as with the *Sea-Land* case of the Iran-United States Arbitral Tribunal.[54]

Second, although the issue of human rights in the *Suez* case was most extensively and explicitly considered in connection with the necessity defence, concerns over the basic rights of the host State's population affected by the management of

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[45] Ibidem, para 245.

[46] Ibidem.

[47] Ibidem.

[48] Ibidem.

[49] See Article 8.3 of the 2004 US Model BIT (Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, www.state.gov/documents/organization/117601.pdf. Accessed 12 October 2011). See Vandevelde 2008–2009, pp. 283–316.

[50] Glamis Gold, supra n. 20.

[51] Azurix, supra n. 18.

[52] LG&E, supra n. 18.

[53] ICSID: Técnicas Medioambientales Tecmed, S.A. v. Mexico, ARB(AF)/00/2, Award (29 May 2003).

[54] Iran-US Claims Tribunal: Sea Land Services Inc. v. Iran, 135-33-1, Award (22 June 1984). See also ECtHR: Sporrong and Lönnroth v. Sweden, 7151/75 and 7152/75, Judgment (23 September 1982); James et al., supra n. 18.

public services appear to have been relevant for the reasoning of the Tribunal on other counts. This is true with regard to the dismissal of Argentina's liability for expropriation, as well as to the "mitigated" interpretation of the facts found to be in breach of the obligation of fair and equitable treatment. This may have a significant impact on a future award of compensation.

Finally, it addressed the human right to water, thereby ignoring some controversial attitudes concerning its contents,[55] hence furthering the enunciation of the right in question as a basic human right under General Assembly Resolution 64/292.[56]

5 Concluding Remarks

It has long been commonplace that international arbitral awards interpret and apply BITs in a way which is favorable to foreign investors and constrains the regulatory power of host States with regard to public services. Against the background of recent arbitration case law, this statement cannot be so readily taken for granted.

Arbitral protection of a foreign investment that is not balanced with the public interest concerns of host States also runs counter to the scope and purpose of the applicable BITs. While the protection of foreign investment appears as the primary purpose of the BIT it should be pursued in harmony with the promotion of economic development cooperation. One should not lose sight of the fact that the very Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965; ICSID Convention)[57] emphasizes in its preamble the "need for international cooperation for economic development".[58] Conduct by foreign investors which contrasts with the basic rights of the population (or parts thereof) of the host State runs counter to the principle of development cooperation; hence, it would not deserve the full protection of the applicable BIT. It would not be for arbitration tribunals to determine the liability of foreign investors, but the investor's conduct in relation to relevant international standards would be an essential yardstick for assessing the legality of the measures adopted by the host State to assure essential public services.

On the other hand, an obligation of due diligence arises for the host State both under BITs and international treaties on human rights.[59] In order to avoid incurring

[55] Thielbörger 2009, p. 491.

[56] Supra n. 2.

[57] Entered into force on 14 October 1966.

[58] First Preambular paragraph.

[59] In the *Suez* case the Tribunal affirmed Argentina's responsibility to guarantee public services to its population (Suez, supra n. 25, para 245). This is confirmed also by the IACtHR: Sawhoyamaxa Indigenous Community v. Paraguay, Judgment (29 March 2006) and by the

liability before either international jurisdictions, let alone the domestic courts, host States should act in a preventive fashion in line with appropriate due diligence standards. Elements to that end are emerging in international treaty-making and soft-law instruments, as well as in domestic regulatory, legislative and contractual practice that allow for compliance with foreign investment protection and human rights obligations alike.

One may find juridical space for balancing the protection of the private interests of foreign investors and the public interests of host States through a reasonable interpretation of the right to development in light of the principles of proportionality[60] and equity, also taking into account administrative, economic and social efficiency in an environmentally sustainable manner. This would allow international arbitration tribunals to consider the two international normative regimes under consideration in a *relationship of interpretation* instead of a *relationship of conflict*, according to the ILC reasoning on the issue of the fragmentation of international law.[61]

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[60] Krommendijk and Morijn 2009, pp. 422–450.

[61] ILC Report on Fragmentation, supra n. 4, p. 8.

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The European Court of Human Rights and the Best Interests of the Child in the Recent Case Law on International Child Abduction

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1 Introduction: The Relevant Conventions

The problem of child custody and of the related question of international child abduction has assumed, in the last few decades, ever increasing proportions, above all due the ever growing formation of multiethnic families and the increase in marriages between people of different nationalities.

Over the years combating international children abduction has been tackled with great efforts and commitment in different fields: national, international and, in the last few years, also European. The results of these efforts have been the adoption of some different legislative instruments, which, although they have a different juridical basis, have the same aim, i.e. preventing and combating the illicit transfer and abduction of children from one country to another, so as to promote cooperation among States and to facilitate that a child wrongfully removed is returned to the State in which he was formerly habitually resident.

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Two specific international conventions[1] have so been concluded: the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (Luxembourg, 20 May 1980; hereinafter Luxembourg Convention),[2] adopted in the framework of the Council of Europe, and the Convention on the Civil Aspects of International Child Abduction (the Hague, 25 October 1980; hereinafter the Hague Convention),[3] concluded under the auspices of the Hague Conference on Private International Law.[4] The Luxembourg Convention and the Hague Convention have the same purpose: to deter international child abduction and to secure that children wrongfully removed are returned to their home country. Although they are both founded on the well-recognised general principles that decisions about the care and welfare of children are best made in the country with which they have the closest connection, and that orders made in one State should be recognised and enforced in another, the two international instruments have different ways of achieving those goals.[5] While the Luxembourg Convention is rarely used in abduction cases where a child's return is

[1] Other international instruments contain references to the international abduction of children. The United Nations Convention on the Rights of the Child (New York, 20 November 1989; hereinafter UNCRC), entered into force on 2 September 1990 (192 member States), which can be considered the most important instrument in the system for the protection of minors, being a comprehensive binding agreement which incorporates civil and political rights, social, economic and cultural rights and protection rights, has, among others, also the objective of preventing the international abduction of minors. It requires States Parties to "take measures to combat the illicit transfer and non-return of children abroad" (Article 11.1). To this end, it urges States Parties to promote the conclusion of bilateral or multilateral agreements or accession to existing agreements (Article 11.2). Moreover, we have to mention the Council of Europe's European Convention on the Exercise on Children's Rights (Strasbourg, 25 January 1996), entered into force on 1 July 2000. Italy, while ratifying the Convention, did not include proceedings concerning the international abduction of children among those falling within the field of application of the Convention (see Fioravanti 2011, p. 3656 ff.). A reference to the international abduction of children is also made in the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the Hague, 19 October 1996), entered into force on 1st January 2002, but not yet in force in Italy (see Jametti Greiner 2009, p. 489 ff.).

[2] Entered into force on 1st Sepember 1983. See Distefano 2011c, p. 3625 ff. also for further references.

[3] Entered into force on 1st December 1983. See Distefano 2011a, p. 3633 ff. also for further references.

[4] Both these instruments have been widely ratified, accepted or approved (see the official sites of the Hague Conference, www.hcch.net, and of the Council of Europe, www.coe.int) and are frequently applied in practice, above all the one signed at The Hague, with currently 82 Contracting States.

[5] In particular, the Luxembourg Convention works on the principle of the mutual recognition and enforcement of orders made in Contracting States: accordingly, there must be in existence an order of a court or other authority with the necessary jurisdiction in a Convention Country, which can be recognised and enforced in the receiving State. Operating only where an order already exists, it has a more frequent application in the enforcement of access orders. Actually, after the entry into force of the European Regulation n. 2201/2003 of 27 November 2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility (see infra, n. 9), the Luxembourg Convention mostly only

sought because it only operates where an order already exists, the Hague Convention is in fact the most effective and successful Convention because it has contributed to resolving thousands of abduction cases and has served as a deterrent to many others through the clarity of its message, which is that abduction is harmful to children, who have a right of contact with both parents, and through the simplicity of its central remedy, i.e. the return order.[6] The Hague Convention has the object of securing the prompt return of children wrongfully removed to or retained in any Contracting State (Article 1.a), and therefore obliges Contracting States to take all appropriate measures to use the most expeditious procedures available (Article 2).[7] The Convention is based on a presumption that, save in exceptional circumstances, the wrongful removal or retention of a child across international boundaries is not in the interests of the child, and that the return of the child to the State of his habitual residence will promote his interests by vindicating the right of the child to have contact with both parents, by supporting continuity in the child's life, and by ensuring that any determination of the issue of custody or access is made by the most appropriate court having regard to the likely availability of relevant evidence. The principle of a prompt return also serves as a deterrent to abductions and wrongful removals, and this is seen by the Convention to be in the interests of children generally. The return order is designed to restore, as quickly as possible, the *status quo* which existed before the wrongful removal, and to deprive the wrongful parent of any advantage that might otherwise be gained by the abduction.

Although under the Hague Convention courts are required to order the return of a child wrongfully removed from, or prevented from returning to, his country of habitual residence, there are a number of grounds on which a return order can be refused. The Hague Convention in fact contains some exceptions to the general obligation to return the child, which are limited and based on a strict interpretation, in order not to defeat the objectives of the entire system.

These grounds include the court being satisfied that returning the child would expose him to a grave risk of physical or psychological harm (which is the most commonly invoked exception), or otherwise place the child in an intolerable situation, the child objecting to being returned and being sufficiently old and mature enough to have his views taken into account. The court may also refuse to return a

(Footnote 5 continued)
operates with respect to countries which are not members of the European Union or with respect to certain orders which predate the Regulation.

[6] Significant post-Convention work has also be carried out on the Hague Convention: a special Commission for the Monitoring and Review of the Operation of the 1980 Abduction Convention has been set up and meets every few years to discuss developments. In addition, the Hague Conference has produced several Guides to Good Practice for the implementation and operation of the Convention, and provides other resources such as a database of case law (INCADAT) and of statistics (INCASTAT) relating to international child abduction.

[7] A wrongful removal or retention is defined as being in breach of rights of custody which are actually exercised by a person, an institution or any other body under the law of the State in which the child was habitually resident immediately before the removal or retention (Article 3).

child if the applicant was not actually exercising rights of custody at the time of removal or consented to or subsequently acquiesced in the removal or retention (Article 13). A discretion not to return a child is also provided if the application was made a year after the removal or retention and the child is now settled in his new environment (Article 12). Finally, the return may be refused if this would not to be permitted by the fundamental rules relating to the protection of human rights and fundamental freedoms of the State addressed (Article 20).

In such a way, the Convention recognises the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained. As Elisa Perez Vera underlined in her Explanatory Report on the drafting of the Convention,[8] "[f]or the most part, these exceptions are only concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area" and "paragraphs 1 b and 2 of the said article 13 contain exceptions which clearly derive from a consideration of the interests of the child".[9]

[8] Perez Vera 1980, paras 25 and 29.

[9] From 1 March 2005 onwards, the Luxembourg Convention and the Hague Convention have been largely superseded by the European Regulation n. 2201/2003 of 27 November 2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility (Brussels II Revised), in Official Journal L 338 (23 December 2003). It has been in force from 1 August 2004 and has been applicable from 1 March 2005 (for further references see Trombetta Panigadi 2011, p. 3487). The Regulation, in the relations between Member States of the European Union, except Denmark, takes precedence over both conventions "in so far as they concern matters governed by this Regulation" under Article 60. As para 17 of the Preamble to the Regulation explains, in cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention would continue to apply as complemented by the provisions of the Regulation, in particular Article 11. So, the Regulation, laying down rules on child abduction, reorganizes the impact of the Hague Convention: when applying Articles 12 and 13 of the Hague Convention, it provides greater emphasis than the Hague Convention to hearing the views of the child provided this is appropriate having regard to his age and maturity, so creating an effective presumption in favour of at least ascertaining the views of the child. It also requires that the left behind parent be given an opportunity to be heard before a decision not to return a child is made. Moreover, the Regulation narrows the grounds on which an order refusing to return a child can be made. The courts of the EU country to which the child has been abducted can only refuse to return the child if there is a serious risk that the return would expose the child to physical or psychological harm, under Article 13.b of the Hague Convention. However, the court cannot refuse to return a child on the basis of Article 13.b and, therefore, must order the child's return if it is established that adequate arrangements have been made to ensure the protection of the child after his return. One of the most significant innovations introduced by Article 11.4, with respect to the Hague Convention, is in fact the obligation for judges who refuse to return the child to demonstrate that adequate measures to ensure the protection of the child have been made in his State of origin. Such a norm has been introduced to discourage an improper use of Article 13.b, obliging the court which has to rule on the abduction to further reflect upon the possible existence of measures to consent to the return of the child, although there may be inherent risks involved.

Moreover, where a court refuses to order the return of a child under Article 13, the courts in the country of the child's habitual residence are able to reconsider and, if appropriate, to override that decision: see Article 11.6. A decision to override a 'non-return' order under Article 13 of the

2 The Importance of the Hague Convention in the Case Law of the European Court of Human Rights

The European Court of Human Rights (hereinafter European Court) has increasingly dealt with the right to family life in cases of international child abduction, thereby interpreting Article 8 of the European Convention on Human Rights (hereinafter ECHR)[10] in the light of the international instruments in force, especially the Hague Convention.

In its case law, the European Court has for years dealt with (and taken into consideration) the strict rules established in the Hague Convention, with the purpose of ascertaining whether, in the case of child abduction, the behaviour of a State contrasted with the principle of the prohibition of interference in private and family life as contained in Article 8 of the ECHR. The European Court has also dealt with cases where national authorities have failed to take all adequate and effective measures to enforce a return order made under the Hague Convention, holding that such a failure is a breach of the right to family life of the applicants.[11]

The European Court has generally stated that once national authorities have verified that a child has been wrongfully removed, national judges are bound to make effective and adequate efforts to enforce the applicant's right to the return of the child and to take necessary and adequate steps to facilitate the execution order. A failure or a delay in enforcing such an order constitutes a breach by the State of the applicant's right to family life and, therefore, a violation of Article 8 of the ECHR: this means that each contracting Party to the Hague Convention (and each EU Member State), "must equip itself with an adequate and sufficient legal arsenal to ensure compliance with the positive obligations imposed on it by Article 8 of the Convention and the other international agreements it has chosen to ratify".[12]

Therefore, in many cases the European Court has decided that a failure to enforce a return under the Hague Convention constitutes a violation of Article 8 of

(Footnote 9 continued)
Convention is enforceable under Article 42 (without any defence being available), provided that (a) the child was given the opportunity to be heard, (b) the parties were given an opportunity to be heard and (c) the court having the final say has taken into account the reasons given by the original court in refusing to order the return of the child under Article 13.

[10] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), entered into force on 3 September 1953, as amended by Protocol No. 11 (Strasbourg, 11 May 1994), entered into force on 1 November 1998 and Protocol No. 14 (Strasbourg, 13 May 2004), entered into force on 1 June 2010.

[11] See, among others, ECtHR: Ignaccolo-Zenide v. Romania, 31679/96, Judgment (25 January 2000); Iglesias Gil and A.U.I. v. Spain, 56673/00, Judgment (29 April 2003); Maire v. Portugal, 48206/99, Judgment (26 June 2003); P.P. v. Poland, 8677/03, Judgment (8 January 2008). For an in-depth analysis of some of this case law see Beaumont 2009a, p. 13 ff.; Beaumont 2009b, p. 78 ff.; Di Chio 2009, p. 101 ff.

[12] See Maire, supra n. 11, para 76.

the ECHR.[13] In *P.P.* v. *Poland*, for instance, the European Court effectively summarised and crystallised the general principles that it has developed in applying Article 8 of the ECHR. The Court reiterated that the essential object of Article 8 is to protect the individual against arbitrary action by public authorities. There are, in addition, positive obligations inherent in effective respect for family life. Article 8 contains both negative and positive requirements: in relation to a violation under the Hague Convention, this is usually where the State has failed to take the necessary positive requirements to ensure that the right to family life is protected. In relation to the State's obligation to take positive measures, the Court has repeatedly held that Article 8 includes a parent's right to take measures with a view to his being reunited with his child and an obligation on the part of national authorities to facilitate such a reunion. In cases concerning the enforcement of decisions within the sphere of family law, the Court has repeatedly held that what is decisive is whether the national authorities have taken all necessary steps to facilitate the execution (as can reasonably be demanded in the special circumstances of each case). In cases of this kind, the adequacy of a measure is to be judged by the swiftness of its implementation, as the passage of time can have irremediable consequences for relations between the child and the parent who does not live with him or her. Lastly, the Court underlined that the Hague Convention must be applied in accordance with the principles of international law, in particular with those relating to the international protection of human rights: consequently, the Court considers that the positive obligations that Article 8 places on Contracting States must be interpreted in the light of the Hague Convention, all the more so where the respondent State is also a party to that instrument.

3 The Best Interests of the Child in the Most Recent Case Law of the European Court

As already pointed out, the Hague Convention operates as a jurisdictional mechanism for cooperation between the judicial and administrative branches of the States Parties in order to promote the swift return of a child wrongfully taken from his place of habitual residence. This mechanism is based on the strict application of procedural norms which restore the *status quo ante* the removal through the prompt return of the child to his place of habitual residence, considering as a general presumption that the prompt return of a removed child objectively corresponds to the best interests of the child.[14]

[13] See supra n. 11.

[14] Marchegiani 2011, p. 988; Sthoeger 2011, p. 513 ff. This can be discerned both from the travaux préparatoires and from the Explanatory Report by Perez Vera, 1980, paras 20–26, especially para 24.

In the operative clauses of the Hague Convention, there are no explicit references to the criterion of the best interests of the child. However, the preamble states that it seeks "to protect children internationally from the harmful effects of their wrongful removal or retention" and that the parties are "firmly convinced that the interests of children are of paramount importance in matters relating to their custody". As Elisa Perez Vera concludes in her Explanatory Report on the drafting of the Convention "it is thus legitimate to assert that the two objects of the Convention—the one preventive, the other designed to secure the immediate reintegration of the child into his habitual environment—both correspond to a specific idea of what constitutes the 'best interests of the child".[15]

The principle of protecting the best interests of the child is the cardinal principle that lies at the heart of the UN Convention on the Rights of the Child (UNCRC), the most widely accepted human rights treaty in the world.[16] Article 3 of the UNCRC reads as follows: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".[17] The then President of the European Court of Human Rights, Jean-Paul Costa, in a Franco-British-Irish Colloque on family law held in Dublin on 14 May 2011, accurately underlined that "of course, the United Nations Convention is not directly reviewed by our Court, but it constitutes an important source of inspiration, and a key for adjudicating cases, mainly when they concern

[15] Perez Vera 1980, para 25.

[16] Supra n. 1. See the references in Distefano 2011b, p. 3589 ff.; De Cesari 2008, p. 233 ff. The concept of the child's best interests stems from the second principle of the Declaration on the Rights of the Child of 20 November 1959, which reads as follows: "The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normally manner and in conditions of freedom and dignity. In the enactment of laws, for this purpose, the best interests of the child shall be the paramount consideration". Moreover, the principle is also embodied in the European Union's Charter of Fundamental Rights, which became legally binding with the entry into force of the Lisbon Treaty on 1 December 2009. Article 24 of that Charter, entitled "The rights of the child", states that "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration" (para 2).

[17] Actually the travaux préparatoires of the UNCRC reveal that an initial drafting containing the phrase "paramount consideration" was rejected, as was a proposal containing the phrase "the primary consideration". Instead, the final wording of the article places the best interests of the child as merely one primary consideration among others in any judicial decision concerning the child himself. See Sthoeger 2011, p. 535. On the differences between the English and the French texts, both of them equally authentic, see Focarelli 2010, p. 987 ff. More recently, with the purpose of solving the problems of ascertaining this pre-eminent and crucial principle for the solution of all the disputes concerning minors in general and the international abduction of children in particular, the Committee of Ministers of the Council of Europe on child-friendly justice has adopted some Guidelines with their explanatory memorandum (Strasbourg, 17 November 2010, version edited 31 May 2011).

See: http://www.coe.int/t/dghl/standardsetting/childjustice/default_en.asp.

Article 8" of the ECHR,[18] and that, in the case law of the European Court, the principle of giving priority to safeguarding the best interests of the child is firmly established and it has been invoked in many different contexts over the years, starting from the reuniting of children taken into social care with their parents.

The case that stands out in this context is the recent Grand Chamber judgment in Neulinger and Shuruk v. Switzerland.[19] Without recalling the facts which are well known, in January 2009 a Chamber of the European Court gave a judgment following the decision of the Swiss Federal Court which was in accordance with the European Court's well established case law, under which from Article 8 of the ECHR derives an obligation for member States to promptly comply with the order to return the child to the State of his former habitual residence: the Chamber of the European Court found that there had not been any violation of Article 8.[20] The mother, on the basis that the child's return to Israel would have constituted unjustified interference, in a democratic society, with the exercise of their rights to respect for their family life, as protected by Article 8 of the ECHR, submitted an application to the Grand Chamber of the Court, obtaining from Swiss judges the suspension of the execution of the decision ordering the child's prompt return. Reversing the decision of the Chamber, the Grand Chamber came to a completely different conclusion, finding the existence of an impediment to the return of the boy to Israel. The Grand Chamber interpreted the Hague Convention bearing in mind the principle of the best interests of the child. In so doing, the Grand Chamber very much insisted on the relevance that the principle of the best interests of the child has achieved in international law, evoking, among other international instruments which provide for this, in particular Article 3 of the UNCRC and Article 24 of the European Union's Charter of Fundamental Rights. The Grand Chamber emphasised that the principle of the child's best interests comprises two limbs: on the one hand, it dictates that the child's ties with his family must be maintained and rebuilt if violated, and, on the other hand, it is in the child's interest to ensure its development in a sound and healthy environment. "The child's best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences".[21]

For that reason, in the opinion of the Grand Chamber these best interests must be assessed in each individual case. National authorities enjoy a certain margin

[18] Costa 2011, p. 2.

[19] ECtHR: Neulinger and Shuruk v. Switzerland [GC], 41615/07, Judgment (6 July 2010). See, among others, Distefano 2012, p. 229 ff.; Marchegiani 2011, p. 992 ff.; Pitea and Tomasi 2012, p. 338 ff.; Walker 2010, p. 665 ff.

[20] ECtHR: Neulinger and Shuruk v. Switzerland, 41615/07, Judgment (8 January 2009). See Distefano 2009, p. 879 ff.

[21] ECtHR: Neulinger and Shuruk [GC], supra n. 19, para 138.

of appreciation having the benefit of direct contact with the persons involved. The Grand Chamber underlined that it is not the European Court's task to take the place of the competent authorities in examining whether there would be a grave risk that the child would be exposed to psychological harm, within the meaning of Article 13 of the Hague Convention, if the child were returned to Israel. It is the precise task of the European Court, however, to ascertain whether the domestic courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees laid down in Article 8 of the ECHR, particularly taking into account the child's best interests. To that end, in the opinion of the Grand Chamber, the European Court must ascertain whether an examination of the entire family situation was conducted in depth by the national courts, taking into account a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and whether the national courts had made a balanced and reasonable assessment of the respective interests of each person, "with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin".[22]

The general criterion of the best interests of the child, therefore, has now achieved the role of a precise and concrete interpretation and reconstruction of a general principle of international law: it follows that from Article 8 of the ECHR there are no automatic or mechanical obligations to favour or encourage the child's return to the country of his habitual residence when the Hague Convention is applicable. The Grand Chamber pointed out that it is true that the general intent and spirit of the Hague Convention is to cause the return of the child to his habitual residence (where judges are supposed to better protect his interests and welfare), and that the exceptions to this rule (such as, in this case, a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation) must be applied restrictively, but the Grand Chamber emphasised that the concept of the child's best interests is also an underlying principle of the Hague Convention. So, the Grand Chamber took the view that the Hague Convention must be interpreted in conformity with the ECHR, making a direct link between the Hague Convention and the best interests of the child. As such, a child's return cannot be ordered automatically or mechanically, as, furthermore, the Hague Convention itself recognises by providing for a number of exceptions to the obligation to return a child. These exceptions (in particular Articles 12, 13 and 20) are in fact based on considerations concerning the actual person of the child and his environment, thus showing that it is for the court hearing the case to adopt an in concreto approach thereto.[23]

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[22] Ibidem, para 139.

[23] ECtHR: Mausmousseau and Washington v. France, 39388/05, Judgment (6 December 2007), para 72.

4 Conclusion

With the best interests of the child being uppermost in its mind, the Grand Chamber in the Neulinger case has for the first time decided in favour of an applicant who was the author of the international abduction, stating that in the event of the enforcement of the federal Swiss Court's judgment there would be a violation of Article 8 of the ECHR. In doing so, the Grand Chamber placed such a great emphasis on the best interests of the child that some authors[24] are now wondering if this is not too damaging for the functioning of the Hague Convention: the statement in para 139 of the judgment (in which the Grand Chamber stated that it "must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin") can be easily interpreted so as to be in line with the earlier case law of the Court, but it can also send out the wrong message. In fact, it could be viewed by national courts as an "invitation" to carry out an investigation on the merits of the case or, at least, as requiring national courts to abandon the swift, summary approach that the Hague Convention envisages, and to move away from a restrictive interpretation of the Article 13 exceptions to a thorough, free-standing assessment of the overall merits of the situation. Of course, this would be very detrimental as it would delay proceedings under the Hague Convention, which are meant to be dealt with expeditiously.[25] Nevertheless, as has already been pointed out, "that is overbroad—the statement is expressly made in the specific context of proceedings for the return of an abducted child. The logic of the Hague Convention is that a child who has been abducted should be returned to the jurisdiction best placed to protect his interests and welfare, and it is only there that his situation should be reviewed in full."[26]

The intention of the Grand Chamber in the Neulinger case was not to create the potential to harm the functioning of the Hague Convention, nor to render the

[24] Walker 2010, p. 668 ff.

[25] Ibidem, p. 668.

[26] In this sense see Costa 2011, p. 4. Walker 2010, p. 668 underlined that para 139 may be a cause for concern if sufficient emphasis is not placed on the last part of the last sentence which refers to the context of an application for a return. Moreover, Walker observed (p. 669) that the "margin of appreciation" for national authorities, to which the Grand Chamber refers, could have the consequence of leaving the Hague Convention open to abuse, because States are effectively free to interpret the Hague Convention as they see fit. "This may in the future have a negative influence on the Hague Convention, which in turn could have a negative impact on the rights of children and their parents".

exceptions largely ineffective in accomplishing its objectives.[27] The prominence of the principle of the best interests of a child, upon which the Grand Chamber based its judgment in the concrete case,[28] must not become an essentially subjective standard that judges can use to facilitate foreign States' manipulation of the Hague Convention and create a pretext for discretionary decisions.[29]

Nevertheless, considering that the result of the Neulinger case has caused a considerable stir amongst practitioners in the field of international family law, for substantive non-compliance with the Hague Convention the feasibility of a protocol to the Hague Convention has been discussed and the idea of continuing the negotiations thereon has already been envisaged and should become a reality.[30] In fact, a Draft Protocol has already been submitted by Switzerland. It contains provisions which would be additional to the Hague Convention and concerns, *inter alia*, protection measures for the child, especially to help ensure the safe return of the child, the provision of information and mutual assistance and the duty to protect and inform after the return of the child.[31]

A protocol to the Hague Convention could probably be beneficial to ensure that the Hague Convention can still continue to function effectively in the future. So, national courts that may have been guilty of interpreting the exceptions too

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[27] Costa 2011, p. 4 underlined that the Neulinger case does not signal "a change of direction in Strasbourg in the area of child abduction. Rather it affirms the consonance of the overarching guarantees of Article 8 with the international text of reference, the Hague Convention".

[28] "Even though he is at an age where he still has a certain capacity for adaptation, the fact of being uprooted again from his habitual environment would probably have serious consequences for him, especially if he returns on his own, as indicated in the medical report. His return to Israel cannot therefore be regarded as beneficial" (Neulinger and Shuruk [GC], supra n. 19, para 147).

[29] In the recent case Sneersone and Kampanella v. Italy, 14737/09, Judgment (12 July 2011), the European Court adopted the same reasoning and based its decision on the relevance of the principle of the best interests of the child who had been wrongfully removed (in the application of Article 11 para 8 of Regulation n. 2201/2003, which recalls Article 13 b of the Hague Convention). See Pitea and Tomasi 2012, p. 338 f.; Nascimbene 2011, p. 109 ff. In the case Raban v. Romania, 25437/08, Judgment (26 October 2010), the European Court recently stated very explicitly that "a child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable" (ibidem, para 28 vi) and that it is a task for the European Court to verify "whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin" (ibidem, para 28 viii). In the same terms see also ECtHR: Van Den Berg and Sarrì v. The Netherlands, 7239/08, Judgment (2 November 2010).

[30] Even before the Neulinger case, at a meeting of the Council on General Affairs and Policy of the Hague Conference on Private International law (The Hague, 1–3 April 2008), the Council decided in relation to a proposal by Switzerland for a protocol to the Hague Convention "to reserve for future consideration the feasibility of a Protocol to the 1980 Convention containing auxiliary rules designed to improve the operation of the Convention". See Duncan 2009, p. 293; Bucher 2008, p. 143 ff.

[31] Duncan 2009, p. 291 ff.

restrictively may think carefully before in effect automatically ordering a return which is not in the best interests of the child. A protocol could help to regulate the safe return of the child and the abducting parent to the country of the child's habitual residence. This would ensure that any protective orders made are enforceable in the State of habitual residence. A protocol could give legal effect to certain orders in the requesting State: the State would then be legally obliged to comply with these orders on the child's return, thus hopefully ensuring better protection for the child. A protocol could contain procedures for ensuring that protective measures ordered by the court in the State of refuge are enforceable in the State of return. This would help to protect the best interests of the child upon his return. A protocol would also protect the returning parent and should ensure that he can safely enter and remain in the State without the risk of prosecution or deportation, thus removing the fear of the Court in the *Neulinger* case. This would have a positive impact on the rights of both parents, ensuring that they both receive a fair hearing as they will be able to attend the actual custody proceedings, and should protect the right of both parents to family life.[32]

In short, a protocol to the Hague Convention containing auxiliary rules to improve the operation of the Convention would be useful and beneficial as long as it is drafted on the basis of the prominence of the principle of the best interests of the child over all other considerations and of the assessment of such a principle in each individual case.

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[32] Walker 2010, pp. 671 ff., 681 ff. Some authors do not appreciate the need for a protocol containing binding obligations to help to regulate and to ensure the protection of the child, prefering, instead, non-binding recommendations and suggestions. See Ripley, 2008, p. 455 ff.

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Part VII
International Crimes

L'autonomie du Procureur et la supervision du Juge dans l'activation de la compétence de la Cour pénale internationale: l'affaire du Kenya

Barbara Aresi

1 Aperçu de la procédure

La CPI est actuellement saisie d'une affaire concernant les actes perpétrés au Kenya au lendemain des élections politiques de 2007/2008, susceptibles d'être classés en tant que crimes contre l'humanité.

L'enquête relative à la situation au Kenya dérive de la requête d'autorisation présentée à cette fin par le Procureur de la Cour à la Chambre préliminaire II le 26 novembre 2009[1]: c'est ainsi que le *trigger mechanism* de la compétence de la CPI visé par l'Art. 15 du Statut de Rome et fondé sur l'initiative *proprio motu* du Procureur a été inauguré.[2] Cette procédure d'enclenchement de l'action de la Cour – profondément disputée au long des travaux préparatoires de l'institution de la CPI[3] – n'avait en effet jamais été utilisée au cours des sept premières années d'activité de la Cour. Toutes les affaires dont le Procureur et les Chambres de la

Je tiens à remercier tout particulièrement Maître David Abreu pour la révision linguistique du texte.

[1] CPI: Situation en République du Kenya, ICC-01/09, Bureau du Procureur, Request for Authorization of an Investigation pursuant to Article 15 ICC-01/09-3 (26 novembre 2009).

[2] Après l'ouverture de l'enquête concernant la situation au Kenya, la Chambre préliminaire III a accueilli une deuxième requête du Procureur d'ouvrir une enquête *proprio motu*: CPI: Situation en République de Côte d'Ivoire, ICC-02/11, Chambre préliminaire III, Rectificatif de la décision d'autorisation d'ouverture d'une enquête, ICC-02/11-14-Corr (3 octobre 2011).

[3] Infra, par. 2.1.

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CPI s'occupent à présent ont en fait été soumises soit par l'instrument du renvoi provenant d'un État Partie au Statut de la Cour (Rome, 17 juillet 1998)[4] – c'est le cas des situations en République Démocratique du Congo, en Ouganda, en République Centrafricaine – soit, dans les cas plus récents du Darfour et de la Lybie, par le Conseil de sécurité des Nations Unies.

En accueillant la requête du Procureur, avec sa décision du 31 mars 2010, la majorité de la Chambre préliminaire II a autorisé l'ouverture d'une enquête sur la situation au Kenya,[5] malgré l'influente opinion dissidente de l'un des trois Juges composant le Collège.[6]

2 L'activation de la compétence de la CPI de la part du Procureur *proprio motu*: dès travaux préparatoires à l'Art. 15 du Statut de Rome

2.1 Les travaux préparatoires

Selon la perspective adoptée par la Commission du droit international (CDI) au début des travaux préparatoires, dans le *Draft Statute* de la CPI[7] soumis à l'Assemblée Générale de l'ONU, les *trigger mechanisms* envisagés pour l'action de la Cour auraient dû se borner à l'initiative « qualifiée » des sujets éminemment politiques de la communauté internationale, c'est-à-dire les États Parties du Statut de la Cour et le Conseil de sécurité des Nations Unies.

D'une part, le renvoi auprès de la Cour d'une situation de commission présumée de crimes internationaux, provenant d'un État Partie, était aussi bien cohérent avec le respect de la souveraineté étatique qu'avec le principe selon lequel un tribunal international peut exercer sa compétence seulement avec le consentement de l'État concerné,[8] ce principe ayant été accueilli dans le système de la CPI par le moyen de l'acceptation de la compétence de la Cour de la part de l'État intéressé – *ratione loci* ou *ratione personae* – à la poursuite d'un crime au niveau international.[9]

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[4] Entré en vigueur le 1er juillet 2002.

[5] CPI: Situation en République du Kenya, ICC-01/09, Chambre préliminaire II, Autorisation d'ouvrir une enquête dans le cadre de la situation en République du Kenya, décision ICC-01/09-19-Corr (31 mars 2010). Infra, par. 3.

[6] CPI: Opinion dissidente du Juge Hans-Peter Kaul, ICC-01/09-19-Corr-tFRA (31 mars 2010). *Infra*, par. 4.

[7] Projet de Statut d'une Cour criminelle internationale, Rapport de la Commission du Droit International sur les travaux de sa quarante-sixième session, 2 mai – 22 juillet 1994, NU Doc. A/49/10 (1994).

[8] Treves 1999, p. 7; 2005, p. 578.

[9] Projet de Statut d'une Cour criminelle internationale, Art. 21 et Statut de Rome, Art. 12. À propos des critères de compétence en matière pénale, Cassese 2003, p. 277 ss.; Gaeta 2005, p. 513-548.

D'autre part, même le Conseil de sécurité aurait pu faire recours à la Cour dans le cadre d'une action fondée sur le Chapitre VII de la Charte de l'ONU, évitant ainsi, à l'avenir, l'institution de tribunaux *ad hoc* – selon les modèles de l'ex Yougoslavie (TPIY) et du Rwanda (TPIR)[10] – et tous les problèmes conséquents à ce choix, précisément, vis-à-vis des principes de légalité et de pré-constitution du juge en matière pénale.[11]

Par contre, aucune prévision du *Draft Statute* de la CDI consacrait la troisième voie de promouvoir une poursuite auprès de la Cour prévue aujourd'hui dans le Statut de Rome,[12] à savoir l'initiative d'office du Procureur, déjà expérimentée par les Tribunaux *ad hoc.*[13] En fait, la proposition – peut-être prématurément avancée[14] – de conférer ce pouvoir au Procureur, dans les cas d'inactivité des États Parties et du Conseil de sécurité, n'avait pas été retenue par la CDI au début des travaux préparatoires, étant donné que « il ne fallait pas ouvrir d'information ni engager de poursuites à l'égard des crimes relevant du Statut sans le soutien d'un État ou du Conseil de sécurité, du moins *pas au stade actuel de développement du système juridique international* » (italiques ajoutés).[15] *A posteriori* on peut présumer que le refus d'une telle prévision était dû, non seulement à des raisons politiques de sauvegarde de la souveraineté des États, mais aussi à l'absence, à ce temps-là, d'une quelconque procédure de contrôle (aussi bien judiciaire que politique) de l'autonomie qui aurait été ainsi conférée au Procureur de la Cour. Néanmoins, cette proposition a fait l'objet, tout au long des travaux préparatoires, d'un ample débat jusqu'à être accueillie dans le Statut de Rome.[16]

D'abord, au sein du Comité *ad hoc,*[17] certaines délégations encourageaient le choix de soustraire le Procureur de l'initiative des États et du Conseil de sécurité dans l'activation de la Cour, envisageant surtout la possibilité de l'inaction de ces-derniers et par conséquent la paralysie de la CPI, ce qui aurait rendu vaine son existence même. Il s'agissait des États *like-minded*, c'est-à-dire la coalition des États qui supportaient d'avantage l'institution de la CPI et souhaitaient lui conférer

[10] Statut actualisé du Tribunal pénal international pour l'ex-Yougoslavie, compilation de septembre 2009 (adopté le 25 mai 1993, Résolution 827, tel qu'amendé par les résolutions du Conseil de Sécurité de l'ONU adoptées par la suite); Statut du Tribunal pénal international pour le Rwanda, version du 31 janvier 2010 (adopté le 8 novembre 1994, Résolution 855, tel qu'amendé par les résolutions du Conseil de Sécurité de l'ONU adoptées par la suite).

[11] TPIY: Procureur c. Dusko Tadić, IT-94-1-T, Chambre de première instance, décision (10 août 1995); et IT-94-1-A, Chambre d'appel, arrêt (2 octobre 1995).

[12] Statut de Rome, Art. 13.c et 15.

[13] Statut du TPIY, Art. 18.1; Statut du TPIR, Art. 17.

[14] Rapport du groupe de travail sur un projet de Statut pour une Cour criminelle internationale, Annexe au Rapport de la Commission du droit international sur les travaux de sa quarante-cinquième session (3 mai – 23 juillet 1993), NU Doc. A/48/10 (1993), Art. 29.

[15] Projet de Statut d'une Cour criminelle internationale, Art. 25.

[16] Fernández de Gurmendi 1999, p. 176.

[17] Créé par l'Assemblée Générale afin d'examiner le *Draft Statute* élaboré par la CDI en vue d'une conférence internationale: Résolution 49/53, Création d'une cour criminelle internationale, NU Doc. A/RES/49/53 (9 décembre 1994).

l'autonomie nécessaire pour une action effective. Ces États étaient aussi de l'avis que le Procureur aurait dû être en mesure de déterminer l'action de la Cour de même que son homologue auprès des Tribunaux *ad hoc*, une distinction sur ce point étant hors de propos et non justifiée.[18]

L'hypothèse d'investir le Procureur du pouvoir d'activer la Cour en autonomie a été ensuite dûment articulée sous l'aspect de la procédure entre 1996 et 1998, lorsque les travaux préparatoires de la CPI se sont déroulés au sein du Comité préparatoire.[19] Dès le début, les États ont semblés conscients de la nécessité d'aboutir à un compromis sur ce point – dont la valeur politique était désormais apparente – au moyen d'un système des garanties et de *checks and balances* à intégrer dans le Statut, afin de cerner et rendre « acceptable » l'initiative *proprio motu* du Procureur, même aux yeux des États les plus rétifs à cet égard, parmi lesquels on comptait surtout les cinq membres permanents du Conseil de sécurité (*Five Permanent*).

Ces garanties reposaient, en premier lieu,[20] sur l'établissement d'une *indictment chamber* dans l'architecture de la future CPI: cette chambre – qui n'était auparavant nullement prévue dans le projet de Statut – était chargée de juger le bien-fondé du cas soumis à son attention par le Procureur, afin d'autoriser l'ouverture d'une enquête si l'existence d'une affaire relevant *prima facie* de la compétence de la Cour était établie.

Cependant, ce n'a été qu'en 1998 – avec le projet conjoint avancé par l'Allemagne et l'Argentine en conclusion des travaux du Comité préparatoire – que les contours de la procédure à suivre à ces fins ont été tracés, délinéant les rôles respectifs du Procureur et du collège de Juges qui en serait devenu le contrepoids, appelé à partir de ce moment-là *Pre-Trial Chamber* (Chambre préliminaire).[21] Ainsi, même dans les cas où les États Parties du Statut ou le Conseil de sécurité étaient restés inertes face à des crimes relevant, apparemment, de la compétence de la CPI, le Procureur aurait pu recueillir tous les renseignements provenant de sources estimées fiables et procéder en autonomie à leur examen préliminaire. Toutefois, lorsqu'une base raisonnable pour ouvrir une enquête serait apparue,

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[18] Rapport du Comité ad hoc pour la création d'une Cour criminelle internationale, NU Doc. A/50/22 (6 septembre 1995), par. 113. Voir aussi les observations présentées à l'Assemblée Générale de la part des Juges du TPIY: Rapport du Secrétaire général, Observations reçues en application du paragraphe 4 de la resolution 49/53 de l'Assemblée Générale concernant la création d'une Cour criminelle internationale, NU Doc. A/AC.244/1 (20 mars 1995), p. 28, par. 10 et, *ibidem*, la déclaration de la délégation suisse, p. 17 et 21, par. 8 et 26.

[19] Créé par l'Assemblée Générale afin d'achever les travaux du Comité *ad hoc* et de rédiger la version consolidée du *Draft Statute* qui aurait été soumise à l'approbation de la conférence internationale: Résolution 50/46, Création d'une cour criminelle internationale, NU Doc. A/RES/50/46 (11 décembre 1995).

[20] Le système de *checks and balances* prévoit aussi un mécanisme de contrôle politique de l'autonomie du Procureur de la part des États (Statut de Rome, Art. 18).

[21] Comité préparatoire pour la création d'une Cour criminelle internationale, Proposition de l'Allemagne et de l'Argentine, Article 46, Eléments d'informations présentés au procureur, NU Doc. A/AC.249/1998.WG.4/DP.35 (25 mars 1998).

le Procureur aurait dû demander et obtenir l'autorisation de la Chambre préliminaire pour ce faire. Le contrôle du Juge – concernant l'existence d'une base raisonnable pour ouvrir une enquête, la recevabilité de l'affaire et la compétence *prima facie* de la Cour – aurait ainsi garanti que le choix d'engager une poursuite devant la Cour soit partagé, endiguant aussi les risques d'excès de pouvoir de la part du Procureur ou de pressions politiques provenant de l'extérieur à son égard.[22]

Les travaux préparatoires de la CPI se sont achevés aux mois de juin et juillet 1998, à Rome, dans le cadre de la Conférence des plénipotentiaires des Nations Unies sur la création d'une cour criminelle internationale.[23] De fait, le débat de la Conférence au sujet des procédures d'activation de la Cour s'est exclusivement concentré sur l'hypothèse déjà formulée par l'Allemagne et l'Argentine[24] sans néanmoins réussir à y apporter des modifications. La seule alternative était l'abandon de cette proposition et, par conséquent, de l'idée-même de permettre au Procureur d'enclencher l'action de la Cour, faute d'un renvoi de la part des États ou du Conseil de sécurité.[25]

En général, le choix de flanquer le Procureur d'un Juge dans le commencement d'une enquête *proprio motu* était estimé un compromis équitable et satisfaisant par la plupart des délégations des États *like-minded.*[26] D'ailleurs, les États qui auraient préféré que le Procureur de la Cour soit complètement autonome ne faisaient pas défaut[27]; toutefois, certains de ces États (parmi lesquels on comptait l'Italie)[28] acceptaient cette solution pour se rapprocher des États (dont les *Five Permanent*) arrêtés sur une objection de principe à l'encontre du pouvoir du Procureur d'activer la Cour *proprio motu.*[29] Cette dernière position reposait, au fond, sur des raisons politiques, les arguments juridiques étant très faibles voire apparemment infondés.[30]

Ce n'a été que pendant la dernière nuit des négociations que l'impasse dans laquelle la Conférence se trouvait a abouti au compromis, laborieusement achevé au moyen d'un *final package* « à prendre ou à laisser » soumis à l'assemblée

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[22] Proposition de l'Allemagne et de l'Argentine *préc.* En doctrine, Fernández de Gurmendi 1999, p. 183-185; Hall 1998, p. 551-552; Zappalà 1999, p. 50.

[23] Kirsch and Holmes 1999, p. 3 ss.; Olásolo 2005, p. 7 ss.

[24] Rapport du Comité Préparatoire pour la création d'une Cour criminelle internationale, Additif, Projet de Statut de la Cour criminelle internationale, NU Doc. A/CONF.183/2/Add.1 (14 avril 1998), Art. 12 et 13.

[25] Conférence diplomatique de plénipotentiaires des Nations Unies sur la création d'une cour pénale internationale, Rome, 15 juin-17 juillet 1998, NU Doc. A/CONF.183/13, Vol. II (2002), p. 183, par. 38.

[26] *Ibidem*, p. 189, par. 47; p. 200, par. 106-109.

[27] *Ibidem*, p. 199, par. 87; p. 200, par. 97.

[28] *Ibidem*, p. 203-204, par. 1-2; p. 199, par. 87; p. 202, par. 120; p. 204, par. 5.

[29] *Ibidem*, p. 187, par. 19 et p. 199, par. 82-83; p. 204, par. 6 e p. 206, par. 47. Voir en particulier la déclaration des États-Unis, p. 202, par. 125-130.

[30] Certains États craignaient que l'action d'office de la Cour n'aurait pas respecté le principe de complémentarité: NU Doc. A/CONF.183/13, Vol. II (2002), p. 200, par. 104-105; p. 205, par. 30; p. 206, par. 37. Néanmoins, aucune dérogation à ce principe n'a jamais été prévue au cas où le Procureur aurait décidé de commencer une enquête *proprio motu* (*ibidem*, p. 205, par. 21).

plénière des États, dont faisait part même (et surtout) la proposition originaire de l'Allemagne et de l'Argentine prévue dans l'Art. 12 du Projet de Statut, ensuite devenu l'Art. 15 du Statut de Rome.

2.2 *L'activation de la Cour* proprio motu*: les Art. 13.c et 15 du Statut de Rome*

L'action de la CPI à l'égard d'une situation de commission présumée des crimes relevant de sa compétence peut à présent être enclenchée, aux termes de l'Art. 13 du Statut de Rome, soit par un État Partie (lett. *a*), soit par le Conseil de sécurité dans le cadre du Chapitre VII de la Charte de l'ONU (lett. *b*), soit par le Procureur de la Cour (lett. *c*), pourvu que dans ce dernier cas (d'autant que dans le cas visé à l'Art. 13.*a*) l'État concerné *ratione loci* et/ou *ratione personae* ait accepté la compétence de la CPI (le cas échéant, même avec une déclaration *ad hoc*) selon l'Art. 12 du Statut.

Lorsque l'activation de la Cour trouve son origine dans l'initiative *proprio motu* du Procureur (Art. 13.*c*), le respect d'une procédure rigoureuse – fondée sur l'interaction entre le Procureur et le Juge et, au final, visée à l'Art. 15 du Statut de Rome – est nécessaire. Cet aspect distingue abruptement le système de la CPI de celui du TPIY et du TPIR, auprès desquels l'exercice de l'action pénale n'appartient qu'au Procureur (même si avec les limites territoriales et temporelles de l'action *ad hoc* des deux Tribunaux) tandis qu'un juge « contrôleur » de la phase préliminaire de la procédure n'est nullement prévu jusqu'à la confirmation des charges.[31] Ce n'a été que dans le contexte de la CPI qu'un juge compétent par rapport à cette phase de la procédure, c'est-à-dire la Chambre préliminaire, a été envisagé pour la première fois au sein d'un tribunal pénal international. En fait, l'existence de cette Chambre constitue une garantie aussi bien politique *lato sensu* que juridictionnelle par rapport à la compétence en principe universelle conférée à la CPI.

Dans le cadre de l'Art. 15 du Statut, une distinction entre une phase de *preliminary examination* et l'ouverture d'une enquête proprement dite s'impose. En effet, si le Procureur est en mesure de vérifier sommairement en autonomie le bien fondé des informations reçues par son office en tant que *notitia criminis* (provenant d'une quelconque source),[32] il ne peut pour autant se livrer à des actes d'investigation, l'autorisation du Juge étant à cette fin requise. Pendant son activité de *preliminary examination*, le Procureur peut (*rectius*, doit), entre autres, se renseigner auprès des sources estimées fiables et même recueillir des dépositions écrites ou orales au siège de la Cour, des activités différentes n'étant pas prévues

[31] Statut du TPIY, Art. 18.1 et Statut du TPIR, Art. 17. Boas 2000, p. 267-291; Roberts 2001, p. 559-572.

[32] Le Procureur de la CPI ne pourrait en tout cas pas en promouvoir l'action en l'absence d'une *notitia criminis*, à la différence du Procureur du TPIY (Statut du TPIY, Art. 18): Olásolo 2005, p. 57-58. Fernández de Gurmendi 1999, p. 186; Kirsch and Robinson 2002, p. 661.

expressément (même si elles pourraient être admises, sauf si elles nécessitaient de l'autorisation préalable du Juge).[33] Cette activité liminaire a pour but d'avérer s'il existe une base raisonnable pour ouvrir une enquête par rapport aux crimes allégués. Ce n'est qu'à ce moment-là que le Procureur est tenu de s'adresser à la Chambre préliminaire en lui demandant l'autorisation pour enquêter à part entière, cette autorisation étant délivrée seulement si le collège de Juges reconnaît, à son tour, que l'enquête s'appuie sur des bases raisonnables.[34]

Il faut néanmoins observer que l'étendue du critère de la « base raisonnable » dont aussi bien le Procureur (pendant la phase de *preliminary examination*) que la Chambre préliminaire (pendant la phase de *judicial review*) doivent faire application n'est pas établie à l'Art. 15 du Statut. D'ailleurs – selon l'opinion déjà répandue en doctrine[35] et confirmée par la suite par la Règle 48 du Règlement de procédure et de preuve de la Cour[36] – les composants de ce critère sont définis à l'Art. 53 du Statut de Rome, c'est à dire la disposition générale qui dirige le choix du Procureur d'ouvrir une enquête, abstraction faite du *trigger mechanism* visé (et, par conséquent, même dans les cas où la situation à enquêter lui est déférée par un État Partie ou le Conseil de sécurité).

Les éléments requis à l'Art. 53 représentent autant des garanties de légitimité que d'opportunité de l'action de la Cour: il s'agit d'une part de vérifier – dès le début – la compétence de la Cour et la recevabilité de l'affaire (potentielle) et, d'autre part, de s'assurer de la compatibilité d'une enquête avec les « intérêts de la justice ».

En conséquence, on pourra retenir qu'il y a une base raisonnable pour ouvrir une enquête, premièrement, si la compétence *prima facie* de la CPI est établie *ratione materiae*, *personae*, *loci* et *temporis* selon les critères visés aux Art. 5 à 8, 11 et 12 du Statut.[37]

Deuxièmement, il est incontournable que l'affaire dont la Cour sera saisie soit recevable,[38] c'est-à-dire respectueuse du principe de complémentarité[39] qui régit l'existence-même de la CPI. Selon ce principe, la Cour peut exercer sa compétence sur (une situation de commission présumé de) un crime[40] seulement de façon

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[33] Statut de Rome, Art. 15.2. Selon la version anglaise de la norme, « the Prosecutor *shall* analyse the seriousness of the information received » (italique ajouté). Bergsmo and Pejić 2008, p. 588-589; Olásolo 2005, p. 58-60.

[34] Statut de Rome, Art. 15.3 e 15.4.

[35] Turone 2002, p. 1147; Friman 2001, p. 494-495.

[36] Règlement de procédure et de preuve, adopté par l'Assemblée des États Parties, Première session, ICC-ASP/1/3 (3-10 septembre 2002).

[37] Statut de Rome, Art. 53.1.*a*.

[38] Statut de Rome, Art. 53.1.*b*.

[39] A propos du principe de complémentarité, *ex multis*, Holmes 1999, p. 73-74; Dupuy 2008, p. 17-24; Delmas-Marty 2006, p. 2-11. Voir aussi Informal Expert Paper: The Principle of Complementarity in Practice, ICC-01/04-01/07-1008-AnxA (30 mars 2009).

[40] Au début de la procédure auprès de la Cour, seule la recevabilité de la « situation » en général doit être établie, alors que l'examen de la recevabilité de l' « affaire » spécifique ne sera possible que lorsque le Procureur aura déterminé les crimes à poursuivre et les personnes visées.

subsidiaire à l'égard de l'État qui devrait le poursuivre dans l'exercice de sa souveraineté et de sa primauté en matière de juridiction pénale et qui néanmoins ne le fait pas, faute de volonté effective (*unwillingness*) ou de capacité objective (*inability*). Ces critères, dont l'évaluation relève de la compétence de la CPI elle-même, sont définis à l'Art. 17 du Statut de Rome.[41]

Troisièmement, les organes de la Cour sont, en tout cas, tenus de vérifier que les crimes présumés soient suffisamment « graves »[42] pour que l'intervention de la CPI soit justifiée et conforme aux intérêts des victimes.[43] Cette clause exprime le principe selon lequel l'action du Procureur de la Cour est discrétionnaire[44]; cependant, le contenu de la notion de gravité n'est pas mieux précisé dans le Statut de Rome.[45]

3 La Décision du 31 mars 2010 de la Chambre préliminaire II

Dans sa Décision portant autorisation à l'ouverture d'une enquête sur la situation au Kenya, la Chambre préliminaire a tout d'abord rappelé l'essentiel des travaux préparatoires desquels tire son origine le pouvoir du Procureur d'enclencher *proprio motu* l'action de la Cour (pouvoir visé aujourd'hui à l'Art. 15 du Statut de Rome), tout en se montrant consciente qu'il s'agit de « l'une des dispositions les plus délicates du Statut ».[46]

La Chambre s'est d'ailleurs penchée sur la raison d'être des attributions du Juge vis-à-vis du Procureur selon la disposition statutaire, affirmant que « l'objet de la procédure prévue à l'article 15 est de conférer à la Chambre un pouvoir de contrôle sur l'initiative que peut prendre le Procureur d'ouvrir une enquête ».[47] Dans ce contexte, au moyen d'une interprétation approfondie – aussi bien littérale que téléologique – des Art. 15 et 53 du Statut, la Chambre préliminaire a retenu que le Procureur tout comme le Juge sont tenus de se conformer aux mêmes critères afin d'avérer si une base raisonnable pour ouvrir une enquête existe en concret, ce *standard* de preuve étant le moins rigoureux parmi ceux prévus dans le Statut (Art. 58, 61, 66).[48] La Chambre a notamment précisé que – en fonction de la nature

[41] Statut de Rome, Art. 17.1.*a-c*, 2, 3.

[42] Statut de Rome, Art. 17.1.*d*. La notion de gravité d'un crime a été éclaircie par la CPI dans la décision relative à la requête du Procureur aux fins de délivrance d'un mandat d'arrêt en vertu de l'article 58, ICC-01/04-01/06, Chambre préliminaire I (10 février 2010), par. 41-60.

[43] Statut de Rome, Art. 53.1.c. Cette disposition est donc en partie superposée à l'Art. 17.1.*d* en ce qui concerne le critère de la gravité des crimes.

[44] Olásolo 2005, p. 182 ss.; Schabas 2004, p. 121.

[45] Bureau du Procureur, Policy Paper on the Interests of Justice (septembre 2007). www.icc-cpi.int, dernier accès le 23 novembre 2011.

[46] Autorisation d'ouvrir une enquête (Kenya), supra n. 5, par. 17.

[47] *Ibidem*, par. 24.

[48] *Ibidem*, par. 23-25, 66-67.

seulement préliminaire de l'examen requis par l'Art. 15 du Statut – le Procureur n'est pas encore tenu, à ce stade, de supporter sa requête d'autorisation à enquêter avec des renseignements complets ou déterminants,[49] cette preuve n'étant d'ailleurs pas requise même lors de la délivrance d'un mandat d'arrêt en conclusion de l'enquête, selon la jurisprudence récente de la Chambre d'Appel dans l'affaire Al Bashir.[50]

La Chambre a ensuite analysé les circonstances qui déterminent l'existence d'une base raisonnable pour ouvrir une enquête et en a conclus que les conditions prévues par l'Art. 53 du Statut étaient, en effet, remplies en l'occurrence.

Premièrement, la Chambre préliminaire a arrêté son attention sur les critères de compétence de la Cour rappelés à l'Art. 53.1.*a* du Statut[51] et sur la notion de crime contre l'humanité retenue dans le Statut de Rome, invoquant aussi la jurisprudence des Tribunaux *ad hoc* à propos de l'élément contextuel du crime, notamment la nécessité de prouver l'existence d'une politique criminelle de l'État.[52] La Chambre a ainsi conclu que les crimes contre l'humanité de meurtre, viol, transfert forcé de population et autres actes inhumains causant des atteintes graves à la population civile auraient été *prima facie* commis au Kenya, selon l'Art. 7 du Statut de Rome.[53]

Concernant la compétence *ratione materiae* de la Cour, il apparaît néanmoins assez singulier (voire inutile) la précision de la Chambre selon laquelle l'autorisation à enquêter accordée au Procureur se borne aux crimes contre l'humanité allégués et ne saurait s'étendre à autres typologies de crimes, ni rester indéfinie dans son contenu.[54] En fait, le Juge est seulement ténu de se prononcer sur les crimes qui font l'objet de la requête du Procureur, sans jamais dépasser les limites de sa fonction dans l'exercice du pouvoir de *judicial review* qui lui est déféré par le Statut de Rome.

Il semble aussi assez arbitraire que la Chambre préliminaire – partant de la prémisse (contestable) que le cadre temporel de l'enquête ne serait pas clairement défini dans la demande du Procureur – ait délimité la compétence de la Cour *ratione temporis* en autorisant le Procureur à enquêter par rapport à une période (du 1 juin 2005 – c'est-à-dire la date d'entrée en vigueur du Statut de Rome pour le Kenya – jusqu'au 26 novembre 2009, à savoir la date du dépôt de la requête) qui résulte bien plus longue de celle indiquée dans la requête du Procureur (portant autorisation à l'ouverture d'une enquête sur les violences postélectorales survenues au Kenya en 2007-2008).[55] En effet, il semble que le Statut de Rome

[49] *Ibidem*, par. 27-35.

[50] CPI: Procureur c. Omar Hassan Ahmad Al Bashir, ICC-02/05-0 l/09-73, Chambre d'appel, arrêt (3 février 2010), par. 33, 39.

[51] Autorisation d'ouvrir une enquête (Kenya), supra n. 5, par. 36-39.

[52] *Ibidem*, par. 77-99.

[53] *Ibidem*, par. 141-171.

[54] *Ibidem*, par. 208.

[55] *Ibidem*, par. 201-207.

n'attribue point à la Chambre le pouvoir de définir ni d'élargir, en autonomie, la période qui va faire l'objet de l'enquête, surtout lorsque la requête du Procureur est formulée de façon assez précise (comme dans le cas d'espèce).

Deuxièmement, la Décision du 31 mars 2010 aborde le sujet de la recevabilité de l'affaire selon les Art. 17 et 53.1.*b* du Statut de Rome, étant précisé que les conclusions du Procureur en ce domaine font l'objet d'un examen « exceptionnel » de la part du Juge, lorsque la procédure devant la Cour est engagée par le Procureur *proprio motu* (à la différence des autres *trigger mechanisms* visés dans le Statut).[56] La Décision apporte des précisions intéressantes concernant la distinction entre la « situation » générale de commission présumée de crimes relevant de la compétence de la Cour et les « affaires potentielles » qui pourraient en découler. La Chambre a notamment affirmé que ces dernières devraient être définies en concret par rapport aux personnes susceptibles d'être impliquées dans la commission de certains crimes que le Procureur serait ténu de sélectionner au préalable, sans préjudice de toute évaluation subséquente à propos de la recevabilité de l'affaire.[57] Cependant, il faut observer que le Statut de Rome ne semble pas imposer une telle activité *ex ante* au Procureur; c'est plutôt le Règlement du Bureau du Procureur qui introduit la notion de « affaire éventuelle » et de « hypothèse de travail provisoire » au sein d'une situation faisant l'objet d'un examen préliminaire en vue de l'ouverture d'une enquête.[58]

Il est d'ailleurs intéressant de noter que, pendant la procédure de *judicial review*, en février 2010, la Chambre préliminaire a demandé au Procureur « des renseignements plus récents sur (…) le cas échéant, les enquêtes menées au niveau national relativement aux éventuelles affaires ».[59] La requête de la Chambre de disposer d'informations mises à jour confirme que la vérification du respect du principe de complémentarité incombe à la Chambre préliminaire (et à tous les organes de la Cour) *in itinere* puisqu'il s'agit d'une qualité requise afin que l'intervention de la CPI soit légitime.

C'est ainsi que la Chambre a été finalement en mesure de juger que la situation au Kenya était tout simplement recevable auprès de la CPI en raison de l'inaction absolue de l'État concerné avec les affaires potentielles qui pourraient résulter de l'enquête menée par la Cour, la question du manque de volonté et de l'incapacité de l'État ne se posant même pas dans ce cas. En effet, la Chambre préliminaire a relevé que les autorités du Kenya avaient engagé des poursuites seulement par rapport à des infractions de moindre gravité, demeurant en revanche inactives face aux crimes faisant l'objet de l'attention de la Cour au niveau international.[60]

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[56] *Ibidem*, par. 43.

[57] *Ibidem*, par. 40-50.

[58] Règlement du Bureau du Procureur, ICC-BD/05-01-09 (23 avril 2009), n. 33 et 34.

[59] CPI: Situation en République du Kenya, ICC-01/09, Chambre préliminaire II, décision demandant des éclaircissements et de plus amples renseignements, ICC-01/09-15 (18 février 2010), par. 14. Autorisation d'ouvrir une enquête (Kenya), supra n. 5, par. 184.

[60] Autorisation d'ouvrir une enquête (Kenya), supra n. 5, par. 52-54, 183, 185, 186.

Compte tenu du contexte des crimes et du *modus operandi* de ceux qui en seraient les auteurs présumés, la Chambre a d'ailleurs estimé suffisamment graves les crimes allégués dans la requête du Procureur par rapport aux affaires potentielles dérivant de la situation au Kenya.[61]

Troisièmement, la Chambre a considéré qu'aucune évaluation des intérêts de la justice était requise en l'occurrence en vertu de l'Art. 53.1.c du Statut de Rome, une telle vérification de la part du Juge étant nécessaire seulement au cas où le Procureur estime ne pas devoir ouvrir une enquête par rapport à une situation donnée. Néanmoins, puisque la requête du Procureur implique en soi-même une réponse affirmative à la question de savoir si l'enquête serait compatible avec les intérêts de la justice, le pouvoir de *judicial review* de la Chambre ne pourrait être déclenché en ce cas.[62]

4 L'Opinion dissidente du Juge Kaul

Il est significatif que la première occasion dans laquelle la Chambre préliminaire a exercé son pouvoir de *judicial review* vis-à-vis de l'action *proprio motu* du Procureur n'ait pas abouti à une position unanime en ce qui concerne l'existence d'une base raisonnable pour ouvrir une enquête sur la situation au Kenya. L'Opinion dissidente du Juge Kaul attachée à la Décision du 31 mars 2010 est argumentée de façon très soignée et critique assez durement la démarche de la majorité de la Chambre dans l'exercice de ce pouvoir, reprochant notamment à cette dernière de ne pas avoir correctement entendu le rôle de la CPI et la spécificité des crimes internationaux présumés dans la requête du Procureur par rapport aux crimes de droit commun – quoique graves – faisant par contre l'objet de poursuites devant les juridictions pénales nationales.

L'Opinion du Juge Kaul précise tout d'abord que la fonction de *judicial review* conférée à la Chambre préliminaire, dans le cadre spécifique de la procédure visée à l'Art. 15 du Statut de Rome, impose à cette dernière de vérifier, avec attention et au préalable, que la compétence de la Cour existe en concret, faute de quoi il y aurait le risque d'enclencher une procédure devant la CPI sans respecter le principe de complémentarité énoncé dans le Statut de Rome:

> Certes, la Chambre préliminaire ne se livre pas à pareil examen lorsqu'un État partie ou le Conseil de sécurité, sur la base d'une résolution adoptée en vertu du Chapitre VII de la Charte des Nations Unies, lui défèrent une situation. Mais c'est là que réside la différence entre le déclenchement de la compétence de la Cour en vertu de l'article 13-c du Statut et le choix délibéré des États de soumettre les pouvoirs d'office du Procureur à un contrôle de la part des juges. La décision quant à savoir si le Procureur peut ou non ouvrir une enquête appartient, en dernière analyse, à la Chambre préliminaire. Loin d'être de nature simplement administrative ou procédurale, la décision de la Chambre préliminaire,

[61] *Ibidem*, par. 55-62 et par. 187-200.

[62] *Ibidem*, par. 63.

> mentionnée à l'article 15-4 du Statut, exige des juges qu'ils procèdent à un examen effectif et réel de la Demande du Procureur. Toute autre interprétation ferait de cette Chambre une simple chambre d'enregistrement.[63]

D'ailleurs, si le critère de preuve visé à l'Art. 15 du Statut est certainement peu rigoureux et exigeant (se bornant à requérir l'existence d'une « base raisonnable » pour enquêter sur une certaine situation de commission présumée de crimes), cela n'autoriserait pas pour autant la Cour à sous-estimer l'importance du respect des prescriptions du Statut de Rome concernant la définition des crimes relevant de la compétence de la CPI.[64] L'opinion dissidente précise notamment qu'un élément contextuel bien spécifique caractérise les crimes contre l'humanité par rapport aux crimes punissables en vertu du droit pénal national, s'agissant de la nécessité de démontrer l'existence d'une politique criminelle de l'État ou d'une organisation afin de prouver qu'un tel crime ait été commis.[65]

En fait, la Décision de la majorité de la Chambre et l'Opinion dissidente divergent principalement en ce qui concerne la possibilité d'attribuer à une « organisation » (lorsqu'il ne s'agit pas d'un État tout court) une politique ayant pour but la commission de crimes à l'encontre de la population civile. On peut en effet remarquer que, si la Chambre préliminaire a pour sa part considéré que même les acteurs non étatiques puissent mettre en œuvre une politique visant à la commission de crimes contre l'humanité,[66] l'Opinion dissidente a accueilli une notion plus stricte en exigeant la preuve de l'existence d'une organisation quasi-étatique en amont d'une telle politique criminelle, au moyen d'une interprétation aussi bien littérale que téléologique de l'Art. 7, très attentive à la formulation de la norme dans les différentes langues du Statut faisant foi.[67] C'est pourquoi l'Opinion dissidente conclut que la compétence *ratione materiae* de la Cour ne serait établie par rapport à la situation concernant les actes commis au Kenya, ces derniers ne se qualifiant pas en tant que crimes contre l'humanité relevant de la compétence de la CPI, faute de l'élément contextuel spécifique exigé à l'Art. 7 du Statut de Rome.[68]

À ce propos, il est intéressant de remarquer aussi que l'Opinion dissidente s'écarte nettement (peut-être même trop durement) de l'approche « réceptive » adoptée par la majorité de la Chambre vis-à-vis de la jurisprudence des Tribunaux *ad hoc* en matière de crimes contre l'humanité. L'opinion réclame surtout l'autonomie de la définition du crime retenue dans le Statut de Rome, aucun élément contextuel n'étant prévu dans la notion de crime contre l'humanité visée dans le Statut des Tribunaux qui ont précédé la Cour. Ainsi, l'Opinion précise que la CPI pourrait tirer des arrêts des Tribunaux *ad hoc* seulement les principes et règles

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[63] Autorisation d'ouvrir une enquête (Kenya), supra n. 5, Opinion dissidente Juge Kaul, par. 19.

[64] *Ibidem*, par. 14, 15.

[65] *Ibidem*, par. 18, 31-32.

[66] Autorisation d'ouvrir une enquête (Kenya), supra n. 5, par. 90-93.

[67] *Ibidem*, Opinion dissidente Juge Kaul, par. 51-52.

[68] *Ibidem*, par. 150.

du droit international (général), ces arrêts n'étant certainement pas des précédents en mesure de lier la Cour.[69]

5 Conclusions

Plusieurs années se sont écoulées avant que la CPI soit finalement mise en œuvre *proprio motu* par le Procureur, ainsi démentant les craintes évoquées tout au long des travaux préparatoires vis-à-vis d'une action « politique » et arbitraire de la Cour, délaissée de tout contrôle de la part des États et du Conseil de sécurité. La première occasion dans laquelle le Procureur a exercé le pouvoir d'activer la Cour de sa propre initiative a prouvé une certaine syntonie entre ce dernier et l'organe judiciaire chargé d'examiner son choix selon la procédure visée à l'Art. 15 du Statut de Rome: en autorisant l'ouverture d'une enquête sur la situation au Kenya, la Chambre préliminaire a en fait ratifié la thèse du Procureur selon laquelle des crimes contre l'humanité auraient été *prima facie* commis au Kenya.

D'ailleurs, il est nécessaire de tenir en bon et dû compte que le désaccord de l'un des trois Juges qui composent le Collège limite, d'une certaine manière, l'entente exprimée dans la Décision de mars 2010. En effet, s'il est vrai que l'Opinion dissidente du Juge Kaul ne partage pas la conclusion de la majorité de la Chambre au fond (puisque la commission présumée de crimes contre l'humanité relevant de la compétence de la Cour n'aurait pas été établie selon le critère de la base suffisante pour ouvrir une enquête), il faut néanmoins considérer que les motivations de l'Opinion dissidente semblent se fonder sur des aspects plus généraux, concernant l'équilibre établi entre les organes prévus dans l'architecture de la CPI. Plus précisément, l'Opinion dissidente aborde le sujet – subtil et complexe – de la relation entre le Procureur et la Chambre préliminaire, reprochant notamment à cette dernière de ne pas avoir exercé de façon suffisamment rigoureuse le rôle de supervision de l'autonomie du Procureur qui lui est attribué par le Statut de Rome.

Il sera intéressant de vérifier à l'avenir quel niveau de cohésion sera atteint par les Juges de la Chambre préliminaire vis-à-vis des décisions du Procureur, étant donné qu'encore récemment la Chambre préliminaire III a fait droit à la deuxième requête du Procureur d'ouvrir une enquête *proprio motu* – concernant la situation en Côte d'Ivoire – sans aboutir à l'unanimité de sa décision.[70]

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[69] *Ibidem*, par. 28-30.

[70] L'Autorisation d'ouvrir une enquête (Côte d'Ivoire), supra n. 2, fait en effet référence à une « opinion individuelle et partiellement dissidente de la juge Silvia Fernández de Gurmendi » (pas encore disponible en ligne).

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Political and Military Leaders' Criminal Responsibility before International Criminal Courts and Tribunals

Giulia Bigi

1 The Origins of the Joint Criminal Enterprise Doctrine in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia

The joint criminal enterprise (JCE) theory[1] was first developed in the 1999 *Tadić* Appeals Judgement, where its rationale was explained considering that "all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice". In this regard, "to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act".[2]

The Appeals Chamber had thus to verify whether criminal responsibility for participation in a common criminal purpose was compatible with the International Criminal Tribunal for the Former Yugoslavia (ICTY) Statute[3] and particularly with the different modes of criminal responsibility expressly mentioned therein.[4]

[1] See, generally, Barthe 2009; Haan 2008.

[2] ICTY: Prosecutor v. Dusko Tadić, IT-94-1-A, Appeals Chamber, Judgement (15 July 1999), paras 190, 192.

[3] Report of the Secretary-General Pursuant to para 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (3 May 1993), Annex.

[4] Article 7.1 of the ICTY Statute stipulates: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2–5 of the present Statute, shall be individually responsible for the crime".

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Mindful of the basic principle of personal culpability (*nulla poena sine culpa*), the Chamber interpreted Article 7.1 in the light of the Statute's object and purpose and of the Report of the Secretary-General on the establishment of the ICTY, which had in fact stated that "*all* persons who *participate* in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations" (emphasis added).[5] This reading led the Appeals Judges to the conclusion that the Tribunal's jurisdiction was meant to extend over all individuals involved in the commission of the crimes envisaged in the Statute, i.e. also over persons contributing to the commission of those offences by a group of persons in the execution of a common criminal plan.

In the absence of an explicit statutory ruling regarding participation in a collective criminal purpose, the contours of JCE were derived from customary international law, in particular from a number of post-World War II cases concerning war crimes. According to the Appeals Chamber, a detailed analysis of that case law demonstrated that the notion of JCE was "firmly established" in general international law and that it was implicitly comprised within the scope of a crime's "commission" as mentioned in Article 7.1 of the Statute;[6] as a consequence thereof, all participants in a collective criminal purpose are to be equally considered as principals to the criminal offences charged.

As to the specific conditions of individual liability under JCE (*mens rea* and *actus reus*), it was inferred that under customary international law there are three different JCE categories, each of them applying to different situations of collective criminality: basic, systematic and extended JCE. These categories of liability share the same general objective elements, namely the plurality of persons, the existence of a common plan amounting to or involving the commission of crimes provided for in the Statute and the participation of the accused in the common design involving the perpetration of those crimes; as to the *mens rea*, intent to engage in the common criminal action is required.[7]

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[5] Report of the Secretary-General Pursuant to para 2 of Security Council Resolution 808 (1993), paras 54 ff.

[6] Tadić Appeals Judgement, supra n. 2, para 220. The asserted customary nature of JCE has been criticised by some scholars, such as Bogdan 2006; Danner and Martinez 2005; Ohlin 2007; Powles 2004. Doubts have also been raised by ICTY Judges, e.g. in ICTY: Prosecutor v. Milan Martić, IT-95-11-A, Appeals Chamber, Judgement (8 October 2008), Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić.

[7] Tadić Appeals Judgement, supra n. 2, paras 195 ff. Basic JCE refers to cases where the crime has been intentionally committed by one or more persons voluntarily participating in the realisation of a criminal plan. The second category of JCE concerns so-called "concentration-camp cases", namely those situations where the crime has been committed in the context of an organised criminal system; here, the *mens rea* requirement entails the accused's knowledge of the system of violent repression and an intent to further the plan. Extended JCE finally covers cases where the crime does not form part of the common criminal design, but is nonetheless a natural and foreseeable consequence of the realisation of the plan itself and the accused willingly took that risk. For a detailed analysis, see Cassese 2008, pp. 187–213.

2 The Application of the Joint Criminal Enterprise Doctrine to "Leadership Cases"

After the *Tadić* Appeals Judgement, the ICTY has pronounced on JCE in a number of other cases.[8] Concerning a general perspective, it can be argued that the subsequent Tribunal jurisprudence shows that the theory has been mostly applied to criminal purposes and plans which were more extended and involved a higher number of participants than in the *Tadić* case, where the JCE comprised "only" the killing of five men during an attack by Bosnian-Serb forces on a small village.[9]

On several occasions the ICTY has relied on JCE as the best concept to capture the personal liability of all participants in the criminal venture under consideration, even if remote from the material commission of the crime. The theory has thus proven to be an effective means to prosecute high-ranking political and military leaders as the real orchestrators of the common criminal design and, lastly, to hold them and the physical perpetrators equally liable as principals to the crimes charged.[10]

Against the frequent and extensive use of the JCE doctrine—which has been severely criticised by some scholars[11]—the ICTY has demonstrated some concerns with regard to an expansive interpretation and application of the theory.[12] While highlighting the importance and potentiality of JCE,[13] the Tribunal has also attempted to identify its limits in order to define its scope of application in the light of the general principles of international criminal law on individual responsibility.

In this regard, the ICTY seems on the one hand to be finally satisfied that the customary notion of JCE is not limited to small enterprises and that the Tribunal's

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[8] The doctrine has also been recalled by other international (and internationalised) criminal courts and tribunals, such as the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL).

[9] In the Milosević case the accused had been indicted for having participated in three different JCEs extending within the territories of Kosovo (ICTY: Prosecutor v. Slobodan Milosević, Milan Milutinović, Nikola Sainović, Dragoljub Ojdanić, Vlajko Stojiljković, IT-99-37-PT, Second Amended Indictment (16 October 2001)), Croatia (ICTY: Prosecutor v. Slobodan Milosević, IT-02-54-T, Second Amended Indictment (23 October 2002)) and Bosnia and Herzegovina (ICTY: Prosecutor v. Slobodan Milosević, IT-02-54-T, Amended Indictment (22 November 2002)); see also the cases regarding the other two "big fishes" before the Tribunal: ICTY: Prosecutor v. Ratko Mladić, IT-09-92, Fourth Amended Indictment (16 December 2011) as well as ICTY: Prosecutor v. Radovan Karadžić, IT-95-5/18, Third Amended Indictment (27 February 2009).

[10] See Piacente 2004.

[11] Badar 2006; Farhang 2010. *Contra* Cassese 2007.

[12] See, e.g., ICTY: Prosecutor v. Milorad Krnojelac, IT-97-25-A, Appeals Chamber, Judgement (17 September 2003); ICTY: Prosecutor v. Blagoje Simić, Miroslav Tadić, Simo Zarić, IT-95-9-T, Trial Chamber, Judgement (17 October 2003), Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm.

[13] Gibson 2008; Haan 2005.

jurisdiction may embrace wide criminal endeavours. In fact, the 2007 *Brđanin* Appeals Judgement even stated that liability for participation in a criminal endeavour could be "as wide as the plan itself, even if the plan amounts to a 'nation wide government-organised system of cruelty and injustice' ".[14]

The Appeals Chamber thus seemed not to share the concerns about possible risks deriving from an extensive application of JCE as, in any case, the theory in itself is not "an open-ended concept that permits convictions based on guilt by association".[15] A correct interpretation of the doctrine's requirements as well as a precise definition of the common criminal plan's objective may, in other words, fully solve the difficulties arising from the inclusion of (geographically and structurally) distant individuals within the scope of the JCE under consideration. This would likewise guarantee full respect for the general principle of individual culpability provided for in the ICTY Statute as well as in customary international criminal law.

Against this backdrop, the Tribunal had on the other hand to deal with more specific issues and to clarify with precision the distinctive and most problematic aspects of the doctrine, such as the strength of the link between the actual perpetrator of the crimes charged and the other members of the group, as well as the accused's level of contribution in the implementation of the common criminal plan. Accordingly, the Tribunal had to verify under which circumstances it could be satisfied that the criminal venture was furthered by a group of persons capable of acting in reciprocal coordination and cooperation.

Regarding the first aspect, the *Brđanin* Appeals Judgement accepted that JCE may even consist of persons who do not materially commit the criminal acts forming part of the collective design. Therefore, the physical perpetrator need not be a member of the common plan, as the only essential requirement for individual responsibility under JCE is that the crimes charged formed part of the criminal venture itself[16]: the criminal enterprise can be entirely concentrated at the sole leadership level. As a consequence thereof, the Appeals Chamber assumed that the existence of the necessary link between the accused and the actual perpetrator is deemed to be established when the latter is used as a "tool" or is otherwise instrumentalised for the implementation of the common purpose.

As to the threshold of participation required, the 2004 *Vasiljević* and the 2005 *Kvočka* Appeals Judgements stated that "in general, there is no specific legal requirement that the accused make a substantial contribution to the joint criminal

[14] ICTY: Prosecutor v. Radoslav Brđanin, IT-99-36-A, Appeals Chamber, Judgement (3 April 2007), para 423, recalling ICTR: Prosecutor v. André Rwamakuba, ICTR-98-44-AR72.4, Appeals Chamber, Decision on Validity of Appeal of André Rwamakuba against Decision Regarding Application of Joint Criminal Enterprise to the Crime of Genocide Pursuant to Rule 72(E) of the Rules of Procedure and Evidence (22 October 2004). These finding were subsequently followed in ICTY: Prosecutor v. Milan Martić, IT-95-11-A, Appeals Chamber, Judgement (8 October 2008), paras 168–202.

[15] Ibidem, para 428.

[16] Brđanin Appeals Judgement, supra n. 14, paras 410–414.

enterprise",[17] as "it is sufficient for a participant in a joint criminal enterprise to perform acts that *in some way* are directed to the furtherance of the common design" (emphasis added).[18] Accordingly, the striking element which "marks the distinction between principals and accessories to the crimes" is "the state of mind with which the contribution is made, and not the significance of the contribution"[19] itself. The Tribunal's most recent jurisprudence seems, however, to embrace a more severe approach since the 2004 *Krstić* Appeals Judgement,[20] which was finally confirmed by the *Brđanin* Appeals Chamber stating that liability under JCE requires that the defendant has made at least "a *significant* contribution to the crime's commission" (emphasis added).[21]

In the subsequent 2006 *Krajišnik* Trial Judgement[22] and the 2009 Appeals Judgement,[23] the ICTY further analysed these crucial issues and introduced a new criterion for a proper interpretation of JCE regarding extensive leadership cases.

The necessity to focus once more on the accused level of participation in the furtherance of the criminal plan arose because of Krajišnik's prominent political and military high-ranking positions and associations—which gave him formal authority as well as *de facto* control over the Bosnian-Serb political and governmental organs and its armed forces—and his consequent structural and geographical remoteness from the actual battlefield.

Faced with the apparent lack of any connection between the accused and the low-level physical perpetrators, the Trial Chamber recalled its settled jurisprudence and argued that the link between the various JCE affiliates does not require the existence of a formal agreement or understanding; in order to establish individual criminal responsibility under JCE, the Tribunal has rather to verify whether the accused had acted in line with the criminal design and in cooperation and coordination with the other members of the group. The key element capable of transforming a plurality of persons into a group or enterprise consists, in the Chamber's view, of the "interaction or cooperation among persons—their joint action—in addition to their common objective", as the persons in a criminal enterprise must "act together, or in concert with each other, in the implementation

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[17] ICTY: Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlađo Radić, Zoran Žigić, Dragoljub Prcać, IT-98-30/1-A, Appeals Chamber, Judgement (28 February 2005), para 97.

[18] ICTY: Prosecutor v. Mitar Vasiljević, IT-98-32-A, Appeals Chamber, Judgement (25 February 2004) para 102.

[19] Olásolo 2009a, p. 163, citing ICTY: Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise (21 May 2003), para 20.

[20] ICTY: Prosecutor v. Radislav Krstić, IT-98-33-A, Appeals Chamber, Judgement (19 April 2004).

[21] Brđanin Appeals Judgement, supra n. 14, para 431.

[22] ICTY: Prosecutor v. Momčilo Krajišnik, IT-00-39-T, Trial Chamber, Judgement (27 September 2006).

[23] ICTY: Prosecutor v. Momčilo Krajišnik, IT-00-39-A, Appeals Chamber, Judgement (17 March 2009).

of a common objective, if they are to share responsibility for the crimes committed through the JCE".[24]

The "joint action" concept was emphasised on appeal and was confirmed by the subsequent ICTY jurisprudence, so that it can now be considered as a settled requirement of JCE also in large leadership cases.[25]

3 The Rome Statute Provisions on Co-Perpetration and the Origins of the Concept of Control Over the Crime

As anticipated, unlike the Statute of the *ad hoc* International Criminal Tribunal, the Rome Statute establishing the International Criminal Court (ICC) (Rome, 17 July 1998; hereinafter Rome Statute)[26] regulates with precision the different modes of liability and contains a detailed compilation of its specific requirements.

Article 25, generally dedicated to individual criminal responsibility, provides in its para 3 that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) *commits* such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible" (emphasis added). As to principal liability, this provision thus distinguishes between three different forms of commission, namely perpetration *strictu sensu*, co-perpetration and indirect perpetration.[27]

Even if it may *prima facie* seem that the second alternative form of *commission* regulated in Article 25.3.*a*—i.e., co-perpetration[28] as the joint commission of a crime with another person—is inspired by JCE doctrine and that the ICC can thus rely on the relevant ICTY jurisprudence, the Court has firmly stated its autonomy from that case law.[29] In the 2007 Decision on the Confirmation of the Charges, the *Lubanga* Pre-Trial Chamber[30] argued that the ICTY pronouncements, on the one

[24] Krajišnik Trial Judgement, supra n. 22, para 884. See Van der Wilt 2009; Zahar and Sluiter 2008, pp. 255–257.

[25] See, among others, ICTY: Prosecutor v. Ante Gotovina, Ivan Čermak, Mladen Markač, IT-06-90-T, Trial Chamber, Judgement (15 April 2011), paras 1948–1954.

[26] Entered into force on 1 July 2002.

[27] Paras 3 (b), (c) and (d) of Article 25, on the other hand, regulate accessorial liability as opposed to principal liability provided for in (a) and respectively refer to ordering, soliciting, inducing, aiding, abetting or otherwise assisting and complicity in group crimes. See, generally, Eser 2002.

[28] On the definition of "co-perpetration", see Ambos 1999, p. 479.

[29] See, generally, Meloni and Manacorda 2010.

[30] ICC: Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Pre-Trial Chamber, Decision on the Confirmation of the Charges (29 January 2007), paras 317–367. Olásolo 2009b.

hand, and the ICC Statute, on the other, adopt two differing approaches in defining the "distinguishing criterion between principals and accessories to a crime".[31]

In particular, whereas the *ad hoc* Tribunal was considered to apply the so-called "subjective approach"—which provides that "only those who make their contribution with the shared intent to commit the offence can be considered principals to the crime, regardless of the level of their contribution to its commission"—[32] the Rome Statute was deemed to embrace, under mentioned Article 25.3.*a*, the concept of "joint control over the crime".

According to Pre-Trial Chamber I, this theory implies that principals to a crime are not only its physical perpetrators but also those who "control or mastermind its commission because they decide whether and how the offence will be committed".[33] As this concept is rooted "in the principle of the division of essential tasks (…) between two or more persons acting in a concerted manner", the existence of an agreement and of a co-ordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime is required.[34] As to the specific subjective elements, they generally consist of the mutual awareness among the co-perpetrators that the execution of the common criminal plan may result in the realisation of the objective elements of the crimes charged as well as the consciousness of the existence of factual circumstances permitting the exercise of control over the crimes themselves.[35]

Due to these considerations, the JCE doctrine as developed by the ICTY jurisprudence was considered only as being "akin" to the form of liability provided for in *d* of the mentioned Article 25.3,[36] which, at any rate, constitutes a mere "residual form of *accessory* liability" (emphasis added).[37]

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[31] Ibidem, para 327. The Lubanga Pre-Trial Chamber also postulated the existence of a third approach (the so-called "objective approach"), according to which "only those who physically carry out one or more of the objective elements of the offence can be considered principals to the crime", ibidem, para 328.

[32] Ibidem, para 329.

[33] Ibidem, para 330.

[34] Ibidem, paras 342–348.

[35] Ibidem, paras 349–367.

[36] "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: [...] (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime".

[37] Lubanga Confirmation Charges Decision, supra n. 30, para 335.

4 The Application of the Concept of Joint Control Over the Crime to "Leadership Cases" Before the International Criminal Court

The mentioned findings of the *Lubanga* Decision were subsequently upheld and further developed in a 2008 Decision in the *Katanga and Ngudjolo Chui* case.[38] In this regard, Article 25.3.*a* was deemed to implicitly cover also an additional form of co-perpetration, other than the mere joint commission of the crime: namely, so-called "indirect co-perpetration", which consists of the joint perpetration of a criminal offence through one or more persons.[39] According to Pre-Trial Chamber I, "through a combination of individual responsibility for committing crimes through other persons together with the mutual attribution among the co-perpetrators at the senior level" this form of co-perpetration would allow the Court to deal properly with collective and mass criminality and to "assess the blameworthiness of senior leaders adequately".[40]

Basing upon these postulates, the "control over the crime" approach was construed as being predicated on the notion of "control over an organisation" (i.e., an organised and hierarchical apparatus of power) capable of securing the execution of the crimes by an almost automatic compliance with and execution of the criminal plan orchestrated by the so-called recognised leadership.[41] In this context, the effective commission of the crimes is secured because of the existence of an efficient mechanism controlled by the senior authority. As to the mutual attribution of principal liability to the leaders for the crimes committed by their respective subordinate perpetrators, the Pre-Trial Chamber finally recalled the essential requirements of the joint commission of a crime as already clarified in *Lubanga*.[42]

These rulings have been applied by the Court to even more extended cases involving the individual criminal responsibility of senior leaders controlling large apparatuses of political and military power, as shown by the *Al Bashir*[43] and

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[38] ICC: Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Pre-Trial Chamber, Decision on the Confirmation of the Charges ICC-01/04-01/07-717 (30 September 2008), paras 487–539.

[39] Ibidem, paras 490–493.

[40] Ibidem, para 492.

[41] In this regard, see also ICC: Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Pre-Trial Chamber III, Decision on the Prosecutor's Application for a Warrant of Arrest (10 June 2008).

[42] Katanga and Ngudjolo Confirmation of Charges Decision, supra n. 38, paras 519–526. As to the subjective elements of indirect co-perpetration, see ibidem, paras 527 ff.

[43] ICC: Prosecutor v. Omar Hassan Ahmad Al Bashir ('Omar Al Bashir'), ICC-02-/05-01/09, Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest ICC-02/05-01/09-3 (4 March 2009) and Second Decision on the Prosecution's Application for a Warrant of Arrest ICC-02/05-01/09-94 (12 July 2010).

Gaddafi[44] pre-trial Decisions on the issuance of arrest warrants. The approaches adopted therein constitute important moments in the ICC jurisprudence, as they finally confirm that the different forms of principal liability envisaged in the Rome Statute as construed by the mentioned pronouncements in *Lubanga* and *Katanga and Ngudjolo* may be also applied to the most high-ranking leaders, such as (still incumbent) Heads of State.[45]

Due to President Al Bashir's undisputed prominent position within the political and military Sudanese hierarchy as well as his *de jure* and *de facto* authority over the State apparatus, Pre-Trial Chamber I affirmed that there were reasonable grounds to believe that a common criminal plan had been "agreed upon at the highest level of the (Government of Sudan), by Omar Al Bashir and other high-ranking Sudanese political and military leaders" to carry out a violent and unlawful counter-insurgency campaign in the region of Darfur[46]; in this regard, there were reasonable grounds to believe that Al Bashir and the other leaders had directed the different branches under their authority in a coordinated manner in order to "jointly implement the common plan".[47] Accordingly, the full control exercised by the suspect upon the different divisions of State power—which, in turn, secured him the furtherance of the criminal design—led the Pre-Trial Chamber to the conclusion that there were reasonable grounds to believe that the suspect was to be considered as an indirect perpetrator or as an indirect co-perpetrator of the crimes envisaged in the Arrest Warrant itself.[48]

Similar rulings were delivered in the 2011 Arrest Warrant Decision against the then President of the Libyan Arab Jamahiriya, Colonel Muammar Gaddafi, regarding his alleged responsibility for the crimes committed from 15 February 2011 against the Libyan population. Being satisfied of the suspect's absolute high-ranking authority within the Libyan territory,[49] the competent Pre-Trial Chamber held that there were reasonable grounds to believe that the criminal plan orchestrated by Colonel Gaddafi and his closest "inner-circle" had been implemented through a number of concerted actions by Gaddafi himself and his son Saif Al-Islam Gaddafi.[50] It was thus concluded that there were reasonable grounds to believe that the suspect had contributed to the execution of the criminal venture

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[44] ICC: Situation in the Libyan Arab Jamahiriya, ICC-01/11, Pre-Trial Chamber I, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi" ICC-01/11-12 (27 June 2011). The case against Colonel Gaddafi was terminated on 22 November 2011 following his death on 20 October 2011.

[45] It has to be specified that the ascertainments contained in the mentioned Decisions are, from an evidentiary perspective, necessarily "superficial" as they are only made for the purposes of the issuance of an arrest warrant (cf. Article 58 of the ICC Statute).

[46] First Al Bashir Arrest Warrant Decision, supra n. 43, para 214.

[47] Ibidem, para 216.

[48] Ibidem, para 223.

[49] Gaddafi Arrest Warrant Decision, supra n. 44, para 72.

[50] Ibidem, para 76.

and that he was responsible—mutually with his son—as a principal to the crimes charged by the Prosecutor, pursuant to Article 25.3.*a* of the Rome Statute as an indirect co-perpetrator.

5 Concluding Remarks

In the light of the above, it can be finally concluded that the ICTY and the ICC endorse different theories to cope with the complex assessment of the individual criminal responsibility of senior political and military leaders.

Given the simple structure of its Statute—which, in turn, had been conceived as a mere "forum and framework for the enforcement" of existing international criminal law[51]—the *ad hoc* Tribunal had to define the contours of JCE on a case-by-case basis.[52] After the 1999 *Tadić* Appeals Judgement the Tribunal has consistently broadened the scope of application of the concept and finally affirmed its pertinence to large criminal endeavours.

On the other hand, the ICC has resolutely affirmed its autonomy from the ICTY case law and opted for the approach based on the notion of (joint) control over the crime.[53] So far, it has proven to be an appropriate means to frame the individual responsibility of the most high-ranking and unquestioned leaders, as demonstrated by the Decisions on the issuance of arrest warrants in the *Al Bashir* and *Gaddafi* cases.

Notwithstanding these deep divergences, both doctrines have effectively enabled international judges to hold the "most distinguished" suspects and accused as principals to the massive criminal offences which they had orchestrated but not actually committed. In fact, their structural remoteness from the physical implementation of the criminal endeavour has not been considered as an obstacle to the affirmation of their individual responsibility, provided that the necessary link to the actual perpetrators could be established. In this regard, it should however be kept in mind that due caution in the interpretation of both theories is required, considering the general principles of international criminal law on individual responsibility.

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[51] ICTY: Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, IT-96-21-T, Trial Chamber, Judgement (16 November 1998), para 418.

[52] Van Sliedregt 2009.

[53] This approach has been recently confirmed in ICC: Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Trial Chamber, Judgement Pursuant to Article 74 of the Statute (14 March 2012), paras 917–1357.

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International Courts and the Crime of Genocide

Valentin Bou

1 Introduction

The legal configuration of the crime of genocide has its origins in the writings of Raphael Lemkin in 1944.[1] The concept of genocide first appeared in the International Military Tribunal (Nuremberg) Judgement of 30 September and 1 October 1946, referring to the destruction of groups. The definition of the crime of genocide was based upon that of crimes against humanity, that is, a combination of "extermination and persecutions on political, racial or religious grounds" and it was intended to cover "the intentional destruction of groups in whole or in substantial part."[2]

On 11 December 1946, during its first ordinary meeting, the United Nations General Assembly (UNGA) unanimously adopted Resolution 96 (I), declaring that "the punishment of the crime of genocide is a matter of international concern" and requested the Economic and Social Council to draw up a draft convention on the crime of genocide. As a result, on 9 December 1948, UNGA Resolution 260A (III) approved the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter: the Convention).[3]

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[1] Lemkin 1944, pp. 79–95.
[2] ICTR: Prosecutor v. Clément Kayishema and Obed Ruzindana, ICTR-95-1-T, Trial Chamber, Judgement (21 May 1999), paras 88–89.
[3] Entered into force on 12 January 1951.

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The Convention has been broadly ratified and it is widely accepted as customary international law and, moreover, as a norm of *jus cogens*.[4] Genocide is an international crime that can be committed either by States or by individuals.[5] Article IX of the Convention gives jurisdiction to the International Court of Justice (ICJ) for disputes relating to the responsibility of a State for genocide.[6] Article VI establishes that persons charged with genocide may be tried "by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."[7] In fact, the crime of genocide is punishable under Articles 2, 4, and 6 of the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC) Statutes, respectively. These articles repeat verbatim the definition of the crime of genocide provided by Article II of the Convention:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, 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.

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[4] ICJ: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement (26 February 2007), para 142, 161 (tracing prior opinions of the ICJ recognizing that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation" and "that the norm prohibiting genocide was assuredly a peremptory norm of international law (*jus cogens*)") (quoting ICJ: Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Op. (28 May 1951), p. 23, and citing ICJ: Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Judgment (3 February 2006), para 64). For the International Criminal Tribunal for Rwanda, see Kayishema and Ruzindana Trial Judgment, supra n. 2, para 88. For the International Criminal Tribunal for the Former Yugoslavia see, e.g., ICTY: Prosecutor v. Radislav Krstić, IT-98-33-T, Trial Chamber, Judgement (2 August 2001), para 541 (surveying the state of customary international law at the time of the 1995 Srebrenica killings); and ICTY: Prosecutor v. Vujadin Popović et al., IT-05-88-T, Trial Chamber, Judgement (10 June 2010), para 807.

[5] Genocide Convention, supra n. 4, para 179.

[6] The ICJ found that Serbia had neither committed, nor conspired to commit, nor incited the commission of genocide, in violation of its obligations under the Convention. However, the ICJ found that Serbia had violated the obligation to prevent genocide in respect of the genocide that occurred in Srebrenica in July 1995. Ibidem, para 471. The ICJ also has, as a pending case, the application to institute proceedings against Yugoslavia submitted by Croatia on 2 July 1999. See Raimondo 2005, p. 53.

[7] Fifty years after the adoption of the Convention, the first genocide conviction was delivered at the ICTR (Prosecutor v. Jean Kambanda, ICTR 97-23-S, Trial Chamber, Judgement (4 September 1998), para 745). See Ratner 1998, p. 1; Meron 2000, p. 276; and Musungu and Louw 2001, p. 196.

Any of those underlying acts constitute genocide when committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. In order to appreciate the commission of genocide, proof of the specific genocidal intent to destroy the targeted group in whole or in part is required in addition to proof of intent to commit the underlying act.[8]

2 The *Mens Rea*

Article II of the Convention defines genocide to mean any of certain "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". This intent (or *mens rea*) has been referred to as, for example, special intent, specific intent, *dolus specialis,* particular intent and genocidal intent.[9] This *mens rea* distinguishes the crime of genocide from crimes against humanity, in particular persecution and extermination.[10] Whether there was genocidal intent is assessed based upon "all of the evidence, taken together".[11]

2.1 Intent to Destroy the Targeted Group as Such

The words "as such" underscore that something more than discriminatory intent is required for genocide; there must be intent to destroy, in whole or in part, the

[8] ICTY: Prosecutor v. Radislav Krstić, IT-98-33-A, Appeals Chamber, Judgement (19 April 2004), para 20. See also Genocide Convention, supra n. 4, para 186.

[9] See for example: ICTR: Prosecutor v. Alfred Musema, ICTR-96-13-A, Trial Chamber, Judgement (27 January 2000), paras 164–167, which refer to specific intent and *dolus specialis* interchangeably; and ICTR: Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Trial Chamber, Judgement (2 September 1998), para 498, which refers to genocidal intent. While the term specific intent was used in ICTY: Prosecutor v. Goran Jelisić, IT-95-10-A, Appeals Chamber, Judgement (5 July 2001), para 45; Krstić Appeal Judgment, supra n. 8, para 134 used the term genocidal intent. The International Law Commission (ILC) refers to specific intent (Report of the International Law Commission on the work of its forty-eighth session, 6 May–26 July 1996, UN Doc. A/51/10, p. 87; hereinafter "Report of the ILC"). The ICJ used mental element, additional intent and specific intent interchangeably. Genocide Convention, supra n. 4, paras 187 and 189.

[10] Kayishema and Ruzindana Trial Judgment, supra n. 2, para 89; ICTY: Prosecutor v. Zoran Kupreškić et al., IT-95-16-T, Trial Chamber, Judgement (14 January 2000), para 636. See Morris and Scharf 1998, p. 167.

[11] ICTY: Prosecutor v. Milomir Stakić, IT-97-24-A, Appeals Chamber, Judgement (22 March 2006), para 55.

protected group[12] "as a separate and distinct entity".[13] The ultimate victim of the crime of genocide is the group.[14]

The term "destroy" in customary international law means physical or biological destruction and excludes attempts to annihilate cultural or sociological elements.[15] According to the ILC, the preparatory work for the Convention clearly shows "that the destruction in question is the material destruction of a group, either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group".[16] However, attacks on cultural and religious property and symbols of the targeted group often occur alongside physical and biological destruction and "may legitimately be considered as evidence of an intent to physically destroy the group".[17]

"By its nature, intent is not usually susceptible to direct proof" because "only the accused himself has first-hand knowledge of his own mental state, and he is unlikely to testify to his own genocidal intent".[18] In the absence of direct evidence, a perpetrator's genocidal intent may be inferred from relevant facts and circumstances that can lead beyond reasonable doubt to the existence of the intent, provided that it is the only reasonable inference that can be made from the totality of evidence.[19] Genocidal intent may be inferred from certain facts or indicia, including but not limited to: (a) the general context; (b) the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others; (c) the scale of the atrocities committed; (d) their general nature; (e) their execution in a region or a country; (f) the fact that the victims were deliberately and systematically chosen on account of their membership in a particular group; (g) the exclusion, in this regard, of

[12] ICTR: Eliézer Niyitegeka v. Prosecutor, ICTR-96-14-A, Appeals Chamber, Judgement (9 July 2004), para 53; Genocide Convention, supra n. 4, para 187.

[13] ICTY: Prosecutor v. Radoslav Brđanin, IT-99-36-T, Trial Chamber, Judgement (1 September 2004), para 698; ICTY: Prosecutor v. Vidoje Blagojević and Dragan Jokić, IT-02-60-T, Trial Chamber, Judgement (17 January 2005), para 665.

[14] See, e.g., Blagojević and Jokić Trial Judgment, supra n. 13, paras 656, 665; ICTY: Prosecutor v. Milomir Stakić, IT-97-24-T, Trial Chamber, Judgement (31 July 2003), para 521; Akayesu, supra n. 9, paras 485, 521. See also ICTY: Prosecutor v. Goran Jelisić, IT-95-10-T, Trial Chamber, Judgement (14 December 1999), para 108.

[15] Krstić Appeal Judgment, supra n. 8, para 25. See also Genocide Convention, supra n. 4, para 344.

[16] Report of the ILC, supra n. 9, pp. 45–46, para 12.

[17] Krstić Trial Judgment, supra n. 4, para 580. See also Genocide Convention, supra n. 4, para 344.

[18] ICTR: Sylvestre Gacumbitsi v. Prosecutor, ICTR-2001-64-A, Appeals Chamber, Judgement (7 July 2006), para 40. See also ICTR: Prosecutor v. Clément Kayishema and Obed Ruzindana, ICTR-95-1-A, Appeals Chamber, Judgement (1 June 2001), para 159; ICTR: Georges Anderson Nderubumwe Rutaganda v. Prosecutor, ICTR-96-3-A, Appeals Chamber, Judgement (26 May 2003), para 525.

[19] ICTR: Ferdinand Nahimana et al. v. Prosecutor, ICTR-99-52-A, Appeals Chamber, Judgement (28 November 2007), para 524.

members of other groups; (h) the political doctrine which gave rise to the acts referred to; (i) the repetition of destructive and discriminatory acts[20]; and (j) the perpetration of acts which violate the very foundation of the group or are considered as such by their perpetrators.[21] Further, proof of the mental state with respect to the commission of the underlying act can serve as evidence from which to draw the further inference that the accused possessed the specific intent to destroy.[22]

The existence of a personal motive must be distinguished from intent and does not preclude a finding of genocidal intent.[23] The reason why an accused sought to destroy the victim group "has no bearing on guilt".[24]

Jurisprudence has held that "the preparatory work of the Convention of 1948 brings out that premeditation was not selected as a legal ingredient of the crime of genocide" and "it ensues from this omission that the drafters of the Convention did not deem the existence of an organisation or a system serving genocidal objective as a legal ingredient of the crime".[25] Hence, the ICTR and ICTY jurisprudence has made it clear that a plan or policy (e.g., a State policy) is not a statutory element of the crime of genocide.[26] Moreover, "the offence of genocide, as defined in the Statute and in international customary law, does not require proof that the perpetrator of genocide participated in a widespread and systematic attack

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[20] Jelisić Appeal Judgment, supra n. 9, para 47. See also ICTY: Prosecutor v. Vidoje Blagojević and Dragan Jokić, IT-02-60-A, Appeals Chamber, Judgement (9 May 2007), para 123 (noting that genocidal intent may be inferred from "evidence of other culpable acts systematically directed against the same group" and therefore "the forcible transfer operation, the separations, and the mistreatment and murders in Bratunac town are relevant considerations in assessing whether the principal perpetrators had genocidal intent"); Krstić Appeal Judgment, supra n. 8, paras 33, 35 (affirming the consideration of other culpable acts systematically directed against the same group, including forcible transfer, and ruling that the scale of the killing in the area of Srebrenica, "combined with the VRS Main Staff's awareness of the detrimental consequences it would have for the Bosnian Muslim community of Srebrenica and with the other actions the Main Staff took to ensure that community's physical demise", permitted the inference that the killing of the Bosnian Muslim men of Srebrenica was done with genocidal intent); ICTR: Mikaeli Muhimana v. Prosecutor, ICTR-95-1B-A, Appeals Chamber, Judgement (21 May 2007), para 31; ICTR: Laurent Semanza v. Prosecutor, ICTR-97-20-A, Appeals Chamber, Judgement (20 May 2005), para 262.

[21] ICTR: Prosecutor v. Callixte Kalimanzira, ICTR-05-88-T, Trial Chamber, Judgement (22 June 2009), para 731; Gacumbitsi, supra n. 4, paras 40–41; ICTR: Prosecutor v. Tharcisse Muvunyi, ICTR-00-55A-T, Trial Chamber, Judgement (11 February 2010), para 29. See Torres Perez and Bou Franch 2004, p. 374.

[22] Krstić Appeal Judgment, supra n. 8, para 20.

[23] Jelisić Appeal Judgment, supra n. 9, para 49. See also Niyitegeka, supra n. 12, paras 52–53; Kayishema and Ruzindana Appeal Judgment, supra n. 18, para 161. See generally ICTY: Prosecutor v. Duško Tadić, IT-94-1-A, Appeals Chamber, Judgement (15 July 1999), paras 268–269, declaring that "personal motives are generally irrelevant in criminal law".

[24] Stakić Appeal Judgment, supra n. 11, para 45.

[25] Jelisić Trial Judgment, supra n. 14, para 100.

[26] Kayishema and Ruzindana Appeal Judgment, supra n. 18, para 138; Jelisić Appeal Judgment, supra n. 9, para 48.

against the civilian population".[27] This is an important difference when compared to crimes against humanity.

International tribunals have noted that Article 6 of the ICC Statute, which defines genocide, does not prescribe the requirement of a "manifest pattern" introduced in the ICC Elements of Crimes.[28] They acknowledged that the language of the ICC Elements of Crimes, in requiring that acts of genocide must be committed in the context of a manifest pattern of similar conduct, implicitly excludes random or isolated acts of genocide.[29] However, "reliance on the definition of genocide given in the ICC's Elements of Crimes is inapposite". The Appeals Chamber further clarified that the ICC Elements of Crimes "are not binding rules, but only auxiliary means of interpretation" of the ICC Statute. Finally, it has been clearly established by jurisprudence that the requirement that the prohibited conduct be part of a widespread or systematic attack "was not mandated by customary international law".[30] However, the existence of a plan or policy can be an important factor in inferring genocidal intent. When the acts and conduct of an accused are carried out in accordance with an existing plan or policy to commit genocide they become evidence which is relevant to the accused's knowledge of the plan; such knowledge constitutes further evidence supporting an inference of intent.[31]

2.2 The Targeted Groups

Genocide was "originally conceived as the destruction of a race, tribe, nation, or other group with a particular positive identity; not as the destruction of various people lacking a distinct identity".[32] The Convention's definition of the group adopts the understanding that genocide is the destruction of distinct human groups with particular identities, such as "persons of a common national origin" or "any religious community united by a single spiritual ideal".[33] A group is defined by "particular positive characteristics—national, ethnical, racial or religious[34]—and

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[27] Krstić Appeal Judgment, supra n. 8, para 223.

[28] The last element of the crime of genocide reads: "The conduct took place in the context of a manifest pattern of similar conduct directed against that group (…)"; Elements of Crimes, Doc. ICC-ASP/1/3 (part II-B), adopted on 9 September 2002.

[29] Popović et al. Trial Judgment, supra n. 4, para 829.

[30] Krstić Appeal Judgment, supra n. 8, para 224.

[31] Popović et al. Trial Judgment, supra n. 4, para 830.

[32] Stakić Appeal Judgment, supra n. 11, para 21.

[33] Ibidem, paras 22, 24 (analyzing the drafting history of the Convention and quoting the interpretation of the Genocide Convention's protections in the UN Economic and Social Council's 1978 Genocide Study, paras 59, 78).

[34] International jurisprudence accepts a combined subjective–objective approach for the identification of the targeted groups. An objective definition can be found, e.g., in Akayesu, supra n. 9, paras 512–515. A subjective approach (holding that the victim is perceived by the

not the lack of them". A negatively defined group—for example all "non-Serbs" in a particular region—thus does not meet the definition.[35]

The drafters of the Convention also devoted close attention to the positive identification of groups with specific distinguishing characteristics in deciding which groups they would include and which (such as political groups) they would exclude. The ICJ spoke to the same effect in 1951 in declaring as an object of the Convention the safeguarding of "the very existence of certain human groups".[36] Such an understanding of genocide requires a positive identification of the group. The rejection of proposals to include, within the Convention, political groups[37] and cultural genocide also demonstrates that the drafters were giving close attention to the positive identification of groups with specific distinguishing well-established characteristics.[38]

2.3 Substantiality of Part of the Targeted Group

To establish specific genocidal intent, it is not necessary to prove that the perpetrator intended to achieve the complete annihilation of a group throughout the world,[39] but, at least, to destroy a substantial part thereof.[40] Indeed, if a group is targeted "in part", the portion targeted must be a substantial part of the group[41] because it "must be significant enough to have an impact on the group as a whole".[42]

(Footnote 34 continued)
perpetrator of the crime as belonging to the group targeted for destruction) was defended, for instance, in ICTR: Prosecutor v. Georges Anderson Nderubumwe Rutaganda, ICTR-96-3-T, Trial Chamber, Judgement (6 December 1999), para 56. See Bou Franch 2005, pp. 145–150.

35 Stakić Appeal Judgment, supra n. 11, paras 19–21, 28; Genocide Convention, supra n. 4, paras 193 and 196.

36 Reservations to the Genocide Convention, supra n. 4, p. 23.

37 For a different view, see Van Schaak 1997, p. 2259.

38 Genocide Convention, supra n. 4, para 194.

39 Kayishema and Ruzindana Trial Judgment, supra n. 2, para 95.

40 ICTR: Prosecutor v. Laurent Semanza, ICTR-97-20-T, Trial Chamber, Judgement (15 May 2003), para 316.

41 Akayesu, supra n. 9, paras 496–499; ICTR: Prosecutor v. Juvénal Kajelijeli, ICTR-98-44A-T, Trial Chamber, Judgement (1 December 2003), para 809; ICTR: Prosecutor v. Jean de Dieu Kamuhanda, ICTR-95-54A-T, Trial Chamber, Judgement (22 January 2004), para 628. The ICTR, in Semanza, supra n. 40, para 316, held: "Although there is no numeric threshold of victims necessary to establish genocide, the Prosecutor must prove beyond a reasonable doubt that the perpetrator acted with the intent to destroy the group as such, in whole or in part. The intention to destroy must be, at least, to destroy a substantial part of the Group".

42 Krstić Appeal Judgment, supra n. 8, para 8. According to the ICJ: "In the first place, the intent must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to a have an impact on the group as a whole" (Genocide Convention, supra n. 4, para 198).

The numeric size of the part of the group which is targeted, evaluated in absolute terms and relative to the overall group size, "is the necessary and important starting point" in assessing whether the part targeted is substantial enough, but is "not in all cases the ending point of the inquiry". Other considerations that are "neither exhaustive nor dispositive" include the prominence within the group of the targeted part, whether the targeted part of the group "is emblematic of the overall group, or is essential to its survival" and the area of the malefactors' activity and control and limitations on the possible extent of their reach. Which factors are applicable, and their relative weight, will vary depending on the circumstances of the case.[43]

3 The *Actus Reus*

3.1 Killing Members of the Group

The ICTR has defined "killing" as "homicide committed with intent to cause death".[44] For the ICTY, the elements of killing are: the death of the victim, the causation of the death of the victim by the accused and the *mens rea* of the perpetrator.[45]

Killing may occur where the death of the victim is caused by an omission as well as by an act of the accused or of one or more persons for whom the accused is criminally responsible.[46] Killing may be established where the accused's conduct contributes substantially to the death of the victim.[47] The *mens rea* for killing may take the form of an intention to kill,[48] or an intention to cause serious bodily harm which the accused should reasonably have known might lead to death.[49]

To establish the death of the victim, the Prosecution need not prove that the body of the dead person has been recovered. It may instead establish a victim's

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[43] Krstić Appeal Judgment, supra n. 8, paras 12–14.

[44] Musema Trial Judgment, supra n. 9, para 155; ICTR: Prosecutor v. Athanase Seromba, ICTR-2001-66-I, Trial Chamber, Judgement (13 December 2006), para 317.

[45] ICTY: Prosecutor v. Dario Kordić and Mario Čerkez, IT-95-14/2-A, Appeals Chamber, Judgement (17 December 2004), para 37; ICTY: Prosecutor v. Miroslav Kvočka et al., IT-98-30/1-A, Appeals Chamber, Judgement (28 February 2005), para 261.

[46] Ibidem, para 260; ICTY: Prosecutor v. Stanislav Galić, IT-98-29-A, Appeals Chamber, Judgement (30 November 2006), para 149. For example, killing may result from the wilful omission to provide medical care. Kvočka et al. Appeal Judgment, supra n. 45, para 270.

[47] Brđanin Trial Judgment, supra n. 13, para 382; ICTY: Prosecutor v. Zdravko Mucić et al., IT-96-21-T, Trial Chamber, Judgement (16 November 1998), para 424.

[48] ICTY: Prosecutor v. Zdravko Mucić et al., IT-96-21-A, Appeals Chamber, Judgement (20 February 2001), para 423; Kordić and Čerkez Appeal Judgment, supra n. 45, para 37; Kvočka et al. Appeal Judgment, supra n. 45, para 261.

[49] Ibidem, para 261.

death by circumstantial evidence, provided that the only reasonable inference that can be drawn is that the victim is dead.[50]

3.2 Causing Serious Bodily or Mental Harm to Members of the Group

Article II.b refers to an intentional act or omission that causes "serious bodily or mental harm" to members of the targeted group. Acts in Article II.b, similarly to Article II.a, require proof of a result.[51] This phrase may be construed to include "harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses".[52] The harm must go "beyond temporary unhappiness, embarrassment or humiliation" and inflict "grave and long-term disadvantage to a person's ability to lead a normal and constructive life".[53] The harm need not be "permanent and irremediable" to meet the standard of constituting serious harm.[54] "Serious mental harm" entails more than minor or temporary impairment to mental faculties.[55] Moreover, "to support a conviction for genocide, the bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part."[56] The determination of what constitutes serious harm depends on the circumstances.[57] The harm must be inflicted intentionally to meet the *mens rea* requisite for the underlying offence.[58]

Examples of acts causing serious bodily or mental harm include "torture, inhumane or degrading treatment, sexual violence including rape, interrogations

[50] Ibidem, para 260.

[51] Brđanin Trial Judgement, supra n. 13, para 688; Stakić Trial Judgment, supra n. 14, para 514.

[52] Kayishema and Ruzindana Trial Judgment, supra n. 2, para 109.

[53] Krstić Trial Judgment, supra n. 4, para 513; see also Blagojević and Jokić Trial Judgment, supra n. 13, para 645.

[54] Krstić Trial Judgment, supra n. 4, para 513; see also Akayesu, supra n. 9, para 502; Kayishema and Ruzindana Trial Judgment, supra n. 2, para 108; ICTR: Prosecutor v. Ignace Bagilishema, ICTR-95-1A-T, Trial Chamber, Judgement (7 June 2001), para 59; Kamuhanda Trial Judgement, supra n. 41, para 634; ICTR: Prosecutor v. André Ntagerura et al., ICTR-99-46-T, Trial Chamber, Judgement (25 February 2004), para 664; Muvunyi Trial Judgement, supra n. 21, para 487; Stakić Trial Judgment, supra n. 14, para 516.

[55] Kayishema and Ruzindana Trial Judgment, supra n. 2, para 110.

[56] ICTR: Prosecutor v. Athanase Seromba, ICTR-2001-66-A, Appeals Chamber, Judgement (12 March 2008), para 46. See also ICTY: Prosecutor v. Momčilo Krajišnik, IT-00-39-T, Trial Chamber, Judgement (27 September 2006), para 862.

[57] Blagojević and Jokić Trial Judgment, supra n. 13, para 646; Krstić Trial Judgment, supra n. 4, para 513.

[58] Kayishema and Ruzindana Trial Judgment, supra n. 2, para 112; ICTR: Muvunyi Trial Judgement, supra n. 21, para 487; Brđanin Trial Judgement, supra n. 13, para 690; Blagojević and Jokić Trial Judgment, supra n. 13, para 645.

combined with beatings, threats of death, and harm that damages health or causes disfigurement or serious injury to members of the targeted national, ethnical, racial, or religious group".[59]

The ICTY Appeals Chamber has held that forcible transfer "does not constitute in and of itself a genocidal act".[60] However, in some circumstances a forcible transfer can be an underlying act that causes serious bodily or mental harm, in particular if the forcible transfer operation was attended by such circumstances as to lead to the death of the whole or part of the displaced population.[61]

3.3 Deliberately Inflicting on the Group Conditions of Life Calculated to Bring About Its Physical Destruction in Whole or in Part

Article II.c covers methods of destruction that "do not immediately kill the members of the group, but, which, ultimately, seek their physical destruction".[62] The methods of destruction covered by Article II.c are those seeking a group's physical or biological destruction.[63] In contrast to the underlying acts in Articles II.a and II.b, which require proof of a result, this provision does not require proof that a result was attained.[64]

Examples of methods of destruction frequently mentioned in ICTR Trial Judgements include denying medical services and "the creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or

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[59] Musema Trial Judgment, supra n. 9, para 156; Brđanin Trial Judgement, supra n. 13, para 690; Krajišnik Trial Judgement, supra n. 56, para 859. See also Genocide Convention, supra n. 4, para 319, finding that systematic "massive mistreatment, [including] beatings, rape and torture causing serious bodily and mental harm during the [Bosnian] conflict and, in particular, in the detention camps" fulfil the material element of Article II.b of the Convention.

[60] Krstić Appeal Judgment, supra n. 8, para 33; see also Blagojević and Jokić Trial Judgment, supra n. 20, para 123. The ICJ has held that neither the intent to render an area ethnically homogenous nor operations to implement the policy "can as such be designated as genocide: the intent that characterizes genocide is to 'destroy, in whole or in part', a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group". Genocide Convention, supra n. 4, para 190.

[61] Blagojević and Jokić Trial Judgment, supra n. 13, paras 650, 654.

[62] Akayesu, supra n. 9, para 505; Rutaganda Trial Judgment, supra n. 34, para 52; Musema Trial Judgment, supra n. 9, para 157.

[63] Krstić Trial Judgment, supra n. 4, para 580. The ICJ ruled that "the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group" (Genocide Convention, supra n. 4, para 344).

[64] Brđanin Trial Judgement, supra n. 13, para 691, 905; Stakić Trial Judgment, supra n. 14, para 517.

excessive work or physical exertion".[65] For the ICTY, the conditions are: "cruel or inhuman treatment, including torture, physical and psychological abuse, and sexual violence; inhumane living conditions, namely failure to provide adequate accommodation, shelter, food, water, medical care, or hygienic sanitation facilities; and forced labour".[66] "Systematic expulsion from homes" has also been cited as a potential means of inflicting conditions of life calculated to bring about destruction.[67]

Absent direct evidence of whether "conditions of life" imposed on the targeted group were calculated to bring about its physical destruction, Trial Chambers have "focused on the objective probability of these conditions leading to the physical destruction of the group in part" and assessed factors like the nature of the conditions imposed, the length of time that members of the group were subjected to them and characteristics of the targeted group like vulnerability.[68]

The *mens rea* standard for the underlying offence of "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" is explicitly specified by the adjective "deliberately".[69]

3.4 Imposing Measures Intended to Prevent Births Within the Group

Trial Judgements have held that measures intended to prevent births should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes, and the prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group. Further, measures intended to prevent births within the group may be physical, but can also be mental.[70]

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[65] See, e.g., Kayishema and Ruzindana Trial Judgment, supra n. 2, paras 115–116; Musema Trial Judgment, supra n. 9, para 157.

[66] Krajišnik Trial Judgement, supra n. 56, para 859; Stakić Trial Judgment, supra n. 14, paras 517–518; Brđanin Trial Judgement, supra n. 13, para 691.

[67] Akayesu, supra n. 9, para 506; Stakić Trial Judgment, supra n. 14, para 517; Brđanin Trial Judgement, supra n. 13, para 691.

[68] Akayesu, supra n. 9, para 505; Kayishema and Ruzindana Trial Judgment, supra n. 2, paras 115, 548; Brđanin Trial Judgement, supra n. 13, para 906. The ICTY held that "living conditions, which may be inadequate by any number of standards, may nevertheless be adequate for the survival of the group" (Krajišnik Trial Judgement, supra n. 56, para 863).

[69] See Genocide Convention, supra n. 4, para 186: "Mental elements are made explicit in paragraphs (c) and (d) of Article II by the words 'deliberately' and 'intended' (…). The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional acts".

[70] Akayesu, supra n. 9, paras 508–509; Rutaganda Trial Judgment, supra n. 34, para 53.

To amount to a genocidal act, the evidence must establish that the acts were carried out with intent to prevent births within the group and ultimately to destroy the group as such, in whole or in part.[71]

3.5 Forcibly Transferring Children of the Group to Another Group

With respect to forcibly transferring children of the group to another group, the Trial Chambers have speculated that, as in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.[72] The ICC Elements of Crimes specify that the person or persons transferred must be under the age of 18 years.

4 Final Considerations

During the first half century after the adoption of the Genocide Convention, no international tribunal decided a case of genocide. During those years, genocide was, at best, a crime reserved for domestic tribunals, as was the case in Eichmann Jerusalem District Court Judgement. However, in the last twelve years three international tribunals (ICTR, ICTY and ICJ) have dealt in extensive detail with genocide, the crime of crimes, establishing a well-settled jurisprudence on its different constituent elements. It seems worth noting that the Achilles' heel of this jurisprudence concerns the definition of the last two types of the *actus reus* of the crime of genocide, where international jurisprudence is highly speculative as there has been no single case of these types.

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[71] Genocide Convention, supra n. 4, paras 355–356, 361. In response to the Applicant's claims, including that "forced separation of male and female Muslims in Bosnia and Herzegovina, as systematically practiced when various municipalities were occupied by the Serb forces (…) in all probability entailed a decline in birth rate of the group, given the lack of physical contact over many months", and that "rape and sexual violence against women led to physical trauma which interfered with victims' reproductive functions and in some cases resulted in infertility", the ICJ found that no evidence was provided as to "enable it to conclude that Bosnian Serb forces committed acts which could be qualified as imposing measures to prevent births in the protected group within the meaning of Article II(d) of the Convention".

[72] Akayesu, supra n. 9, para 509. See Fernandez-Pacheco 2011, pp. 76–77.

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Recent Developments in the Fight Against International Terrorism: The Role of the European Courts

Patrizia De Cesari

1 The Need to Strike a Balance Between Guaranteeing Security and Protecting Fundamental Rights

Many uncertainties have emerged about the role of Nation States, multilateral and European Union institutions in the difficult task of balancing international security and protecting fundamental rights in the fight against terrorism. This issue has taken on great importance and become prominent in the discourse on international security in recent years, mainly because the legislative instruments adopted at the international, regional and national level to eradicate terrorism have proved inadequate in protecting fundamental rights. The protection of human rights has often been sacrificed in the name of security and has led to disproportionate responses that have failed to strike the right balance between the two values.[1]

The gaps in the system are the result of several factors, but primarily because of a lack of adequate legislation at the international level as a result of the difficulties in arriving at a definition of terrorism and adopting a Global Counter-Terrorism Convention.

[1] Almqvist 2008, p. 312; Couzigou 2008, p. 52; Gautier 2008, p. 37; Defeis 2007, p. 1449; Eeckhout 2007, p. 183; Foot 2007, p. 496; Mock 2006, p. 23; Nesi (ed) 2006, p. 3; Id., 2011, p. 73; Ashby Wilson 2005, p. 217; Cameron, in Wallesteen, Staibano (eds) 2005, p. 189; Dickson 2005, p. 12; Flynn 2007, p. 31; Garbagnati 2005, p. 402; Röben et al. 2004; Chemerinsky 2003, p. 303; Olivier 2004, p. 399; Bribosia and Weyembergh 2002, p. 3; Di Stasio 2010, p. 3; Salerno 2010a, p. 3; Gargiulo and Vitucci 2009, p. 3; Villani 2007, p. 8; De Sena and Vitucci 2009, p. 189; Ciampi 2007, p. 96; Conforti 2006, p. 333.

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These difficulties were underlined by Martin Scheinin, the first Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, who was appointed by the UN Commission on Human Rights.[2] In his sixth report Mr. Scheinin pointed out that a global counterterrorism instrument is necessary both to prevent abuses within nation states which undermine the protection of fundamental rights, but also to promote international judicial cooperation.[3]

Recently Ben Emmerson,[4] the second Special Rapporteur, clearly reaffirmed that respect for all human rights and the rule of law are at the centre of the fight against terrorism. He emphasised that measures taken to counter terrorism must comply with international human rights law. He has also affirmed that "the denial of human rights and the rule of law might, in itself, create conditions that are conducive to terrorism".[5]

The rulings of the European courts on this issue in recent years as well as of national and international courts have been of great importance. They have not only addressed the problem of striking the right balance between security needs and the protection of fundamental rights, but have also brought into sharp focus the weaknesses in the body of the counter-terrorism laws contributing, at the various levels, to creating a system of greater protection. The cases dealt with by the courts also provide an opportunity to comment on the dialogue between the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR).

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[2] In April 2005 the Commission on Human Rights decided to appoint a special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (UN Commission on Human Rights, Resolution 2005/80 on Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN Doc. E/CN.4/RES/2005/80 (21 April 2005). The first Special Rapporteur (1 August 2005–31 July 2011) was Martin Scheinin (Finland).

[3] The sixth report of the Special Rapporteur, Martin Scheinin, was transmitted by the Secretary-General to members of the General Assembly on 6 August 2010, see Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. UN Doc. A/65/258 (6 August 2010). For a comment see Nesi 2011, p. 73.

[4] The current Special Rapporteur is Mr. Ben Emmerson (United Kingdom), who began his mandate on 1 August 2011. On 18 August 2011 the Secretary-General transmitted to the General Assembly the Report of the second Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, see UN doc. A/66/150 (18 August 2011), in accordance with Assembly resolution 65/221 and Human Rights Council resolution 15/15 of 7 October 2010. The current Special Rapporteur has identified two substantive areas of interest falling within his mandate, namely the rights of victims of terrorism and the prevention of terrorism.

[5] See Ben Emmerson's Report 2011 *supra* note 4, p. 9.

2 The UN Security Council and the Fight Against Terrorism

Since 2001, the United Nations has adopted a number of measures to combat terrorism, particularly through Security Council resolutions 1267 (1999) and 1373 (2001) and subsequent amendments and additions.[6] These resolutions were adopted under Chapter VII of the UN Charter, and based on the classification of terrorism as a threat to international peace and security. They have imposed on Member States a set of obligations and established a Sanctions Committee, a body which has been assigned the task of drawing up lists of persons and entities suspected of belonging to terrorist organisations. Member States are required to take action against them, by freezing the assets of those included on the list. Listing is confidential and those listed have not been allowed to either challenge a listing decision or to know the reasons for being listed, resulting in a serious detriment to the very due process guarantees of the rule of law. It should be noted that even if inclusion on the list is an administrative action, it may actually amount to a criminal charge both with regard to the damage to the reputation of those listed and to the financial consequences thereof.

These measures have been strongly criticised in relation to the protection of human rights and in particular of fundamental due process guarantees.[7] They have revealed the problem of States seeking to comply with their obligations under human rights protection treaties, customary law and general principles of law, while fulfilling their duty to implement the Security Council resolutions laid down by Article 25 of the United Nations Charter.[8]

Developments in legal practice, however, have reaffirmed the respect for fundamental due process guarantees and led the Security Council to adopt two new resolutions, 1904/2009[9] and 1963/2010,[10] which incorporate some of the human rights requirements that had been sacrificed for the sake of international security.

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[6] See UN Security Council resolutions 1390/2002, UN Doc. S/RES/1390 (28 January 2002); 1452/2002, UN Doc. S/RES/1452 (20 December 2002); 1455/2003, UN Doc. S/RES/1455 (17 January 2003); 1540/2004, UN Doc. S/RES/1540 (28 April 2004); 1526/2004, UN Doc. S/RES/1526 (30 January 2004); 1566/2004, UN Doc. S/RES/1566 (8 October 2004); 1617/2005, UN Doc. S/RES/1617 (29 July 2005); 1624/2005, UN Doc. S/RES/1624 (14 September 2005); 1699/2006, UN Doc. S/RES/1699 (8 August 2006); 1730/2006, UN Doc. S/RES/1730 (19 December 2006); 1735/2006, UN Doc. S/RES/1735 (22 December 2006); 1822/2008, UN Doc. S/RES/1822 (30 June 2008); 1904/2009, UN Doc. S/RES/1904 (17 December 2009) and 1963/2010, UN Doc. S/RES/1963 (20 December 2010).

[7] See the authors already mentioned in note 1 and Koufa 2006, p. 45 ff.; Treves 2009, p. 913 ff.; Salerno 2010b, p. 105; Ciampi 2010, p. 105.

[8] On this specific problem see Lugato 2010, p. 127.

[9] Adopted by the Security Council at its 6247th meeting, on 17 December 2009.

[10] Adopted by the Security Council at its 6459th meeting, on 20 December 2010.

3 Protection of Fundamental Rights and Duties Arising from Security Council Resolutions

No legislative solution has been found to the problem of the role of States in cases where fundamental rights and freedoms are violated when implementing the resolutions of the Security Council to combat terrorism. This delicate problem has been addressed by national courts as well as European and international courts. The courts have played an extremely difficult and complex role that has highlighted the shortcomings of the strategies put in place by the international community to deal with the problem.

Relevant case law has evolved in recent years. Initially, the most common position was to consider the obligation to implement sanctions against individuals adopted by the Security Council as prevailing over that of respecting procedural safeguards. The position later shifted towards a more protectionist one.

Initially the courts preferred to seek refuge in the protection offered by the higher level of the Security Council by declaring themselves incompetent to review an act adopted by the Security Council.

This particular position is based on the provisions of Article 103 of the UN Charter, which affirms the primacy of obligations contracted by States under the Charter over those undertaken by Member States under any international agreement.

In the first phase, several national courts ruled that the need to enforce sanctions against individuals suspected of terrorism did not infringe human rights standards.[11] Some of these courts did, however, find that the procedures envisaged in respect of individual measures against suspected terrorists failed to provide fundamental due process guarantees.[12]

A decision of this kind was the one delivered on 12 December 2007 by the House of Lords in the *Al-Jedda* case.[13] Although the decision does not relate to the issue of sanctions against blacklisted individuals, it is still a significant one for our purposes. The question concerned the relationship between authorisation resolution 1546 of 8 June 2004, adopted by the Security Council under Chapter VII of

[11] Federal Court of Lausanne: Youssef Mustapha Nada v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs, A.45/2007, 14 November 2007. www.bger.ch/fr. Accessed 15 June 2012.

[12] England and Wales High Court, Administrative Court: A, K, M, Q and G. v. H.M. Treasury, 24 April 2008. www.bailii.org. Accessed 15 June 2012. In this decision the Court affirmed that States are obliged because: "art. 103 of the Charter makes clear that the obligation under the Charter takes precedence over any other international agreement. Thus human rights and the ECHR cannot prevail over the obligations set out in the resolution". However the court also stated that the procedure "does not begin to achieve fairness for the person who is listed".

[13] House of Lords (Judicial Committee): R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence (12 December 2007), 2007 UKHL 58. www.publications.parliament.uk. Accessed 15 June 2012. For a comment see: Arcari 2008, p. 1083; Tomushat 2008, p. 15 ff.; Di Stasio 2010, p. 619.

the Charter, and Article 5.1 of the European Convention on Human Rights (Rome, 4 November 1950; hereinafter ECHR).

The resolution in question authorised the coalition forces in Iraq to adopt measures for the maintenance of international peace and security in Iraq, including detaining persons suspected of international terrorism without being charged with a criminal offence, and thus depriving them of the due process guarantees provided for in cases of deprivation of liberty.

The applicant, an Iraqi and UK citizen, claimed to have been arbitrarily detained from 2004 to 2007 by the UK military on suspicion of being a recruiter of terrorists, of aiding a known terrorist and explosives expert and conspiring with them to conduct attacks against coalition forces near Fallujah and Baghdad. He had complained of a violation of Article 5.1 of the ECHR claiming that his detention between 10 October 2004 and 30 December 2007 was unlawful, as was the UK government's refusal to allow him to re-enter the country. Al-Jedda claimed that his detention was unlawful under the ECHR because he had not been shown the intelligence evidence in support of the allegations and no formal charges had been made against him.

At that time the Iraqi interim government was in power and the multinational force, to which the British military in Iraq also belonged, had remained in the country under the authorisation of the UN Security Council.

The UK government had argued that Article 5 did not apply in the *Al-Jedda* case because detention without a formal charge was authorised by Security Council Resolution 1546/2004, which, under international law, had greater force than Article 5 of the ECHR.

In its judgment of 12 December 2007 the House of Lords rejected the UK government's argument that the United Nations, and not the United Kingdom, was responsible for the detention. However, the judges ruled that by virtue of the resolution the UK was obliged to detain persons who posed a threat to security and therefore ruled that the obligation to implement the resolutions adopted by the Security Council prevailed over compliance with procedural safeguards regarding detention, provided for by Article 5.1. They argued that, under Article 103 of the United Nations Security Council Charter: "binding Security Council decisions under Chapter VII supersede all other treaty commitments" and they ruled that the ECHR is among such "international agreements".

However, in their judgment the judges also suggested that it was necessary to balance the needs of the Charter with the protection of fundamental rights.[14]

[14] Cf. the leading opinion of Lord Bingham, who asserts that the decisions of the Security Council, under Article 103 of the UN Charter, prevail over "all other treaty commitments" but also underlines that there is "a clash between a power or duty to detain exercisable on the express authority of the Security Council and, on the other, the fundamental human rights which the UK has undertaken to secure" (para 39). Lord Carswell also shared Lord Bingham's leading opinion, which underlines that the power of detaining persons "has to be exercised in such a way as to minimise the infringements of the detainee's rights under Article 5.1 of the Convention, in particular by adopting and operating to the fullest practicable extent safeguards" (para 136).

4 Developments in Case Law Within the European Union: The Judgment of the General Court of 30 September 2010

The European Court of Justice's ruling of 3 September 2008 in the *Kadi* Appeal[15] (hereinafter Kadi I) marked a point of departure from the previous decisions of the Court of First Instance (CFI) in which the Security Council resolutions, taken under Chapter VII, were considered to supersede the obligation to respect fundamental rights.

The case arose as a result of an action brought by a Saudi businessman and financier, who was suspected of terrorism and had been put on a blacklist by the UN Security Council, and whose assets were frozen under EC Regulation 467/2001 implementing Security Council resolutions regarding sanctions against individuals.[16] The applicant complained that his fundamental rights had been violated, particularly the rights to property, the right to a fair trial and an effective legal remedy.

The CFI had asserted the primacy of obligations on Community law imposed by the UN under Article 103 of the Charter.[17] Although the Community is not a member of the UN, the CFI held that, by virtue of the combined provisions of Articles 297 and 307 TEC, it was bound to adopt all the measures necessary to enable Member States to fulfil those obligations. Finally, the Court ruled that it did not have the power to conduct a judicial review of the contested Community regulation implementing a UN resolution. To do so would amount to an indirect review of the resolution, which would be inadmissible because: "the determination of what constitutes a threat to peace and international security and the measures necessary to maintain or restore them is the 'sole responsibility of the Security Council, and, as such, is outside the powers of both national and Community authorities and courts".[18]

The European Court of Justice (ECJ) overturned the CFI's decision ruling that UN resolutions do not enjoy primacy over fundamental rights as guaranteed by EU law. In its ruling, the ECJ affirmed the need to protect fundamental rights in listing and de-listing procedures, but also felt it necessary to clarify the relationship between Community acts and the effects of Security Council resolutions.

Rejecting the position of the CFI, the ECJ first argued that Article 103 of the Charter would prevent it from scrutinising the legality of a Community act

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[15] ECJ: Yassin Abdullah Kadi and Al Barakaat International Foundation. v. Council the European Union and Commission of the European Communities, Joined Cases C-402/05 P and C-415/05 P, Judgement (3 September 2008).

[16] De Cesari 2006.

[17] GC/CFI UE: Ahmed Ali Yusuf and Al Barakaat v. Council of the European Union and Commission of the European Communities, T-306/01, Judgment (21 September 2005); Yassim Abdullah Kadi v. Council of the European Union and Commission of the European Communities, T-315/01, Judgment (21 September 2005).

[18] Ibidem, para 219.

implementing a Security Council resolution. It also stated that judicial scrutiny is necessary because the Community is a community of law and therefore "neither its Member States nor its institutions are immune from a review of the conformity of their acts with the fundamental 'constitution' of the EC Treaty".[19] It pointed out that fundamental rights are an integral part of the general principles of law whose observance the Court enforces,[20] and concluded that an international agreement cannot affect these principles.[21] It underlined that a review of the respect for human rights is a prerequisite for the legality of Community acts, even when these seek to implement an international agreement, namely the UN Charter itself.[22] Thus, the effects of international law must be determined on the basis of the conditions imposed by Community law.

However, the Court then also clarified that judicial scrutiny concerned Community legislation, but not the international agreement which it implements, even if such scrutiny is limited to examining the compatibility of the UN resolution with *jus cogens*.[23]

The ECJ therefore ruled that the contested regulation did not provide any legal remedy in relation to sanctions and constituted a disproportionate infringement of private property rights; it further declared the Council regulation 881 of 27 May 2002 to be partially unlawful because it failed to comply with the obligation to provide reasons, but stayed its ruling for three months so that the necessary changes could be made to the Regulation.

Although the appellate decision of the European Court of Justice in the *Kadi* case was a positive change of course from previous guidelines, as the Court strongly reaffirmed that fundamental rights are to be protected also in listing and delisting procedures, it did not solve the problems arising from the individual sanctions adopted by the Security Council.

In this decision, the Court seems to have closed in on itself and considered itself to possess the legal jurisdiction to determine the illegality of an act which, even if it is the result of the implementation of a measure by a third international organisation, remains an internal act and, as such, is subject to judicial review.

Some commentators have instead seen in the decision of the Court the emergence of an EU constitutional framework not subordinated to the Security Council, but subsequent developments in the Union's practices appear to confirm the central position of the Security Council, as is also evident from the new EU Council Regulation 1286/2009 amending Regulation 881/2002, adopted after the aforementioned resolution 1904 of 17 December 2009.

EU Commission Regulation 1190/2008, adopted in order to comply with the ECJ's judgment in the Kadi case, is proof that the decision of the Court failed to

[19] Kadi I, supra n. 15.

[20] Ibidem, para 283.

[21] Ibidem, para 285.

[22] Ibidem, para 284.

[23] Ibidem, para 287.

remedy the lack of procedural safeguards. Indeed Mr. Kadi submitted a fresh application before the Court of Justice of the European Union. In the new Regulation, the Commission merely confirmed that, even after careful consideration of comments received from Mr Kadi, his inclusion in the list was justified by reason of his connections with the Al-Qaeda network, given that the freezing of funds constitutes a preventive measure.

Through its judgment of 30 September 2010[24] the General Court annulled the contested regulation no. 1190/2008 insofar as it concerned the appellant, since it had been adopted in violation of his rights of defence, the right to an effective judicial remedy, as well as in violation of the principle of proportionality. In the opinion of the Court, Mr. Kadi did not have access to useful information or evidence and had no opportunity to actually be heard. He had received only a summary of the reasons advanced by the UN Sanctions Committee.

The Court also noted that the Community system of freezing funds, while based on a two-stage procedure, the first at the UN level, the other at Community level, is characterised by an absence of guarantees of the rights of defence on which to exercise effective judicial review in proceedings before the Sanctions Committee. Consequently, the Community institutions are required to ensure that such safeguards are established and implemented at Community level.

As a result of the ruling of 30 September 2010, Mr. Kadi's assets were unfrozen after nine years, but with no compensation for damages.

The ruling fails to fully clarify how the need to ensure the individual's right to judicial review is to be balanced with effectively combating international terrorism. The General Court's decision does not appear to be clear on the fundamental issue of the scope of judicial review. The Court initially admits that a full judicial review of the Community implementing measure could encroach on the Security Council's prerogatives,[25] thus compromising the effectiveness of international cooperation, but it then asserts that it must follow the ECJ's guidance,[26] in compliance with the hierarchical principle of the European judicial structure. This is why the General Court concludes that its task is to ensure "in principle the full review of the lawfulness of the contested regulation in the light of fundamental rights",[27] as the ECJ held in its Kadi ruling of 2008. The General Court therefore reaffirms the stance adopted by the ECJ, but does not provide a persuasive explanation as to why it abandoned its previous position as expressed in its Kadi ruling of 2005.

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[24] TFI/GC UE: Yassin Abdullah Kadi v. European Commission, T-85/09, Judgment (30 September 2010). For a comment see Simon 2010, pp. 12–14; Brodier 2011 pp. 14–17; Savino 2011, p. 257.

[25] Kadi II, supra n. 24, para 114.

[26] Ibidem, para 121.

[27] Ibidem, para 126.

However, in addition to the reasons provided by the ECJ, the General Court offers a new argument, affirming that the rule of a full judicial review must apply "at the very least, so long as the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection".[28] The General Court thereby admits that a European court may withdraw when another international court protects the fundamental rights at issue, whereas the ECJ had not clarified whether Community judicial review could or could not be affected by the existence of due process guarantees at the UN level.

Although the General Court appears to open up to the United Nations legal order, by adopting a softer tone to the ECJ's declaration of the autonomy of the Community legal order, it nevertheless ends up following the ECJ's line of reasoning. It argues that even the recent establishment of an Office of the Ombudsperson does not ensure effective judicial review and

> in those circumstances the review carried out by the Community judicature of Community measures to freeze funds can be regarded as effective only if it concerns indirectly, the substantive assessments of the Sanctions Committee itself and the evidence underlying them.[29]

In its conclusion the General Court held that the right to defence cannot be sacrificed to the requirements of international cooperation: a judicial review of the implementation of anti-terrorism measures by the European Union courts must be complete, regardless of the fact that these measures implement resolutions adopted by UN Security Council under Chapter VII of the United Nations Charter. This must remain the case, at the very least, so long as the re-examination procedure operated by the Sanctions Committee does not offer the guarantees of effective judicial protection.

Finally the *Kadi II* ruling raises the following question. At what point should a restriction on the right to property be considered disproportionate? In this specific case, the judges considered the restriction of the property rights "significant", having regard to the general application and duration of the freezing measures to which Kadi was subject.[30]

On 13 December 2010 the European Commission appealed against the decision of the General Court before the European Court of Justice, and its decision is now awaited.[31] On 16 December 2010 the Council of the European Union and the United Kingdom also appealed.

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[28] Ibidem, para 127.

[29] Ibidem, para 129.

[30] Ibidem, para 192.

[31] Official Journal of the European Union, C 72 (5 March 2011).

5 The Case Law of the ECtHR

The decisions of the ECtHR are also an indication of the aforementioned shift. Until the two judgments of 7 July 2011 in the *Al-Jedda*[32] and *Al-Skeini*[33] cases, its case law had shown a rather lukewarm attitude of convenience with regard to the issue of the responsibility of States in the case of violations of fundamental rights and guarantees arising from measures taken to combat terrorism on the basis of a Security Council resolution.

This rationale can be seen in its decisions in the *Segi* and *Gestoras*[34] cases. Both associations were included in lists of suspected terrorists and had applied to the ECtHR claiming irreparable harm to their right to a presumption of innocence, freedom of expression and action, and the right to a fair trial. The Court declared the appeals inadmissible on the ground that, according to its case law, ECHR violations must be current, concrete and direct and not potential or future.

In its *Bosphorus* v. *Ireland*[35] decision the Strasbourg Court referred to Article 1 of the ECHR stating that a Member State is responsible for all acts and omissions of its organs that could breach the Convention regardless of whether the conduct results from domestic law or the need to comply with international obligations. However, it accepted the principle of the presumption of conformity with the European Convention since acts adopted by the States are intended to fulfil obligations arising from their membership of an international organisation such as the European Community, in which fundamental rights are protected in an "equivalent" manner.

In *Behrami and Saramati*,[36] the Court rejected the responsibility of States for alleged violations not so much as a result of the obligations under Articles 25 and 103 of the United Nations Charter, but as a result of the need to take into account the mandatory nature of the UN's purposes and the powers of the UN Security Council, whose effectiveness would be undermined by the scrutiny of the Court.[37]

The *Al-Jedda* case also came before the ECtHR. The Court was asked a specific question relating to whether the responsibility for violations of the obligations under Article 5.1 of the European Convention on Human Rights resulting from Security Council resolutions remains with the States or, alternatively, with the European Union or with the United Nations.

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[32] ECtHR: Al-Jedda v. United Kingdom [GC], 27021/08, Judgment (7 July 2011).

[33] ECtHR: Al-Skeini and others v. United Kingdom [GC], 55721/07, Judgment (7 July 2011).

[34] ECtHR: Segi and Gestoras Pro-Amnistia and Others v. 15 States of the European Union, 6422/02 and 9916/02, Judgment (23 May 2002).

[35] ECtHR: Bosphorus Hava ollari Turizm Anonim Sirketi v. Ireland [GC], 43036/98, Judgment (30 June 2005).

[36] ECtHR: Behrami and Behrami v. France and Saramati, v. France, Germany, Norway [GC], 71412/01 and 78166/01, Decision (2 May 2007).

[37] Ibidem, para 148.

The specific questions were: "Was the applicant's detention attributable to the United Kingdom or to the United Nations? If attributable to the United Nations, did this have the effect of bringing it outside the scope of the Convention?"; "If the detention was attributable to the United Kingdom what was the effect to the legal regime established pursuant to United Nations Security Council Resolution 1546 (and subsequent Resolutions) on the respondent State's obligation under Article 5 of the Convention?"

As to the breach of Article 5.1 of the ECHR, the Court referred to its case law according to which the said provision envisages a number of cases where detention is allowed even when there is no intention to formalise criminal charges within a reasonable period (extrajudicial detention). However, it rejected the UK government's argument that the responsibility for the detention remained with the United Nations. The judges noted that after overthrowing the regime of Saddam Hussein in May of 2003, the United States and the United Kingdom had taken control of the security services in Iraq. At the time of the detention there was no Security Council resolution assigning the United Nations with responsibility for the country's security. Hence, the scrutiny of acts or omissions by the military of occupying States was not the responsibility of the United Nations, but of the United Kingdom. The internment had in fact occurred in a detention centre in Basra, a city under the exclusive control of the British military.

Although there was no conflict in this case between the obligations imposed on States arising from the resolution and those to protect human rights for the reasons just mentioned, the Court's decision is nonetheless particularly interesting. It should be noted that the UK government had argued that Security Council resolution no. 1546 obliged it to enact the measure of internment, since Article 103 of the United Nations Charter imposed on it an obligation that prevailed over the obligation to apply Article 5.1 of the ECHR Convention.

After ruling out the application of Article 103,[38] the ECtHR also referred to the ECJ's judgment in the *Kadi* case.[39] It noted that the ECJ had dealt precisely with the issue of responsibility for violations of obligations under the ECHR made on the basis of Security Council resolutions. It recalled that in *Kadi* the CFI had rejected the applicant's appeal seeking the annulment of the contested regulation by invoking Articl 103 of the United Nations Charter, while the ECJ, in a landmark ruling, had reversed the CFI's decision, reaching quite different conclusions.

The ECtHR retraced the ECJ's reasoning noting that one of the objectives and aims of the UN is to promote respect for human rights and fundamental freedoms, and not only to maintain international peace and security. According to the ECtHR, the Security Council, in pursuing these aims, must act in accordance with these principles and purposes under Article 24 of the Charter. The aim of Security Council resolutions cannot therefore be to require states to violate the fundamental principles of human rights. Thus, the Court held that the Security Council cannot

[38] Al-Jedda, supra n. 32, para 101.

[39] Ibidem, paras 51–53.

compel States to adopt measures that are inconsistent with the obligations arising under international law to protect human rights.[40] So if there is uncertainty or ambiguity in the terms used by the Security Council, the Court must choose an interpretation "which is most in harmony with the requirements of the Convention and which avoids any conflict of obligation".

The ECtHR then stated that Resolution no. 1546[41] did not create any obligation to detain persons without charge, and that in the preamble to the resolution all forces undertook a commitment to act in accordance with international law. It also noted that the resolution also mandated the Secretary-General through his Special Representative, the United Nations Assistance Mission (UNAMI), to promote the protection of human rights in Iraq. Moreover, the Mission had repeatedly expressed its concern at the large numbers of people being held indefinitely and without judicial scrutiny.

6 The Relationship Between the ECJ and the ECtHR

The cases dealt with by the European Union courts and those decided by the ECtHR offer an opportunity for some observations on the relationship between the two courts with regard to the protection of fundamental rights. In its *Kadi* ruling the ECJ clearly stated that while, on the one hand, it refers to ECtHR case law in order to evaluate the compatibility of certain measures implementing a UN resolution, on the other hand, the EC Community Court must be able to undertake independent judicial scrutiny of the acts of the European Union implementing these resolutions.[42] This scrutiny is also based on completely different assumptions from those considered by the ECtHR. Indeed, in the *Kadi* case, the ECJ first made reference to the *Behrami* and *Sarmati* decisions pronounced by the ECtHR to underline that the latter's jurisdiction is exempted only when an action is directly attributable to the UN.[43] It then referred to the judgment delivered in the *Bosphorus* case to show how, in the latter case, the ECtHR's jurisdiction was recognised in respect of the respondent State, even though the measure in question had been decided on the basis of a Community regulation, implementing a resolution adopted by the Security Council.[44] According to the ECJ any measures implementing UN resolutions may fall within the scope of application of the ECHR and may be subject to the jurisdiction of the ECtHR. However, in the Kadi case the ECJ sought to clarify that its function in reviewing the implementation of the UN resolution in the EU legal system stems from altogether different

[40] Ibidem, para 102.

[41] Ibidem, para 105.

[42] Kadi I, supra n. 15, para 317.

[43] Ibidem, para 312.

[44] Ibidem, para 313.

circumstances from those of the ECtHR.[45] The jurisdiction of the ECtHR stems from an international agreement while the ECJ's review of the validity of Community acts "must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system, which is not to be prejudiced by an International agreement".[46]

In conclusion, the ECJ ruled that the Treaty of the European Community has led to the establishment of a new order in the international legal landscape which recognises rights and duties not only to States, but also to individuals. The ECJ thus sought to focus on how it differed from the ECtHR. The former is in fact more similar to a constitutional court, while the ECtHR is instead an intergovernmental court.

The Kadi case reveals a greater openness of the ECJ to the ECtHR Court. While the ECJ has focused, on the one hand, on differing circumstances underlying the jurisdictions of the two courts, on the other, it has shown that the dialogue between the courts is growing to the benefit of building a community of values. This ever more integrated relationship with the Strasbourg court can also be seen in the General Court's most recent decision of 30 September 2010, again in the Kadi case. The ECJ and the General Court referred in their decisions both to ECHR provisions, but also to ECtHR case law. Similarly, in its decisions the ECtHR has often referred to the principles upheld in the ECJ's judgments, as can be seen in its recent decision in the *Al-Jedda* case.

7 The Need to Revise the Counter-Terrorism Strategy

The system adopted by the UN Security Council in the fight against terrorism has proved to be very unclear as to the relationship between the obligations of States, of the European Union and of the United Nations in the protection of fundamental rights. In view of the uncertainties of the outlined framework, the most logical solution would be to transpose, at a universal level, the aforesaid guarantees and greater co-ordination among the different legal systems involved. On the other hand, any other solution would be inconsistent with the United Nations Charter, which purports to both protect human rights and maintain peace.

It should also be noted that Council resolutions in their preambles require States to implement individual sanctions in accordance with international human rights law. Resolution 1269/1999 had already done so, as did resolution 1456/2003, which reads: "States must ensure that any measures taken to combat terrorism comply with all their obligations under international law and should adopt such measures in accordance with international law, in particular international human

[45] Ibidem, para 315.

[46] Ibidem, para 316.

rights, humanitarian and refugee law". The preamble to Resolution no. 1822/2008 affirmed "the need to combat by all means, in accordance with the Charter of the United Nations and international law, including applicable international human rights, humanitarian and refugee law, threats to international peace and security posed by terrorist acts, stressing in this regard the important role the United Nations plays in leading and coordinating this effort". Resolution nos. 1904/2009 and 1963/2010 are formulated in the same vein.

Without doubt, the system needs to be reformed to achieve greater clarity. The need to protect fundamental rights should be embedded in the text of the resolutions, and not just in the preamble, with a clear requirement on the part of the UN to respect them. While the current system allows the adoption of a resolution under Chapter VII of the Charter imposing a series of obligations on all Member States and on the European Union, it has proved very weak in terms of the aforesaid protection because the measures taken by the Security Council have been adopted against individuals and are, in the case of listing procedures, to some extent judicial.

It should also be noted that the Security Council itself has signalled its intention to move in this direction. Resolution no. 1904/2009 reflected an acceptance of demands for greater guarantees such as grounds, albeit brief, for the listing of individuals or entities, and established the "Office of the Ombudsman", which is assigned the competence to receive and examine de-listing applications made by individuals. Although this new procedure is not judicial in nature and does not envisage the right of the individual to defend himself directly before the Sanctions Committee, as it is the Ombudsman who makes observations in this context, it is still significant. The new Resolution no. 1963/2010 reminds us that effective counter-terrorism measures and respect for human rights are complementary and mutually reinforcing and are an essential part of a successful counter-terrorism effort. For the first time this resolution recognises that terrorism "will not be defeated by military force, law enforcement measures and intelligence operations alone" and underlines, *inter alia*, the need to strengthen the protection of human rights and fundamental freedoms and to promote the rule of law as conditions for combating international terrorism.[47]

In conclusion, given the calls for greater guarantees in the fight against terrorism not only from individual States and the European Union, but also from international organisations such as the Council of Europe, and protected by European, international and national courts, further reform in the procedures adopted by the Security Council is certainly much needed, so that its resolutions may be implemented in the national and European Union legal orders while respecting fundamental rights.

[47] See Security Council Resolution 1963 (2010), fourth preambular paragraph. UN Doc. S/RES/1963 (20 December 2010).

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The Contribution of the Special Tribunal for Lebanon to the Notion of Terrorism: Judicial Creativity or Progressive Development of International Law?

Chiara Ragni

1 The Definition of Terrorism: A "Stumbling-Block" in International Law

The question of defining international terrorism has always been regarded, as highlighted by Tullio Treves, as a "stumbling-block" in international law.[1]

Notwithstanding the efforts made by States to find an appropriate solution, political and ideological reasons have made it particularly challenging to reach an agreement on a generally acceptable definition of terrorism and to conceive it as an international discrete crime to be included within the jurisdiction of international criminal tribunals.

The first attempt to define terrorism as a crime at the international level can be traced back to the Convention on the Prevention and Punishment of Terrorism (Geneva, 16 November 1937; hereinafter the 1937 Convention), which was adopted at the initiative of the League of Nations. The Convention was intended, *inter alia*, to oblige State parties to criminalize acts of terrorism, as defined therein,[2] and to prosecute or extradite the alleged offenders. Although it never entered into force, it first served as a model for later conventions dealing with the

[1] Treves 1990, p. 71. The quite insurmountable problems that the search for a legal definition of terrorism has always implied are broadly highlighted by scholars. See for example, among the others, Graham 2005, 55, who claimed that "Defining "terrorism" and identifying a "terrorist" is perhaps the most complex and highly charged issue of modern times"; Levitt 1986, p. 97, Dugard 1974.

[2] The 1937 Convention defined terrorism as all criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public (cf. Article 1).

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prevention and suppression of terrorism,[3] which adopted the same mechanism of interstate cooperation (based on the principle *aut dedere aut iudicare*). It deserves, moreover the merit to provide (or better to attempt to provide) a general definition of acts of terrorism.

This marks a difference between the 1937 Convention and more recent treaties dealing with the matter, whose negotiators, aware of the problems arising from an attempt to define terrorism, but also of the need to develop a legal framework which is suitable for the task of countering that crime, chose a different route: namely that of identifying particular offenses which undoubtedly amount to terrorism and elaborating specific instruments for their suppression.[4]

International treaties which take this approach follow the principle of *aut dedere aut iudicare*. Accordingly, they oblige the party in whose territory the offender is found to either extradite the person to the State having jurisdiction under the convention concerned, or to submit the case to its own authorities for prosecution.

A definition is not even included within Security Council Resolutions 1368 (2001) and 1373 (2001), adopted in the aftermath of the Twin Towers attacks,[5] which severely condemned acts of terrorism as a threat to the peace and security of mankind and requested States to adopt measures indicated therein in order to prevent, criminalize and, more generally, to combat such actions. The Security Council in particular called upon States "to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions"; by doing so it essentially

[3] Gioia 2005, p. 3.

[4] According to this method States have entered into specific treaties such as, for example, the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 14 September 1963, entered into force on 4 December 1969); the Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970, entered into force on 14 October 1971); the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 23 September 1971, entered into force on 26 January 1973) and its Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Montreal, 24 February 1988, entered into force on 6 August 1989); the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Rome, 1988 entered into force on 1 March 1992) under the auspices of the United Nations Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (New York, 1973, entered into force on 20 February 1977); the 1979 UN New York Convention Against the Taking of Hostages (New York, 18 December 1979, entered into force on 3 June 1983); and the 1979 UN New York Convention for the Suppression of Terrorist Bombing (New York, 17 December 1979, entered into force on 3 June 1983). For a complete list of the Conventions see Hafner G., The Definition of the Crime of Terrorism, in Nesi 2006, p. 33.

[5] Cf. UN Doc. S/RES/1368 (12 September 2001) and UN Doc. S/RES1373 (28 September 2001). It is worth mentioning that in 2004 the Security Council attempted to arrive at a general definition of terrorism, by actually following the same sectorial approach as that utilized in international conventions, but by also trying to identify shared elements of terrorist acts, see UN Doc. S/RES/1566 (8 October 2004). On the question of the "legislative" nature of these resolutions see Treves 2006, p. 128 ff. and the literature quoted there.

referred to the definition of terrorism provided in national legislation or in sectorial international treaties.

Among those, only the 1999 New York UN Convention for the Suppression of the Financing of Terrorism actually defines terrorism (Article 2.1.b).[6] Generic definitions are also included in some regional treaties, whose different approach to the notion, according to several scholars, demonstrates a lack of agreement on the matter.[7]

The analysis of the relevant norms and of their negotiations reveals that most controversial issues in this respect pertain to two aspects: (i) the relationship between terrorists and freedom fighters[8]; and (ii) the specific intent required in order to distinguish terrorist acts from ordinary crimes. As regards the second aspect, one of the objections to criminalizing certain acts as terrorism was that most of the relevant forms of conduct are already covered by existing forms of international and domestic crimes. On this basis, respect for the legality principle (*nullum crimen sine lege*) implies avoiding, as far as possible, a proliferation of overlapping offenses. Individuals must be able to know the scope of their obligations and of their criminal liabilities. This aim could be jeopardized if the same conduct can be subsumed under more than one crime.

This problem actually applies to all the existing typologies of international crimes, which differ from ordinary crimes in their mental or contextual element; according to the conditions that accompany the conduct, a given act can be qualified in different ways. Moreover, whether or not it is true that specific manifestations of what is commonly referred to as terrorism are generally criminalized under international or domestic law—terrorism's unique features (primarily, its *mens rea*, the intention to spread terror or to coerce an authority) are not adequately embodied, in our opinion, in existing national and international criminal law.

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[6] Article 2.I.b defines terrorism as "Any […] act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act".

[7] Like global conventions, counter-terrorism agreements concluded within the fora of regional organizations—such as, for example, the Arab Convention on the Suppression of Terrorism (Cairo, 22 April 1998, entered into force on 7 May 1999, hereinafter "Arab Convention") and the European Convention on the Suppression of Terrorism (Strasbourg, 27 January 1977, entered into force on 4 August 1978) generally provide for facilitating and encouraging international cooperation with the aim of national prosecution.

[8] States are indeed politically and ideologically divided on whether the actions of "freedom fighters" involving attacks on civilians should be defined as terrorist or instead lawful. See in this regard Cassese 2006, p. 950; the author identifies three different attitudes emerging among States in this regard.

2 The Prosecution of Terrorism Before International Criminal Tribunals

The exercise of criminal jurisdiction implies that criminal acts, to which it should extend, are properly defined. The problem is strengthened by the need to respect the nullum *crimen sine lege* principle, both at the national and at the international level. For those reasons, in the absence of a shared view on its definition, the prevailing view has been that an autonomous international crime of terrorism cannot be conceived of.[9]

This assumption seems to be validated by the decision (adopted at the Rome Conference in 1998 and reiterated at the Review Conference held in Kampala in 2011) not to add terrorism to the list of crimes under the jurisdiction of the International Criminal Court (ICC).[10] During the long negotiations on the ICC Statute the 1995 ILC Draft Code on Offenses against Peace and Security of Mankind, and also various suggestions stemming from the practice of other international tribunals, suggested including terrorism among the subcategories of offenses punishable as crimes against humanity.[11] This option was rejected by most negotiators of the Rome Statute and it was deliberately not considered at the Review Conference. The proposal to add terrorism as a crime against humanity

[9] See Dinstein 1990, p. 55; Duffy 2005, p. 17 ff. and p. 348 ff.; Kolb 2004, p. 227; Saul 2006, p. 270. See further: France, Court of Cassation, *Gheddafi Case*, 13 March 2001, reprinted in English in 125 I.L.R. 490. More generally, on the lack of a definition of terrorism under international law see Guillaume 1989 at 305; Sorel, Existe-t-il une definition universelle du terrorisme?", in Bannelier et al. 2002, pp. 35–68; Sorel 2003, 371: the author suggests that, although it is clear that no perfect definition of terrorism could be given, an attempt should be made; Higgins 1997, p. 13; Schmid 2004, p. 375.

[10] The Draft Statute for an International Criminal Court submitted by the Preparatory Committee to the Rome Conference contained, in brackets, a very broad definition of terrorism: it was the object of negotiations that resulted in the rejection of the proposal for its inclusion in the Statute. See Draft Statute for an International Criminal Court, U.N. Doc. A/CONF.183/2/Add.1 (14 April 1998), 27–28, (for a comment see, for example, Glennon and Sur 2008, 247 ff. The absence of a shared view on the notion of terrorism was one of the reasons justifying the exclusion of the crime from the jurisdiction of the ICC. Most States also considered that the inclusion of this crime might have politicized the Court to a very high degree. See in this regard the Report of the Preparatory Committee on the Establishment of an International Criminal Court, Supp. No. 22, UN Doc. A/51/22 (2006), Vol. I, pp. 25 ff., at p. 26. It was finally noted that "at the time of the Rome Conference, and before, terrorism (as drug-related crimes) was not considered of the same level of gravity as the accepted international crimes. Repression within domestic systems, although within a framework of international cooperation, appeared sufficient and more appropriate. After September 11 such assessment may have changed. Terrorism has climbed towards the top of international concerns. Yet, the gravity of the threat seems to have discouraged States to formalize the position of terrorists, to the degree of making them accused in international proceedings with all the rights inherent in such position and with all the occasions for publicity and propaganda it involves". Treves 2006, p. 214.

[11] ICTY: Prosecutor v. Radislav Krstić, IT-98-33-T, Trial Chamber, Judgment (2 August 2001), para 607.

was actually criticized since it did not take adequately into account the fact that terrorist acts are committed with a view to promoting (mostly) a political objective; and there might be, in addition, terrorist offenses that do not meet the conditions, namely their widespread and systematic character, to be qualified as crimes against humanity.[12]

The crime was not even included in the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY),[13] even though the practice of the Tribunal supported the idea that terrorism against a civilian population, proscribed in the second sentence of Article 51(2) of Protocol I to the 1949 Geneva Convention,[14] is a criminal offense under international treaty law that entailed individual criminal responsibility; the Appeals Chamber did not rule out the treaty basis of such a crime, but added that terrorism as a war crime is also based on custom.[15]

International criminal liability for breaches of international humanitarian law provisions on terrorism has been expressly established in the Statutes of other international criminal tribunals; Article 4.d of the Statute of the International Criminal Tribunal for Rwanda (ICTR) criminalizes acts of terrorism committed in Rwandan territory,[16] by embodying Artice 13.2 of Protocol II to the 1949 Geneva Conventions[17]; Article 3.d of the Statute of the Special Court for Sierra Leone (SCSL) enables the prosecution of "Acts of terrorism",[18] which are listed among violations of common Article 3 of the 1949 Geneva Conventions and of Protocol II.

The above-mentioned practice of international criminal tribunals and the provisions included in their Statutes has not so far taken into consideration terrorism as a separate crime under international law; they rather support the idea that terrorism may be ascribed to one of the existing categories of international crimes;

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[12] If "it is perhaps plausible" (as suggested by Cassese 2001, p. 995) "to contend that large-scale acts of terrorism showing the atrocious features of the attacks of 11 September, or similar to those attacks, fall under the notion of crimes against humanity as long as they meet the requirements of that category of crimes (whereas no special account should be taken of one of the specific features of terrorism, namely the intent to spread terror among the civilians)" it could be more questionable whether single attacks perpetrated to harm a limited number of victims can be tried as crimes against humanity, unless they meet the "widespread" and the "systematic" criteria.

[13] ICTY Statute, contained in the annex to the Report of the Secretary-General Pursuant to para 2 of Security Council Resolution 808 (1993), UN Doc. S/RES/808 (3 May 1993).

[14] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. See ICTY: Prosecutor v. Stanislav Galić, IT-98-29-T, Trial Chamber, Judgment (5 December 2003), paras 592–594, ascertaining the elements of the crime of terror against the civilian population, which is prohibited—but not defined—by the Additional Protocols to the Geneva Conventions.

[15] ICTY, Prosecutor v. Stanislav Galić, IT-98-29-A, Appeals Chamber, Judgment (30 November 2006), para 85, cf. Hodgkinson 2010; Van der Vyver 2010.

[16] ICTR Statute, U.N. Doc. S/RES/955 (8 November 1994).

[17] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

[18] SCSL Statute, U.N. Doc. S/2000/915 (4 October 2000).

accordingly its status as a treaty crime (under the 1949 Geneva Conventions and Protocol II) or, according to a minority opinion, as a crime against humanity was emphasized.[19]

Terrorism was finally included within the jurisdiction of the Special Tribunal for Lebanon, which was created by Resolution 1757 (2007),[20] and was designed to address the assassination of the former Lebanese Prime Minister Rafik Hariri on February 14, 2005.[21] It is the first time that a court of an international character has been vested with competence over terrorism as a separate crime, even if the STL Statute specifies that the prosecution and punishment of the offenses under the jurisdiction of the Tribunal will be regulated by the Lebanese Criminal Code.[22] According to the Secretary-General, the choice to resort to national law was a consequence of "the insufficient support for the inclusion of crimes against humanity within the subject matter jurisdiction of the tribunal".[23] The option to refer to an international crime of terrorism was not even taken into account: that could give support to the absence of a shared notion of terrorism as a distinct crime under international law.

The Statute was criticized in this respect since it was objected that national Lebanese law by its very nature is not competent to cover all the criminal acts under the competence of the Tribunal, due to transnational implications that the possible involvement of Syria might imply. It was therefore suggested that the provisions should be read in the light of the international law on terrorism in order

[19] See Arnold, Terrorism as a Crime Against Humanity under the ICC Statute, in Nesi 2006, p. 121 ss; Greppi 2001, at 114; the author emphasizes that "systemic terrorism" can prosecuted as a crime against humanity.

[20] UN Doc. S/RES/1757 (30 May 2007).

[21] The Special Tribunal for Lebanon was set up to try those responsible for the 2005 bombing that killed the former Lebanese Prime Minister Rafiq Hariri and other related crimes. It was to be established by an Agreement between the United Nations and the Lebanese Republic pursuant to Security Council resolution 1664 (2006) of 29 March 2006, which responded to a request from the Government of Lebanon to establish a tribunal of an international character to try all those who are found responsible for the terrorist crime which killed the former Lebanese Prime Minister. Since it proved impossible to reach a broad political consensus within the Lebanese institutions, and, as a consequence, to have the agreement enter into force, the Security Council imposed the establishment of the STL by Chapter VII Resolution, aimed at overcoming this constitutional impasse.

[22] Article 2 of the STL Statute provides that the prosecution and punishment of the crimes referred to in Article 1 (namely those related to Hariri's murder), are subjected to the provisions of the Lebanese Criminal Code relating to acts of terrorism and other national offences specified therein.

[23] Report of the Secretary-General on the establishment of a Special Tribunal for Lebanon, UN Doc. S/2006/893 (15 November 2006), paras 21–25. It was also noted that "As Hariri and other victims of terrorist attacks in Lebanon were not assassinated during an armed conflict, these murders cannot be war crimes or other violations of international humanitarian law" (cf. Milanovic 2007, p. 1140).

to fill any possible lacunae.[24] It was moreover observed that, while the Statute seems clearly to designate the Lebanese Criminal Code as the sole source of crimes, it attaches to national offenses international modes of criminal responsibility which are not recognized in that same Code; this was deemed to be an inconsistency within the Statute, which could also result, according to the literature, in a breach of the legality principle.[25]

3 The STL Interlocutory Decision on Applicable Law: Is There Room for Doubts About Its Compliance with the Legality Principle?

The doubts raised by the Statute on the law applicable to the crimes under the jurisdiction of the STL, namely the question of whether or not, in the absence of such a clear reference, international law should be regarded as a source of principles or rules, was dealt with by the Appeals Chamber of the Tribunal in its first decision. Having been asked by the pre-trial judge to clarify the law on 15 points,[26] according to its advisory competence under Article 68 of the STL Rules of Procedure and Evidence (RPE), as amended in November 2010,[27] the Chamber

[24] Serra 2008, p. 107; the author highlighted the international character of the crimes under STL jurisdiction, given the involvement of the Syrian authorities and the following transnational dimension of the facts which occurred in Lebanon on 14 February 2005. Indeed the transnational dimension of the crime is not a conclusive argument in support of its international nature, which essentially depends, according to the criteria developed by the ICTY in the *Tadić* jurisdictional decision (Cf. ICTY: Prosecutor v. Tadić, IT-94-1-A, Appeals Chamber, Decision (2 October 1995), para 103 ff.), on its attitude to create a proper international individual criminal responsibility. See in this regard Cassese 2008, pp. 11–12.

[25] Article 3 of the Statute allows individual responsibility to accrue not only on grounds of liability common to all legal systems, such as commission and complicity, but also for a joint criminal enterprise (JCE) and superior responsibility; both those modes of responsibility do not exist (at least in the form provided for in the Statute) in domestic criminal law for ordinary crimes, but rather relate solely to international crimes.

[26] STL: Ayyash et al., STL-11-01/I, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (16 February 2011). The pre-trial judge requested the Appeals Chamber to pronounce on 15 questions relating to substantive criminal law regarding, in particular, the definition of terrorism and the modes of liability applicable to specific intent crimes.

[27] STL RPE, STL/BD/2009/01/Rev. 3 (29 November 2010). At the plenary meeting of the STL's judges held from 8 to 11 November 2010, new rules were added to the STL Rules of Procedure and Evidence (RPE); among them, Article 68 gives the Pre-Trial Judge "the unique ability to submit to the Appeals Chamber interlocutory questions on legal issues that arise during the confirmation of the indictment, a procedure aiming at ensuring consistency in applicable law throughout the legal proceedings and at speeding up pre-trial and trial deliberations". Cf. Rules of Procedure and Evidence—Explanatory Memorandum by the Tribunal's President Antonio Cassese (25 November 2010), para 11. The opportunity to entrust a criminal court with advisory functions was objected to since, according to scholars, "this procedure is arguably *ultra vires* the

delivered a pivotal decision on 16 February 2011, dealing *inter alia* with the controversial issue of the definition of terrorism.[28]

The Appeals Chamber first found that the clear wording of Article 2 makes clear reference to "the provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism",[29] and does not allow for anything but the application of national law, as interpreted and applied by the Lebanese courts. With these premises in mind, the Appeals Chamber suggested that national norms should however be read in the context of international obligations undertaken by Lebanon with that, in the absence of clear language, any legislation should be presumed to comply.[30]

According to the decision, the application of international provisions seems to be also required both from the incorporation in the Statute of elements and standards of international criminal law and by the legal nature of the Tribunal, which is international in character.[31] As such, the Tribunal may "take into account the relevant applicable international law as an aid to interpreting the relevant provisions of the Lebanese Criminal Code",[32] when national law and "its interpretation or application by Lebanese courts appear to be unreasonable, might result in manifest injustice, or appear not to be consonant with international principles and rules binding upon Lebanon".[33] Once such conditions are satisfied the STL, being an international tribunal, could also depart from the application and interpretation of national law by the Lebanese courts.

As regards terrorism, the relevant provision of the Lebanese Criminal Code, Article 314, provides that the elements of the crime are the following: the volitional commission of an act intended to cause a state of terror; the use of means

(Footnote 27 continued)
Statute, which limits the Appeals Chamber's role to hearing appeals from the parties on questions of law and fact and grants it the power to 'affirm, reverse or revise the decisions taken by the Trial Chamber', and which conforms to the classic corrective function of any appellate body in general and the appeals chambers of the international criminal courts and tribunals in particular". Cf. Gillet and Schuster 2011; in this regard the author quoted the practice of other International Criminal Tribunals, namely the ICTY, whose judges stated in the Tadić case that "A tribunal having international criminal jurisdiction should be careful not to convert itself into a free or general advisory body. Its enunciation of the law must be on a case to case basis and limited to the list before it. A matter which should normally be decided on the basis of law and evidence should not be foreclosed by an enunciation of law by a superior tribunal which may have the effect of pre-empting the rights of the parties to have the matter properly appraised by the lower chamber" (Tadić (2 October 1995), supra n. 24, Separate Opinion of Judge Sidhwa, para 109).

[28] Interlocutory Decision, supra n. 26.

[29] Article 2 Statute of the Special Tribunal for Lebanon.

[30] Interlocutory Decision, supra n. 26, paras 44 and 45.

[31] Ibidem, paras 15–16.

[32] Ibidem, para 45.

[33] Ibidem, para 39. The Appeals Chamber quoted the practice of other international tribunals to support its conclusion. It is worth noting that, while clarifying the interpretation principles with which it will comply, the Tribunal also took the advantage to confirm its nature as an international court.

liable to create a public danger, such as those enumerated in the norm, which limits itself to listing, without being exhaustive, some possible devices falling within that definition. According to the strict interpretation given by national courts, the norm in question refers only to acts performed by means capable of creating *per se* a danger to the general population, regardless of whether or not the intended consequences of the criminal conduct actually materialize. The Appeals Chamber claimed that such a restrictive interpretation could have the result that crimes like the assassination of political leaders would not be treated as terrorism under Lebanese legislation as applied by national courts, unless they were perpetrated by means which could cause a public danger or, more precisely, to harm innocent victims; it then deemed it opportune to examine whether or not such a narrow reading of Article 314 complies with counter-terrorism international norms which are binding on Lebanon.

As for *treaty* obligations, the Appeals Chamber analyzed the Arab Convention for the Suppression of Terrorism, the only treaty to which Lebanon was a party that includes a definition of terrorism, which is broader than that provided for by Article 314.[34] The Convention indeed does not embody any restriction on the means used to perpetrate terrorism; limitations were not even included in other counter-terrorism international treaties, whose ratification has gradually been authorized or approved by Lebanese authorities.[35]

Then, the Appeals Chamber proceeded with a closer examination of the controversial question of the existence of a discrete crime of terrorism under *customary* international law. After having reviewed state practice, UN resolutions and international treaties pertaining to the matter, it found that "although it is held by many scholars and other legal experts that no widely accepted definition of terrorism has evolved in the world society because of the marked difference of views on some issues, closer scrutiny demonstrates that in fact such a definition has gradually emerged". Despite differences in domestic laws and the lack of an agreed definition of terrorism by the international community, the Appeals Chamber chose to overcome the divergences and to identify some "core" shared elements. These would be the perpetration or the threat of a (serious) criminal act; the intent to spread fear or terror among the population or to coerce national or international authorities to take some action or to refrain from taking such action; and the involvement of a transnational element.[36] The definition of terrorism resulting from the sum of such elements would have, according to the Interlocutory Decision, customary international law status, at least in relation to offenses committed in a time of peace (while it still remains controversial whether or not a

[34] Cf. Article 2 Arab Convention.

[35] Interlocutory Decision, supra n. 26, para 141.

[36] On this last issue, namely the relevance, according to the Interlocutory Decision, supra n. 26, of the transnational element to the notion of the international crime of terrorism, see Ventura 2011, pp. 7–15.

shared notion of terrorism exists with regard to terrorist offenses carried out within armed conflicts). As such, it should be binding upon Lebanon.

The Appeals Chamber then suggested a broad interpretation of the Lebanese Code, an interpretation that, in accordance with international legal obligations which are binding on Lebanon, should include in the notion of terrorism even those acts perpetrated by means which cannot be assumed *in abstracto* to cause a public danger, but should rather be assessed on a case by case basis (for instance, gunshots in a large crowd as opposed to gunshots at close range in a deserted place).

To this approach, one could have objected that this reading unduly broadens the scope of Article 314 so as to include acts that would not have been considered as terrorism under the established approach of national courts. As such, it would jeopardize the *nullum crimen sine lege* principle, as enshrined in international human rights law.[37]

According to international human rights law and also to the practice of international tribunals, a criminal conviction should indeed not be based on a norm which an accused could not reasonably have been aware of at the time of the act.[38] As long as it was foreseeable and accessible to a possible perpetrator that his conduct was punishable at the time of its commission, however, the legality principle is satisfied.[39] With these principles in mind, the Appeals Chamber addressed the possibility of a *nullum crimen sine lege* challenge and ultimately rejected it.

First of all, the Appeals Chamber reasoned that it was foreseeable for a Lebanese national or for anybody living in Lebanon that any act designed to spread terror would be punishable, regardless of the exact means used—as long as these means were likely to cause a public danger. All the international norms supporting this broad interpretation were foreseeable to the accused and accessible to him, especially given the publication of the Arab Convention and other international treaties ratified by Lebanon in the Official Gazette. Moreover, Lebanese law does not provide binding precedents doctrine; any judicial departure from the strict interpretation of the notion of terrorism by national courts is therefore admissible and should be reasonably taken into account by a possible perpetrator.

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[37] See for example Article 7 of the European Convention on Human Rights and Fundamental Freedoms (Rome, 4 November 1950, Entered into force on 3 September 1953); Article 15 of the International Covenant on Civil and Political Rights (New York, 16 December 1966, entered into force on 23 March 1976).

[38] Interlocutory Decision, supra n. 26, para 193.

[39] Cf. ICTY: Prosecutor v. Enver Hadzihasanovic et al., IT-01-47-AR72, Appeals Chamber, Decision (16 July 2003), para 62. As further explained by the ICTY "as to foreseeability, (…) the accused (…) must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision. As to accessibility, in the case of an international tribunal (…) accessibility does not exclude reliance being placed on a law which is based on custom". *Id.*, para 34. For a consistent view in the practice of human rights bodies cf. ECtHR: S.W. v. United Kingdom, 20166/92, Judgment (22 November 1995), paras 35–36; C.R. v. United Kingdom, 20190/92, Judgment (22 November 1995), paras 33–34.

4 Concluding Remarks: Did the STL Make a Contribution to the Progressive Development of International Criminal Law on Terrorism?

The STL Interlocutory Decision has been challenged on various grounds; the most controversial issue pertains to, as mentioned above, its consistency with respect to the legality principle,[40] especially with regard to the claim of the existence of a discrete crime of terrorism under customary international law.

The legality principle is indeed only satisfied if the offense is defined with sufficient specificity and clarity to serve as the basis for a criminal prosecution.[41] Given the customary nature of a large number of international criminal rules dealing with the scope and the definition of criminal offenses, the contribution of courts to giving precision to the law is of crucial importance at the international level. When dealing with crimes under customary international law, compliance with that principle therefore implies that an analysis of the existence and of the scope of the customary criminal offense should be very accurate. As already explained, the question of a proper and well-characterized definition is particularly delicate in the context of international terrorism. Accordingly any study of the norms dealing with this crime should be particularly careful and rigorous.[42]

The approach taken by the Appeals Chamber in assessing customary international law, although harshly criticized by some, appears to satisfy that condition.[43] The Appeals Chamber analyzed, at length, international and national sources dealing with terrorism; it verified the existence of some divergences in state practice as to the definition of the crime, and cast them aside with a reasoned judgment; it then proceeded to extrapolate the core shared elements of the notion

[40] Ambos 2011, p. 661 ff.; Gillet and Schuster 2011, p. 15 ff., stated: "While the list of the means is not exhaustive ('such as'), the means listed share a common characteristic and that is the fact that, once they are employed or activated, they cannot be controlled. (…) If one severs the link between the listed and the additional means, as in fact suggested by the Chamber, the latter ones can no longer be reasonably defined".

[41] ICTY: Prosecutor v. Mitar Vasiljević, IT-98-32-T, Trial Chamber, Judgment (29 November 2002), para 201 ("Once it is satisfied that a certain act or set of acts is indeed criminal under customary international law, the Trial Chamber must satisfy itself that this offense with which the accused is charged was defined with sufficient clarity under customary international law for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible").

[42] Treves 2006, p. 73.

[43] With regard to the Interlocutory Decision, supra n. 26, one of the elements pointed out as the most controversial one was actually the assessment of customary international law: in this regard it was argued that all the sources of custom relied upon by the Appeals Chamber—national legislation, judicial decisions, regional and international treaties and UN resolutions—were "misinterpreted, exaggerated, or erroneously applied". Saul 2011, p. 679.

in line with various precedents by the ICJ, the ICTY and other international courts, without excluding the fact that further developments in international law could lead to an agreement also on the ongoing controversial aspects. This way of proceeding, defined by scholars as the "lower common elements"[44] or the "line of best fit"[45] approach, is consistent with the principles enshrined by the practice of other international tribunals, which, in assessing customary international law,[46] have stated that uniformity in state practice is not required for the existence of the rule as such. The approach is also broadly consistent with respect for the principle of *nullum crimen sine lege*, which is satisfied if a judicial interpretation of the elements of a criminal offense, consistent with the development of practice on the matter, complies with the very essence of the crime.[47]

It should moreover be observed that, whether or not the claim of an existing international crime of terrorism is shared and although the need to refer to international law for the interpretation of national provisions could be arguable,[48] the reading of the Lebanese notion of terrorism given by the STL is consistent with respect for the legality principle, also at the national level. Such a reading actually gives a modern interpretation to the "means" element, which does not amount to adding a novel offense to the Lebanese Criminal Code or a new element to an existing crime. The Appeals Chamber simply applies a reasonable interpretation of relevant national provisions which takes into account significant legal developments within the international community affecting Lebanon.[49]

At the international level, the Appeals Chamber in any event made a very important and valuable contribution to the progressive development of the cus-

[44] Ventura 2011, p. 15.

[45] Gillet and Schuster 2011, p. 19.

[46] It was the ICJ in the Nicaragua merits judgment that first noted that uniformity in state practice is not needed for a rule to be established as customary (ICJ: Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment (27 June 1986), para 186; on the issue see Treves 2006, p. 76). This assumption does not cease to be valid even when dealing with international criminal law: divergences in state practice regarding some elements of the definition of crimes such as genocide or aggression did not prevent their existence under customary international law. With specific reference to the assessment of the existence of international crimes under customary international law it was also noted that "the urgency of coping with widespread sentiments of moral outrage regarding crimes committed in conflicts, such as those in Rwanda and Yugoslavia, (…) brought about the rapid formation of a customary set of rules concerning crimes committed in internal conflicts" (see Treves 2006, p. 74; Treves 2012, para 24; see also on this issue Condorelli 1999, p. 12).

[47] C.R. v. United Kingdom, supra n. 39; Tadić (2 October 1995), supra n. 24, paras 94–137; ICTY: Prosecutor v. Anto Furundžija, IT-95-17/1-T, Trial Chamber, Judgment (10 December 1998), para 183. See in this regard the consistent opinion of Shahabuddeen 2004, p. 1017.

[48] See Ambos 2011, p. 2; Kirsch and Oehmichen 2011, p. 5 ff.

[49] Interlocutory Decision, supra n. 26, para 145 ff.

tomary international law on terrorism (and more generally of international criminal law)[50,51] even if, in the end, the criticism that accompanied the decision—especially as regards the existence and the scope of such an international crime—leads to the conclusion that the stumbling-block is still to be overcome.

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[50] On the importance of the contribution made by the International Criminal Tribunals to the Development of Customary International Criminal Law see Ragni 2010, p. 268 ff. and more generally on the role of international courts as to the progressive development of international law see Treves 2005, 587 ff. and Treves 2007.

[51] As claimed by the Appeals Chamber itself: "This interpretation is not binding per se on courts other than the Special Tribunal for Lebanon, although it may of course be used as an interpretation of the applicable legal provisions in other cases where terrorism is charged" (Interlocutory Decision, supra n. 26, para 144).

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Part VIII
International Economic Law

Public Morals in International Trade: WTO Faces Censorship

Angelica Bonfanti

1 Introduction

On 19 January 2010, the World Trade Organization (WTO) Dispute Settlement Body (DSB) adopted the Appellate Body (AB)'s report on China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products.[1] The report - whose partial implementation by China was not carried out until the beginning of 2012—confirms most of the conclusions reached by the Panel on 12 January 2009.[2] The case concerns the alleged misconduct of China, in violation of the trading rights commitments under the Accession Protocol and the Accession Working Party Report, the market access provisions set by Article XVI General Agreement on Trade in Services (Marrakesh 15 April 1994; hereinafter GATS),[3] and the national treatment established in Articles XVII GATS and III.4 of the General Agreement on Tariffs and Trade

[1] WTO: China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/AB/R, Appellate Body Report (21 December 2009).

[2] WTO: China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/R, Panel Report (19 August 2009).

[3] Agreement Establishing the World Trade Organization, Annex 1B, entered into force on 1 January 1995.

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(Marrakesh 15 April 1994; hereinafter GATT).[4] The contested misconduct consists of having adopted and applied measures restricting the trading rights of foreign companies with respect to imported films for theatrical release, audiovisual home entertainment products, sound recordings, and publications, as well as measures that restrict market access for, or discriminate against, foreign suppliers of distribution services for publications, audiovisual services and sound recording distribution services. China justified those measures on the basis of Article XX.a GATT, i.e., the public morals exception. In so doing, it argued that the measures at stake were aimed at establishing "a content review mechanism and a system for selection of import entities" for specific types of goods that China considers to be "cultural goods", i.e., "vectors of cultural identity and values and, as such, justifying the implementation of specific, yet WTO compliant, regulatory measures".[5] Because "cultural goods are unique in that they may have a potentially serious impact on societal and individual morals", China argued that "imported cultural goods (…) may collide with standards of right and wrong conduct which are specific to China",[6] therefore falling into the field of application of Article XX.a GATT.

Despite the surprising literal mention of censorship just twice in more than 650 pages,[7] the Panel and the AB reports focus on such a mechanism and deal with its compatibility with the specific commitments undertaken by China under the WTO multilateral agreements. This paper aims at examining the reports at stake, paying particular attention to public morals, with the purpose of verifying how the WTO dispute settlement bodies apply this exception, which extent they reserve to it, and which practical effects they attain. More specifically, the paper aims to assess whether the implementation of WTO commitments may have the effect of removing the filters imposed by censorship, and whether, in so doing, the liberalization of international trade may contextually function as a means for protecting freedom of expression from obstacles imposed by States.

2 The Notion of "Public Morals" in WTO Law

Even if the three main WTO-covered agreements (GATT, GATS, TRIPS[8]) provide for a public morals exception clause, a common, precise, and unanimously accepted definition is not provided. According to the notion outlined by the Panel in the US—Gambling case, public morals concern the "standard of right and

[4] Agreement Establishing the World Trade Organization, Annex 1B, entered into force on 1 January 1995.

[5] China-Publications and Audiovisual Products, Panel Report, supra n. 2, para 4.89.

[6] Ibidem, para 7.712.

[7] Ibidem, paras 5.47 and 7.717.

[8] Agreement on Trade-Related Aspects of Intellectual Property (Marrakesh, 15 April 1994; hereinafter TRIPS), Agreement Establishing the World Trade Organization, Annex 1C, entered into force on 1 January 1995.

wrong conduct maintained by or on behalf of a community or nation".[9] This generic description does not expand upon the basic notion agreed by the GATT drafters. Indeed, the exception, incorporated in the GATT on the basis of a proposal by the United States (US), was originally designed to justify a series of trade restrictions that the US and other countries had in place at the time of the negotiations; such a notion was not further discussed during the preparatory works.[10]

Article XX.a's vagueness gives rise to practical issues when its application is claimed. First, it is doubtful whether it encompasses only values essential to the international community as a whole, or also those values considered as essential by the individual member States. Second, it does not explain whether it should be considered as an evolutionary notion.

These points have been partially dealt with by the WTO dispute settlement bodies in US—Gambling and China—Publications, representing the only WTO disputes, up to now, in the context of which the application of Article XX.a has been invoked. According to them, the notion is amorphous and evolutionary in nature. Its content "can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values".[11] This means that "'public morals' can vary from Member to Member",[12] given that it is up to each State to identify the values it considers so essential as to be encompassed in it.[13] Moreover, Members have the right to determine the appropriate level of protection, depending on their discretionary evaluation in the given situations, meaning that, if they deem it appropriate, they can also select very high or zero levels of protection.[14]

Public morals embody values the application of which cannot be neglected: namely, they encompass both those basic values prevailing across societies and those ethical norms accepted and deeply rooted in a particular culture. Given the importance of the values at stake, the principles composing public morals can be considered mandatory. Indeed, as noted by a prominent scholar, "[l]'indérogeabilité est un attribut conféré à une norme en raison de son caractère d'ordre public, qu'aucune volonté individuelle ne saurait transcender sans porter du même coup atteinte à la sécurité de l'ensemble du système et des intérêts collectifs de la société qu'il a à charge de réguler".[15] As far as China is concerned, censorship is addressed to prohibit publications whose content

[9] WTO: United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, Appellate Body Report (7 April 2005), para 6.465. See Delimatsis 2006, pp. 1059–1080; Delimatsis 2011, pp. 20–23.

[10] Wu 2008, pp. 217–218; Feddersen 1998, p. 75.

[11] US—Gambling, AB Report, supra n. 9, para 6.6461; WTO: United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R, Panel Report (10 November 2004), para 7.759.

[12] China-Publications and Audiovisual Products, Panel Report, supra n. 2, para 7.763.

[13] On this definition, see: Gonzalez 2006, p. 951; Pauwelyn 2008, pp. 14–15.

[14] China-Publications and Audiovisual Products, Panel Report, supra n. 2, para 7.819.

[15] Dupuy 2002, p. 282.

> (…) defies basic principles specified in the Constitution; (…) jeopardizes the solidarity, sovereignty and territorial integrity of the nation; (…) divulges national secrets, jeopardizes national security or injures the national glory and interests; (…) incites discrimination, undermines the solidarity of the nationalities and infringes upon customs and habits of the nationalities; (…) disturbs public order or destroys social stability; (…) propagates obscenity, gambling or violence, or instigates crimes; (…) jeopardizes social morality or fine cultural traditions of the nationalities.[16]

Moreover, it should be noted that, even if the content of public morals is subject to the discretionary evaluation of each Member State, it does not completely and exclusively depend on its unilateral definition. Indeed, if, on the one hand, it is up to each Member to enact restrictions under Article XX.a without the preliminary authorization of the other Members, on the other hand, according to the Panel in US—Gambling, in order to conclude that the claimed value is part of public morals, a systemic and comparative analysis thereof was carried out. After having verified that several other Members considered the prohibition of gambling essential, the Panel confirmed that trade restrictions on gambling could be encompassed in public morals.[17] Therefore it is submitted that the definition of public morals is not a completely unilateral process. Even if the WTO dispute settlement bodies have never adopted an explicit position on this point, it is clear that it is up to each Member State, in case of complaints by others, to demonstrate the importance of the value claimed as a basis for justifying the adopted trade restrictions.[18] Moreover, Members are allowed to define public morals under the essential condition of adopting the least trade-restrictive and non-discriminatory measure.[19] In so doing, they avoid hiding protectionist policies behind the justification of protecting public morals.

As far as China is concerned, the importance of the values at stake and their qualification as public morals were not under discussion, as the US did not contest the possibility for China to invoke Article XX.a to protect them. The Panel and the AB plainly concluded that the "protection of public morals is a highly important governmental interest" and "China has adopted a high level of protection of public morals within its territory".[20] In so doing the AB expressed an implicit evaluation of the adequacy of the protected values to be encompassed in public morals.

On the contrary, the WTO dispute settlement bodies did not give any relevance to the 'cultural exception' invoked by China. According to the respondent, censorship should be justified as a content review mechanism for cultural goods, "justifying the implementation of specific, yet WTO compliant, regulatory measures".[21] To this end China recalled the regime for the protection of cultural

[16] China-Publications and Audiovisual Products, Panel Report, supra n. 2, para 7.760, citing Publications Regulation, Articles 26 and 27.

[17] US—Gambling, AB Report, supra n. 9, paras 6.471–6.474.

[18] Wu 2008, pp. 231–233.

[19] Marwell 2006, p. 815 ff., especially p. 824 ff. Critical of this theory is Wu 2008, p. 240.

[20] China-Publications and Audiovisual Products, Panel Report, supra n. 2, para 7.863.

[21] Ibidem, para 4.89.

diversity established by the UNESCO Declaration[22] and the UNESCO Convention,[23] to which it is a contracting party.[24] However, the respondent did not enter into an in-depth analysis of this point, and the WTO bodies did not take the recall into consideration for determining the content of the public morals exception.[25] Indeed, even if the reference to the UNESCO Convention and Declaration could theoretically support the general proposition that the importation of cultural products could have a negative impact on public morals in China, the Panel focused its attention on the coordination clause under Article 20.2 of the UNESCO Convention, pursuant to which "Nothing in this Convention shall be interpreted as modifying the rights and obligations of the parties under any other treaties to which they are parties". In this light, it confirmed that "nothing in the text of the WTO Agreement provides an exception from WTO disciplines in terms of 'cultural goods', and China's Accession Protocol likewise contains no such exception".[26]

3 Censorship v. Freedom of Expression: On the Limits of the WTO Mandate

According to the Constitution of the People's Republic of China, "citizens of the PRC have freedom of speech, publication, assembly, association, procession and demonstration".[27] In 2007 Wen Jabao, the Prime Minister, stated: "science, democracy, rule of law, freedom and human rights are not unique to capitalism, but are values commonly pursued by mankind over a long period of history".[28] When censorship is at stake, as in the case at issue, the definition of public morals is strictly linked to the concurring protection of freedom of expression. Indeed, it is clear that the more censorship is expansive and intrusive, the less freedom of expression can be enjoyed. Therefore, in this field WTO commitments on free trade apparently follow the same direction as international instruments protecting freedom of expression. This means that the abolition (or limitation) of censorship as a trade-restrictive measure can lead, at the same time, to eliminating one of the main obstacles to the enjoyment of freedom of expression. As a conflict arises between

[22] UNESCO Universal Declaration on Cultural Diversity, adopted by the 31st session of the UNESCO General Conference (Paris, 2 November 2001).

[23] Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Paris, 20 October 2005), entered into force on 18 March 2007. See, among others: Ruiz Fabri 2009, p. 191; Ruiz Fabri 2007, p. 325.

[24] On the relationship between WTO law and cultural diversity protection see, among others: Graber 2006, pp. 553–574; Dahrendorf 2008, pp. 31–83; Germann forthcoming; Neuwirth 2010, p. 1333.

[25] Neuwirth 2010, pp. 1349–1354.

[26] China-Publications and Audiovisual Products, Panel Report, supra n. 2, para 4.207.

[27] Constitution of the People's Republic of China, Article 35.

[28] Reproduced in Ting 2011, p. 287.

censorship and trade liberalization, it can also be looked at as "a fresh intersection between a nation's sovereign right to adopt legislation to govern its people, and the obligations owing to trading partners under international trade law".[29]

As stated by a prominent scholar, "[i]f prying open market is a way to pry open minds, WTO obligations can be used to limit censorship".[30] However, it should be noted that WTO dispute settlement bodies serve only "to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".[31] Therefore, the WTO is not the proper forum for claiming human rights protection. While human rights disputes are adjudged by specialized international bodies, any positive effect arising with respect to freedom of expression before the WTO dispute settlement bodies can only be the incidental consequence of a decision on trade commitments.[32]

As noted by Professor Tullio Treves

> the autonomy (or self-contained character) of each international adjudicating body must, however, be seen in light of two elements of the law regulating each court or tribunal, be it its constitutive instruments, its rules of procedures or its jurisprudence. One such element is what we could call the "degree of openness" or, seen from the other side, the degree of "exclusiveness", of the court or tribunal in determining the scope of its jurisdiction in light of the existence of other courts, tribunals or similar bodies. (…) The other element consists in the rules concerning applicable law. By broadening the applicable law beyond the treaties that contain compromissory clauses granting jurisdiction to a court or tribunal they help in avoiding that compromissory clauses fragment the law applicable to a given dispute.[33]

In the light of these remarks, considered that the WTO dispute settlement bodies are competent to adjudicate disputes on the application and interpretation of the WTO-covered agreements, and that such treaties are not to be interpreted in "clinical isolation"[34] but in accordance with the customary rules of interpretation of public international law—to which the principles enshrined in the Vienna Convention on the Law of Treaties (VCLT)[35] shall be ascribed[36]—WTO bodies

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[29] Ting 2011, p. 286.

[30] Pauwelyn 2008, p. 122.

[31] Understanding on Rules and Procedures Governing the Settlement of Disputes (Marrakesh, 15 April 1994; hereinafter DSU), Agreement Establishing the World Trade Organization, Annex 2, entered into force on 1 January 1995, Article 3.2.

[32] Pauwelyn 2008, p. 122.

[33] Treves 2007, pp. 851–852.

[34] The expression was used by the Appellate Body in the case United States—Standards for Reformulated and Conventional Gasoline. See WTO: United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, Appellate Body Report (29 April 1996), para 14.

[35] Convention on the Law of Treaties (Vienna, 23 May 1969), entered into force on 27 January 1980.

[36] US—Reformulated Gasoline, supra n. 34, paras 16–17.

might take the international law provisions on human rights protection indirectly into account as "relevant rules of international law applicable in the relations between the parties" on the basis of Article 31.3.*c* VCLT.[37]

Several international instruments protect freedom of expression; among them are the Universal Declaration of Human Rights (UDHR),[38] the International Covenant on Civil and Political Rights (New York, 16 December 1966; hereinafter ICCPR),[39] and, at a regional level, the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; hereinafter ECHR),[40] as well as the American Convention on Human Rights (San José, 22 November 1969; hereinafter ACHR).[41] In any case, it must be emphasized that the freedom at stake is not an absolute right. As expressly stated by Article 19.3.b ICCPR, "It may (…) be subject to certain restrictions (…) provided by law and (…) necessary (…) for the protection of national security or of public order (*ordre public*), or of public health or morals".[42] Therefore international bodies are called upon to follow a balancing approach between fundamental rights and state restrictions, and to apply the margin of appreciation doctrine. Notwithstanding the treaty law attribution to contracting parties of the possibility to adopt censorship in those exceptional circumstances when it is necessary to defend essential values, and among them public morals, the correspondent case law developed by international bodies shows a trend in favor of a restrictive interpretation and a reluctance to justify any restriction of freedom of expression.[43]

When, as in the present case, China is involved, two additional factors must be underscored. First, China signed the ICCPR on 5 October 1998, but never ratified it. Second, according to the definition provided by the Panel in EC—Biotech, "it makes sense to interpret Article 31.3.c as requiring consideration of those rules of international law which are applicable in the relations between all parties to the treaty which is being interpreted".[44] Therefore, should freedom of expression be claimed as a "rule applicable in the relations between the parties" in a dispute before the WTO dispute settlement bodies, given the lack of ratification of ICCPR

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[37] On the relationship between WTO agreements and international law, see Marceau 2006, p. 5; Marceau 2001, p. 1081; Pauwelyn 2003, *passim*; Pauwelyn 2005, p. 1405; Van Damme 2010, pp. 619; Van Damme, 2006, p. 21.

[38] Universal Declaration of Human Rights (10 December 1948).

[39] Entered into force on 23 March 1976.

[40] Entered into force on 3 September 1953, as amended by Protocol No. 11 (Strasbourg, 11 May 1994), entered into force on 1 November 1998 and Protocol No. 14 (Strasbourg, 13 May 2004), entered into force on 1 June 2010, Article 10.

[41] Entered into force on 18 July 1978, Article 13.

[42] In the same direction, Article 10.2 ECHR.

[43] See Ovey and White 2006, p. 317; Harris et al. 2009, p. 443.

[44] WTO: European Communities—Measures Affecting the Approval and Marketing of Biotech Products WT/DS291/R, WT/DS292/R, WT/DS293/R, Panel Report (29 September 2006), para 7.70. On its interpretation, Young 2007, pp. 914–15; McGrady 2008, p. 614; Thomison 2007, p. 287.

on the part of China, they could be called to assess whether it has acquired the status of customary law. However, in the light of their past case law, it is regrettably foreseeable that the WTO bodies would avoid expressing a clear and definitive assessment of this point.[45]

Finally, as far as China—Publications is concerned, it is submitted that, had the values protected through censorship been contested by the respondent as not ascribable to public morals, the WTO bodies would not necessarily have reached a better result. Indeed, as their mandate excludes the carrying out of a balancing approach between fundamental rights and state protection of essential values,[46] their reports could have been favorable to the former only to the extent that the protection of fundamental rights followed the same direction as trade liberalization. With specific reference to China—Publications, this coincidence, occurring in theory, is void of any significance in practice. Indeed, as it will be demonstrated below, the measure indicated to China as alternative to and less trade-restrictive than censorship might not necessarily ensure a higher level of protection for freedom of expression.

4 The Application of the Necessity Test Under Article XX.a

In China—Publications, both the Panel and the AB concluded that a public morals exception could not be applied, due to the lack of necessity of most of the measures implementing censorship under Chinese law and the existence of less trade-restrictive measures to be applied instead of them.

According to the WTO case law, the application of Article XX exceptions requires a two-tiered test. After confirming the possibility of justifying the contested measures under one of the specific typologies listed by Article XX, the dispute settlement bodies must verify their compliance with the conditions set forth by Article XX *chapeau*. The present case never reached this latter phase of the analysis, given that both the Panel and the AB excluded that the contested measures comply with the conditions established under letter *a*.[47] Indeed, as recalled above, according to the Panel, China did not demonstrate that most of the measures were necessary to protect public morals; as for the measures that the Panel concluded to be necessary for the purpose under Article XX.a, its assessment was reverted by the AB. Therefore, in the end, all the measures claimed by the US

[45] The reference is to the attitude shown towards the status of the precautionary principle, in EC—Biotech, supra n. 44, para 7.88; WTO: European Communities—Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, Appellate Body Report (16 January 1998), paras 123–124.

[46] Delimatsis 2011, p. 31.

[47] Critical on the lack of assessment under the chapeau requirements, is Wu 2010, p. 431; Delimatsis 2011, pp. 30–31.

as contrary to WTO commitments and alleged by China to be justifiable as public morals exceptions were considered unlawful by the WTO bodies.[48]

The necessity test under which the censorship measures at stake were condemned was carried out in the framework of the coherent approach mainly developed by the WTO in three previous cases, i.e., the US—Gambling, the Brazil—Retreated Tires,[49] and the Korea—Beef[50] cases. Rejecting the complaint advanced on appeal by the US on this point, the AB pointed out that the necessity test is a "sequential process" and a "weighting and balancing of factors".[51] According to the mentioned cases—only the first of which focused on public morals exceptions (even if under Article XIV.*a* GATS), while the others dealt with letters *b* and *d* of the GATT general exception provision—"the process begins with an assessment of the 'relative importance' of the interests or values furthered by the challenged measure"[52]; then, "having ascertained the importance of the provision at stake, a panel should [...] turn to the other factors that are to be weighed and balanced"[53]; and finally, a "comparison between the challenged measure and possible alternatives should [...] be undertaken".[54] As noted in US—Gambling, among the factors to be weighed and balanced, the bodies can envisage the contribution of the measure to the realization of the end pursued, its restrictive effects on international trade, and additional factors specific to the cases at stake.[55]

In China—Publications the importance of the values at issue was not under discussion; more problematic was the assessment of the second and the third steps. As for the second, US complaints focused on the preventive selection, on the part of China, of only those import entities complying with suitable organization, personnel qualification, and state plan criteria, and the corresponding exclusion of foreign-invested and privately-owned enterprises. China argued that the selection of import entities was a necessary means to protect public morals within the country according to the meaning of Article XX.a GATT. Given the high level of protection pursued, China contended that its mechanisms for selecting import entities not only contributed to, but were also essential for achieving the objectives of avoiding the importation into China of reading materials and finished audiovisual products with inappropriate content.[56] According to the US, however, China did not demonstrate a nexus between prohibiting all foreign importers and all

[48] Roessler (2011), pp. 119–131.

[49] WTO: Brazil—Measures Affecting Imports of Retreated Tires, WT/DS332/AB/R, Appellate Body Report (3 December 2007).

[50] WTO: Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, WT/DS169/AB/R, Appellate Body Report (11 December 2000).

[51] China-Publications and Audiovisual Products, AB Report, supra n. 1, para 242.

[52] US—Gambling, AB Report, supra n. 49, para 306; Brazil—Retreated Tires, supra n. 49, para 143.

[53] US—Gambling, AB Report, supra n. 49 para 306.

[54] Ibidem, para 307.

[55] Ibidem, paras 307–308; Korea—Beef, supra n. 50, para 166.

[56] China-Publications and Audiovisual Products, Panel Report, supra n. 2, paras 8.794–8.796.

privately owned Chinese importers from importing the products at issue and achieving its content-review goals.[57]

Coming to the second step of the necessity test, the AB, reversing the Panel's finding, concluded that State ownership, the exclusion of foreign-invested enterprises and State plan requirements could not be characterized as necessary under XXa,[58] Namely the AB concluded that China did not establish a connection between the exclusive ownership of the State in the equity of an import entity and that entity's contribution to the protection of public morals in China.[59] As for the State plan, the AB found that the evidence before the Panel did not prove that any State plan would allow the public authority to devote more time to conduct its annual inspections on the entities' compliance with the content review requirements, and so contribute to the protection of public morals.[60] As for the discretionary approach provided by Article 41 of the Publications Regulation and the exclusion of enterprises other than those that are wholly State-owned, the Panel had already refused to consider them as measures to be followed necessarily to protect public morals in China.[61]

It must be noted that, in conducting this assessment, the WTO bodies never took into consideration the obstacles to freedom of expression as elements to be weighed, nor as factors to be balanced against the contribution of censorship to the protection of public morals. However, a systemic analysis of the effects arising from the measures at stake might have justified an incidental evaluation of the obstacles to freedom of expression also as elements participating in the public morals content. This conclusion can be agreed with, if we assume that, according to the WTO case law, it is up to each State to determine the appropriate level of protection, including very high levels of protection and zero levels of tolerance; in this light, it would be reasonable to take into account also those other values essential to the international community, which may themselves contribute to the notion of public morals, as balancing factors against the other values encompassed therein.

Finally, with respect to the third step of the analysis, both the Panel and the AB confirmed that reasonably available alternative measures existed, which were not theoretical in nature and would not impose an excessive burden on China. In indicating such measures as being reasonably available, the bodies followed the case law developed in Korea—Beef[62] ad EC—Asbestos,[63] and rejected the complaints advanced by China. The reports state that even if the measures imply some change or administrative costs, in order to demonstrate that alternative measures are

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[57] Ibidem, para 8.809.

[58] China-Publications and Audiovisual Products, AB Report, supra n. 1, paras 255–299.

[59] Ibidem, para 268.

[60] Ibidem, para 296.

[61] China-Publications and Audiovisual Products, Panel Report, supra n. 2, paras 7.737–7.868.

[62] Korea—Beef, supra n. 50, para 152.

[63] WTO: European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, Appellate Body Report (5 April 2001), para 164.

not reasonably available, the respondent must prove that they would impose an undue burden.[64] Since China did not substantiate with evidence "the likely nature and magnitude of the claimed additional costs"[65] linked to the proposed measure, the attribution of sole responsibility to the government for the task of conducting the content review must still be considered reasonably available.[66]

5 Concluding Remarks

All this said, some criticism must be addressed to the procedural measures identified as alternative to the contested censorship mechanisms, i.e., the replacement of the limitations at stake with the attribution to the Chinese government of the sole responsibility for conducting content review. Even if the adoption of the report was considered a victory by the US, the effects of the alternative measures on free trade cannot be easily predicted.[67] Should the procedural review be adequate to ensure the protection of public morals without restricting free trade, it is nonetheless doubtful whether it would definitively favor freedom of expression. Indeed, a similar result would be possible only with the less democracy-impairing measures, while it seems that the State-centric content review might not necessarily lead to a more democratic society and to a more open-minded reading market. Namely, it cannot be excluded that, with the centralization of pre-importation review in the hands of the State, censorship might become even more restrictive than under the previous, criticized, system.[68]

From a practical point of view, the implementation of the alternative measures requires, in any case, a far-reaching administrative change in China. In February 2012 China reported that it had completed amendments to most measures and signed a Memorandum of Understanding with the US regarding measures concerning films. The US said that it would continue to monitor the situation. However, the delay in bringing measures into compliance with the AB report represents just one of the recent difficulties arising with China since its entry into the WTO. In the past 11 years, since its accession, China has been the respondent in more than 20 cases brought within the WTO. New conflicts, in particular in the IP and communication sectors,[69] are still expanding. It is foreseeable that the more

[64] China-Publications and Audiovisual Products, AB Report, supra n. 1, para 327.

[65] Ibidem, para 328.

[66] Ibidem, para 328.

[67] Qin 2011, p. 288; Conconi and Pauwelyn 2011, p. 107.

[68] Delimatsis 2011, pp. 30–31; Ting 2011, p. 285 ff.; Qin 2011, 288.

[69] See Liu 2011, p. 1200; Santoro 2009, pp. 71–100. The reference is to the recent China-Google conflict, which follows the WTO dispute in China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362/R, Panel Report (26 January 2009).

the role of China will grow on the international scene, the more it will be involved in future WTO case law.

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The WTO Dispute Settlement Understanding Review: What Future for the Appellate Stage?

Marcella Distefano

1 Introductory Remarks

The negotiations on the review of and amendments to the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (Marrakesh, 15 April 1994; hereinafter DSU),[1] which commenced at the 2001 Doha Conference, have now reached a crucial point.[2]

Initially based on proposals made by individual Members or groups of Members and, at a later stage, on the Chairman's Text of 2003, the negotiations are now evolving on the basis of the July 2008 Legal Draft.[3]

This letter covers many issues, such as third party rights, panel composition, remand authority, mutually agreed solutions, strictly confidential information, sequencing, post-retaliation, transparency and *amicus curiae* briefs, timeframes, developing country interests, including special and differential treatment, flexibility and Member control and effective compliance.

[1] Agreement Establishing the World Trade Organization, Annex 2, entered into force on 1 January 1995.

[2] The opinions expressed by authors have been fluctuating between positive judgements and doubts about the real successful outcome of the negotiations: hence Lacarte 2002, p. 137. It is interesting to note the opinion that distinguishes between the political and the legal dimension of the negotiations: in fact, the negotiators tend to emphasise the efficiency of the system and its credibility, while legal experts express their ideas on the creation of a real "judicial system" (Ehlermann 2002, p. 140).

[3] See Special Session of the Dispute Settlement Body. Report by the Chairman, Ambassador Ronald Saborio Soto to the Trade Negotiations Committee, doc. TN/DS/25 (21 April 2011) (hereinafter, TN/DS/25). The negotiations on the DSU Special Session may be downloaded from the WTO website in the document series TN/DS/W/1 et seq.

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Some of these proposals address the relationship among the different organs vested with the resolution of disputes and point towards a more influential role for the Dispute Settlement Body (DSB), whose powers seem to have progressively weakened *vis-à-vis* those of the Appellate Body (AB).[4]

In this context, both the amendments proposed and an additional guidance for WTO Adjudicative Bodies made by the DSB call for attention, and pose some legal questions and raise doubts about the future of the WTO dispute settlement system.

2 DSU Review of the Appeal Stage

Although the creation of the AB review in 1995 was one of the major changes in the new WTO dispute settlement system, Members have not welcomed its original and innovative role. Since its introduction, this body has improved the credibility and predictability of the system through scrupulous and legally qualified interpretation.

The AB authority, developed over time through the meticulous use of customary rules on treaty interpretation, has resulted in lively arguments among the Member States. In particular, they have criticised the excessive freedom of the AB in dealing with aspects not expressly disciplined in the WTO Agreements or in the DSU, especially with non-trade issues.[5]

On examining the work in progress at Geneva, there emerges the will to limit the law-making attitude of the AB and its relative procedure, as the numerous proposals for amendments to Article 17 eloquently testify.

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[4] See Distefano 2001, pp. 49–58. The reconstruction of the AB functions in the WTO dispute settlement system and, more generally, the analysis of the AB reports in this book owe much to Professor Treves' teachings. My sincere gratitude to him is indissolubly tied to the great humanity he showed me in a key moment of my personal and professional life. *Ximbhalaijè*, Prof. Treves!

[5] The problem of dealing with non-trade issues is one of the crucial questions. On this issue the AB has widened its authority, almost acting as a consultative body. Some States, mostly developing countries, have proposed submitting to the International Court of Justice a request for an advisory opinion with regard to "disputes raising issues that exceed the trade competence of the WTO in order to promote international legal harmony": see Negotiations on the Dispute Settlement Understanding. Proposal by the African Group, doc. TN/DS/W/15 (25 September 2002). The Jordan communication (Jordan's Contributions Towards the Improvement and Clarification of the WTO Dispute Settlement Understanding, doc. TN/DS/W/43 (28 January 2003)). Proposed that the panels, AB and/or DSB be granted the power to "seek" advisory opinions from the ICJ on matters of international law. The reference to an independent organ, such as the ICJ, would attest to the impartiality of the WTO in the resolution of disputes. The advisory opinion should be considered as an instrument of interpretation that aims at assisting the relevant bodies in recommending or adopting a report on a certain dispute. The said opinion should be subject to adoption by the Ministerial Conference or the General Council under Article IX para 2 of the WTO Agreement. On this subject see Treves 2000, p. 215.

First of all, they want to attribute major "institutional" relief to the Members' participation as third parties.[6] In fact, under the proposal it would no longer be necessary to prove a substantial interest in order to participate as a third party, but it would be sufficient to show a generic interest in the procedure. Besides, the possibility to take part in all substantive meetings of the AB procedure would be increased, as well as access to any documents or other information submitted to the AB. Another idea reflected in the July 2008 Legal Draft is to give more importance to legal arguments developed by third parties: in particular, those arguments should be reflected in the AB final report.

Such modifications entail some inconveniences for the functioning of the DSU system in itself, whose primary aim is to secure a positive solution to a dispute for the parties involved. In fact, the participation of the third party should not be allowed to increase the complexity of the dispute process. In the interests of judicial economy, the AB should not be bound to take into consideration the views and arguments presented by the third party, but should only address those claims relevant to resolving the matter at issue in the dispute.[7]

Second, another proposal concerns the introduction of an interim review stage, similar to that existing for the panel procedure. An interim report would be produced and circulated among parties and third parties, containing a description of, inter alia, findings and conclusions of the AB.[8] This proposal, which does not

[6] Several communications stress the need to guarantee this participation at all stages of the procedure. The proposal presented by the Government of Costa Rica stands out because of its completeness (Proposal by Costa Rica—Third Party Rights, doc. TN/DS/W/12/Rev.1 (6 March 2003)). This proposal foresees a general reform, with the following aims: to strengthen the rights of third parties; to grant an effective application to Article 10.1 of the DSU, to build on past GATT/WTO practice and public international law in establishing the rights of third parties; and to achieve a better balance between the rights of the parties and those of the third parties in the dispute settlement system. This proposal has been fully endorsed by the European Union, that only added a possibility to guarantee the confidentiality of certain information in single cases. The modifications proposed regarded both Article 10 and Article 17 of the DSU. The latter lays down that "Each third party, and any other Member having notified to the Appellate Body, the DSB and each party to the dispute, its interest to do so no later than 5 days after the date of circulation of the notification of appeal referred to in paragraph 5(a), may participate as a third participant in a proceeding before the Appellate Body. Each third participant shall have an opportunity to be heard by and to make a written submission to the Appellate Body. Each third participant shall give its submission to each party to the dispute and to every other third participant. The Appellate Body shall reflect the submissions of third participants in its report. The Appellate Body shall consider only the submissions of parties and third participants, and shall not accept or consider any submission beyond those submitted by the parties and the third participants".

[7] On the other hand, if a large number of Members exercise their right to become third parties and submit both written and oral pleadings the volume of cases will be enormously increased.

[8] See Article 17.5.b of the 2008 Legal Draft: "Following the consideration of submissions and oral arguments, the Appellate Body shall issue an interim report to the parties to the dispute, including both the descriptive sections and the Appellate Body's findings and conclusions".

appear to be very practical and useful considering the strict time frame of the appeal procedure, seems only to reflect the wish of Member States to monitor in depth the activity of the AB.[9]

The third and more important proposed amendment of Article 17 concerns the object of the appeal stage. Establishing the appropriate content of the appeal review has been the object of several decisions. The main difficulty lies in the distinction between factual and legal aspects. The AB noted that "in certain appeals the reversal of a panel's finding on a legal issue require us to make a finding on a legal issue which was not addressed by the panel".[10] In the *Shrimps* case, the AB adds that "fortunately we believe that the facts on the record of the panel proceedings permit us to undertake the completion of the analysis required to resolve this dispute". Conversely, in the *Hormones* case, the AB clarified the boundaries within which its mandate works:

> the determination of whether or not a certain event did occur in time and space is typically a question of fact; (…) Determination of the credibility and weight properly to be ascribed to (…) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the Trier of facts. The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question. Whether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is also a legal question which, if properly raised on appeal, would fall within the scope of appellate review.[11]

Following the lively Member reactions, in order to eliminate this kind of problem the AB approved some amendments to its *Working Procedures*. The new Article 20 lays down that a notice of appeal

> shall include a brief statement of the nature of the appeal, including: identification of the alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel; a list of the legal provision(s) of the covered agreements that the

[9] The proposal to introduce the possibility for the parties to request the suspension of the procedure in Article 17 seems to move in the same direction.

[10] See WTO: European Communities—Measures Affecting the Importation of Certain Poultry Products, WT/AB/DS70/AB/R, Appellate Body Report (13 July 1998), para 156. See also WTO: United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, Appellate Body Report (12 October 1998), paras 123–124, which refers to other similar cases: "in *Canada—Periodicals* having reversed the panel's findings on the issue of 'like products' under the first sentence of Article III:2 of the GATT 1994, we examined the consistency of the measure with the second sentence of Article III:2. (…) In *United* States—*Gasoline*, having reversed the panel's findings on the first part of Article XX(g) of the GATT 1994, we completed the analysis of the terms of Article XX(g), and then examined the application of the measure at issue in that case under the chapeau of Article XX".

[11] See WTO: European Communities—Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, Appellate Body Report (16 January 1998), para 132; Canada—Measures Affecting the Export of Civilian Aircraft, WT/DS79/AB/R, Appellate Body Report (2 August 1999), para 211; United States—Tax Treatment for "Foreign Sales Corporations", WT/DS108/AB/R, Appellate Body Report (20 March 2000), paras 102–103.

> panel is alleged to have erred in interpreting or applying; and without prejudice to the ability of the appellant to refer to other paragraphs of the panel report in the context of its appeal, an indicative list of the paragraphs of the panel report containing the alleged errors.[12]

Notwithstanding these clarifications, the July 2008 Legal Draft contains attentive amendments of this aspect, and the new paragraph 12 reads as follows: "Where the Appellate Body finds that there is not a sufficient factual basis to complete the analysis with respect to certain issues, it shall in its report provide a detailed description of the types of findings that are required to complete the analysis with respect to those issues". On the other hand, "Where the Appellate Body has identified certain issues according to paragraph 12 (b) of Article 17, a complaining party [the party who advanced the particular claim or defence to which the unresolved issue relates] may refer such issues to the panel".[13]

This new phase of the procedure, known as the *Referral Procedure*, does not represent a completely new proposal, above all in legal doctrine.[14] What is striking, compared to other jurisdictional systems which use similar mechanisms, is that the request should come from one of the parties and not from the AB.[15] The AB (and the DSB) could have a simple supervision power concerning this procedure whose boundaries are not well defined and shared.[16]

Lastly, the interference by the Members is evident if we consider the proposed amendment to Article 17 whereby the AB shall not include in its report circulated to the Members any finding, together with its basic rationale that the parties to the dispute have agreed is not to be included.

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[12] See Working Procedures for the Appellate Review, doc. WT/AB/WP/6* (16 August 2010), p. 9.

[13] See TN/DS/25, p. A-11.

[14] In the past similar considerations were made by Petersmann 1997, pp. 190–191 and Palmeter 1998, pp. 41–44. Other legal experts pointed out a number of collateral issues from which such a modification could derive, because the panel would have to be given the authority to reopen cases, hear new evidence and arguments and review its original decisions in the light of the findings of the AB (Steger 2002, p. 63). This would entail a further delay for the conclusion of a dispute, creating uncertainty as to its outcome.

[15] See the new Article 17bis, paras 2–4: "The referring party shall make the referral before the adoption of the Appellate Body report. It shall do so in writing and shall identify the specific issues it seeks to have addressed by the panel as well as the relevant paragraphs in the Appellate Body report. The referring party shall address the referral to the panel and shall notify the DSB thereof. The panel may examine only those issues with respect to which the Appellate Body has expressly found that there is not a sufficient factual basis to complete the analysis, and that the referring party has identified in accordance with paragraph 2".

[16] See Article 17 bis, para 4: "The panel shall make such findings and recommendations, in accordance with the guidance description provided by the Appellate Body pursuant to paragraph 12 of Article 17, as will assist the DSB in making its rulings and recommendations".

3 Additional Guidance for the WTO Adjudicative Bodies

To complete the puzzle, while there may be further doubts as to the will to restrict the role of the AB, we have to consider some *DSB Proposals of Decision* on issues which have raised apprehension among Members, such as the *Protection of Strictly Confidential Information*, *Flexibility and Member Control*, *Working Practices Concerning Panel Composition* and, as far as it directly concerns this analysis, Additional Guidance for the WTO Adjudicative Bodies.

This Guidance should introduce some parameters concerning the use of public international law, the interpretative approach in using WTO dispute settlement and the determination of the measure under review. Hence, it is subdivided into three parts.

The first set of indications is aimed at limiting the possibility to refer to other international legal sources: while other sources of international law might properly play a role in WTO dispute settlement *fora*, Members stressed that it is not the function of WTO dispute settlement to adjudicate rights and obligations beyond those in the covered agreement.

On the other hand, although "each WTO adjudicative body is tasked with managing its own proceedings and may wish to consider how other adjudicative bodies have approached similar procedural issues, including other international adjudicative bodies, such consideration is not a question of interpreting a covered agreement in accordance with public international law".[17]

In respect of this first set of parameters, it is not clear how customary rules of international law and of non-WTO sources of public international law more generally are relevant to WTO dispute settlement. The famous consideration of the AB in *United States—Gasoline*, "The WTO law is not to be read in clinical isolation from public international law", represented a crucial transition and inaugurated a new phase in the case law concerning the multilateral trade system, but this seems to have been forgotten.

The second series of parameters, more drastically, cover how to interpret the WTO agreements in light of the general rule of interpretation reflected in Articles 31–33 of the Vienna Convention on the Law of Treaties (Vienna, 22 May 1969).[18]

The Proposal stressed the ambiguous but "constructive" nature of the WTO Agreements, specifying that sometimes ambiguity is deliberate in order to promote further negotiations.[19] However,

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[17] See TN/DS/25, p. A-28.

[18] Entered into force on 27 January 1980.

[19] "In some circumstances, reaching agreement on the terms of the covered agreements may have necessitated the use of constructive ambiguity in a provision of a covered agreement where the negotiators leave unresolved particular issues by agreeing on language that does not resolve the issue and is capable of more than one interpretation. Constructive ambiguity can serve as a placeholder marking an area where negotiators accept that it may be appropriate to agree on disciplines but where further negotiation is necessary before those disciplines can be specified" (TN/DS/25, cit., p. A-29).

> WTO adjudicative bodies are not called to determine if ambiguity is deliberate. Ambiguity is ascertained from an examination of the text. WTO adjudicative bodies will determine whether the meaning of a text is ambiguous after applying the customary rules of interpretation and in light of the evidence and argument presented by the parties to the dispute. There is no separate requirement to establish the intent behind or reason for the ambiguity.

However, what does the reference to the "constructive" ambiguity of the WTO Agreements exactly mean? How might a form of ambiguity be distinguished from mere imprecision? If any ambiguity emerges, how might the WTO bodies complete the interpretation of the relevant provision?

As an example, let us consider the general exceptions contained in Article XX of the GATT 1994. *Il s'agit*, as we know, as indefinite concepts: "public morals", "human, animal or plant life and health", the "conservation of exhaustible natural resources", etc. The wide and flexible sense of these concepts answers a precise negotiated choice which needs to be adapted on a case-by-case basis:

> WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind.[20]

The AB case law—issued from the aforementioned general statement—containing extensive cross-references to other international legal decisions represented a sign of the evolution of the whole WTO system. Member intervention risks cancelling this practice in the name of some overblown concerns.[21]

Finally, the third group of parameters concerns the definition of a measure under review in WTO Dispute Settlement. The WTO Dispute Settlement Bodies should respect the fact that findings need to relate to "measures affecting the operation of any covered agreement" taken by a Member. Such bodies are not permitted to render authoritative interpretations of the covered agreements.

4 Towards Involution?

Considered as a whole, these proposals seem to project an involution of the system rather than an improvement. The WTO Dispute Settlement mechanism constitutes, in fact, a precious component of the new multilateral trading system, and more

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[20] See WTO: Japan—Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Appellate Body Report (4 October 1996), p. 31. See McRae 2004, p. 6, who considered many of the criticisms "as micro-concerns focused on the consequences of the interpretation of a particular agreements".

[21] See TN/DS/25, cit., p. A-30: "there are at least two ways in which 'gaps' in a covered agreement could be unacceptably filled, other than through negotiation. First would be to read into the text of a covered agreement an obligation or right that is not present in the text, for example by extrapolating from a different provision. Second, would be to resolve ambiguity in the text of a covered agreement in a manner that supplements or diminishes rights and obligations under the covered agreement".

generally, of the international economic law landscape. While the DSU practice has revealed a certain number of flaws, the mechanism has worked well.

In this context, AB "judicial activism" has opened the doors of the WTO system to international law in order to fill the interpretative gap left by WTO law; then to apply precise procedural principles, such as due process, the burden of proof, estoppel, good faith and others; then to confront with new issues, for example, the participation of civil society, like many other international tribunals.[22]

This has avoided the implosion of the system in itself, as a "self-contained regime"; it has provided the role which the WTO system can play in the evolution of international law[23] and it has contributed to refuelling that diversity of judicial opinion which represents, at best, a changing international legal order. This is all aimed at implementing its principal mission, namely to resolve disputes between Member States.[24]

The indications of the DSB Additional Guide risk provoking major inconveniences. Looking to the future, it would be better to assuage the concerns and to avoid the "misrepresentation" of the WTO dispute settlement system. It should be possible to improve the DSU system with a few but important changes concerning the implementation stage and the position of developing countries.[25]

As to implementation issues, a large number of delegations have stressed that the key objective of the dispute settlement mechanism remains that of securing the withdrawal of national measures which are inconsistent with WTO law. The early functioning of the complex implementation mechanism of the WTO dispute settlement decisions and recommendations has underlined the necessity to apply certain rules and principles: only by ensuring predictability and legal certainty in this phase is it possible to effectively induce compliance. In this perspective, the adoption of an ad hoc regulation on implementation review and the improvement of the retaliation regime have been proposed.[26]

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[22] See Distefano 2005, pp. 261–270, at 267.

[23] See McRae 1996, p. 260.

[24] See Treves 2007, p. 823, at 840–841.

[25] These countries emphasised their enormous difficulties in actively participating in the DSU proceedings, because of the lack of adequate legal support and the huge costs of the procedure which are not easily borne by such countries.

[26] The "sequencing issue" foreseen in the new Articles 21 and 22 of the DSU concerns the chronological order of the implementation stage. The clarification of the relationship between Article 21.5 and Article 22 is functional to the principle expressed by article 23 of the DSU. This issue was emphasised in the European Communities—Regime for the Importation, Sale and Distribution of Bananas. Recourse to Article 21.5 by the European Communities, WT/DS27/RW/EEC, Panel Report (12 April 1999), para 2.19: "if it could be unilaterally determined by any Member, outside a procedure under Article 21.5, that another WTO Member had incorrectly implemented the recommendations and rulings of the DSB in an earlier dispute, and if this determination were considered to be legally relevant within the WTO system, this would be paramount to a presumption of inconsistency. Such a presumption would mean, in practical terms, that an implementing measure that did not satisfy the original complainant could lead to a

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(Footnote 26 continued)
threat of immediate retaliation through the withdrawal of concessions or other obligations". For more details, see Distefano 2000, p. 595.

Reforms to the Global Governance Model in Times of Crisis

Marco Frigessi di Rattalma

1 Has the Global Economic and Financial Crisis Bolstered International Cooperation in Dealing with Global Governance?

The Chinese word for "crisis" is made up of two characters that represent "danger" and "opportunity". At times such as these, one might legitimately wonder if what we are experiencing might be a "good" crisis, in the sense that it can offer States and international organisations that want to take advantage of the opportunity the ability to review their value chain and adapt it to the new landscape, while reinforcing cooperation and getting past egocentric and country-specific thinking. I intend to pose the question of whether the current crisis has led to a strengthening of international cooperation in the global economic governance model, namely the authorities and the mechanisms put in place by States, international organisations and private entities towards regulation and the related control of the global economy. Since we are in the tail end of the global economic crisis caused by the previous global financial crisis, the assessment which we will attempt to give is naturally only provisional, as well as inevitably subjective.

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2 The Economic Crisis Has Led the G-8 to Transform into the G-20

An early effect of the global economic crisis was to reshape the top tier of the global economic governance. The international community, which is expressed in its main international governing body—the United Nations—is founded on the principle of the sovereign equality of its Member States. Yet, in contradiction to this premise, the Charter of the United Nations, signed in San Francisco in 1945, awarded a permanent seat and veto rights in the Security Council to the main victorious powers of World War II. As a result, a few nations have historically been given greater importance by reason of their superior degree of political, economical, technological and military capability.[1]

This is the backdrop that also shapes the summits between State and Government leaders and the ministerial summits, which since 1975 have been known as the G-7 (comprises the United States, Germany, Japan, France, Great Britain, Canada and Italy) and later since 1998 as the G-8 (with the addition of Russia as a member). This elite group made up a forum with leadership aspirations on nearly all the main discussions on the international political agenda.

To be sure, in their early stages, these summits had primarily focused discussion on technical, economical and currency matters. However, as time progressed the meetings assumed the quality of a forum that attempted to provide answers to the key problems affecting the international community. If we were to draw an outline, we would see how the agenda of the G-7 or G-8 from the Rambouillet talks in 1975–1982 turned its attention from how to stimulate the world economy and how to limit inflation to take a more marked political direction, gradually looking at the response to the geopolitical earthquake that followed the end of the Cold War, the governance of globalisation, the drafting of a strategy to link globalisation and development and the fight against international terrorism and its causes.

These summits are not due to the phenomenon of international organisation in the proper sense, since these are not founded on an international agreement and are not organs of an autonomous and independent body, separate from States, and able to adopt decisions on their own. More simply, it deals with information exchange between States, albeit carefully prepared and regulated, and gives life to steering actions that are not legally binding. Because these actions are founded by heads of State and government leaders, they assume a clear political value and direction especially with government bodies which take part in the negotiations. If generally shared among members, it can take on persuasive effectiveness for other States and can give rise to sound national and international measures.[2]

[1] See also Treves 2005, p. 121 ff.

[2] Malaguti 2003, p. 120.

The G-20 was formed in 1999 to work alongside the G-8. This expanded group is made up of the finance ministers and central bank governors of the G-8 member nations and, in addition, Argentina, Australia, Brazil, China, India, Indonesia, Mexico, Saudi Arabia, South Africa, South Korea, Turkey and the European Union. However, the proposal to transform the G-20 into an L-20 (Leaders 20) or into an annual summit of the political and government leaders, thus superseding the formation of the G-8, had been largely rejected by the G-8.

As the crisis exploded, the world has witnessed the passage of responsibilities from the G-8 to the G-20. In fact, after a preliminary meeting between national heads and government leaders in Washington on 5 November 2008, the G-8 meeting in Pittsburgh on 24 and 25 September 2009 passed a resolution that the G-20 should be the primary forum for global economic cooperation.

Accounting for 80 % of the world gross product and representing the near entirety of the players in the global economy, the G-20 stands as the main centre for global decisions on the issue of the economy.

The first major effect of the crisis seems to be that it hastened the transformation of the G-8 into the G-20. While it is possible that there are overlapping areas of competence between the two international *fora*, which clearly arise from the moment of transition and its emergence, the G-20 has already demonstrated that its sphere of influence is not confined exclusively to economical policy, indicating as future areas of intervention energy security and food safety, climate change, human rights, the fight against terrorism, poverty and illness. The evolutionary history of the G-8, which was founded, as mentioned, as a forum with mainly economical competences but has quickly expanded its role to an organisation with general competence, would lead one to conclude that the G-20 might also be subject to a similar evolution.

As we will discuss in the ensuing paragraphs, evidence that the transition from the G-8 to the G-20 is not merely a name change, is clear from the fact that it has already laid the political basis for making decisions that imply significant reforms in the governance of the primary international financial organisations.

However, it is important to spend some time illustrating the deeper significance of the transition from the G-8 to the G-20.

We have long known that many sides have already disputed the legitimacy of the G-8, since it does not necessarily reflect the world's economical, demographical and political dynamics, as its current configuration hardly accounts for trends such as the extraordinary economical growth of China and India, the concentration of the global population in the emerging and developing economies, and, finally, the growing importance of the emerging economies in global governance. Several sides have protested that the G-8 as a body poorly represents the actual international situation and has proposed to guarantee more inclusion by involving emerging and developing economies.

There is no doubt that many of these criticisms lose their relevance if referred to the new format of the G-20. While within the limits connected to a narrow composition, by nature less democratic than a hypothetical G-192, or a world committee on a level of all the Member States of the United Nations—a crucial

issue to which we will return later—the G-20 objectively represents a credible forum thanks to its wide and generally balanced representative qualities.[3]

3 The IMF and Related Reforms

The passage from the G-8 to the G-20 and the more important role attributed especially to the emerging economies—China and India above all—was not confined to the informal organisation authority. On the contrary, it triggered, or rather accelerated, the process of the modernisation of important financial international organisations, the most important of which was the International Monetary Fund.[4]

It is well known that the current governance of the IMF, which in many ways is still very faithful to the regulations adopted at Bretton Woods[5] on 22 July 1944, is a target of criticism largely due to its weighted voting system. This system is used to pass resolutions at the top levels of the organisation, namely, the Board of Governors and the Executive Board and would no longer be appropriate to the reality of the current world economic situation.

The system of quotas assigned to each of the current 187 Member States of the International Monetary Fund, and which determine the weight of the vote of each member, was founded on a formula that considers chiefly the gross domestic product; it is still essentially the same system established in the 1944 Bretton Woods agreement. Furthermore, the system of the Fund includes a stipulation that the quota must be attributed to each State when the country becomes a member of the IMF. While the Charter contains a mechanism whereby the quota may be revised, it is commonly held that the current allocation of the quotas no longer corresponds to the real weight of each Member State in the current world economy. Some Member States, especially the emerging economies, are highly under-represented. One only has to consider that the quotas currently assigned to Brazil and India are lower than the quotas assigned to Belgium.

This is why a number of partial modernisations of the governance of the IMF were made even prior to the outbreak of the crisis. In this way, a process of reforming the IMF was initiated in 2006 which included the ad hoc revision of the quotas assigned to China, South Korea, Mexico and Turkey, which were considered for the most part under-represented.

However, it cannot be denied that the crisis has also given a more decisive stimulus to the reforming process. So, in the spring of 2008, the Board of Governors approved a number of innovations that included a new ad hoc increase in the quotas assigned to a number of countries and an increase in the basic votes

[3] Sacerdoti 2009.

[4] In general, see also Tosato 2004, p. 1443 ff.

[5] See also Viterbo 2008, p. 189 ff., p. 197 ff.

to allow developing countries to have a greater say in the decision-making process. Furthermore, the G-20 meeting of the world's finance ministers, held in South Korea on 23 October 2010, approved an agreement on an ambitious reform project of the IMF governance which will lend greater representativeness and effectiveness to the Fund. This package of reforms also envisages doubling the quotas which will, therefore, exceed US$ 750 billion, thereby significantly increasing the funding available to the IMF. It also includes a new distribution of the quotas that will imply transferring 6 % of the voting rights from industrialised countries to the emerging economies, thus preserving the voting rights of even the poorest nations. Lastly, an agreement was reached on a new composition and method of formation of the Executive Board. Henceforward, all the members will be elected, thereby eliminating the role of appointed directors. These motions were ultimately ratified by the Executive Board of the Fund in November 2010.

Regardless of the interim time necessary for the amendment to reach acceptance by as many member nations as represent 85 % of the voting rights (which is expected to take place by the end of 2012), it would seem to be inevitable that the governance of the Fund will emerge as completely new. Simply consider that as soon as the quotas are revised, the Executive Board will be permanently represented by the ten largest world economies and, therefore, will also include the emerging economies.

Since the Executive Board is the body responsible within the International Monetary Fund for dictating the lines of action of the Fund and, therefore, for ultimately steering the shape of world economical development, it is reasonable to believe that this model could undergo changes as a result of the new arrangement at its highest level of leadership.

It is commendable that during the G-20 meeting of world leaders and governors, held in Seoul on 11 and 12 November 2010, European leaders allowed and approved a reduction in the number of European Executive Directors which will be elected by the various constituencies to make room among executive directors for representatives of the developing and emerging economies. However, is also clear that the anchor of this evolution should ideally be made up—in light of the spirit of the Treaty of Lisbon—of a single representative of European Monetary Union countries in the decision-making body of the IMF.

It is also important to note how the new architecture of the global financial governance is well defined in the joint letter dated 13 November 2008, signed by the heads of the two "operating arms" of the G-20, namely, the IMF and the Financial Stability Forum (the FSF)—which has since come to be known as the Financial Stability Board (FSB)—and addressed to the G-20, namely the political arm of the new architecture. The G-20 ratified the contents thereof at its meeting on 15 November 2008. This document underscores how the global financial crisis has focused on the importance of international cooperation to provide an appropriate response to the crisis and for the development and implementation of policies addressed towards developing a sounder financial system. This need for coordination largely concerns the international organisations and financial

authorities that play a role in supporting efforts undertaken by national leaders, such as the IMF and the FSB in particular.

In this framework, the IMF and the FSB have decided to reinforce the cooperation and improve coordination to better identify the respective areas of authority. The IMF is responsible for supervising the global financial system while the FSB has primary jurisdiction over the creation of the rules and regulations and supervision of the financial markets, and it is responsible for coordinating the work of the many international standard-setting bodies. However, the IMF is also involved in this work as a member of the FSB.

While the implementation of the policies in the financial sector is naturally an area of competence for the national authorities, the IMF is responsible for monitoring and enforcing the actual implementation of these policies. Finally, the IMF and the FSB cooperate in conducting early warnings: the IMF evaluates macroeconomic and systemic risk, while the FSB identifies the vulnerabilities of the financial system, in conjunction with the IMF.

Furthermore, there is no doubt that the crisis brought about an acceleration in reforms to the governance of the World Bank, leading it in the direction of greater representation of the organisation. Reforms have developed in two phases. The first envisages doubling the basic votes and the addition of a seat on the Board of Directors to assign to emerging nations in Africa. The second phase follows along the lines of the actions already undertaken by the IMF and consists of redefining how the votes of the Member States are weighted, based on the relative weight of the world economy and the contribution of each in funding development.

An additional development caused by the crisis involved the already mentioned Financial Stability Forum, the informal authority founded in 1999 which brought together the top leadership and representatives of the finance ministers of the central banks and the supervisory bodies of the national financial markets of the G-7 and Australia, Hong Kong, the Netherlands and Singapore, as well as representatives of the international financial institutions and other international representative supervisory bodies or committees of experts. Indeed, in November 2008, the leaders of the G-20 agreed to set up the FSF on a more solid institutional basis by expanding its membership and reinforcing its effectiveness as a mechanism for the development and implementation of the regulatory and supervisory policies on the global financial markets.

This expansion of the "mandate" of the informal financial organisation was later more precisely articulated during the G-20 meeting in London on 2 April 2009 in which the FSF, renamed yet again as the FS Board, was expanded *ratione personarum*. The membership of the new organisation was widened to include those States that had been members of the FSF, with all the States already represented in the G-20 in addition to Spain and the European Commission.

The Charter of the FSB recognises that the objective of achieving more stability in the financial markets, given their interconnection and intrinsic international nature, cannot be realised without involving a higher number of States, especially those that represent the emerging economies. In addition, the Charter reinforces the field of action of the leadership body, expanding specifically the areas related

to the coordination of the actions put in place by the international standard-setting bodies with respect to which the FSB acts as an "umbrella body". One of the actions reinforced by the FSB pursuant to the crisis relates to identifying gaps and deficiencies in the regulation and supervisory system of the financial markets on an international level.

A few examples of these actions include the work done by the FSB, under the political direction of the G-20 and whose technical aspects were later developed by the Basel Committee on bank recapitalisation (Basel 3), and the proposals regarding the regulation of hedge funds and derivative contracts. Finally, the developments concerning the issue of the international cooperation of the supervisory authorities and the increasingly efficient controls on the markets include reinforcements in mechanisms such as committees of supervisors for multinational corporations, the stipulation of agreements between the national supervisors and peer reviews.

4 The European Work Site: Reform of the Governance of Pan-European Supervision

The European Union has also been a site of important governance changes which have been made, and which can continue in the future, as a result of the economical crisis. In this work, I am seeking to give a global assessment of the effects of the crisis and will touch upon only general profiles. Among these, I will explore the reform of pan-European supervision, since it is the only piece in the puzzle that has been fully and completely acquired since it has been approved in European-wide measures.

As the economical crisis has unfolded, the European Union has armed itself with a series of tools that aim to incorporate and reinforce the basket of tools it already had available to it, namely monetary policy and the stability and development agreement. While the European Union has already built the foundation of a new architecture for the supervision of the financial markets, at the same time, works were put in place to secure the economical stability of the Eurozone as a whole, especially through plans for a closer fiscal union among Eurozone States.[6]

The closer fiscal union is based upon enhanced commitments to budgetary discipline and economical coordination and is aimed to improve the fundamental governance mechanism of the Euro and to restore market confidence. Finally, from the different options on the table, the winning option consisted of the Eurozone countries, together with any non-Eurozone Member State, agreeing upon a new international treaty which would stand outside the existing EU legal framework. The output is the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union which was signed by all of the Member States except the Czech Republic and the United Kingdom on 2 March 2012. The treaty will

[6] See also, Saccomani 2011.

enter into force on 1 January 2013, if by that time 12 members of the Euro area have ratified it

Title III contains the constitutional commitment to maintain a balanced central government budget and the presumption of support for proposals or recommendations in respect of Eurozone States subject to the excessive deficit procedure, while titles IV and V deal with reinforcing economical policy coordination and governance between the contracting parties, including the pursuit of enhanced cooperation, the elaboration and coordination of plans for major reforms and the scheduling of Euro Summit meetings.

Here, it is clearly not possible to provide a full comment on and an analysis of this complex agreement so I will only briefly highlight a major aspect. The issue concerns the objections raised to the use of the Union institutions for the purpose of a non-Union agreement without the participation, or the explicit consent, of all 27 Member States.

However, I note that the text of the Treaty has been attentively written so as to involve the institutions of the Union exclusively in procedures they would already participate in pursuant to the EU Treaties. Consider, moreover, the—also controversial—conferral of jurisdiction upon the European Court of Justice as regards the Contracting Parties' obligation to enshrine the commitment to a balanced central government budget into national law at a constitutional or equivalent level. Article 8 of the Treaty provides that if a Contracting Party has failed to enshrine the golden rule in its Constitution, the matter will be brought to the Court of Justice of the European Union by one or more Contracting Parties.

As a rebuttal to these objections I note that the Treaty States that this provision is based on Article 273 TFEU pursuant to which the ECJ shall have jurisdiction "in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties".

As a more general remark, I would like to express my concern that countries like the UK do not really perceive the risk of isolation that the choice of non-participation in the reform of the EU governance may trigger. I do not discuss the right of the UK to define its own place in the integration process. However, I think that the UK must not be allowed to unilaterally obstruct the further building of the European project and a new political dialogue must be started among EU Member States about the possible modifications of the UK's scope of membership and responsibilities in the EU.

More generally, there is the danger that the European Union is perceived as an entity under Franco–German dominance and the indirect dominance of the unaccountable power of globalised financial markets and rating agencies. Moreover, the Treaty focuses attention on the dangers facing the cohesion of the EU as a whole, not least the threat of the Union breaking down into a "two-speed Europe".

As regards how the crisis has been managed, it is common knowledge that the European Union features mechanisms for intervening and providing financial assistance to Member States in economical dire straits. Subsequent to the bilateral actions taken to save Greece, the European Financial Stability Facility (EFSF) and

the European Financial Stabilisation Mechanism (EFSM) have become operational, while the ECB has developed a plan for purchasing government bonds issued by those countries whose sovereign debt is under more severe pressure on the markets. Also, it would be appropriate to shape a reform of the Treaty that includes a provision stating that any European support given to a Member State which might become insolvent would have to be contingent on restructuring the debt with private creditors.

In this perspective, it would be best to establish a European-wide debt agency with the power to issue Eurobonds, which would send a message of the solidity of the system to the global markets, keeping the national markets protected from the spread of future upheavals to sovereign debt.

Coming now to the reform of the governance of the European financial supervision, it is interesting to note that three new independent European authorities have been created and have been operational since January 1, 2011. Known as the ESA—(European Supervisory Authorities), these agencies are responsible for monitoring the banking sector (EBA), the insurance sector (EIOPA) and the financial markets (ESMA). Besides these microprudential supervisory authorities, a macroprudential supervisory body has also been instituted at the European Central Bank for monitoring systemic risk, known as the European Systemic Risk Board (ESRB). The ESA and the ESRB, along with the national supervisory authorities, make up the European System of Financial Supervision—ESFS.[7]

Reforms of the European financial supervisory system were founded on the *de Larosière Report*, requested by the Commission, which found that the previous supervisory system, founded on the national supervisory committees (CEBS, CEDR and CEIOPS) (also known as the tier-three committees), had demonstrated great limitations in the impact with the financial crisis, especially in terms of insufficient cooperation and exchange of information between the national authorities of supervision, difficulties in reaching a shared action by them, as well as the different interpretation of the same applicable European regulations. In any event, its greatest limitation was identified in the voluntary and non-mandatory nature of the cooperation between national authorities and in the non-binding nature of the decisions adopted in cooperation.

This is why the three new ESAs, agencies of European law, were established, which will absorb the tier-three committees. While they already include the presence of national supervisory authorities, the ESAs will also constitute a strong link with the European Commission, which, due to the need to institutionally pursue the general interest of the European Union, should make it possible for the ESA to more effectively exercise the powers of supervision on the activities of the individual national authorities. The powers of the three ESAs as well as their governance structure, which requires the rule of majority vote for passing resolution, are essentially the same and are distinguished only by areas of competence,

[7] Moloney 2010, p. 1317 ff.

as we should also note that the ESMA supervises financial intermediaries and markets and also has specific regulatory powers over the rating agencies.

Coming now to the powers of the ESAs, it is important to note that these agencies must set forth technical regulatory and implementing provisions in order to create a Europe-wide rule book to eliminate the current interpretational divergences that are reported in the application used by the individual national supervisory authorities of the common European rules. After receiving the approval of the Commission, the technical provisions will turn into regulations, acts of European law directly applicable in every Member State, which will therefore contribute to creating a level playing field for all financial intermediaries which do business across the European Union territory.

If the national authority does not conform to the European laws, the Commission expresses an opinion to ask the competent authorities to take the necessary steps to enforce European Union laws. If the authorities are unable to conform to the opinion, the ESAs can pass a resolution against the individual financial institution, if a situation of urgency arises and provided the relevant European disciplines are applicable, demanding that the institution takes steps to comply with the obligations imposed by European Union laws.[8]

While designed as a "last resort", there can be no doubt that the power of the ESA to make a binding decision—as a substitution for national supervisory authorities—against an enterprise is truly an innovation.

The new governance also sets forth that in the case of disputes between the national authorities on the measures to be taken in cross-border situations (for example, against an international banking group), the ESAs may come to a binding decision on behalf of the national supervisory authorities, after attempting reconciliation.

Similar powers are granted to the ESAs in the event of emergencies that could potentially jeopardise the orderly functioning and integrity of the financial system of the single market, with the reminder that the Council is responsible for declaring such an emergency, exclusively upon the request of the ESRB, the Commission or the ESA. Furthermore, with the provision that this does not apply to the probably more frequent procedure (a violation of European Union laws), the governance structure includes a basic mechanism to which the Council may, by majority, confirm or halt the decision of the ESAs, and namely when a country raises the issue that the decision has a significant effect on its finances.

The multifaceted discipline that I attempted to briefly outline here—while certainly representing a step forward on the road towards solid European supervision—clearly emerges like a sort of compromise between States who purported independent ESAs and States with more conservative attitudes.

It is also interesting to note how the innovations introduced in Europe, with the creation of the ESAs—i.e. agencies endowed with effective decision-making power with the Member States' own authorities—have also been a source of

[8] See also, Bastianon (forthcoming).

debate on the other side of the ocean. Scholars in the United States are wondering if it might be a good idea to "replicate" the European experience on a global scale.

In particular, the idea is to transform the FSB into an international organisation endowed with binding powers towards the Member States.[9] Clearly, this radical proposal rests on a sentiment of dissatisfaction concerning the effectiveness of the current arrangement of governance in the financial industry, based on committees that do not have the power to adopt binding regulations for members and which promise to promote the convergence of minimum standards in the form of soft law, trusting in the capacity of the moral suasion of the committees to implement the standards.

Naturally, serious doubts may linger concerning the existence of a corresponding international level of political interest and in any event, before making a decision on such an important issue, it would be important to make an appropriate investigation of which powers the new body would be given and, furthermore, if it would be appropriate to transform the IMF by expanding its powers and responsibilities rather than establish yet another international organisation.

5 The Current Architecture of the Global Economical Governance and Its Limitations

The post-crisis developments that we have been able to discuss up to this point should naturally be viewed in the more general dynamics and critical issues of the current complex structure of global economical governance.

In connection with this, I note that the crisis did have the positive result of reminding the key global players as well as the international civil society of a single irrefutable truth, authoritatively confirmed by Pope Benedict XVI in the encyclical *Caritas in veritate*: this is the unstoppable growth of global interdependence and, as a result, the natural propensity of the economical, social and humanitarian crisis to assume an international dimension, which implies the need to set up an effective and coordinated governance procedure which can undertake appropriate measures in the interest of the world population.

Now, the present-day architecture of global economical governance is founded essentially on the stimulating role of the G-20, on the United Nations and on the trio of the intergovernmental economic organisations—the IMF (and the FSB), the World Bank and the World Trade Organisation. By Charter, these organisations must deal with monetary questions, assistance to development, and international trade and they do not have general competence in economical matters. By contrast, the United Nations have this general competence but—unlike the other organisations mentioned—do not have the tools to effectively influence global economical governance.

[9] Pan 2010.

Clearly, this type of architecture requires efficacious coordination and cooperation between the above organisations.

It is a common belief that this cooperation has been sorely lacking.

Emblematic in the picture indicated here is the weak standards under paragraph 5 of Article III of the Marrakesh Agreement Establishing the World Trade Organization where it is stated that "with a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies". The ministerial declaration adopted when establishing the Agreement underscores the interconnections of the various aspects of economical policy—finance, commerce, development—therefore recognising that the international organisations designated to each of these areas must pursue coherent policies. However, the practices of the WTO have demonstrated the reluctance of the dispute settlement bodies to take full advantage of the contribution of the IMF.

Furthermore, the relationship between the United Nations and the two international financial organisations are supported by weak coordination agreements dating back to the 1947 while the relationships between the United Nations and the WTO, which does not even formally belong to the United Nations, are upheld by an agreement that includes merely an exchange of information. Despite the criticisms aimed, legitimately, towards the United Nations, the connection with the United Nations appears to be essential to restoring the balance with an approach that risks being excessively linked to market parameters, setting aside themes such as sustainable development, respect for human and social rights, and the protection of the environment.

It is clear that the situation described above brings with it the serious risk that organisations involved in the world governance will pursue policies, in their respective areas of influence, which may not be coherent, or worse, at odds, in their response to the global economical crises.

Finally, even from the perspective of day-to-day operations, I should note the lamentable lack of coordination and cooperation, the case in point being the disjointed way that the WTO, IMF and World Bank carry out the assessment of the trends in national economical policies.[10]

6 Ideas for Improving International Economic Governance

A number of sides have expressed the need to modify this clearly unsatisfactory situation and the direction is to come up with a reinforced coordination between the international organisations involved.

[10] Vellano 2008, p. 283 ff., p. 296.

Furthermore, a number of European governments have expressed the need to start talks, especially in the G-20, as regards a new architecture of world governance.

The 2009 report issued by the commission of experts appointed by the President of the General Assembly of the United Nations on the necessary reforms to the international monetary and financial systems, chaired by Joseph Stiglitz, illustrated a radical reform that would imply the creation of a new body in the United Nations that would be given the same weight as the General Assembly and the Security Council. This new body would be known as the "Council of Global Economic Coordination" and be made up of a narrow but representative group of countries. It would be assisted by a panel of independent experts in economics with general competence in economical issues and powers of coordination with the IMF, the World Bank and other specialised institutions of the United Nations, as well as with the WTO which would therefore be brought back into the United Nations "family"[11].

The report also contained a sweeping criticism of the prevailing system: it stated that the financial crisis began in the United States, also and largely caused by the broad deregulation of the financial markets aggressively pursued by the United States administrations, and soon spread to become a world economical crisis, most heavily impacting the emerging economies and developing nations due to the neoliberal policies followed by the International Monetary Fund.

However, scepticism continues about the United Nations' ability to take on the role of the coordinator of the world economical governance. Nevertheless, scepticism is not enough, since it still does not resolve the need to identify a centre with the powers of coordination and direction with all the organisations working in the global landscape.

7 Representation–Legitimacy–Efficiency

The issue of reforms to the global economical governance model connects back to the wider issue of the reform of global governance without further qualification, as in the title of this work.

It appears clear how the discussion currently taking place revolves around a number of concepts—representation, legitimacy, efficiency—which have always connoted the debate on the reform of the United Nations, the International Monetary Fund and the other larger international organisations.[12]

[11] Report of the Commission of Experts of the President of the United Nations General Assembly on Reports of the International Monetary and Financial System (21 September 2009), www.un.org/ga/econcrisissummit/docs/FinalReport_CoE.pdf. Accessed 15 June 2012.

[12] Caron 1993, p. 552 ff.; Picone 1995; Schwartzberg 2004; Bargiacchi 2005.

From this perspective, the development brought about by the transition to the G-20 as an informal leadership authority, at least as regards economical matters, able to overcome the lack of coordination in the present global governance or represent an important centre of decision making, constitutes a real step in the right direction, since it implies the inclusion of the emerging economies, and especially China, in the decision-making processes. Especially as concerns international relations, it is a common belief that decisions taken jointly have better chances of being respected by the beneficiaries—the States—than decisions taken by small groups of countries which then attempt to impose these decisions on countries which had no opportunity to discuss them.

Yet, for this very same reason, the transition from the G-8 to the G-20 brings with it a critical truth: as much as it might expand, the format is still perceived by those excluded as discriminatory and, therefore, illegitimate.

There is no doubt that the developing countries, namely, those more likely, due to the weakness of their economical structures, to be negatively affected by inappropriate decisions made by the stronger nations, are not adequately represented in the G-20.

The Millennium Summit held in New York in September 2010 encouraged most of the members of the United Nations to confirm their commitment to earmark 0.7 of the gross domestic product to public assistance to development by 2015. This included the involvement of the beneficiary countries of the aid, calling on donors to abide by the commitments undertaken and observing how the impact of the global financial and economical crisis would not be sustainable for them if it were combined with a decrease in assistance.

A presence of developing countries in the G-20 would give greater guarantees on the overall respect for these commitments.

For all these reasons, I believe that the first equitable and necessary step forward is to expand the representativeness of the formation of the G-20, involving the major developing countries. Naturally, since the International Monetary Fund and the FSB are the two main operating arms of the G-20—the political head of the world economical governance system—, this expansion would also have to imply a corresponding expansion of the membership of the FSB and an additional reinforcement of the voting rights of the developing countries in the IMF.

However, the problem is more complex: it involves all the excluded nations. This is demonstrated by the fact that many of the countries excluded from the process are attempting to identify ways that can alleviate this kind of marginalisation. I am referring to a sort of G-172, namely the group of United Nations Member States excluded by the G-20, which take shelter in the United Nations that becomes a sort of "compensation fund".[13]

These nations, which are structured into a group called the 3G (Global Governance Group), guided by nations such as Chile, Singapore and Switzerland, are attempting to develop forms of connection between the United Nations as regards

[13] See also, Ragagliani 2010, p. 509 ff.

the G-20 and have initiated dialogue with the G-20 in order to reinforce the relationship.

The second step that I also feel is very positive consists of promoting the dialogue of the G-20 with countries that are currently excluded from its ranks and with those that will still be excluded subsequent to the hoped-for expansion.

Finally, it is also important to note that, like a game of mirrors, the discussions raised in relation to authorities perceived as not sufficiently representative if compared to the universality of the United Nations inevitably lead to reopening the question that is posed regularly with regard to the heart of the United Nations—the Security Council.

It is no accident that the Council on Foreign Relations suggested that the Obama administration should "use" the expanded G-20 as a forum to weigh the actual interest of the members appointed as candidates to the Security Council to contribute to pursuing "global public good".[14]

Coming now to the role of our country, I should note how a constant point of reference of Italian foreign policy has been the key importance of the United Nations and how the Italian governments have adopted a very admirable bipartisan position on the issue of the Security Council reforms that attempts to strike a balance between the needs expressed.[15]

This proposal promotes a reform that leads to a Security Council that is more representative, more responsible and more sensitive to the developments of the international community.

The formula suggested (with new non-permanent members and longer terms for those countries elected) would better represent the different interests of some of the Member States to contribute towards maintaining peace and security, allowing a larger number of countries to join (to date, more than 70 countries have never had the opportunity to serve on the Security Council).

Furthermore, all new Security Council members would be elected directly by the General Assembly.

Finally, thanks to the electoral mechanism, it would avoid the formation of inherited position and would allow the body to respond to the changes taking place in the international community.[16]

It would be very positive if the principles underlying this proposal could be even more widely shared and could become the basis for every reform of world governance.

[14] See McDonald and Patrick 2010.

[15] See also, De Guttry and Pagani 2005, p. 153 ff. On Italy's actions within the United Nations see also, Baldi and Nesi 2005.

[16] See also, Ragaglini 2010, p. 516 ff.

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The World Bank Inspection Panel and the Development of International Law

Ellen Hey

1 Introduction

When established in 1993, the World Bank Inspection Panel (WBIP or Panel) was a *novum*.[1] It was established by identical resolutions of the Boards of Executive Directors (Board) of the International Bank for Reconstruction and Development (IBRD) and of the International Development Association (IDA) (collectively referred to as the World Bank).[2] During the following years, other international

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[1] For some early writings on the WBIP see Bissell 1997; Bradlow 1994; Bradlow and Schlemmer-Schulte 1994; Hey 1997; Schlemmer-Shulte 1998; Shihata 1994. For a list including publications up to 2002 see http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Bibliograpgy.pdf. Accessed 14 October 2011.

[2] The Boards of the IBRD and IDA adopted Resolution No. IBRD 93-10 and Resolution No. IDA 93-6 "The World Bank Inspection Panel" (22 September 1993), hereinafter the Resolution, available at http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,menuPK:64132057~pagePK:64130364~piPK:64132056~theSitePK:380794,00.html. Accessed 13 October 2011. All documents related to and cases considered by the WBIP are available from the above mentioned website.

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development banks (IDBs) followed suit and established similar accountability mechanisms.[3] The WBIP and other IDB-accountability mechanisms serve to hold IDBs to account and seek to enhance their legitimacy. The most innovative aspect of these mechanisms is that individuals and groups in society are in a position to trigger the procedure.

The focus of this chapter is on the changes that the WBIP has introduced to international law, to the law of international organizations in particular. This chapter highlights the most innovative legal aspect of the WBIP and IDB-accountability mechanisms in general: the legal- or rule-based relationship that they establish between an international organization on the one hand and individuals and groups in society on the other hand. This chapter concludes that it may be useful for purposes of analysis to conceptualize IDB-accountability mechanisms as procedures for administrative or quasi-judicial review.

This chapter also suggests that in assessing the contribution of courts to the development of international law, the question put to us by the editors of this volume, IDB-accountability mechanisms as well as other court-like bodies that are available at the international level merit inclusion, a suggestion that was welcomed by the editors. This, moreover, is a point pursued by Tullio Treves when he, together with others, developed first the research project on civil society, international courts and compliance bodies and subsequently the research project on non-compliance procedures in international environmental law.[4] Non-compliance procedures and IDB-accountability mechanisms differ from each other and from international court procedures and challenge classical international legal notions about dispute settlement.[5] However, such procedures also enrich the ways in which an increasing variety of international actors may seek to enhance compliance with international law.

This chapter proceeds as follows. Section 2 describes the procedure available at the WBIP. Section 3 presents a brief overview of the accountability mechanisms established by IDBs. Section 4 analyzes the WBIP and IDB-accountability mechanisms more in general in terms of international law. Section 5 concludes this chapter by assessing what the WBIP has contributed to the development of international law.

[3] Bradlow 2005 and Sect. 3 below.

[4] Treves et al. 2005, 2009. On the WBIP in Treves et al. 2005 see Boisson de Cahzournes 2005.

[5] See Treves 2005, 2009.

2 The Procedure of the World Bank Inspection Panel

The WBIP started its work in 1994 and its operations were reviewed by the Board in 1996 and 1999.[6] The Panel consists of three members who are appointed for 5-year non-renewable terms.[7] Panel members are appointed by the Board,[8] are officials of the Bank, owe loyalty to the Bank[9] and operate independently from Bank Management.[10]

The WBIP considers requests for inspection from two or more persons (affected party), or their local representative and exceptionally another representative.[11] An affected party "must demonstrate that its rights or interests have been or are likely to be directly affected by an act or omission of the Bank as a result of a failure of the Bank to follow its own operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank".[12] If an investigation is pursued, the Panel procedure proceeds in two stages: the eligibility phase and the investigation phase.

During the eligibility phase, the Panel first ascertains whether the request is not prima facie inadmissible, based on formal criteria.[13] It, thereafter, considers whether the request meets the other, more substantive, eligibility criteria listed in the Resolution. At this stage, the Panel ascertains if the alleged violations are serious, if the subject matter of the request has been raised with Bank Management and if the latter has failed to take steps to address the situation in accordance with Bank policies and procedures.[14] Within 21 days after receipt of notification of the request from the Panel, Bank Management must inform the Panel of its response to the request.[15] Thereafter, the Panel, within another 21 days, determines whether the request is eligible and makes a recommendation to the Board whether a full investigation should ensue.[16] If the Board approves a recommendation to engage in an investigation, the investigation phase starts.

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[6] Review of the resolution establishing the Inspection Panel 1996 Clarification of Certain Aspects of the Resolution (17 October 1996), hereinafter 1996 Review of the Resolution and 1999 Clarification of the Board's Second Review of the Inspection Panel (20 April 1999), hereinafter 1999 Clarification of the Second Review, both available at website mentioned *supra*, note 2.

[7] The Resolution, paras 2 and 3.

[8] The Resolution, para 2.

[9] The Resolution, para 10.

[10] The Resolution, para 4.

[11] The Resolution, para 12 and 1996 Review of the Resolutions, para 3. For an overview of the Panel procedure and its work see IBRD 2009.

[12] The Resolution, para 12.

[13] The Resolution, para 14.

[14] The Resolution, paras 12–13.

[15] The Resolution, para 18.

[16] The Resolution, para 19.

During the early years of the Panel's operation, Bank Management regularly interfered at this stage of the procedure with the aim of preventing an investigation from being conducted and the Board regularly rejected or limited recommendations for investigation because Executive Directors representing borrower States prevented the Board from reaching consensus, which is how the Board adopts decisions in practice.[17] This situation was considered in the 1999 Board Review. As a result, it was made explicit that Bank Management should no longer interfere with the work of the Panel and the Board decided that it would hence forward, if so recommended by the Panel, authorize investigations without considering the merits of the request.[18] Since then, all recommendations for investigation issued by the Panel have been approved by the Board.[19]

During the investigation phase, the Panel proceeds to a full investigation of the request. Thereafter, the Panel submits its findings and recommendations to the Board.[20] The Board considers the Panel's findings together with a response by Bank Management and decides on any action to be taken.[21]

The Panel may undertake site visits in the State concerned, subject to the consent of the borrowing State.[22] Such visits are in practice and as necessary carried out by Panel members during both the eligibility and investigation phase.

An affected party is informed within 2 weeks after the Board decides on a Panel recommendation on whether to proceed to a full investigation or on action to be taken pursuant to a full investigation.[23] Within the same period of time, the information is also made available to the public by placing relevant decisions and reports on the website of the Panel.[24]

The WBIP in determining whether the rights or interests of an affected party have been or are likely to be directly affected by an act or omission of the Bank bases its assessment on the so-called Operational Policies and Procedures (OP&P), that is Operational Policies, Bank Procedures, and Operational Directives of the Bank.[25] The OP&P include so-called safeguard policies, which address social and

[17] See Naudé Fourie 2009, pp. 187–190 and 297–301 on the Request of Inspection n. 4, Brazil: Rondônia Natural Resources Management Project (16 June 1995), where the Board did not approve the recommendation to proceed to a full investigation, and the Request of Inspection n. 10, India: NTPC Power Generation Project (1 May 1997), where the Board limited the nature of the investigation in terms of the time allowed for the investigation and by preventing a site visit.

[18] 1999 Clarification of the Second Review, paras 2 and 9.

[19] See IBRD 2009, pp. 26–28.

[20] The Resolution, para 22.

[21] The Resolution, para 23.

[22] The Resolution, para 21.

[23] The Resolution, paras 19 and 25.

[24] The Resolution, para 25.

[25] The Resolution, para 12. More generally on the relevance of OP&P and the impact of IDB-accountability mechanisms applying and interpreting them see Bradlow and Naudé Fourie 2011a.

environmental risks that may arise as a result of a project financed by the Bank.[26] Operational Directives have been largely replaced by Operational Policies and Bank Procedures, so-called OP&BP, which are internally binding on the Bank's staff.[27] The OP&P concern topics such as: involuntary resettlement, environmental assessment, natural habitats, indigenous peoples, development cooperation and conflict, water resources management, and pest management,[28] with the first four topics belonging to the category safeguard policies. OP&P are issued by senior Bank Management in accordance with policies approved by the Board and may be the subject of discussion in the Board.[29] More recently, new or significantly amended OP&Ps may also be subject to public consultation prior to their adoption.[30] While OP&P may reflect or be inspired by international law, they do not constitute a restatement of, for example, human rights law or international environmental law. This entails that the WBIP does not base its findings on international law in general, but on the norms and rules as contained in the OP&P. This situation, however, has not prevented the Panel from including in its considerations the deplorable state of human rights observance in the context in which a bank financed project was to be carried out.[31]

3 IDB-Accountability Mechanisms

As illustrated by the comprehensive study conducted by Bradlow in 2005,[32] the founding of the WBIP was followed by the establishment of similar mechanisms by other IDBs. IDBs that have established accountability mechanisms include the following.

- The Inter-American Development Bank (IDB), in 1994, established the Independent Investigation Mechanism and in February 2010 its successor, the Independent Consultation and Investigation Mechanism (ICIM).[33]

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[26] For the safeguard policies see http://go.worldbank.org/WTA1ODE7T0. Accessed 13 October 2011.

[27] Shihata 2000, p. 44.

[28] For the texts of OP&P see http://go.worldbank.org/DZDZ9038D0. Accessed 13 October 2011.

[29] Shihata 2000, pp. 41–43.

[30] See http://go.worldbank.org/3LO8WV1V80. Accessed 11 October 2011.

[31] Naudé Fourie 2009, pp. 261–263. See Request of Inspection n. 22, Chad: Petroleum Development & Pipeline Project (22 March 2001). Also see WB General Council's, Ana Palacio, 2006 statement acknowledging that human rights are an intrinsic part of the Bank's mission 'The Way Forward: Human rights and the World Bank' at http://go.worldbank.org/RR8FOU4RG0. Accessed 25 October 2011.

[32] Bradlow 2005, also see Bradlow and Naudé Fourie 2011b.

[33] www.iadb.org/en/mici/independent-consultation-and-investigation-mechanism-mici,1752.html. Accessed 24 October 2011.

- The International Finance Corporation and the Multilateral Investment Guarantee Agency, in 1999, established the office of the Compliance Advisor/Ombudsman (CAO).[34]
- The Asian Development Bank (ADB), in 2003, established the ADB Accountability Mechanism.[35]
- The European Bank for Reconstruction and Development, in 2004, established the Independent Recourse Mechanism and in May 2009 its successor, the Project Compliant Mechanism.[36]
- The African Development Bank (ADB), in 2006, established the Independent Review Mechanism (IRM).[37]

The mandates of the IDB-accountability mechanisms are not identical. Salient differences are, for example, whether the mechanism engages only in compliance review or also in problem solving and whether a single individual can submit a complaint. All IDB-accountability mechanisms, except for the WBIP, are explicitly mandated to engage in problem solving during the first stage of the procedure. The WBIP, however, in recent years, based on the experience of other IDB-accountability mechanism, informally has introduced problem solving during the eligibility phase.[38] A single individual may submit complaints to, for example the ADB's ICIM and the EBRD's PCM.[39] The WBIP, as the ADB's IRM, however, will not consider complaints involving a single individual.[40]

Despite these and other differences, I suggest that the IDB-accountability mechanisms share certain salient traits. These traits are as follows: (1) the competence to consider complaints submitted by individuals or groups in society against an IDB; (2) the standards for assessing the conduct complained of are provided by internal rules of the IDB; and (3) the accountability mechanism operates independently from IDB management organs and reports to IDB executive organs. In addition, it is worth noting that neither the standards of review employed or the outcome of the review processes are legally binding in terms of classical international law.

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[34] www.cao-ombudsman.org/about/. Accessed 24 October 2011.

[35] www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/default.asp?p=policies. Accessed 24 October 2011.

[36] www.ebrd.com/pages/project/pcm/about.shtml. Accessed 24 October 2011.

[37] www.afdb.org/en/about-us/structure/independent-review-mechanism/. Accessed 24 October 2011.

[38] See IBRD 2009, pp. 51–55.

[39] Policy establishing the Independent Consultation and Investigation Mechanism (17 February 2010), para 28; Project Complaint Mechanism: Rules of Procedure (May 2009), para 2. See websites referred to supra n. 33 and n. 36, respectively.

[40] The Resolution, para 12 and the Independent Review Mechanism Operating Rules and Procedures (16 June 2010), para 4(a); see website referred to supra n. 37.

4 A New Legal Relationship and a New Normative System

With the establishment of the WBIP, a normative system beyond classical international law has emerged within the World Bank and, I suggest, in other IDBs. Within these systems, individuals and groups in society are entitled to hold an international organization to account for non-observance of its own internal rules. Within these normative systems, procedural rules apply—for the WBIP these are contained in the Resolution and in its Operating Procedure[41]—and substantive rules are applied and interpreted—for the WBIP the rules in the OP&P. Moreover, the OP&P are deemed to bind the individuals who are to secure their application—World Bank staff.

Why is the procedure provided by the WBIP, and other IDB-accountability mechanisms, difficult to define in terms of classical international law? I suggest, this is due to the absence of two elements that are determinative of classical international law: the State and State consent.

That the State, beyond the obligation to consult the borrower and the Executive Director representing the State concerned,[42] does not have a role carved out for it in the WBIP procedure is remarkable. In terms of classical international law, one would expect affected individuals and groups in society to be represented by their State at the international level or expect the State to act on the basis of its own right at that level, as when it exercises diplomatic protection. As the WBIP procedure illustrates, an entirely different procedure has been established: one in which affected parties—individuals or groups in society—hold the World Bank, to account. This procedure thereby establishes the independent responsibility of the World Bank vis-à-vis individuals and groups in society and creates a legal- or rule-based relationship between these two actors, which is independent from the State concerned. The normative content of this relationship is provided by the OP&P, which can be invoked by affected parties.

State consent is remote, if not absent, from the decision-making procedure applied for the adoption of the OP&P and the Resolution instituting the WBIP. States did not explicitly consent to the OP&P or to the Resolution establishing the WBIP. States instead consented to the Articles of Agreement of the IBRD and of IDA, adopted in 1945 and 1960, respectively, neither of which foresees the establishment of an accountability mechanism, such as the Panel. Instead, the Articles of Agreement provide that the Board of Governors, the supreme organ of the Bank, save for a few exceptions, may delegate its powers to the Executive Directors who are responsible for the general operations of the Bank and oversee

[41] For the WBIP Operating Procedure see http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20175161~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html. Accessed 24 October 2011.

[42] The Resolution, para 21.

Bank Management in conducting the ordinary business of the Bank.[43] It is within the general operations and ordinary business of the Bank that the Board and Bank Management take decisions that govern the operations of the Bank: decisions such as the OP&P and the Resolution establishing the WBIP.

As I have suggested elsewhere, this manner of proceeding might be conceptualized as States consenting to a process of normative development, instead of to a rule of international law or a set of rules of international law in the form of a treaty.[44] The latter is characteristic of classical international law and in this context State consent serves both to establish and legitimize the rule or treaty in question as a rule of international law.[45] When States consent to a process of normative development they instead agree to a decision-making procedure, in which they may or may not themselves be involved and which years after giving their consent may result in (unforeseen) decisions that apply to them.[46] In this situation, State consent does not create and provides a very weak basis for legitimizing the rules that emerge from the decision-making procedure. As a result, the legitimacy of the decision-making procedure that engendered the rules is questioned. In the case of the World Bank, this issue has arisen with developing States questioning the legitimacy of decision-making procedures of the Bank, especially because developed States hold the majority of votes.[47]

Some might argue that an individual State by subscribing to the content of the loan agreement governing the project, concluded between itself and the World Bank, consent to the rules in question. While formally, this may be a correct reflection of the legal situation. In practice at this stage, two legal-policy elements play a role, which undermine the legitimacy of the argument. First, States at this stage cannot amend or reject the OP&P or the WBIP-procedure and thus have no influence on the content of the rules that apply to them. Second, States at this stage may find themselves in a take-it-or-leave-it situation in which they feel they cannot reject the agreement for fear of losing the project.

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[43] IBRD Articles of Agreement (16 February, 1989), Articles 2, 4 and 5; IDA Articles of Agreement (24 September 1960), Sects. 2, 4 and 5. For the texts of the Articles of Agreement of the IBRD and IDA see http://go.worldbank.org/0FICOZQLQ0. Accessed 24 October 2011.

[44] Hey 2003, pp. 14–15.

[45] See also Bodansky 1999, pp. 607–610.

[46] This situation is similar to the position of the United Nations Security Council, which although explicitly authorized to take legally binding decisions (Article 25 United Nations Charter), is now taking decisions that were not foreseen in 1945, when Charter was drafted. Examples of such decisions are those adopted to counter terrorisms. See Nolte 2008; Wet 2008; Wood 2008.

[47] See "BRICS Countries Urge IMF, World Bank to Speed Up Reforms", English.xinhuanet.com, 3 September 2011, http://news.xinhuanet.com/english2010/world/2011-09/23/c_131154706.htm. Accessed 24 October 2011. This situation is similar to the ongoing discussion regarding the legitimacy of the UN Security Council, given its composition and voting arrangements (see "New powers seek UN Security Council Reform" Sydney Morning Herald, 14 April 2011, http://news.smh.com.au/breaking-news-world/new-powers-seek-un-security-council-reform-20110414-1dfyl.html. Accessed 24 October 2011).

In the absence of States and of State consent, it is clear that the WBIP and IDB-accountability mechanisms more in general do not easily fit the classical international law framework. However, as international society develops so do its subjects and the relationships among those subjects, a point that was made by the International Court of Justice in its 1949 Advisory Opinion in *Reparation for Injuries*. Where the Court held that

> Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.[48]

Might it be that as a result of IDBs taking on tasks that directly affect individuals and groups in society, the requirements of international life have become such that the factual or social relationship that exists between these two types of actors is being translated into law. If so, we might be witnessing the emergence of a new body of law or a new normative system, beyond classical international law. The fact that the decisions adopted by IDB-accountability mechanisms are not legally binding in terms of classical international law does not seem to be determinative of their normative significance. Moreover, we have witnessed similar developments in national legal systems where the emergence of administrative law in continental legal systems gave rise to considerations similar to those that emerge when assessing the significance of IDB-accountability mechanisms.[49] Think of the *Conseil d'Etat* in France and the *Raad van State* in the Netherlands. Both bodies are now administrative courts; however, their *sections du contentieux* initially started as advisors to the king or government.[50] Moreover, Naudé Fourie's research shows that the WBIP acts like courts engaged in judicial review.[51] Why do I raise these points? Not to argue for or against the international legal status of IDB-accountability mechanisms, but rather to point to a legal context that offers a basis for understanding and assessing IDB-accountability mechanisms: national public, and in particular administrative, law. The argument, moreover, should not be taken to imply that national administrative law can or should be transplanted to the international legal field on a one-by-one basis; it cannot and should not. However, the argument made is that areas of national law may offer useful insights for conceptualizing contemporary issues in international law.[52]

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[48] ICJ: Reparation for Injuries Suffered in the Service of the United Nations, Advisory Op. (11 April 1949), p. 178.

[49] For the Netherlands see Samkalden 1952; Wiarda 1952.

[50] On the history of the *Conseil d'Etat* see Koopmans 2003, pp. 130–135; on the history of the *Raad van State* see www.raadvanstate.nl/over_de_raad_van_state/geschiedenis/#wetgeving. Accessed 14 October 2011.

[51] Naudé Fourie 2009.

[52] See e.g. van Aaken 2009 (suggesting that the proportionality principle, used by national courts to balance and thereby reconcile countervailing values may offer a useful perspective for addressing fragmentation in public international law. On fragmentation see Treves 2007.

5 Conclusions: How Has the WBIP Changed International Law?

The WBIP, I suggest, has in three major ways changed international law, only two of which have been considered in this chapter. First, the fact that the WBIP has been replicated, even if not in the exact same way, has changed the law, or the "normative landscape" if you think the term "law" is not appropriate, in which IDBs operate. Moreover, it is not only the WBIP which has influenced other IDB-accountability mechanisms, but the WBIP itself has been influenced by the practice of other IDB-accountability mechanisms. An illustration is provided by the initiative of the WBIP to introduce problem solving into its procedures.[53] As a result of the activities of IDB-accountability mechanisms, I suggest, it is now generally accepted that affected people should be able to hold an IDB to account based on the internal rules and regulations of the IDB in question. This process, besides substantive standards, I suggest, involves three further distinct but related elements: transparency and access to information, participation in decision making and access to justice. In the case of the World Bank, the OP&P and bank policies more in general[54] provide the substantive standards as well as the standards for transparency and access to information and participation in decision making; the WBIP-procedure, as other IDB-accountability mechanisms, provides the last element—access to justice. How might this development be conceptualized? Possibly as the 'constitutionalizing' of secondary rules of international law, just as Cardesa-Salzmann has suggested we should conceptualize the development of non-compliance procedures in global environmental regimes.[55]

Second, the IDB-accountability mechanisms illustrate that at the international level the development of law, or norms if you prefer, of a public nature need not be limited to those instances which involve States. Normative systems, akin to national administrative law, seem to have evolved within IDBs—including the right to complain, norms to assess the conduct complained of and an independent body that engages in the assessment. Is this another example of the "Reweaving of the Fabric of International Law?" as Brunnée suggests is taking place in the context of decision making in Multilateral Environmental Agreements (MEAs).[56] I suggest that IDB-accountability mechanisms indeed are reweaving the fabric of international law. However, given that State consent is very far removed from the operation of the accountability mechanisms, legitimate decision making, both in the adoption of the applicable rules and in the functioning of the mechanisms,

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[53] See supra n. 38 and accompanying text.

[54] See e.g. the World Bank's new Policy on Access to Information (1 July 2010), at http://go.worldbank.org/TRCDVYJ440. Accessed 14 October 2011.

[55] Salzmann 2011. Also see Bodansky 2009, suggesting that individual treaty regimes harbor traits of constitutionalism, but that international environmental law *in toto* does not constitute a constitutional order.

[56] Brunnée 2008.

becomes even more of an issue than is the case with regard to MEAs, even if the issues at stake are similar.

Third, and this is the topic not considered in this chapter, the IDB-accountability mechanisms have contributed to the interpretation of rules such as those on involuntary resettlement, environmental impact assessment, and indigenous peoples,[57] which are relevant also in contexts other than those of IDBs. The exclusion of this analysis from the present chapter is an omission which is due to considerations of space and time and due the fact the work of IDB-accountability mechanisms is not easily accessible in a format that facilitates comparative analysis. What is required is analysis of IDB-accountability mechanisms' practice.[58] The importance of studying international law on the basis of practice is what Tullio Treves emphasizes in his work,[59] and it is by engaging in this type of analysis that he has made a major contribution to our understanding of international law.

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[57] Bardlow and Naudé Fourie 2011.

[58] The work by Bradlow and Naudé Fourie 2011, referred to in this chapter, is exemplary in this respect.

[59] Treves 2005, p. 3.

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The 2008 Investment Arbitration Between Italy and Cuba: The Application of the Rules of Attribution and the 1993 BIT's Scope *Ratione Personae* Under Scrutiny

Enrico Milano

1 Preliminary Remarks

In a recently reported award rendered on 15 January 2008,[1] an *ad hoc* arbitral tribunal, instituted in accordance with Article 10 of the 1993 bilateral agreement on the promotion and protection of investments (BIT) between Italy and Cuba,[2] concluded a lengthy inter-State litigation involving the espousal by the Italian government of a number of private claims originally connected to 16 Italian investors economically active in Cuba.

The case raises several interesting international legal issues. In terms of litigating strategies, the singular choice of the Italian government to act in diplomatic protection on behalf of its investors and the preference accorded to diplomatic protection, rather than the standard option of private investors using the arbitration clause under the BIT, are noteworthy. Moreover, the award lends itself to a critical analysis of the substantive issues dealt with, especially the notion of investment adopted by the Tribunal, the rule on the exhaustion of local remedies, the question of attribution to the Cuban State of conduct by State-owned corporations and the exclusion of the applicability *ratione personae* of the BIT to Italian investors active on the Cuban market through the vehicle of companies incorporated in third countries.[3] The two latter aspects have proved particularly controversial and have been

[1] Arbitral Tribunal: Italy v. Cuba, Final Award ("*Sentence Finale*") (15 January 2008). http://italaw.com/documents/Italy_v_Cuba_FinalAward2008.pdf. Accessed on 10 January 2012.

[2] Accordo fra il Governo della Repubblica Italiana e il Governo della Repubblica di Cuba sulla promozione e protezione degli investimenti (Rome, 7 May 1993). Entered into force on 23 August 1995. http://itra.esteri.it/trattati/CUBA018.pdf. Accessed on 10 January 2012.

[3] With regard to the notion of investment endorsed by the Arbitral Tribunal see Tonini 2008.

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analysed in detail in the dissenting opinion delivered by the Italian arbitrator, Attila Tanzi. They will be discussed in the present contribution, after having provided an overall description of the arbitral proceedings, of the conclusions reached in the award of 15 January 2008 and of the dissent expressed by Arbitrator Tanzi.

2 The Arbitral Proceedings

On 16 May 2003 the Italian Government notified the Cuban Government of its intention to institute proceedings against the Republic of Cuba on the basis of Article 10 of the 1993 Italy/Cuba BIT.[4] Article 10 is a dispute settlement clause, which provides that in case of disputes on the interpretation and application of the treaty, the Parties will endeavour to reach an amicable solution through diplomatic means; if a settlement is not reached within three months from the notification of a written request to that effect, either Party may institute *ad hoc* arbitral proceedings.[5] In line with the procedure established in Articles 10.3 and 4, Italy's request was followed by Italy's and by Cuba's appointment of Attila Tanzi and Olga Miranda Bravo[6] as arbitrators, respectively; upon their designation, Yves Derains of France was appointed as President of the Tribunal.

Italy originally complained in its own right, and by way of diplomatic protection granted to 16 investors, of a series of breaches of the 1993 BIT effected by Cuban authorities and entities, in particular of Article 2.1 (the obligation to encourage and promote investments) and 2.2 (the obligation to guarantee a fair and equitable treatment to investors and to avoid unjust and discriminatory practices), Article 3.2 (the obligation to accord to Italian investors the same treatment granted to national investors), Article 5.1 (the obligation to ensure full protection and security to investors) and 5.2 (the obligation not to expropriate either directly or indirectly), Article 6 (the obligation to ensure the return of invested capital) and of

[4] Accordo sulla promozione e protezione degli investimenti, con protocollo e scambio di lettere (Rome, 7 May 1993), enterd into force on 23 August 1995.

[5] In the Spanish text, Articles 10.1 and 2 provide: "Articulo 10 – Conciliación de las controversias entre las Partes Contratantes. 1. – Las controversias entre las Partes Contratantes sobre la interpretación y la applicación del presente Acuerdo deberán, cuando sea posible, ser conciliados por medio de consultas amigables de las dos Partes a través de los canals diplomáticos. 2. – En el caso en que tales controversias no puedan ser arregladas en los tres meses sucesivos a partir de la fecha en la cual una de las Partes Contratantes haya notificado por escrito a la otra Parte, las mismas serán sometidas, a solecitudo de una de las Partes, a un Tribunal Arbitral ad hoc de acuerdo a lo dispuesto por el presente Articulo." Article 10 has to be read in conjunction with Article 9, which provides for the possibility of the investor of either Party to seek a solution to a dispute either before a domestic court or before an arbitral tribunal constituted in accordance with Article 10.

[6] As Olga Miranda Bravo passed away in 2007, the Cuban Government appointed Dr. Narciso Cobo-Roura as arbitrator.

the Additional Protocol, Point 1.b (the obligation to settle questions related to the entry and stay of Italian investors in Cuba in the most favourable way to the investor). Italy sought the payment of 1 Euro by way of satisfaction for the direct breaches of its own rights and of a sum totalling several millions of US dollars by way of compensation for the injury suffered by its investors and, as a subsidiary claim, for the unjust enrichment ensuing from Cuba's contractual breaches.[7]

The Tribunal rendered, by majority, a preliminary judgment on 15 March 2005. In the judgment, the Tribunal rejected a number of preliminary objections raised by Cuba: in particular, the Tribunal recognised Italy's right of action in diplomatic protection, notwithstanding the private investor/State jurisdictional clause under Article 9; it established that the rule of the prior exhaustion of local remedies applied to the claims in diplomatic protection only (not to Italy's claims "in its own right") and that it would be examined at the merits phase; at a preliminary stage, it did not uphold Cuba's objections related to Italy's claims concerning Italy's investors other than the companies Caribe and Figurella and Finmed, notwithstanding the fact that they were not included in the initial request of 16 May 2003 and reserving a final decision at the merits phase.[8] Quite importantly, the Tribunal adopted a definition of investment for the purpose of the 1993 BIT, which extended to any economic operation carried out by a natural or juridical person of either Party characterised by a contribution to the economic development of the host State, a certain duration and the participation of the investor in the risks deriving therefrom.[9] It established that this definition should be applied in the merits phase and it invited the Applicant not to submit in the subsequent phase of the proceedings any claim concerning economic operations that did not meet the above requirements.[10]

Subsequent to the Tribunal's adoption of the above definition of investment, Italy renounced its stance that it would act in diplomatic protection with regard to ten cases. Italy also dropped its claim in diplomatic protection concerning Menarini Società Farmaceutica as a consequence of an extra-judicial settlement reached by the Parties (but did not withdraw its claim concerning the direct breach of its treaty rights). On the other hand, Cuba raised a counter-claim seeking from Italy a public apology for the moral damage caused by the proceedings.

The Tribunal rendered its final award on 15 January 2008. It rejected all of Italy's claims and Cuba's counter-claim.

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[7] For a summary of Italy's original claims see Arbitral Tribunal: Italy v. Cuba, Interim Award ("*Sentence Preliminaire*") (15 March 2005), paras 21–34. http://italaw.com/documents/Italy_v_Cuba_InterimAward_15Mar2005.pdf. Accessed on 10 January 2012.

[8] Ibidem, *dispositif*, paras 1, 3–4.

[9] Ibidem, paras 76–85.

[10] Ibidem, para 85.

3 The Award of 15 January 2008

The Tribunal's final award is mainly characterised by a detailed analysis of the factual elements, and the legal consequences flowing therefrom relevant to Italy's claims in diplomatic protection, which turn out to be determinative of Italy's claims for the direct breaches of its own rights under the 1993 BIT. The Tribunal examined in turn the cases espoused by the Italian Government.

As far as the case *Caribe and Figurella Project s.r.l.* is concerned, the Tribunal found that the economic operations initiated in 1998 and formalised in two contracts concluded by Caribe and Figurella with the Cuban Hotel Habana Libre Trip (belonging to the State-owned Grupo Hotelero) for the rental of equipment and the provision of services with a view to operating a beauty centre within the Hotel met the requirements of the definition of investment established in the preliminary ruling.[11] Yet, according to the Tribunal, there was no evidence indicating that the damage suffered by Caribe and Figurella was the result of an internationally wrongful act committed by Cuba. The dispute between the Grupo Hotelero and Caribe and Figurella originated from the withdrawal by the Cuban Ministry of Internal Trade of the licence (granted to the Hotel) to operate the beauty centre as the Cuban authorities realised that a tattooing service was provided by Caribe and Figurella, which was not envisaged in the licence. The licence was reinstated 20 days later on condition that tattooing activities would be suspended. According to the Tribunal, the decision of the Cuban authorities was "sans doute brutale",[12] but it did not constitute a violation of the 1993 Agreement. Moreover, according to the Tribunal, while the omissions of the Hotel (the denial of information concerning the reinstatement of the licence, the dismantlement of the equipment and its belated return to Caribe and Figurella) may well have constituted contractual breaches and even evidence of the desire to end the Italian investment contrary to the 1993 Agreement, the acts of the Grupo Hotelero could not be attributed to Cuba, as the Hotel had a separate legal status under Cuban law and, more importantly, was engaged in commercial activities (as opposed to a governmental activity).[13] Finally, the Tribunal ruled out the hypothesis of a *deni de justice* by the Cuban State, since a number of civil suits brought by Caribe and Figurella were examined by Cuban tribunals and found inadmissible as a result of proper procedures established by law; moreover, Caribe and Figurella had failed to use the arbitration clause in the contract. If anything, the lack of the exhaustion of local remedies was an impediment to the exercise of diplomatic protection by Italy.[14]

The dispute concerning the case *Finmed s.r.l.* originated from the failed attempt by the latter Italian company, constituted in Italy by Samarcanda s.r.l. and by Clinica Santa Chiara s.r.l. at the initiative of the President of the mixed Cuban

[11] Italy v. Cuba, Final Award, supra n. 1, paras 146–153.

[12] Ibidem, para 156.

[13] Ibidem, paras 159–163.

[14] Ibidem, paras 164–168.

entrerprise Medi Club SA, Mr Filippi, to substitute the Irish company Finmed Ltd in Medi Club, which had been established in 1996 to allow Samarcanda and Clinica Santa Chiara, through Finmed Ltd and the Cuban enterprise Cubanacan, to build a tourist resort. The substitution had been approved by the assembly of Medi Club in 1998, but was not followed by a governmental authorisation in accordance with Cuban law. According to Italy, the obstruction of the substitution by the Cuban authorities and by Cubanacan was instrumental in favouring new Italian shareholders within Finmed Ltd, especially Mr Rampinini, and to allow Cubanacan to take control of the original investment. The Tribunal found that Finmed s.r.l. and Mr Filippi had indeed exhausted all available local remedies by resorting to administrative procedures, civil tribunals and by bringing accusations before the *Fiscalia General de la Republica de Cuba.*[15] Yet, the economic injury suffered by Finmed srl could not be attributed to the acts or omissions of Cubanacan, but was the result of an internal litigation within Finmed Ltd between new and original associates concerning the control of the investment. According to the Tribunal, Cubanacan's decision to accept the document certifying a new director in Finmed Ltd, Mr Rampinini, in place of the former one may have been adopted "avec une certaine precipitation", especially in light of the "apparence assez suspecte"; but it was not the cause of the damage suffered by Finmed srl, which was due to the "incapacité de M. Filippi e de Mme Ciscato du justifier du pouvoir d'agir au nom de Finmed Ltd".[16] Hence, according to the Tribunal, Italy's claim in diplomatic protection concerning Finmed had to be rejected.

The Tribunal instead found Italy's claims in diplomatic protection and in its own right concerning Icemm srl and Menarini Società Farmaceutica, respectively, to be inadmissible due to a lack of competence *ratione materiae*: in both cases the Italian companies had concluded contracts with Cuban companies for the sale of goods regulated by the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980)[17]—economic operations which, according to the Tribunal, did not amount to investments under the definition provided in the preliminary judgment, due to the lack of contribution over time and of risks entailed in the execution of the contract.[18]

Claims in diplomatic protection concerning Cristal Vetro and Pastas y Salsas Que Chevere were also rejected on the basis of a lack of competence *ratione personae*: both companies had been incorporated in third countries, Panama and Costa Rica, respectively, and could not fall under the purview of Article 1.1 of the 1993 BIT, which extends to investments realised "por persona fisica o juridical de una Parte Contratante en el territorio de la otra". According to the Tribunal, on the basis of the textual, contextual and teleological interpretation of the above provision, it was not possible to consider Cristal Vetro and Pastas y Salsas Italian as

[15] Ibidem, paras 176–179.

[16] Ibidem, paras 181–194.

[17] Entered into force on 1 January 1988.

[18] Italy v. Cuba, Final Award, supra n. 1, paras 195–199 and 212–221.

juridical persons; hence, Italy could not act in diplomatic protection on the basis of the 1993 BIT.[19]

Moreover, mainly on the basis of the findings reached in the analysis of the claims in diplomatic protection, the Tribunal rejected Italy's claims in its own right concerning the violations of several provisions of the 1993 BIT allegedly deriving from the cases of Caribe and Figurella and Finmed (the other four do not fall under the BIT); as well as the subsidiary claim of unjust enrichment.[20]

The Tribunal also rejected Cuba's counter-claim as Italy's application was the exercise of a right granted under Article 10 of the 1993 BIT and could not have caused any prejudice to Cuba requiring a public apology.[21]

The award was adopted by a majority ruling, arbitrator Tanzi attaching a thorough dissenting opinion. Points of dissent were the Tribunal's treatment of the question of the attribution of acts of the Hotel to the Cuban State in the case Caribe and Figurella, which, according to Tanzi, should have been responded to in the positive[22]; the violations of the 1993 BIT in Caribe and Figurella and Finmed resulting from Cuba's actions and omissions, including a denial of justice in the latter case[23]; as well as the interpretation of Article 1.1 of the 1993 BIT for the purpose of Italy's diplomatic protection in the cases Cristal Vetro and Pastas y Salsas.[24]

4 The Attribution to Cuba of the Acts of State-Owned Enterprises

The question of the attribution of the acts of Grupo Hotelero to Cuba raises a number of interesting legal issues under the law of State responsibility, especially in view of the particular role of the State in the Cuban economy. As mentioned, it was one of the main points of disagreement in Tanzi's dissenting opinion, exactly on the basis of the overall configuration and role of State authorities in the Cuban economic and investment sector.

The Award is consequential and plain in its identification of the relevant law of State responsibility as it is normally applied in investment arbitration, especially with regard to the question of attribution. The terms of reference—also adopted by

[19] Ibidem, paras 200–211.

[20] Ibidem, paras 222–252.

[21] Ibidem, paras 253–254.

[22] Italy v. Cuba, Final Award, supra n. 1, Dissenting Opinion of Arbitrator Tanzi, paras 6–14.

[23] Ibidem, paras 15–30. Tanzi did not dispute the findings of the Tribunal concerning the non-exhaustion of local remedies by Caribe and Figurella, hence his agreement in para 2 of the *dispositif*, where the Tribunal rejected Italy's claim in diplomatic protection concerning Caribe and Figurella's investment.

[24] Ibidem, paras 31–36.

the Parties during the proceedings—were the 2001 International Law Commission Articles on State Responsibility (ILC Articles).[25] According to the Award, actions and omissions of State organs are attributable to the State (Article 4 of the ILC Articles). A State cannot escape attribution only by creating a private law entity and claiming that it is not a State organ under its domestic law, if that entity exercises elements of governmental authority and acts in that capacity in the contested instance (Article 5 of the ILC Articles). Moreover, acts committed by private entities under the control, instructions or direction of the State are attributable to the latter (Article 8 of the ILC Articles). The Award presents some ambiguity in the language employed, especially when it refers to "State entity", but it is apparently applying Article 5. According to the Award, if a private law entity can be considered a State entity for the purpose of the law of State responsibility it depends on a joint application of a structural criterion and a functional criterion. If the entity is owned or controlled by the State, there is a presumption that it is a "State entity". However, the presumption is not absolute. One must examine if the entity exercises elements of governmental authority and if it was acting in that capacity when the alleged violation of international law was committed. The functional criterion shows that Grupo Hotelero could not be considered a State entity for the purpose of attribution, as it was engaged in purely commercial activities when entering into the contracts with Caribe and Figurella.[26]

As a matter of fact, according to the Award, the functional criterion is "généralement préféré au critère structurel dans la jurisprudence internationale".[27] One can agree with the Tribunal's statement if the issue at hand is merely the characterisation of an entity as a state entity or a private entity. However, as observed by Arbitrator Tanzi, such characterisation has been made giving prevalence to the functional criterion mainly in the context of ICSID Arbitral Tribunals affirming jurisdiction *ratione personae* on the basis of Article 25.1 of the Washington Convention with respect to "any legal dispute arising directly out of an investment, between *a Contracting State* (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) *and a national of another Contracting State*" (emphasis added).[28] In this specific regard, one cannot but agree with Tanzi where, after analysing the ICSID cases of *Ceskoslovenska Obchodni Banka, A.S. v. Slovakia*[29] and *Consortium R.F.C.C. v. Morocco*[30] (one

[25] For the text and commentary of the ILC Articles see Crawford 2002.

[26] Italy v. Cuba, Final Award, supra n. 1, paras 160–163.

[27] Ibidem, para 161.

[28] Italy v. Cuba, Final Award, supra n. 1, Dissenting Opinion of Arbitrator Tanzi, para 8. With regard to Article 25 of the ICSID Convention see Schreuer 2009.

[29] ICSID: Ceskoslovenska Obchodni Banka, a.s. v. Slovakia, ARB/97/4, Decision on Objections to Jurisdiction (24 May 1999).

[30] ICSID: Consortium R.F.C.C. v. Morocco, ARB/00/6, Decision on Jurisdiction (16 July 2001).

could also add the decisions on jurisdiction in *Salini* et al. *v. Morocco*[31] and *Maffezini v. Spain*),[32] he notes

> dans la jurisprudence CIRDI une application 'en accordéon' du test fonctionnel sur la qualification d'entité étatique – selon que l'entité publique économique soit demandeur ou défendeur – pour assurer au mieux sa competence *ratione personae* par le biais d'un exemple classique d'interprétation fondée sur l'*effet utile* de la règle juridique, notamment l'art. 25(1) de la Convention de Washingto.[33]

But the Tribunal was not called upon to establish its jurisdiction under the Washington Convention; it was called upon to determine the attribution *vel non* of the acts of Grupo Hotelero to Cuba under general international law. The truly "controlling" cases dealing with attribution should have been three, namely *Maffezini v. Spain* (merits),[34] *Noble Ventures v. Romania*[35] and *Nykomb v. Latvia*[36] with the former only—*Maffezini*, cited by the Award in a footnote—giving prevalence to the functional criterion, as interpreted through the distinction between governmental and commercial acts for the purpose of attribution. In *Noble Ventures v. Romania*, the Tribunal found that SOF, which had been entrusted by the Romanian Government to implement a privatisation process in a number of sectors and, with that aim, to promote and regulate foreign investments in those sectors, was endowed with governmental powers and was under governmental control and supervision: while not qualifying as a State organ under Article 4 of the ILC Articles as it was a separate legal entity (it should rather fall under Article 5), all its acts and omissions should have been attributed to Romania and the distinction between governmental acts and commercial acts—a distinction elaborated in the context of sovereign immunities—was not justified, nor sup-

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[31] ICSID: Salini et al. v. Morocco, ARB/00/4, Decision on Jurisdiction (16 July 2001).

[32] ICSID: Maffezini v. Spain, ARB/97/7, Decision on Jurisdiction (25 January 2000).

[33] Italy v. Cuba, Final Award, supra n. 1, Dissenting Opinion of Arbitrator Tanzi, para 8.

[34] ICSID: Maffezini v. Spain, ARB/97/7, Award (13 November 2000). In *Maffezini* the Tribunal, having found in the jurisdictional phase that the Galician legal entity SODIGA (*Sociedad para el Desarollo Industrial de Galicia*) *prima facie* could be considered a State entity (for the purpose of jurisdiction), rejected Maffezini's position that all acts of SODIGA were attributable to Spain. It asserted that SODIGA's activities were both governmental and commercial in nature. It went on to apply the functional test in considerable detail and concluded that the provision of faulty advice to Maffezini, as well as the pressure put on Maffezini to go ahead with the investment without environmental evaluation were not governmental actions. SODIGA's actions were instead attributable to Spain with regard to a bank transfer effected by an official of SODIGA for the benefit of Maffezini through EAMSA, a local bank; according to the Court the handling of that bank account was a governmental prerogative (ibidem, paras 62–71). Generally, with regard to the question of the attribution of acts of State-owned corporations to the State see Hobér 2008. With regard to the *Maffezini* case, see Cohen Smutny 2005.

[35] ICSID: Noble Ventures v. Romania, ARB/01/11, Award (12 October 2005).

[36] Stockholm Chamber of Commerce: Nykomb Synergetics Technology Holding AB (Nykomb) v. Latvia, Award (16 December 2003). http://ita.law.uvic.ca/documents/Nykomb-Finalaward.pdf. Accessed on 10 January 2012.

ported by the ILC articles.[37] In *Nykomb v. Latvia*, the contractual breaches of Latvenergo, a Latvian State company, with regard to Windau, Nykomb-controlled local subsidiary, were considered attributable to Latvia by virtue of the former's "dominant position as a major domestic producer of electric power and as sole distributor of electricity over the national grid".[38] According to the Tribunal:

> [i]t was clearly an instrument of the State in a highly regulated electricity market. In the market segment where Windau operated, Latvenergo had no commercial freedom. It had no freedom to negotiate electricity prices but was bound, and considered itself to be bound, by the legislation and the regulatory bodies' determination of the purchase prices to be paid for electric power produced by cogeneration plants. Latvenergo cannot be considered to be, or to have been, an independent commercial enterprise, but clearly a constituent part of the Republic's organization of the electricity market and a vehicle to implement the Republic's decisions concerning the price setting for electric power.[39]

Leaving aside the question of when contractual breaches imply violations of treaty norms,[40]—a question that normally must follow a determination of attribution—[41]the above case law shows that the attribution of acts of State-owned enterprises must be solved by reference to both a structural and a functional test; the latter should not be interpreted *stricto sensu* only as was done by the Tribunal, but as referring mainly to the overall function of the entity within the domestic economy.

In the case of Caribe and Figurella, the Grupo Hotelero was instrumental in the development of the tourist sector in Cuba, in attracting foreign investments and it acted under the supervision and control of the Cuban Ministry of External Trade when dealing with foreign investors. A number of evidential elements showed the close connection between different State authorities and Grupo Hotelero in the case of Caribe and Figurella, including the fact that the second contract had been signed at the insistence of the Ministry of Tourism, the advertising campaign concerning the beauty centre had to be changed due to specific instructions by the Ministry of Internal Trade, the catalogue and the prices of services were approved after consultation with the Deputy Minister and the beauty centre was closed in agreement with the Ministry of Internal Trade.

It might be that, according to a rather mechanical application of the ILC Articles, the situation did not exactly fit into that of an act of a State organ under Article 4; that the Hotel could be considered as acting in a private capacity when entering into contracts with Caribe and Figurella, hence Cuba would not bear responsibility under a strict reading of Article 5; and that the evidence was not sufficient to directly link the Hotel's actions and omissions with instructions and control by Cuban authorities in accordance with Article 8.[42] However, the "factual

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[37] Noble Ventures v. Romania, supra n. 35, para 82.

[38] Nykomb Synergetics Technology Holding AB (Nykomb) v. Latvia, supra n. 36, p. 31.

[39] Ibidem

[40] Hobér 2008, pp. 575–582.

[41] Italy v. Cuba, Final Award, supra n. 1, Dissenting Opinion of Arbitrator Tanzi, para 5.

[42] Quite interestingly, in the award in the ICSID Waste Management case (ICSID: Waste Management, Inc. v. Mexico, ARB(AF)/00/3, Final Award (30 April 2004), para 75), an ICSID

link" between the actions of the Hotel and different State authorities, on which any attribution must be based, was "structurally and functionally" present and, as correctly observed by Arbitrator Tanzi, should have been given full weight in the appreciation of facts and of the law related to a case involving an economic operation.[43] After all, the law of State responsibility is not "set in stone", but is based on general principles that must adapt to the material and legal context in which they are applied; in the case of Caribe and Figurella, the context was that of an investment of a small business in a heavily regulated and State-controlled market and enjoying the protection of a bilateral investment agreement. The Tribunal should have shown full appreciation of that specific context.

5 The 1993 BIT's Applicability *Ratione Personae* and Diplomatic Protection

Another important legal issue that has been disputed in Tanzi's dissenting opinion has concerned the interpretation of Article 1.1 of the BIT, which extends the subjective scope of the agreement to investments realised "por persona fisica o juridica de una Parte Contratante en el territorio de la otra". As anticipated, the Tribunal's conclusion had been that the BIT's protection could not extend to Cristal Vetro and Pastas y Salsas as the two companies were registered in Panama and Costa Rica, respectively, hence they could not be considered Italian legal persons allowing Italy to act in diplomatic protection.

According to the Award, the textual meaning of the provision leaves little room for ambiguity. Either Party's investments are protected by the BIT if carried out through their own nationals or own corporations, but not through corporations registered in the territory of a third party. Such textual reading would be confirmed by the legal context in which the agreement was adopted in 1993, namely a customary discipline defined by the landmark ruling in *Barcelona Traction*,[44] which confined diplomatic protection to the state of incorporation of the company (excluding the possibility of the State of nationality of the shareholders presenting concurring claims).[45] According to the Tribunal, a teleological reading of the

(Footnote 42 continued)
Tribunal presided over by Arbitrator James Crawford considered that the acts of Banobras, a development bank partly owned by agencies of the Mexican Government, would be attributable to Mexico "one way or another" for NAFTA purposes, despite the lack of clear evidence showing that the entity was a State organ under Article 4 of the ILC Articles, that it was exercising governmental authority according to Article 5 of the ILC Articles when carrying out the contested dealings, or that it was acting under the direction or control of governmental bodies.

[43] Italy v. Cuba, Final Award, supra n. 1, Dissenting Opinion of Arbitrator Tanzi, para 14.

[44] ICJ: Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962), Judgment (5 February 1970).

[45] Italy v. Cuba, Final Award, supra n. 1, para 204.

provision would also confirm this interpretation *a contrario*: if we were to uphold an extensive interpretation of Article 1.1, in accordance with the dispute settlement clause found at Article 9.2, either Party may have to respond before an arbitral tribunal to alleged violations of the BIT affecting the owners of capital or shareholders of the other Party, who have invested in a company registered in a third State, including third countries with which the host State does not want to maintain economic or diplomatic relations.[46]

In our view, the Tribunal's reading of the BIT is rather formalistic and it entails a mechanical, if not misleading, application of general international law to the issue at hand. As singled out in the dissenting opinion, one can read in the contested provision a substantial, rather than a formal notion of investment.[47] In fact, Article 1.1 defines an investment "*independientemente de la forma juridical elegida y del ordenamento juridico de referencia,* culquia tipo de bien invertido, por persona fisica o juridical de una Parte contraente en el territorio de la otra […]" (emphasis added). According to the same provision, investment may consist, among others, in movable and immovable properties, but also bonds and shares. Rather than to the form chosen and to the fact that the investment had been formally effected through a company registered in a third country, the Tribunal should have appreciated the gist of the above provision, which is to protect the investments carried out by economic operators of either Party in the territory of the other.

Even the textual reading of the qualification "por persona fisica o juridical de una Parte contraente" is not fully convincing: unlike Articles 25.1 and 2.b of the ICSID Convention, Article 1 does not refer to legal or natural persons *having the nationality of either Party* as a general rule qualified by the possibility of consensual derogation—which may warrant a narrower interpretation of the treaty—[48] but a more generic and possibly broader connection between the investor and the State Party.[49] Exactly due to the generic notion of investment *ratione personae*, the reference to general international law was not misplaced; on the contrary, it was appropriate as a means to interpret that provision. It was also appropriate to refer to notions of nationality elaborated for the purpose of diplomatic protection, given that Italy was acting primarily in that role. However, instead of construing a "legal context" for the purpose of conferring an ordinary meaning based on the alleged state of general international law in 1993, it should have meant identifying "any relevant rules of international law applicable in the relations between the parties" at the time of application of the contested provision in accordance with Article 31.3.c of the Vienna Convention on the Law of the Treaties. The most important provision should have been Article 9 of the Articles on Diplomatic Protection approved by the ILC in 2006, which is reflective of customary

[46] Ibidem, para 205.

[47] Italy v. Cuba, Final Award, supra n. 1, Dissenting Opinion of Arbitrator Tanzi, para 33.

[48] See Letelier Astorga 2007, pp. 443–445; Schlemmer 2008, pp. 75–81; Schreuer 2009, pp. 279–283.

[49] For an overview of different types of nationality clauses contained in BITs see Sinclair 2005.

international law as it has emerged over the course of the twentieth century and the first years of the current century. According to that provision:

> For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.[50]

In other words—and unlike what the Award seems to suggest—general international law accommodates situations where the "formal" nationality of a company is purely fictitious, by providing for the prevalence of a "genuine link": this is in line with international law's original character, which is to recognise legal claims based on real and effective ties. As noted by Tanzi, the exception spelled out in the second sentence of Article 9 completely fitted the situation of Cristal Vetro and Pastas y Salsas: the two companies were fully controlled and managed by Italian nationals, their seat of management was in Italy and there were no activities carried out in Panama and Costa Rica, respectively. They should have been considered Italian legal persons for the purpose of Article 1.1 of the BIT, hence for the purpose of Italy's diplomatic protection.

Against the dangers of fictitious constructions in matters of nationality and espousals of claims, one is tempted to recall Judge Treves' conclusion in his separate opinion in the *Grand Prince* case. In discarding registration as evidence of the nationality of a ship entailing the right of Belize to seek its release under Article 292 of UNCLOS, Judge Treves concluded that:

> A "registration" of such an artificial character as that which might have existed for the *Grand Prince*, whatever the name it receives, cannot be considered as "registration" within the meaning of article 91 of the Convention. And it is only this kind of registration that makes a State a flag State for the purposes of article 292 of the Convention [on the Law of the Sea].[51]

6 Concluding Remarks

The arbitration between Italy and Cuba is a rather unique case of diplomatic protection being exercised with regard to alleged breaches of a BIT and despite the presence in the treaty of a clause allowing investor/State arbitration. It is interesting in that it has addressed a number of different issues of general international law confirming the view held by Tullio Treves in several writings[52] that the

[50] Draft Articles on Diplomatic Protection with commentaries UN Doc. A/61/10 (2006), pp. 52–55.

[51] ITLOS: "Grand Prince" (Belize v. France), Judgment (20 April 2001), Separate Opinion of Judge Treves p. 2.

[52] E.g. Treves 2007, 2012.

fragmentation of international law is far from being a reality (and especially if one seeks the evidence in international investment dispute settlement). Overall, one remains with the impression that the Award, whether settling the dispute over complex questions of fact and law or whether interpreting the BIT on the basis of customary international law, is neither incoherent, nor manifestly errs in applying the law; it is simply imbued with excessive formalism.

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State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential?

Michele Potestà

1 Introduction

It is well known that one of the most salient innovations brought by the now almost 3,000 Bilateral Investment Treaties (BITs) entered into by States in the last 50 years has been the incorporation of provisions on the settlement of investment disputes granting investors of the home State the right to directly resort to international arbitration against the host State (investor-State arbitration).[1] Thanks to these provisions generally contained in BITs, the last few decades have experienced a "boom" in such treaty-based investor-State cases initiated under different arbitration rules,[2] and the interest for the scope, policy, and the mechanics of

The text of this chapter has been updated as of 15 October 2011.

[1] The first BIT to provide for the contracting States' unconditional offer to resolve disputes with the foreign investor through investor-State arbitration appears to be the Italy-Chad BIT of 1969, http://itra.esteri.it, accessed 15 October 2011. See Newcombe and Paradell 2009, p. 45. Interestingly, the Italy-Chad BIT eliminated the State-to-State adjudication provision and simply provided that disputes between the two State Parties were to be resolved diplomatically (Article 7, final sentence).

[2] The majority of investor-State cases are conducted pursuant to the Rules of the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL), with other venues (such as the Stockholm Chamber of Commerce or the International Chamber of Commerce) being used only marginally. See Latest Developments in Investor-State Dispute Settlement, IIA Monitor No. 1, UNCTAD doc. UNCTAD/WEB/DIAE/PCB/2011/3 (30 June 2011), p. 2 available at www.unctad.org, accessed 15 May 2012.

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investment arbitration has resulted in a now abundant literature on the topic. Investor-State arbitration is, however, not the only type of dispute settlement mechanism contained in BITs. In fact, almost all BITs also provide, in addition to investor-State arbitration, for State-to-State arbitration for the resolution of disputes between the Contracting Parties concerning the "interpretation and application" of the treaty. These clauses are the heritage of the dispute settlement provisions contained in the BITs' predecessors, the Friendship, Commerce and Navigation (FCN) Treaties, and in fact early BITs, such as the very first one entered into by Germany and Pakistan in 1959, included only the State-to-State and not the investor-State dispute settlement mechanism.[3] Despite being incorporated in almost every BIT, State-to-State dispute settlement clauses have attracted very little attention, with rare contributions being devoted to the issue. The scarce interest in inter-State arbitration pursuant to BITs is certainly to be explained by its limited success in practice. Until recently, in fact, arbitral practice had been limited to only one case in which Peru had called for the initiation of State-to-State proceedings pursuant to a BIT in an attempt to block or hinder the ongoing investor-State arbitration where it was a Respondent.[4] As the attempt proved unsuccessful, the State-to-State arbitration was no longer pursued.[5] The *terra incognita* of State-to-State arbitration has however been recently fully explored by Italy, which, acting in diplomatic protection of a group of Italian investors operating in Cuba, brought arbitration proceedings against Cuba invoking the dispute settlement procedure contained in the Italy-Cuba BIT. These proceedings culminated in the issuance of an "Interim Award" of 2005 and of a "Final Award" of 2008 by an *ad hoc* Arbitral Tribunal constituted pursuant to Article 10 of the BIT.[6] The Italy-Cuba arbitration can thus be considered as a milestone in the law of investment claims as it marks the first real attempt to invoke the inter-State dispute settlement mechanism contained in a BIT, in a scenario where investor-State arbitration would have been an alternative option according to the treaty,[7] but where the certainly more unusual avenue of inter-State arbitration was selected. The invocation of this kind of dispute settlement

[3] See, e.g., Article 11 of the Germany-Pakistan BIT of 1959, www.investmentclaims.com, accessed 15 October 2011.

[4] In 2003, Peru initiated State-to-State arbitration against Chile pursuant to the Chile-Peru BIT in response to the investment claim brought against it by the Chilean investor Lucchetti. Peru requested the suspension of the investor-State proceedings as a consequence of the inter-State arbitration. The request was denied by the investor-State Arbitral Tribunal. See ICSID: Empresas Lucchetti SA and Lucchetti Peru SA v. Peru, ARB/03/4, Award on Jurisdiction (7 February 2005), paras 7, 9.

[5] Schreuer 2007, pp. 350–351.

[6] See Arbitral Tribunal: Italy v. Cuba, Interim Award ("*Sentence Preliminaire*") (15 March 2005), and Final Award ("*Sentence Finale*") (15 January 2008), with Dissenting Opinion, http://italaw.com, accessed 15 October 2011. The Arbitral Tribunal was composed of Yves Derains (President), Attila Tanzi and Olga Miranda Bravo (later replaced by Narciso A. Cobo Roura). For a comment on the case, see Tonini 2008.

[7] See Article 9 of the Italy-Cuba BIT, providing for investor-State arbitration.

mechanism raises, as the Italian-Cuban dispute displays, a number of issues of great relevance for the architecture of the investment dispute settlement system, such as the scope of inter-State dispute resolution provisions, the possible role to be played by the exhaustion of local remedies rule, and the potential interplay between inter-State and investor-State dispute settlement.[8]

2 The Scope of State-to-State Dispute Settlement Clauses in BITs

A BIT State-to-State dispute settlement clause may read as follows: "any dispute between the Parties concerning the interpretation or application of this Treaty, that is not resolved through consultations or other diplomatic channels, shall be submitted on the request of either Party to arbitration for a binding decision or award by a tribunal in accordance with applicable rules of international law".[9] Similar formulations, with variations and different levels of detail as to the negotiation/consultation period, the method for appointing the arbitrators, and the applicable law, are to be found in virtually every existing BIT.[10] In examining the potential use which may be made of such clauses, the point of departure must be the understanding of the scope of such a dispute settlement clause. What kinds of controversies are likely to be considered as "disputes concerning the interpretation and application" of the BIT? Two conceptually different situations may be envisaged which may trigger the use of inter-State dispute settlement.

In the first type of scenario, arbitration proceedings may be launched by one of the Contracting Parties to the BIT against the other Contracting Party with a view to resolving questions of "abstract interpretation" of the treaty. One may for example imagine the situation where a legislative measure is enacted by the host State in violation of the relevant standards contained in the BIT (e.g., because it is discriminatory towards foreigners, or because it prohibits the transfer of capital) and where the other Contracting Party to the BIT seeks from the arbitral tribunal an interpretation of the relevant provisions of the treaty, without any national of the claimant State having (yet) been affected.[11] One difficulty in this kind of

[8] Beyond the issues which are discussed in the present paper, the Arbitral Tribunal's Interim Award and Final Award in the Italy-Cuba dispute raise several further issues which would warrant separate examination, such as the definition of "investment" pursuant to the BIT, questions of corporate nationality for the purpose of diplomatic protection in relation to the BIT's definition of "investor", and issues of attribution of State responsibility. On the latter two issues see in particular the Dissenting Opinion of Arbitrator Tanzi, appended to the Final Award.

[9] Article 37.1 of the 2004 U.S. Model BIT, www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf, accessed 15 October 2011.

[10] For an analysis of State-to-State dispute settlement clauses contained in BITs, see Sacerdoti 1997, pp. 428–436; Peters 1991, pp. 102–117.

[11] Paparinskis 2008, pp. 314–315.

scenario would be to demonstrate the existence of a 'legal dispute', a precondition to the exercise of jurisdiction by any dispute settlement body, in terms of a disagreement between the parties beyond mere hypothetical grievances.[12]

In the second type of scenario, the investor's home State could resort to the State-to-State dispute settlement procedure with the purpose of espousing its national's claim and of exercising diplomatic protection. The language of the dispute settlement clauses (extending also to the "application" of the treaty, and not simply to its "interpretation") would seem to clearly comprise issues relating to the host State's compliance with its substantive treaty obligations in a situation of concrete implementation involving foreign investors.[13] Moreover, often identically phrased dispute resolution clauses were contained in the FCN treaties and there is little doubt that disputes relating to an alleged injury to a national were subject to the dispute resolution clauses of those treaties.[14]

3 The Exhaustion of Local Remedies Rule

The distinction between a dispute on abstract interpretation (where the alleged violation of the treaty is said to arise directly in the relationship between the two States *inter se*) and a diplomatic protection claim (where the home State is espousing a claim of its national) is significant in view of the applicability of the rule of exhaustion of local remedies. The rule requires that local remedies be exhausted before international proceedings may be instituted and it ensures that "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system".[15]

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[12] See Schreuer 2008, pp. 970–972.

[13] One could also think of a third situation: a State may bring State-to-State proceedings if the host State which has been a respondent in a previous investor-State claim fails to abide by or to comply with the arbitral award (a scenario which is expressly addressed by Article 27 of the ICSID Convention and by many BITs, on which see *infra*). While a dispute of this kind would involve the interpretation of the obligation to comply with the award arising out of the BIT, it may not be entirely assimilated to a question of "abstract interpretation" in the first sense seen above, because it would involve and presuppose an injury (already ascertained by an investor-State arbitral tribunal) to the home State's national, on whose behalf the home State is acting. At the same time, it is different from the "classic" diplomatic protection scenario described above, because it would not involve a full litigation on the facts and substantive breaches of the BIT (on which a different tribunal has already ruled), but would merely aim at obliging the host State to comply with the arbitral award.

[14] Rubins and Kinsella 2005, p. 420. One such example is the *ELSI* case, where there was no doubt that the claim brought by the US on behalf of two American companies was subject to the State-to-State dispute settlement clause contained in the FCN Treaty between Italy and the US, which provided that "any dispute (…) as to the interpretation and the application of this Treaty" be submitted to the ICJ. See ICJ: Elettronica Sicula S.p.A. (ELSI) (United States v. Italy), Judgment (20 July 1989), paras 48–49.

[15] ICJ: Interhandel (Switzerland v. United States), Judgment (21 March 1959), p. 25.

The International Court of Justice (ICJ) referred to the rule as a "well-established rule of customary international law".[16] The question arises as to what extent the exhaustion rule should apply within the framework of inter-State arbitration proceedings in BITs.[17] BITs are silent in this regard.[18] In public international law dispute settlement generally, the rule is understood to be applicable only in cases of international claims arising from injury to natural or juridical persons, whereas it is irrelevant in claims arising from direct injury to States in their relations *inter se*.[19] As the International Law Commission (ILC) Special Rapporteur on Diplomatic Protection John Dugard explained in his Second Report of 2001, "the rule applies only to cases in which the claimant State has been injured 'indirectly', that is, through its national. It does not apply where the claimant State is directly injured by the wrongful act of another State, as here the State has a distinct reason of its own for bringing an international claim".[20] Transferring the distinction to the field of inter-State disputes pursuant to a BIT, *prima facie* the rule would thus seem to be inapplicable in the first type of scenario (dispute on abstract interpretation), and only applicable in the second one (proper diplomatic protection claims). The solution is not, however, as clear-cut as it would appear at first sight. As evidenced by the extensive discussions in Dugard's reports (as well as in the ILC's final commentary to the 2006 Draft Articles on Diplomatic Protection), the distinction between direct and indirect injuries is commonly accepted in principle, but is difficult to maintain in practice.[21] This is so because most of the time the claim is of a "mixed" nature, that is, it contains elements of both injury to the State and injury to its nationals. In this regard, the ILC in its 2006 Draft Articles

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[16] Ibidem. See also ELSI, supra n. 14, para 50, where the rule is referred to as "an important principle of customary international law".

[17] The question also arose in the negotiation of the so-called Multilateral Agreement on Investment (MAI) within the OECD framework. See The Multilateral Agreement on Investment. Commentary to the Consolidated Text, OECD Doc. DAFFE/MAI(98)8/REV1 (22 April 1998), hereinafter MAI Commentary, p. 36 for a commentary on Article C.1.*a* (dealing with State-to-State proceedings). Documents related to the MAI are available at www1.oecd.org/daf/mai/index.htm, accessed 15 October 2011.

[18] It may occur—although this is rather infrequent—that BITs expressly address the applicability or inapplicability of the exhaustion of local remedies rule within the framework of clauses on investor-State arbitration. In this regard, see also Article 26 of the ICSID Convention, providing for a waiver of the exhaustion rule with regard to investor-State arbitration. See also Schreuer et al. 2009, pp. 402–413, esp. 405–407.

[19] See Amerasinghe 2004, pp. 146–168; International Law Commission, Draft Articles on Diplomatic Protection with Commentaries, UN Doc. A/61/10 (2006), hereinafter Draft Articles on Diplomatic Protection, pp. 70–76. For a case applying this distinction, see Arbitral Tribunal: Air Service Agreement of 27 March 1946 between the United States of America and France (United States/France), Decision (9 December 1978), paras 19–32.

[20] ILC, Second Report on Diplomatic Protection by Mr. John Dugard, Special Rapporteur, UN Doc. A/CN.4/514 (28 February 2001), hereinafter Dugard Second Report 2001, para 18 (footnotes omitted).

[21] See ibidem, paras 18–31; Draft Articles on Diplomatic Protection, supra n. 19, pp. 74–76. See also Amerasinghe 2004, pp. 146–168; Meron 1959, pp. 84–86.

resorted to the "preponderance test" in order to decide between the two categories of injuries[22] (although it must be noted that doctrine and case law have also advanced other criteria to establish whether the claim is direct or indirect).[23]

The difficulty in distinguishing the two types of situations, for the purpose of the applicability of the exhaustion rule, also arose in the Italy-Cuba arbitration. Italy maintained that, in pursuing its claim, it was invoking a "double standing" ("*double légitimation*"), i.e., that first it was protecting its own rights; and secondly, it was protecting the rights of its nationals on whose behalf it was acting.[24] According to Italy, this "double standing" was rooted in the very institution of diplomatic protection, which implies that the rights of the State which acts in diplomatic protection are indissolubly linked to the interests of the physical or juridical persons in whose favor it is acting.[25] Coherently with this purportedly double facet of its claim, Italy was seeking from the Tribunal both compensation (calculated in relation to each of the injuries allegedly suffered by the investors) and satisfaction. In relation to the latter, Italy requested the Tribunal to award "the symbolic amount of 1 euro for the continued and reiterated violation of the terms, the spirit and the purposes of the BIT, and for the refusal, the indifference and the silence by the Cuban authorities vis-à-vis the several diplomatic initiatives directed at the amicable settlement of the disputes concerning the Italian investors".[26] In the preliminary phase of the arbitration, Cuba raised the objection that local remedies had not been exhausted by the Italian investors, and thus Italy was barred from resorting to diplomatic protection.[27] For its part, Italy's line of defence was not very dissimilar to the one advanced by the United States in *ELSI*. In that case, the United States, in an attempt to bypass the exhaustion rule, sought to present its diplomatic protection claim clothed as a request for a declaratory judgment, directed at finding that the United States' own rights under the FCN Treaty had been infringed.[28] The Chamber of the ICJ did not accept this line of reasoning. It held that it was unable "to find a dispute over alleged violation of the

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[22] Article 14(3) of the ILC Draft Articles provides: "Local remedies shall be exhausted where an international claim, or request for a declaratory judgment related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8".

[23] See in particular the discussion in Dugard Second Report 2001, supra n. 20, paras 18–31.

[24] Italy v. Cuba Interim Award, supra n. 6, paras 24–25.

[25] Ibidem, para 25. It could be said that Italy's position was coherent with the more traditional (but highly debated) view on the legal nature of diplomatic protection as reflected in the "Mavrommatis paradigm" (whereby "[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights"). The discussion of this topic (on which see ILC, Preliminary Report on Diplomatic Protection by Mr. Mohamed Bennouna, Special Rapporteur, UN Doc. A/CN.4/484 (4 February 1998); ILC, First Report on Diplomatic Protection by Mr. John Dugard, Special Rapporteur, UN Doc. A/CN.4/506 (7 March 2000), paras 10–40; Pellet 2008) is beyond the scope of this paper.

[26] Italy v. Cuba Final Award, supra n. 6, para 96.

[27] Italy v. Cuba Interim Award, supra n. 6, para 57.

[28] ELSI, supra n. 14, paras 50–52.

FCN Treaty resulting in direct injury to the United States that is both distinct from, and independent of, the dispute over the alleged violation in respect of [the US companies]".[29] It went on to say that it had no doubt "that the matter which colors and pervades the United States claim as a whole, is the alleged damage to [the US companies]".[30] In the Italy-Cuba dispute the Tribunal did not question the conceptual "double standing" scheme advanced by Italy. However—at least for the purposes of the applicability of the exhaustion rule—a clearer inquiry by the Tribunal as to the preponderance of either the direct or the indirect damage to the State in the dispute at issue would have perhaps been desirable. In retaining the distinction suggested by Italy, the Tribunal concluded that the exhaustion rule applied only in relation to those claims where the State was acting in diplomatic protection, but not in relation to that part of the claim where the claimant State was pursuing its own rights.[31] Alternatively, the Tribunal could have found, in line with the ICJ precedents (*Interhandel* and *ELSI*), that the two claims could not be severed and that the international claim should be treated as a unity, with the consequence that being the *indirect* damage of the State the one "preponderant" the exhaustion rule had to be applied. The fact that Italy was not simply asking for compensation but also for declaratory relief is not decisive in this regard. As explained by Dugard in his second report, as per *Interhandel* and *ELSI* "[w]here the request for a declaratory judgment is incidental to or related to a claim involving injury to a national—*whether linked to a claim for compensation or restitution on behalf of the injured national or not*—it is still possible for a tribunal to hold that in all the circumstances of the case the request for a declaratory judgment is preponderantly brought on the basis of an injury to the national."[32]

A second issue raised in the Italy-Cuba dispute with regard to the exhaustion rule is worthy of consideration. Italy submitted that, even if the exhaustion rule was deemed to be applicable in principle, it had been in effect waived by the Contracting Parties to the BIT. A waiver of the exhaustion rule is indeed generally possible and resorted to in practice.[33] It may be either express or implied.[34] In the dispute between Italy and Cuba, Italy's argument with regard to the waiver was twofold. First, the Contracting Parties' intention to waive the exhaustion rule would allegedly result from the fact that they conditioned the submission of

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[29] Ibidem, para 51.

[30] Ibidem, para 52. But see ICJ: Avena and Other Mexican Nationals (Mexico v. United States), Judgment (31 March 2004), para 40.

[31] Italy v. Cuba Interim Award, supra n. 6, paras 86–91.

[32] Dugard Second Report 2001, supra n. 20, para 30 (emphasis in the original); Draft Articles on Diplomatic Protection, supra n. 19, p. 76.

[33] See ILC, Third Report on Diplomatic Protection by Mr. John Dugard, Special Rapporteur, UN Doc. A/CN.4/523 (7 March 2002), paras 46–64; Draft Articles on Diplomatic Protection, supra n. 19, Article 15.*e* and relating commentary (pp. 83–86); Amerasinghe 2004, pp. 247–279, with further references.

[34] See Draft Articles on Diplomatic Protection, supra n. 19, Article 15.*e* and relating commentary (pp. 83–86).

disputes *inter se* only to a negotiation period (Article 10 para 1 of the BIT). In Italy's view, the presence of this sole condition would indicate that they intended to clearly exclude the exhaustion rule. The Arbitral Tribunal did not address this particular argument. It would not seem, however, that the presence of such a negotiation period can be taken as amounting to an express waiver, as Amerasinghe has convincingly explained.[35] The second argument advanced by Italy on the alleged waiver of the exhaustion rule is particularly interesting because it goes to the heart of the policy of the rule within the present architecture of the investment dispute settlement system. Italy submitted that there would be no room left for the exhaustion rule (not even in State-to-State proceedings) once the investment treaty grants investors a direct right to resort to arbitration against the host State in alternative to resort to domestic courts. If the rule is dispensed with in connection with investor-State arbitration (Article 9 of the BIT), so it was argued, then "it would be illogical to require Italy to respect such rule when it is invoking Cuba's responsibility pursuant to Article 10 of the BIT [inter-State arbitration] and when it seeks to obtain a favorable result for its investors".[36] The Arbitral Tribunal did not share this view and held that nothing in the Article 9 of the BIT would indicate that the State Parties had waived the exhaustion rule for the purpose of diplomatic protection.[37] The reasoning on this point would perhaps have warranted a more in-depth discussion, although in the end the Tribunal's conclusion has to be shared. In fact, there is ample authority that a waiver of local remedies must not be readily implied,[38] and it would be too far-fetched to conclude that the mere presence of the investor-State arbitration mechanism constitutes an implied waiver of the exhaustion rule within the State-to-State framework. It is however true that, from a broader policy point of view, this solution may seem somewhat paradoxical and perhaps not effectively reflecting the latest developments within investment dispute settlement (where there has been, thanks to the web of thousands of BITs, a generalization of investors' standing to pursue direct arbitration against the host State). There is thus a certain force in the view (put forward by Italy) which considers it "illogical" to hold that, on the one hand, local remedies need not be exhausted when the investor brings a direct claim, while, on the other, the rule strictly applies when the investor invokes the diplomatic espousal from its government pursuant to the same treaty—even when the investor had the option to pursue investment arbitration in the first place. But the functional underpinnings of the exhaustion rule should not be overlooked. If those lie, among others,[39] in considerations aimed at "reduc[ing] the chances of unwelcome interference in the

[35] Amerasinghe 2004, p. 276 (noting that "[t]he reference to negotiation as a pre-condition for arbitration is a reference to what is required of the parties to the BIT. It does not affect what is required of the investor, if a party to the treaty wishes directly to exercise diplomatic protection").

[36] Italy v. Cuba Interim Award, supra n. 6, para 41.

[37] Ibidem, para 90.

[38] Draft Articles on Diplomatic Protection, supra n. 19, p. 85; ELSI, supra n. 14, para 50.

[39] See extensively Amerasinghe 2004, pp. 56–64.

relations between [States] and of the elevation of disputes to an international level",[40] then a differentiation between the applicability of the rule in investor-State and State-to-State proceedings continues to be justified. When the choice is made to elevate the dispute to the higher level of inter-State adjudication, rather than to submit it to the more "depoliticised" mechanism of investor-State arbitration, then there is sufficient reason for keeping the exhaustion rule operative.

4 The Interplay Between State-to-State and Investor-State Dispute Settlement Mechanisms

These last considerations of the possible repercussions of the availability of investor-State mechanisms on the applicability of the exhaustion rule in State-to-State proceedings lead us to a further point which merits attention. From a broader perspective, how do the two types of mechanisms interrelate with one another? Given that in most cases BITs offer both possibilities, in which terms (alternative, complementary, additional, etc.) should one dispute settlement mechanism be seen *vis-à-vis* the other? Although investment arbitration and inter-State arbitration proceedings would not *strictly* compete with each other, because they would not involve the exact same parties,[41] the issue that parallel proceedings may lead to conflicting decisions on either the interpretation of the same treaty or the same set of facts should not be underestimated.

In order to address the issue of the interplay between the two types of mechanisms, it is useful to maintain the distinction drawn above between possible State-to-State disputes on abstract interpretation and diplomatic protection claims.

4.1 Abstract Interpretation v. Investment Arbitration

Neither the arbitration rules under which investor-State arbitrations may be conducted nor BITs contain provisions addressing the coordination between State-to-State proceedings and investment arbitration *in general terms*.[42] There are certain rules, as we shall see further, on the relationship between investor-State arbitration and diplomatic protection, with Article 27 of the ICSID Convention being the foremost example. But Article 27 ICSID Convention, as well as those provisions in BITs modeled around it, are not concerned with disputes on abstract

[40] Ibidem, p. 57.

[41] Schreuer 2007, p. 349.

[42] Only certain Chinese BITs contain a clause addressing the general relationship between the two dispute settlement mechanisms. See Article 13.12 of the China-New Zealand BIT (1988) and of the China-Singapore BIT (1985), and Article 13.11 of the China-Sri Lanka BIT (1986).

interpretation short of diplomatic protection.[43] Thus, under the present discussion on the ways to coordinate a possible dispute on the inter-State level concerning the abstract interpretation of the BIT and a parallel investor-State arbitration the situation is in principle no different if the ICSID Convention is or is not applicable.

The framework could be delineated in the following terms. Let us first suppose that a State-to-State arbitration is launched on a question of abstract interpretation of the treaty *before* investor-State proceedings are initiated (and that the inter-state tribunal finds that the threshold of a 'legal dispute' between the parties is met). One interesting question that would arise in this regard is whether the interpretation given by the inter-State arbitral tribunal on the compatibility of a legislative measure with the treaty or, even more generally, on the correct interpretation to be accorded to a certain provision (e.g., the meaning of "fair and equitable treatment" or the definition of "investment" under that particular BIT) would have any binding effect on a subsequently constituted investor-State tribunal, which may have to consider the same measure—or the same treaty provision—but from the perspective of an alleged harm to an investor. There are no indications whatsoever in BITs as to how to deal with a situation of this kind. It appears likely that the investor-State tribunal would take the interpretation rendered on the inter-State level into serious consideration. But to imply—absent clear language in the BIT in this regard—that interpretations given by a State-to-State tribunal will enjoy binding authority upon an investor-State tribunal would seem to be an unjustified conclusion.[44] It should be added that when States have intended to bind investor-State tribunals to interpretations given by a different body, they have explicitly done so. Certain investment treaty regimes, in fact, entrust particular non-judicial authorities with the power to issue interpretations of the treaty, which are expressly said to be binding on investor-State arbitration tribunals. The premier example of this is the mechanism established by the North American Free Trade Agreement (NAFTA), which provides that the Free Trade Commission (FTC), comprised of "cabinet level representatives" of the three NAFTA Parties, may issue an interpretation of a provision of the NAFTA, which shall be binding upon a Chapter 11 tribunal.[45] Similar mechanisms are provided in BITs to which the United States or Canada is a party. For example, Article 30(3) of the US Model BIT of 2004, in its provision dedicated to the governing law in investor-State arbitration, provides that "[a] joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision". One could perhaps argue *a contrario* that under those treaty regimes the only decision which would be

[43] The wording of Article 27 (quoted *infra* n. 49) is clear on the point at issue. This is also indirectly confirmed by the MAI Commentary, supra n. 17, p. 36, *sub.* Article C 1.*b* of the draft MAI (quoting the view expressed on Article 27 by the ICSID observer).

[44] But see *contra* Broches 1972, p. 377.

[45] See Kaufmann-Kohler 2011.

binding upon an investor-State tribunal is the one stemming from the State Parties themselves (given in the form of either a joint declaration or through an FTC-type body), whereas a decision rendered by an inter-State arbitral tribunal constituted under the same treaty would not be accorded any binding authority.

More problematic would be the situation where a State-to-State tribunal is seized when an investor-State arbitration is already underway. The risk that the investor-State tribunal would perceive any position taken on interpretation issues by the State-to-State tribunal as an interference in its proceedings would arguably be high. It should be noted that certain BITs provide—in addition to the two usual dispute settlement mechanisms—for the possibility to resort to "consultations" between the two Contracting Parties. This is for example envisaged by the BIT between the Netherlands and the Czech Republic.[46] The case of *CME v. Czech Republic* testifies to the use of such a procedure: after the investor-State tribunal had issued a partial award, the Czech Republic requested consultations with the Netherlands, with the purpose of resolving certain issues relating to the interpretation and application of the treaty arising from the tribunal's partial award. This procedure led to certain "Agreed Minutes" containing a "common position" of the parties on the interpretation of the BIT.[47] When the investor-State tribunal rendered its final award, it appeared to take the "Agreed Minutes" into account as supporting its holdings.[48] Once again, however, the interpretation stemmed from the two Contracting Parties to the BIT, and not from a State-to-State arbitral tribunal.

4.2 Diplomatic Protection v. Investment Arbitration

If a State-to-State arbitration is invoked with a view to espousing an investor's claim, a fundamental distinction has to be made between the ICSID framework and non-ICSID arbitrations.

If the ICSID Convention is applicable (because it is in force between the two State Parties and the investor has consented to submit its dispute to ICSID arbitration), the prohibition, contained in Article 27 of the Convention, on the home State to provide diplomatic protection comes into play.[49] A number of BITs

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[46] Netherlands–Czech Republic BIT (1991), Article 9.

[47] UNCITRAL: CME Czech Republic B.V. (The Netherlands) v. Czech Republic, Final Award (14 March 2003), paras 87–93, 216–226.

[48] Ibidem, paras 437, 504.

[49] Article 27.1 ICSID Convention reads: "No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute". During the ICSID Convention's drafting, the question of competing remedies in investor-State and State-to-State proceedings was discussed at some

"replicate" this rule (though sometimes not in identical formulations) within the text of the bilateral treaty itself.[50] The thrust of Article 27 ICSID Convention is that once an investor has consented to submit or has submitted a dispute to ICSID arbitration, the investor's home State is barred from instituting State-to-State proceedings with a view to exercising diplomatic protection (except where the host State fails to abide by the arbitral award). It has been suggested that a State-to-State arbitral tribunal, if seized of such a dispute, would have to decline jurisdiction.[51] This would be the obvious solution if an Article 27-type provision is repeated in the BIT,[52] which would be the legal instrument under which the State-to-State tribunal would derive its authority. But the same could be said to be true even if the BIT lacks a specific 27-type provision: If the ICSID Convention is applicable to the investor-State arbitration, the inter-State BIT tribunal could—even in the absence of a 27-type provision in the BIT—decline jurisdiction,[53] by paying heed and giving effect to a binding obligation of the two Contracting Parties contained in a different legal instrument (the ICSID Convention). The risk that the host State is exposed to litigation at both the inter-State and the individual-State level at the same time would thus be ruled out. The institution by the home State of inter-State proceedings would, on the other hand, constitute a breach of Article 27, but would have no effect on the jurisdiction of the ICSID tribunal, as confirmed by two *obiter dicta* in *Banro v. Congo*[54] and *Aucoven v. Venezuela*.[55] However, the violation of Article 27 may trigger the institution of a second and different type of State-to-State adjudication: the aggrieved State may namely bring a dispute "on the interpretation or application" of the ICSID Convention before the ICJ by resorting to the compromissory clause contained in Article 64 of the Convention.[56]

(Footnote 49 continued)
length. Schreuer notes, with reference to the *travaux* of the Convention, that "[t]he issue remained unregulated but there seemed to be consensus that inter-State arbitration should neither interfere in investor-State cases nor affect the finality of ICSID awards". See Schreuer 2007, p. 349.

[50] See Juratowitch 2008, pp. 16–22; Schreuer et al. 2009, p. 426.

[51] Schreuer 2007, p. 350.

[52] Certain BITs elucidate that the parties are barred from resorting to State-to-State arbitration "in consideration of Article 27", thus clearly instituting a link between this latter provision and the need to avoid concurrent State-to-State proceedings. See Article 10.6 of the Germany-Barbados BIT (1994), of the Germany-Bolivia BIT (1987), of the Germany-Estonia BIT (1992), and of the Germany-Poland BIT (1989).

[53] Schreuer 2007, p. 350.

[54] ICSID: Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo, ARB/98/7, Award (1 September 2000), para 18.

[55] ICSID: Autopista Concesionada de Venezuela, C.A. v. Venezuela, ARB/00/5, Decision on Jurisdiction (27 September 2001), para 140.

[56] The compromissory clause in Article 64 has so far never been resorted to.

In contrast, if Article 27 ICSID is *not* applicable (either because the Convention is not in force between one of the two States, or because the investor has consented to submit the dispute to arbitration with the host State according to a different set of rules, e.g., UNCITRAL), the framework for the delineation of the interplay between investor-State and State-to-State proceedings becomes much more uncertain. As already noted, the Contracting Parties to the BIT may have incorporated an Article 27-type provision in the treaty which applies also in situations where *any* type of investor-State arbitration is initiated by the investor. A significant number of the Italian BITs (though not the Italy-Cuba BIT) contain such a clause.[57] In the absence of any such provision, the suggestion that an inter-State tribunal should decline jurisdiction in view of the pending investor-State arbitration cannot be automatically transposed in the non-ICSID context. It has been cogently argued that "there is no practice that would support the existence of customary law analogous to Article 27 and applicable to all investment arbitrations".[58]

The Italy-Cuba arbitration provides once more for an interesting example of how these issues may concretely arise in practice. Faced with Cuba's objection to Italy's lack of standing to act in diplomatic protection of its nationals by way of the inter-State dispute settlement mechanism, the Tribunal considered whether the investor-State provision in the BIT prohibited the home State from exercising diplomatic protection within the framework of State-to-State proceedings. It is worth noting that Cuba is not a Party to ICSID and that the investor-State provision in the BIT provides accordingly for *ad hoc* arbitration. The Arbitral Tribunal found that "as long as the investor has not consented to international arbitration with the host State, its right to diplomatic protection persists".[59] On the contrary, the Tribunal held that if the investor had already seized an investor-State tribunal or provided its advance consent to such a dispute settlement mechanism, then the home State would be barred from espousing its claim. Not going as far as to find that the principle embodied in Article 27 ICSID should be considered as a codification of a customary norm, the Tribunal nonetheless made the statement that it could be applied "by analogy".[60] It is doubtful whether this reflects the *lex lata* or should rather be viewed as a consideration *de lege ferenda* on how to correctly coordinate the two dispute settlement systems.

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[57] See Article 10.5 of the Model Agreement involving the Government of the Italian Republic on the Promotion and Protection of Investments. In: UNCTAD (2003) International Investment Instruments: A Compendium 12: 295–303, www.unctad.org/en/docs/dite4volxii_en.pdf, accessed 15 October 2011. A similar provision had been incorporated in the draft MAI. See Article C.1.*b* of the MAI Draft Consolidated Text, OECD Doc. DAFFE/MAI(98)7/REV1 (22 April 1998).

[58] Paparinskis 2008, p. 285.

[59] Italy v. Cuba Interim Award, supra n. 6, para 65.

[60] Ibidem.

5 Concluding Remarks

This contribution has attempted to draw a preliminary overview on State-to-State dispute settlement clauses contained in BITs and has pointed out some of the intricacies which may arise when investor-State and State-to-State mechanisms are combined or otherwise interrelate. This complex field would certainly deserve to be further explored. No doubt the illustration of the interrelationship between investment arbitration proceedings and diplomatic protection State-to-State claims (probably the most thorny question in this area) is likely to be significantly affected by the different conceptions one takes on both diplomatic protection and the nature of the substantive BIT rights at issue. Different solutions may in fact be advanced depending on the answers one will give to questions such as whose rights the State is protecting through diplomatic protection as well as to whom the substantive rights contained in BITs are in reality owed.

A few final observations should be made on the role which inter-State arbitration will play within the present and future architecture of investment law dispute settlement. Is the Italy-Cuba dispute bound to remain an exceptional occurrence reinforcing the general rule (i.e., that direct investor-State arbitration will almost always be the preferred mechanism), or does it have the potential of awakening the attention of States (and their nationals) towards a tool which has so far been largely neglected? It is difficult to provide a clear-cut answer to this question, though it would appear that the success of investor-State arbitration in BITs is unlikely to be eroded by the availability of inter-State dispute settlement mechanisms in the same treaty. When the investor has a choice between a direct remedy (which "allows the true complainant to face the true defendant"[61]) and a request for espousal by its home Government, it will more likely resort to the first option, because it will retain more control over the proceedings, it will not normally have to observe the local remedies rule, it will recover—in the case of a favorable decision—direct compensation, and will in general avoid, or at least reduce, the risk of the politicized atmosphere characterizing diplomatic protection.

Does this mean that the thrust of inter-State dispute settlement is bound to remain limited? For certain authors the inter-State arbitration option should be characterized as a guarantee "of last resort" for the protection of foreign investors should they encounter difficulties in investor-State proceedings.[62] In a similar vein, State-to-State dispute settlement could be viewed as an "additional tool" in case investor-State arbitration fails, for example due to a lack of co-operation by the host State.[63] This seems to be certainly correct in a scenario where the losing host State in an investor-State arbitration fails to comply with the award, and thus the award creditor turns to its home State for support.[64] In contrast, ordinary

[61] Paulsson 1995, p. 256.

[62] Sacerdoti 1997, p. 436.

[63] See Kokott 2002, pp. 24–25; Juratowitch 2008, p. 33.

[64] Article 27 ICSID Convention envisages precisely this possibility. See supra n. 49.

difficulties encountered in the course of investment proceedings (deriving, for example, from the refusal by the host State to take part in the arbitration or to appoint their party-appointed arbitrators, or from other dilatory tactics, etc.) should not be viewed as a sufficient reason for discontinuing (or failing to initiate) investor-State proceedings and for "elevating" the dispute to an inter-State level. That is so because investor-State provisions in BITs are normally drafted so as to avoid such scenarios, either by referring to arbitration administered by an institution (*in primis*, ICSID) which will therefore ensure that the arbitration is not derailed, or by providing for procedural safeguards in case of *ad hoc* arbitration. The room for resorting to inter-State arbitration would thus not seem to be too wide in practice. Things, however, may change in the future if the backlash, perceived in certain quarters, against investor-State arbitration should succeed in convincing States to discard this mechanism in their future treaties. It is still early to attempt to identify trends in this area. But it appears significant that certain countries, such as Australia, have recently expressed the firm resolution to avoid investor-State dispute settlement mechanisms in their future investment treaties (or in the investment chapter of their free trade agreements).[65] If this choice is effectively pursued in future treaty negotiations, the so far dormant inter-State dispute settlement mechanisms are likely to experience renewed interest.

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Part IX
Private International Law

The ECJ's Rule of Reason and Internationally Mandatory Rules

Paolo Bertoli

1 The "Non-Prejudice" to Internationally Mandatory Rules

As is well known, internationally mandatory rules are overriding rules (belonging to the *lex fori*, to EU or international law or to the law of third countries) that, due to their "evaluative intensity", can or must be given effect regardless of choice-of-law rules (including express choice by the parties) that point to a different law.

While the above principle is widely accepted, opinions differ as to *how* internationally mandatory rules should be given effect. This article discusses recent developments in EU and domestic courts that shed light on the mechanism of the application of such rules.

According to the traditional approach, internationally mandatory rules operate "*ex ante*" (*i.e.*, before the applicable foreign law is assessed and regardless of its contents). Under this "hard-and-fast" approach, if a rule is characterized as internationally mandatory, it must be fully applied regardless of the content of the law that would otherwise be applicable.

In his first book, Professor Treves undermined this traditional (and currently widely accepted) approach by engaging in a conceptual analysis and by analyzing the actual application of various norms.[1]

Other authors adopted and further developed Treves' ideas, as have recent domestic and EU courts. In particular, with some nuanced differences, academic commentary and judicial decisions have stated that internationally mandatory rules do not operate *before* the applicable choice-of-law rules. Instead, these rules are given effect *after* the assessment of the applicable law and of its contents on the

[1] Treves 1967, pp. 53–59.

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basis of a fungibility or proportionality test, i.e., when the result they aim to obtain is not adequately granted by the otherwise applicable law.

2 The ECJ and Internationally Mandatory Rules

As the present author has demonstrated elsewhere, the ECJ dealt with internationally mandatory rules both by assessing the conformity of domestic internationally mandatory rules with EU law and by developing internationally mandatory rules of EU origin.[2] These lines of cases together provide an overview of how internationally mandatory rules should be given effect.

In *Ingmar*, the Court was asked to consider the application of Articles 17 and 18 of EC Directive 653/86, which guarantee certain rights to commercial agents upon the termination of agency contracts. In *Ingmar*, the agent's activity was carried out in a Member State, but the principal was established in a non-member country, and the contract contained a choice-of-law clause specifying the law of the latter (which did not contain similar provisions). The Court affirmed that the articles were internationally mandatory and accordingly could not be evaded by an express choice of law. The Court explained that these rules are intended to "protect, for all commercial agents, freedom of establishment and the operation of undistorted competition in the internal market. Those provisions must therefore be observed throughout the Community if those Treaty objectives are to be attained".[3]

Another well-established principle that has been applied by the Court on a number of occasions states as follows:

> the fact that national rules are categorized as public-order legislation does not mean that they are exempt from compliance with the provisions of the Treaty (…) the considerations underlying such national legislation can be taken into account by Community law only in terms of the exceptions to Community freedoms expressly provided for by the Treaty and, where appropriate, on the ground that they constitute overriding reasons relating to the public interest.[4]

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[2] Bertoli 2005, pp. 341 ff., 442 ff.

[3] ECJ: Ingmar GB Ltd v Eaton Leonard Technologies Inc., Judgment (9 November 2000), para 24.

[4] ECJ: Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL and Bernard Leloup, Serge Leloup and Sofrage SARL, joined cases C-369/96 and C-376/96, Judgment (23 November 1999), para 31. At para 30, the Court defines internationally mandatory rules as "national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State". This definition, which follows the formula traditionally advocated by Professor Franceskakis, appears to be too strict (as it excludes, at least on a literal reading, the protection of private interests), not to mention useless (as it is not for the Court or EU law to define the interests to be protected by domestic internationally mandatory rules). See, *e.g.*, Bonomi 2009, p. 116 ff.

In *Arblade* and *Mazzoleni*, the Court assessed the application by the host State of internationally mandatory labor law rules to workers temporarily deployed in their territory by companies that submitted that they were in compliance with the law of their State of establishment (in fact, the application of such rules could have turned into a double burden for their EU freedom).[5] The Court applied the rule of reason test and, while admitting *in abstracto* that the protection of workers constituted valid overriding reasons relating to the public interest, applied the proportionality test to assess whether "that interest is already protected by the rules of the Member State in which the service provider is established and whether the same result can be achieved by less restrictive rules".[6]

The application of the rule of reason test to internationally mandatory rules significantly impacts their operation.[7] This test (i) compares the content and effects of the application or non-application of the applicable law and the internationally mandatory rule at stake; and (ii) allows for the application of the latter only if its aim is not adequately met by the former. This conclusion is consistent with the opinion expressed by some authors on the way in which internationally mandatory rules function, following and developing the insightful ideas of Professor Treves.[8]

This way in which internationally mandatory rules function is imposed by the Court only with respect to domestic internationally mandatory rules in situations falling within the reach of EU legislation.[9]

The question thus arises whether internationally mandatory rules of domestic or international origin should also operate pursuant to a fungibility or proportionality test in situations not covered by EU law, and whether EU internationally mandatory rules should operate in the same way.

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[5] *E.g.*, Ingmar, supra n. 3, para 33; and ECJ: Criminal proceedings against André Mazzoleni and Inter Surveillance Assistance SARL, as the party civilly liable, third parties: Eric Guillaume and Others, C-165/98, Judgment (15 March 2001), para 22. These cases were discussed before the entry into force of EC Directive No. 96/71 on the relocation of workers.

[6] Arblade, supra n. 4, para 39.

[7] As per its general features, the burden test should not be applicable with respect to the sector's object of "maximum" or "complete" harmonization.

[8] See in particular Treves 1967, pp. 53–59; Treves 1983, p. 25 ff.; Treves 1996, p. 87; Boschiero 1996a, pp. 1064–1065; Boschiero 1996b, pp. 233; 242 ff.; Bonomi 1998, p. 138 ff.; Bonomi 2007, p. 57 ff.

[9] See also, *e.g.*, Idot 2002, p. 27 ff.; Pataut 2004, p. 130 ff.; Jobard-Bachellier 2003a, p. 201 ff.

3 The Mechanism for the Application of Internationally Mandatory Rules in Rome I and Rome II Regulations in Light of the ECJ's Case Law

The above-mentioned question is particularly interesting since the recently enacted Rome I[10] and Rome II[11] Regulations, which respectively address the law applicable to contractual and non-contractual obligations, regulate domestic internationally mandatory rules as well as "mandatory provisions" of EU law.

Both regulations allow for the application of "overriding mandatory provisions of the law of the forum" (Articles 9.2 Rome I and 16 Rome II).[12] In addition, both regulations provide for "non-prejudice" of: (i) (internally) mandatory provisions of the State to which, in wholly internal situations, all elements of the situation (other than the choice of law) refer, and (ii) in the event of wholly "infra EU" situations, mandatory provisions of EU law, where appropriate as implemented in the forum State (Articles 3.3[13] and 3.4[14] Rome I and 14.2[15] and 14.3[16] Rome II).

It is generally agreed that when the situation is wholly internal, the "non-prejudice" of domestic mandatory provisions imposed by Articles 3.3 and 14.2 does not necessarily imply their "application" in mechanical terms. Indeed, those mandatory rules should be applied pursuant to the "rule of reason" or fungibility test, which—as discussed—involves: (i) a comparison between the content and effects of the application or non-application of the applicable law and the mandatory rule at stake, and (ii) the application of the latter only if its aim is not

[10] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

[11] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

[12] Differently from Rome I, Rome II does not define internationally mandatory rules nor does it govern the relevance of internationally mandatory rules of third countries. See further Bertoli 2009, p. 259 ff.

[13] Laying down that "where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement".

[14] Stating "where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement".

[15] Stating "where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement".

[16] Stating that when the elements mentioned in the previous note "are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement".

adequately provided by the former. In this way, mandatory rules may be limited to preventing the application of certain provisions of the applicable law, or they may simply impose a certain interpretation thereof.[17]

Before the adoption of Rome I and Rome II, there was significant debate on the issue of whether *all* mandatory rules of EU origin should operate similar to the rule of reason technique already accepted for domestic mandatory rules in wholly internal situations.[18] In other words, the question arose whether "instead of imposing the immediate application of some (particularly important) mandatory rules, it should be assured that the objectives of all mandatory rules (or at least, of mandatory rules of EC law) cannot be jeopardised by the application of a foreign *lex causae*".[19] It was submitted that this solution would have overcome the distinction between domestic and internationally mandatory rules, since "all mandatory rules (and not only of that '*noyau dur*' to which belong the *lois de police*)" would have had to be compared with the rules of the foreign *lex causae*.[20]

This solution has been criticized on the grounds that internationally mandatory rules protect particularly significant interests and thus should not be restricted to exceptional circumstances; in addition, it has been argued, this would have rendered the choice-of-law methods adopted in Europe too similar to the American interest analysis and would have unduly favored the application of the *lex fori*.[21]

In the present author's view, these opinions can and should be reconciled by focusing on the distinction between the characterization of a rule as internationally mandatory, its operation, and its applicability. In other words, it is submitted that: (i) the distinction between domestic and internationally mandatory rules should be maintained; (ii) both sets of rules operate in the same way, *i.e.*, pursuant to a rule of reason test, but (iii) in different situations, *i.e.*, the former in wholly internal situations and the latter when they are characterized as internationally mandatory (and their criterion of applicability is satisfied).

In fact, Articles 3.4 and 14.3 appear to be aimed at partly codifying the ruling in the well-known *Ingmar* case, in which—as discussed above—the ECJ affirmed that certain rules contained in EC Directive 653/86 were internationally mandatory and accordingly could not be avoided by an express choice of law.

In this regard, it should be noted that (primary and secondary) EU legislation has implemented measures to ensure that rules "essential for the Community legal order" are neither avoided "by the simple expedient of a choice-of-law clause"[22] nor by means of the normal operation of choice-of-law rules.

This objective is attained with different types of rules, which include "traditional" internationally mandatory rules and a combination between a mandatory

[17] Treves 1983, p. 25 ff.

[18] Boschiero 2004, p. 374 ff.

[19] Bonomi 2003, p. 64 (who disagrees with this approach).

[20] Ibidem, p. 65. Also see De Cesari 2009, p. 262 ff.

[21] Bonomi 2003, pp. 67–68.

[22] Ingmar, supra n. 3, para 25.

rule and applicability criteria. Although technically different, these methods share the same aim, as the EU legal order naturally delimits the scope of rules that are characterized by a particular "evaluative intensity". In particular,[23] some secondary legislation explicitly states that the objectives of certain rules must be protected regardless of the contents of the applicable law[24]; in other circumstances, as in *Ingmar*, this conclusion may only be reached by means of interpretation.[25] Moreover, legislation of the first category limits the application of such provisions in various ways, *e.g.*, to cases where a choice of law has been made,[26] and usually sets out applicability criteria for the same rules.[27] An applicability criterion was also developed by the Court in *Ingmar* as that situation was "closely connected with the Community."

The practical impact of Articles 3.4 and 14.3 is accordingly to codify a solution retained by many (but not all) EU directives, i.e., to characterize mandatory provisions contained therein as internationally mandatory in the event that the parties have opted for the law of a third country. However, the provisions have some shortcomings, as these directives do not all: (i) require *all* the elements relevant to the situation to be located within the Community for the provisions to acquire an internationally mandatory character, nor (ii) limit this character to cases where the parties have chosen an applicable law.

It is submitted that, as confirmed by Article 23 of Rome I and Article 27 of and Rome II, as long as the secondary legislation itself prescribes or implies its internationally mandatory character, Articles 3.4 and 14.3 should not be interpreted as being capable of restricting the operation of these rules in their original scope (including, *e.g.*, where certain elements are located outside the EU, or where the applicable law has been assessed by means of choice-of-law rules which are different from the parties' choice).

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[23] Also see Bonomi 1998, p. 123 ff.

[24] See EC Directives 93/13 of 5 April 1993, Article 6.2; 94/47 of 26 October 1994, Article 9; 97/7 of 20 May 1997, Article 12.2; 99/44 of 25 May 1999, Article 7.2; 2002/65 of 23 September 2002, Article 12.2.

[25] For further developments and examples see Bertoli 2005, p. 460 ff.; Fumagalli 1994, p. 15 ff.; Cannada Bartoli 1995, p. 324 ff.; Jayme and Kohler 1995, p. 1 ff.; Treves 1997, p. 561 ff.; Knöfel 1998, p. 439 ff.; Kohler 1999, p. 835 ff.; Wilderspin and Lewis 2002, p. 289 ff.; Duintjer Tebbens 2004, p. 101 ff.

[26] *E.g.*, the protection afforded by Directive 94/47 of 26 October 1994 cannot be refused "whatever the law applicable may be", whereas all directives cited in the previous note set out rules which operate in the presence of *optio legis*.

[27] *E.g.*, that the contract presents "a close link with the territory of one or more Member States" (or similar provisions) pursuant to Articles 12.2 of Directive 2002/65; 7.2 of Directive 99/44; 6.2 of Directive 93/13; 12.2 of Directive 97/7; or that "the immovable property concerned is situated within the territory of a Member State" pursuant to Article 9 Directive 94/47. For further developments see Jobard-Bachellier 2003b, p. 477 ff.; Basedow 2003, p. 195 ff.; Fallon and Francq 2000, p. 155 ff.; Fallon 2003 p. 253 ff.; Fallon 1995, p. 217 ff.

For the residual cases, Articles 3.4 and 14.3 should operate as a prescriptive rather than a narrative provision and mandate the non-prejudice of mandatory EU provisions where all elements are located within the EU.

In all cases, the conclusion that a provision of EU law standing alone enjoys an internationally mandatory character, or that it enjoys an internally mandatory character to be "internationalized" by Articles 3.4 or 14.3, is a matter of legal interpretation to be addressed by the criteria developed by the ECJ. *Ingmar* itself is not very satisfactory in this respect, as it cannot be accepted that all rules that are somehow relevant to "freedom of establishment", "undistorted competition in the internal market", or to other Community policies or interests, are transformed into rules that are internationally mandatory.[28]

4 The Rule of Reason and Domestic Internationally Mandatory Rules

As has been convincingly argued elsewhere, the rule of reason "elaborated by the European Court of Justice can be taken as a model for the internationally mandatory application of domestic rules" with respect to an overall approach.[29] The approach which the Court followed in *Ingmar* appears to lead to the same conclusion. In fact, the Court focused on the need to ensure that the objectives of EU internationally mandatory rules would not be impaired by the application of foreign law, rather than formalistically imposing their *application* regardless of the contents of the latter.[30]

A 2007 decision by the Court of Rovereto (Italy) explicitly espoused this view.[31] The Court was called upon to determine whether Article 1384 of the Italian Civil Code—which provides that liquidated damages can be equitably reduced if the obligation has been partly fulfilled or if they are manifestly excessive—should be applied, pursuant to Article 7.2 of the 1980 Rome Convention, to a contact governed by English law. The Court held that the rule was internationally mandatory pursuant to Article 7.2, but that it should not be given effect in the case before it since English law provided for the nullity of the liquidated damages clause and "internationally mandatory rules must be applied only when the interest they aim to protect is not protected by the foreign applicable law".

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[28] See, *e.g.*, Idot 2001, p. 117; Pataut 2004, p. 121 ff.; Lagarde 2003, p. 89 ff.; Boschiero 2004, p. 380.

[29] See Bonomi 1999, p. 234; see also Boschiero 2004, p. 392; Pataut 2001, p. 511; Fallon 2000, p. 735.

[30] In the same sense see Roth 2002, pp. 375–376; Boschiero 2004, p. 392; Wilderspin and Lewis 2002, pp. 293–294; Duintjer Tebbens 2004, p. 107; *contra* Pataut 2001, p. 511.

[31] Tribunal of Rovereto (15 March 2007). In: (2008) Rivista di diritto internazionale privato e processuale: 179 ff.

While this finding is perfectly consistent with the above-mentioned opinions and the present author fully agrees with it, it should be noted that the Court also stated that internationally mandatory rules should not be applied if the interest they protect is protected by the foreign law, *regardless* of "the degree of intensity of the protection and of the legal remedies" available under such law.

It is submitted that the latter finding is not persuasive, as the above-mentioned approach is based on a fungibility principle and only allows for the non-application of the forum's internationally mandatory rules when the aim they serve has already been accomplished by the foreign applicable law. To the contrary, if the objective of the forum's internationally mandatory rule is not adequately fulfilled by the foreign applicable law, then the objective should be considered *un*protected, since the foreign law is accordingly not fungible with the domestic internationally mandatory rules, thus frustrating the latter's aim.

In conclusion, it is apparent that all internationally mandatory rules operate as suggested by a well-known author in his proposal for the wording of the relevant norm in Rome I: "Nothing in this Regulation shall restrict the application of the rules of the law of the forum or of EC law, if they are the expression of a fundamental policy, provided that their application is necessary and represents the most effective way of promoting the underlying policy. When considering whether to apply these rules, regard shall be given to the content of the law that would govern the contract according to the other rules of the Regulation".[32]

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[32] Bonomi 2003, p. 68.

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Jurisdictional Immunities of the State and *Exequatur* of Foreign Judgments: A Private International Law Evaluation of the Recent ICJ Judgment in *Germany v. Italy*

Nerina Boschiero

1 Introduction

The Federal Republic of Germany (hereinafter: Germany) instituted, in December 2008, proceedings against the Italian Republic (hereinafter: Italy) before the ICJ requesting the Court to adjudge and declare that Italy has failed to respect the jurisdictional immunity that Germany enjoys under international law, in three different ways: (1) by allowing, before the Italian courts, several civil claims against Germany seeking reparation for injuries caused by violations of international humanitarian law committed by the German Reich during World War II against Italian nationals in Italy and elsewhere in Europe; (2) by taking measures of constraint against a German State property (Villa Vigoni) used for government non-commercial purposes; and (3) by declaring enforceable in Italy certain Greek judgments against Germany awarding compensation for civil damages to the successors of Greek nationals who had been victims of a massacre in the Greek village of Distomo committed by German units during their withdrawal in 1944. On 3 February 2012 the ICJ issued a judgment totally in favor of Germany, having rejected all the Italian arguments in favor of the existence of an exception to State sovereign immunity in civil cases based on the most serious violations of rules of international law of a peremptory character (war crimes and crimes against humanity) for which no alternative means of redress is available.[1]

Despite the truly public international law nature of the claim submitted to the ICJ (jurisdictional immunity and immunity from enforcement), originating in

[1] ICJ: Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Judgment (3 February 2012).

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"violations of obligations under international law" allegedly committed by Italy through its judicial practice, the subject matter of the dispute also involved a typical "private international law" issue, namely the process of enforcing a foreign judgment (the claim against Italy regarding the recognition and enforcement of the decisions of Greek courts upholding civil claims against Germany). The ICJ decided (by a majority of 14 to 1) that the Italian courts had violated Germany's immunity from jurisdiction in upholding a "request for *exequatur*" of judgments rendered by these foreign courts. Thus, the enforcement of foreign judgments is expressly recognized by the World Court as another topic at the crossroads of public and private international law convergence and their relationship, which challenges the sharp distinction between the law applicable to the rights and obligations of States with respect to other subjects of international law and individuals (public international law) and issues of jurisdiction, applicable law, and the recognition and enforcement of judgments before national courts (private international law),[2] whose other point of interest also derives from its location at the intersection of the fundamental procedure/substance distinction drawn by the ICJ.[3] This paper will focus precisely on Germany's third submission and the crucial pronouncements of the Court on the question of the purpose of *exequatur* proceedings and their relation with the jurisdictional immunity of States: the ICJ's judgment might in fact have consequences also on the private international law level; particularly, it could have a potential "chilling effect"[4] on the fundamental role of PIL's rules in preventing or remedying a denial of justice which affects procedural as well as substantive fundamental human rights, as well as on its role, maybe not so fundamental, but still very important, in supporting the evolving nature of customary international law.[5]

2 Historical and Factual Background of the ICJ's Decision in Relation to Proceedings Involving Greek Nationals

The historical and factual background of the case are well known. In the last decade, Germany has faced a growing numbers of disputes before Italian and Greek courts. Various claimants, who suffered injury during World War II, have instituted proceedings seeking financial compensation for that harm; Germany, in its Application to the ICJ,[6] distinguished three main groups: (1) claimants (civilians) who were

[2] Mills 2009.

[3] Kerameus 1997, p. 198.

[4] Webb 2012. On the role played by the ICJ in the development of private international law, see De Dycker 2010; Tams and Tzanakopoulos 2010.

[5] See for a conclusion on these aspects that which is considered in Section 4.

[6] ICJ: Jurisdictional Immunities of the State (Germany v. Italy), Application Instituting Proceedings (23 December 2008).

arrested on Italian soil and sent to Germany to be used as forced labor; (2) members of the Italian armed forces who, after the events of September 1943 (when, after the fall of Mussolini, Italy joined the Allied Powers and declared war on Germany), were taken prisoner by German forces, deported to German territory and German-occupied territories to be used as forced labor, and soon thereafter "factually" deprived by the Nazi authorities of their status as prisoners of war; (3) victims of massacres perpetrated by German forces during the last months of World War II during the German occupation of Italian territory. Cases involving Greek nationals have been considered by Germany in its Application as a "fourth group of disputes" to be mentioned separately as these disputes were raised from the attempts by Greek nationals to enforce in Italy a judgment obtained in Greece on account of a similar massacre committed by German military units during their withdrawal in 1944 (*Distomo* case).[7] Actually, this distinction only makes sense with respect to Germany's third submission against Italy, in which it complained that its jurisdictional immunity had also been violated by the Italian court's decision to declare enforceable in Italy, the Greek judgments against Germany in proceedings arising out of the Distomo massacre. In the country of origin of these judgments (the Hellenic Republic, hereinafter: Greece), the said proceedings found the same cause of action (infringements of human rights and international humanitarian law during belligerent occupation) invoked by the Italian victims of massacres committed by the German forces on the forum soil. The Distomo massacre was in fact one of the worst crimes, involving many civilians, committed by German armed forces in Greece in June 1944, during its occupation.[8]

In 1995, over 250 plaintiffs brought an action for a declaratory judgment before the Greek Court of First Instance of Livadia, claiming compensation for loss of life and property due to acts perpetrated by the German occupation forces in Greece. Two years later (in 1997) the Court of First Instance, by means of a "default" judgment against Germany, held this State liable and ordered it to pay compensation to the relatives of the victims (approximately $ 30 million).[9] Against this judgment, Germany instituted proceedings before the Supreme Court of Greece (*Areios Pagos*) claiming immunity from the jurisdiction of Greek courts. On 4 May 2000 the Supreme Court confirmed the judgment, stating (by seven votes to four) that the Greek courts were competent to exercise jurisdiction over the case.[10] After the Greek Supreme Court's pronouncement, the judgment of the Court of First Instance became

[7] Ibidem, para 10.

[8] Finke 2010, p. 855, n. 8, which refers, for a description of the massacre, to Mazower 1995, pp. 213–215.

[9] Court of First Instance of Levadia: Prefecture of Voiotia v. Federal Republic of Germany, Case no. 137/1997 (30 October 1997). An English translation of the judgment is reproduced in 1997 Revue hellénique de droit international 50: 599 (with note by Gavouneli). See also Bantekas 1998, p. 765.

[10] Areios Pagos (Supreme Court of Greece): Prefecture of Voiotia v. Federal Republic of Germany, Judgment no. 11/2000 (4 May 2000). International Law Reports 129: 513; for a comment see Gavouneli and Bantekas 2001.

final, but the efforts to enforce it in Greece failed because the Minister of Justice denied his approval, which was necessary, according to Article 923 of the Greek Code of Civil Procedure, to start enforcement proceedings against a foreign State. The applicants then sought to enforce the judgments of the Greek courts in Italy, as the Italian courts, after the landmark judgment of the Italian Court of Cassation of 11 March 2004, in the *Ferrini* case,[11] have reputedly disregarded the jurisdictional immunity of Germany.[12] The Court of Appeal of Florence held, in May 2005, that the Greek order contained in the judgment of the Supreme Court of Greece imposing an obligation on Germany to reimburse legal expenses for the judicial proceedings before that Court was enforceable in Italy.[13] In a decision, dated 7 February 2007, the same Court rejected the objections raised by Germany against its decision of May 2005,[14] and the Italian Court of Cassation confirmed, in a judgment dated 6 March 2008, the Court of Appeal of Florence's ruling.[15] Concerning the question of reparation to be paid to Greek claimants by Germany, the same Court of Appeal of Florence declared, by a decision dated 13 June 2006, that the 1997 judgment of the Court of First Instance of Livadia was equally enforceable in Italy and rejected, in a judgment dated 21 October 2008, the objections by Germany against the 2006 judgment. Again, the Italian Court of Cassation confirmed, by a judgment dated 12 January 2011, the ruling of the Court of Appeal.[16]

In 2011, Greece filed an Application at the Court's Registry for permission to intervene in the case,[17] and it was authorized by an order of the Court of July 2011 to intervene in the case "as a non-party", in so far as its intervention was limited to the decisions of the Greek courts which were declared, by the Italian courts, to be enforceable in Italy.[18]

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[11] Corte di cassazione (Italy) Sezioni unite civili: Ferrini v. Federal Republic of Germany, Judgment no. 5044/2004. 2004 Rivista di diritto internazionale 87: 539 (in Italian) and International Law Reports 128: 658 (in English). See Bianchi 2005; Gattini 2005; Focarelli 2005; De Sena and De Vittor 2005; Gianelli 2004; Baratta 2004; Iovane 2004; Ronzitti 2004; Ronzitti 2002.

[12] Jurisdictional Immunities, supra n. 1, paras 27–29.

[13] Ibidem, para 33.

[14] Corte d'Appello di Firenze (Court of Appeal of Florence): Judgment (22 March 2007). 2008 Il foro italiano 133: 1308.

[15] Corte di cassazione (Italy), Sezioni unite civili: Federal Republic of Germany v. Prefecture of Voiotia, Judgment no. 14199 (29 May 2008). 2009 Rivista di diritto internazionale 91: 594. With a note by Bordoni 2009.

[16] Corte di cassazione (Italy), Sezione I civile: Repubblica Federale di Germania v. Prefecture of Voiotia, Judgment no. 11163 (12–20 May 2011). www.europeanrights.eu. Accessed 15 June 2015. International Law Reports 150 (in English, forthcoming).

[17] Tzanakopoulos 2011.

[18] Jurisdictional Immunities, supra n. 1, para 10. For different conclusions on the point of Greece's legal interest relating to the enforcement of its judicial decisions abroad, see ICJ: Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Additional Observations of Germany on Whether to Grant the Application for Permission to Intervene Filed by Greece (26 May 2011), paras 5–6; and Order (4 July 2011), Separate Opinion of Judge Cançado Trindade and Declaration of Judge *ad Hoc* Gaja.

3 The Arguments of the Court on the Private International Law Issue of Jurisdictional Immunity in *Exequatur* Proceedings

In its third submission, Germany contended that its jurisdictional immunity had also been violated by the Italian decisions to enforce in the Italian *forum* the Greek judgments against Germany in proceedings arising out of the above-mentioned *Distomo* massacre, for the same reasons as those invoked by Germany in relation to the Italian proceeding instituted in Italy and concerning war crimes committed in Italy between 1943 and 1945. All these civil claims, according to Germany, would have to be dismissed by Italy as the Italian courts were obliged to accord Germany jurisdictional immunity in respect of acts *jure imperii* performed by the Authorities of the Third Reich. Similarly, the decisions of the Greek court had also themselves been rendered in violation of its jurisdictional immunity.

Before assessing the Court's decision on Germany's contention that its jurisdictional immunity had also been violated by the Italian decisions, it is worth remembering that *exequatur* is a concept which is specific to private international law and which refers to a specific procedure by which a national court authorizes the enforcement of a foreign judgment in its country.[19] The enforcement of a foreign judgment consists of securing compliance therewith, if necessary by means of coercion as allowed by the law, including the intervention of the forces of law and order (it could take, for instance, the form of an attachment of the debtor's assets). In principle, enforceability is confined to the State of the court which gave the judgment; to be enforceable abroad, the judgment must be declared enforceable (by the *exequatur* procedure) or be registered (like in the UK and in Ireland). The enforcement of a foreign judgment nevertheless requires a preliminary step: there can be no enforcement without recognition; recognition has the fundamental function of rendering the foreign judgment *res judicata* in the forum, conferring on it the authority and effectiveness accorded in the State in which it was given. Only after recognition, is the judgment a valid title for execution. It is obviously possible for the creditor to have a foreign judgment only recognized, in order to prevent proceedings being pursued before a domestic court of the forum, without any prospect of enforcement/execution.

The distinction between mere recognition and enforcement in the strict sense of the term in relation to State immunity has been the object of divergence between French courts confronted with an application to recognize an award rendered under the auspices of the ICSID: Articles 53 and 54 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965; ICSID Convention)[20] require each Contracting State to recognize

[19] See, European Judicial Network in Civil and Commercial Matter, *Glossary*. http://ec.europa.eu/civiljustice/glossary/. Accessed on 15 June 2012.

[20] Entered into force on 14 October 1966.

an ICSID award simply upon the production of a copy of the award. The ICSID Award in *SOABI v. Senegal*[21] had been granted an *exequatur* by the *Tribunal de grande instance* of Paris. Senegal appealed against it before the *Cour d'appel* of Paris which set aside the order of *exequatur* as being contrary to "international public policy" (*ordre public*): according to the Court of Appeals, the State of Senegal had not waived its right to invoke its immunity from enforcement in a Contracting State under Article 55 of the ICSID Convention, and the applicant/creditor had not demonstrated that enforcement would be carried out against commercial property, in such a way as not to conflict with Senegal's the immunity from execution.[22] This judgment was reversed by the *Cour de cassation*, with the reasoning that an *exequatur* did not constitute a measure of enforcement which, as such, could give rise to immunity from execution for the State concerned.[23] Thus, for the purpose of State immunity enjoyed by States, according to the French *Cour de cassation* a distinction is to be made between *exequatur* (the procedure on the basis of which judgments are recognized and also declared enforceable in the State addressed) and "enforcement" in the strict sense, i.e. effective enforcement measures against property belonging to it, situated in a foreign territory.[24]

This is the same distinction which was also made by the ICJ in relation to Germany's third submission against Italy: after having determined, in respect of Germany's second submission, that the Italian measures of constraint against Villa Vigoni (a German-Italian center for cultural encounters, located near Lake Como) constituted a violation by Italy of its obligations to respect Germany's immunity from enforcement,[25] the Court stated that Germany's third submission is an entirely separate and distinct issue from that set out in the preceding one. In being asked to decide whether the Italian judgments declaring the Greek decisions to be enforceable in Italy "themselves" constituted a violation of Germany's immunity, independent of any act of execution/enforcement, the Court was no longer concerned with immunity from enforcement. Notwithstanding the obvious link

[21] ICSID: Société Ouest Africaine des Bétons Industriels v. Senegal, ARB/82/1, Award (25 February 1988).

[22] Cour d'appel de Paris, 1ère Chambre: État du Sénégal v. Alain Seutin ès qualité de liquidateur amiable de la SOABI et autres, Judgment (5 December 1989). 1990 Journal du droit international 117: 141.

[23] Cour de cassation, 1ère Chambre Civile: Societé SOABI v. État du Sénégal, Judgment (11 June 1991). 1991 Journal du droit international 118: 1005.

[24] This distinction has also been endorsed by Italian doctrine commenting on the *Corte di cassazione*'s judgment which confirmed the *exequatur* to the Greek decision on the Distomo massacre: see Franzina 2008.

[25] First, Germany had not waived its immunity from enforcement as regards property belonging to it situated in Italy; secondly, the property which was the subject of the legal charge (*ipoteca gudiziale*) was being used for governmental purposes, hence within Germany's sovereign functions. It is worth noting that Italy did not seek to justify this specific measure of constraint; on the contrary, it indicated to the Court that it "has no objection to any decision by the Court obliging Italy to ensure that the mortgage on Villa Vigoni inscribed at the land registry is cancelled", see Jurisdictional Immunities, supra n. 1, para 110.

between the two aspects of the procedure, since the measures of constraint against Villa Vigoni "could only have been imposed on the basis of the judgment of the Florence Court of Appeal according *exequatur* in respect of the judgment of the Greek court in Livadia",[26] the Court declared that the two issues remain "clearly distinct". In its view, the *exequatur* proceedings by which foreign judgments are given *res judicata* effects and *force éxecutoire*, i.e., declared enforceable, address another form of immunity governed by a different set of rules, precisely "immunity from jurisdiction".

A possible explanation for the different approach taken by the French Court of Cassation concerning the relevance of immunity in *exequatur* proceedings is that all States parties to the ICSID Convention are under an obligation to recognize and enforce ICSID awards as if they were final judgments of local courts; therefore, the Contracting States which have consented to arbitration have thereby "agreed that the award may be granted *exequatur*"[27]: under the ICSID Convention, only "enforcement" has its limitation in State immunity, as Article 55, which preserves State immunity from execution, neither applies to immunity from jurisdiction, nor to proceedings for the recognition of an award.[28] In any case, the relationship between arbitration law and the law of State immunity poses particular and peculiar challenges,[29] extraneous to the traditional doctrine of State immunity: what was as at stake in Germany's third submission before the ICJ was precisely the scope and the extent of the customary international law governing the jurisdictional immunity of States (understood *strictu sensu* as the right of a State not to be the subject of judicial proceedings in the courts of another State).

While the issue of the jurisdictional immunity of foreign States immediately arises when a national court is asked to rule "on the merits" of a claim brought against a foreign State, difficulties arise when the same court is simply asked to recognize and enforce a decision already rendered by a foreign court against a

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[26] Ibidem, para 124.

[27] SOABI v. Sénégal, supra n. 23.

[28] UNCTAD, International Centre for the Settlement of Investment Disputes, 2.9. Binding Force and Enforcement (2003) p. 18.

[29] In its decision in *Creighton v. Qatar* (Cour de cassation, 1ère Chambre Civile: Societé Creighton Ltd v. Ministère des Finances de l'État du Qatar et Ministre des Affaires municipales et de l'agriculture de l'État du Qatar, Judgment (6 July 2000). 2000 Journal du droit international 127: 1054–1055 (note by Pingel-Lenuzza); 2001 Juris classeur périodique II, 10512, 764 (note by Kaplan and Cuniberti)), the French *Cour de cassation* held that: "The obligation entered into by the State by signing the arbitration agreement to carry out the award according to Article 24 of the International Chamber of Commerce Arbitration Rules [now Article 28.6 of the Rules in force as of 1 January 1998] implies a waiver of the State's immunity from execution". The principle that an arbitral award against a State that has given its consent to submit certain disputes to arbitration should not be rendered ineffective simply because the State benefits from immunity from execution (see Gaillard and Younan 2008, pp. 179–192), has been recently contradicted by a decision of the Hong Kong Court of Final Appeal, in which the Court held that no state may be sued in Hong Kong's courts unless the state waives its immunity, and that submitting to arbitration does not constitute a waiver (Democratic Republic of Congo v FG Hemisphere Associates LLC, Judgment (8 June 2011). International Law Reports 150 (forthcoming)).

third State "which is deemed to have itself examined and applied the rules governing the jurisdictional immunity of the respondent State".[30] By stating this, the ICJ referred to one condition (among a number of common conditions) under which, according to various national legal regimes, a foreign judgment is entitled to recognition and enforcement: what is required is that the court of origin must have had jurisdiction ("indirect jurisdiction"). Most national legal regimes assess whether the foreign court was entitled to assume jurisdiction not according to foreign law (as one State's rules of jurisdiction are not binding on other States), but with respect to their own rules of private international law. This is, for example, the case with the recognition and enforcement of foreign judgments in Italy, governed by Article 64 *et seq.* of the Private International Law Act (Law 218 of 31 May 1995), which replaced, when it came into force (on 31 December 1996), the provisions of the Italian Code of Civil Procedure. In order for a foreign judgment to be recognized, Article 64 (among seven conditions which must be satisfied) requires that "[t]he judge who issued the judgment must have had jurisdiction over the matter in accordance with the relevant Italian principles" (part a). The same is also true for the German–Greek Treaty on the Mutual Recognition and Execution of Court Judgments, Settlements, and Public Documents in Civil and Commercial Matters of 4 November 1961, as well as for the ZPO—the German Code of Civil Procedure dealing with the recognition of foreign judgments: both require for a Greek judgment to be recognized and enforced in Germany that the original (Greek) court had jurisdiction on the merits of the claim according to Germany's own jurisdiction rules.

Nevertheless, the ICJ immediately rejected the "private international law" reasoning argued by both Parties, according to which the solution to the question of jurisdictional immunity in relation to *exequatur* proceedings simply depends on whether that immunity had been respected by the foreign court having rendered the judgment on the merits against the third State. It is worth remembering that, according to their private international law rules, the Italian and the German courts had arrived at opposite conclusions on the question whether the Greek courts, in the *Distomo* case, had themselves violated Germany's immunity; in 2003, the *Bundesgerichtshof* (BGH) declined to give effect to the Greek judgment in the *Distomo* case, on the ground that the Greek court did not have jurisdiction to hear the case. According to the principle of sovereign immunity recognized by customary international law, which is part of German law, the Federal Court affirmed that a State can claim immunity from another State's jurisdiction in respect of *acta jure imperii*. To the extent that the acts committed by German armed forces in Greece were undoubtedly the exercise of a sovereign power, albeit illegal (just as those committed on Italian soil, a point never contested by Germany), the BGH ruled that the Greek courts had no fundamental requirement of jurisdiction to hear the case. Accordingly, the Greek decision was not recognized by the German courts, being in contrast to the international public order

[30] Jurisdictional Immunities, supra n. 1, para 125.

exception due to the reason that it had been rendered in breach of Germany's entitlement to immunity.[31] The Italian courts, on the contrary, while recognizing that the actions carried out by Germany (on which the Italian and Greek claims were based) were undoubtedly an expression of its sovereign power, being conducted during war operations, contested that immunity from jurisdiction can be granted in the case of such conduct which constitutes (on the basis of customary international law) an international crime in that it violates universal values that transcend the interests of individual states. According to the Italian courts, respect for inviolable human rights has by now attained the *status* of a fundamental principle of the international legal system, and the emergence of this principle cannot but influence the scope of other principles that traditionally inform this legal system, particularly that of the "sovereign equality" of States, which constitutes the rationale for the recognition of state immunity from foreign civil jurisdiction. Therefore, according to the Italian courts, the distinction between *acta jure imperii* and *acta jure gestionis* carries no weight in relation to claims for compensation deriving from cases concerning torts of particular seriousness, in the light of the priority importance that is now attributed to the protection of basic human rights over the interests of the State in securing recognition for its own immunity from foreign jurisdiction.[32]

In its counter memorial, Italy argued that the Italian judges did not commit an unlawful act since lifting Germany's immunity was the only appropriate and proportionate remedy to the ongoing violation by Germany of its obligations to offer effective reparation to Italian war crimes victims. Such a measure was adopted only after several attempts by the victims to institute proceedings in Germany and it was the only possible means to ensure respect for and the implementation of the imperative reparation regime established for serious violations of international humanitarian law.[33] Italy argued that the reasoning and the conclusion provided to the Italian victims applied *mutatis mutandis* to the proceedings relating to the enforcement in Italy of the Greek judgment concerning the *Distomo* massacre. Since the Greek judgment concerned a case which presented much of the same features which were present in the Italian cases, including the fact that Greek victims had tried to obtain reparation before the German courts and were repeatedly confronted with a denial of justice,[34] the

[31] BGH (Federal Court of Justice, Germany): Distomo Massacre Case (Greek Citizens v. Federal Republic of Germany), Case no. III ZR 245/98. 2003 NJW: 3488–3489. International Law Reports 129: 556. See, Pittrof 2004.

[32] Ferrini, supra n. 11. For an account of the most recent Italian judicial practice concerning foreign State immunity, see Sciso 2011.

[33] ICJ: Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Counter-Memorial of Italy (22 December 2009), para 6.39.

[34] In September 1995, the Greek plaintiffs had brought action for a declaratory judgment before the *Landgericht* (Regional Court) of Bonn, claiming Germany's liability to pay compensation for the massacre. The regional Court dismissed the action (Landgericht Bonn: case no. 1O 358/95, Judgment (23 June 1997); the plaintiffs therefore lodged an appeal before the OLG, the Higher

recognition that the Greek judgment in the *Distomo* case could be enforced in Italy does not amount to a violation of international law.

The reason why the Court refused to follow the Parties' private international law approach in order to determine whether the Florence Court of Appeal had violated Germany's jurisdictional immunity by declaring the Greek decision to be enforceable in Italy was simply because of the fact that taking the applicable rules of private international law into account would have obliged the ICJ to pronounce "itself" on the question of whether the Greek courts had themselves violated Germany's immunity. Something that the court could not do, since Greece did not have the *status* of a party to the proceedings in question.[35] Therefore, the Court decided to address the issue "from a significantly different viewpoint": as nothing prevents national courts from ascertaining (before granting *exequatur*) that the foreign judgment had been rendered in respect of the immunity of the respondent State, the Court affirmed that "Where a court is seized, as in the present case, of an application for *exequatur* of a foreign judgment against a third State, it is itself being called upon to exercise its jurisdiction in respect of the third State in question". In granting or refusing *exequatur*, "the courts exercise a jurisdictional power which results in the foreign judgment being given effects corresponding to those of a judgment on the merits in the requested State", with the consequence that "the proceedings brought before that court must therefore be regarded as being conducted against the third State which was the subject of the foreign judgment".[36] It followed, for the ICJ, that a court seized of the application for *exequatur* of a foreign judgment against a third State *has* to ask itself whether, in the event that it had itself been seized of the merits of a dispute identical to that which was the subject of the foreign judgment, it would have been obliged under international law to accord immunity to the respondent State.[37]

On this relevant question, the ICJ decided that the Italian courts, if they had been seized of the merits of a case identical to that which was the subject of the Greek decisions, should have been obliged to grant immunity to Germany. Consequently, they could not have granted *exequatur* to the Greek decisions

(Footnote 34 continued)
Regional Court of Cologne, which upheld the lower court's decision. In the already mentioned judgment of 26 June 2003, the *Bundesgerchtshof* (the German Federal Supreme Court) again rejected the plaintiffs' application for revision. Against these German courts' decisions, the plaintiffs filed a constitutional complaint at the German Federal Constitutional Court and their allegations (violations of their right to have access to a court, their right to a hearing in accordance with the law, their general personality right, and their right to physical integrity, as protected by the German Basic Law) were again rejected as being inadmissible (Bundesverfassungsgericht (BVerfG): 2 BvR 1476/03, Judgment (15 February 2006), www.bundesverfassungsgericht.de/entscheidungen/rk20060215_ 2bvr147603.html. Accessed on 15 June 2012). See Rau 2007.

[35] Jurisdictional Immunities, supra n. 1, para 127.

[36] Ibidem, para 128.

[37] Ibidem, para 130.

without thereby violating Germany's jurisdictional immunity.[38] In reaching such a decision, the Court confined itself to considering, in general terms, that the fact that Germany might have waived its immunity before the courts hearing the case on the merits, does not bar the respondent's immunity in *exequatur* proceedings instituted in another State.[39]

3.1 Evaluation of the Court's Reasoning: Its Correctness and Weakness in the Light of the Preliminary Unconvincing Solution Given in Respect to the Violation of Germany's Jurisdictional Immunity in Proceedings Brought Before the Italian Courts by Italian Claimants

The ICJ's reasoning is correct in several respects, except (in our opinion) for the conclusion reached, according to which the conduct of the Italian courts is to be qualified as being inconsistent with the doctrine of sovereign immunity under current international law.

Regarding the ICJ's arguments, it is certainly true that *exequatur* proceedings, according to which a court declares a pecuniary award rendered against a third State to be enforceable in the forum, are an "exercise of jurisdictional power". The legal procedure by which foreign judgments are given *res judicata* effects and declared enforceable (thus given effects corresponding to those of a judgment on the merits rendered in the requested State) entails an act which is exactly an *exercise of jurisdiction* on the part of the requested State. The foreign judgment in itself, in the absence of treaty commitments which provide for its automatic recognition and enforcement abroad, does not have any authority and effectiveness outside the country of origin. When there are certain legal provisions, like the Italian and German laws mentioned above, which make the recognition and enforcement of a foreign judgment dependent on various conditions being fulfilled, the insertion of the foreign judgment into the domestic legal order of the requested State, as well as its "efficacy", depends on a judicial decision (*exequatur*) that has "constitutive" effect. Without this jurisdictional act, the foreign judgment cannot extend its effects in the country of reception. In sum, the foreign judgment can be considered a valid title for execution only insofar as its efficacy has been declared by a court of the State in which the party seeks authorization for enforcement. Article 67 of the Italian law on private international law subjects the enforceability in the forum of any foreign judgment to a special procedure, which is necessary in order to ascertain that there are no grounds for the refusal of recognition as

[38] Ibidem, para 131.

[39] Ibidem, para 132.

referred to in the same Italian law. This special procedure (declaration of enforceability) is undeniably an act of State.[40]

Second, irrespective of the fact that a declaration of enforceability is to be distinguished from actual enforcement, the ICJ was correct in asserting that *exequatur* proceedings must be regarded as being "directed against" the State which was the subject of the foreign judgment: such proceedings, in fact, are a preliminary step leading to actual execution against the assets of the foreign State. According to the United Nations Convention on Jurisdictional Immunity of States and Their Properties (New York, 2 December 2004),[41] proceedings before a court of a State shall be considered to have been instituted against another State (not named as a party to the proceedings) when such a proceeding in effect "seeks to affect the property, rights, interests or activities of that other State" (Article 6.2). Therefore, Germany was entitled to object to the decision of the Florence Court of Appeal granting *exequatur* to the Greek decision.

In support of the conclusion that a court seized of an application for *exequatur* of a foreign judgment must itself deal with the question of immunity from jurisdiction for the respondent State, the ICJ cited two judgments: one by the Supreme Court of Canada in *Kuwait Airways Corp. v. Iraq,* and a second judgment by the United Kingdom Supreme Court in *NML Capital Limited v. Republic of Argentina*. The first case arose out of Kuwait Airways Corp's action for damages against Iraqi Airways for the appropriation of its aircraft, equipment, and parts during the 1990 invasion of Kuwait. An English court awarded $ 84 million in damages against Iraq, as it held that Iraq could not rely upon its State immunity because of its involvement in the defence related to its commercial interests. KAC applied for the recognition of that judgment in the Quebec Superior Court, and Iraq, relying on its immunity, moved for the dismissal of the application for recognition on the ground that the impugned acts were sovereign acts and that the Quebec court could not simply recognize the foreign court's finding that State immunity did not apply. According to Iraq, the Quebec court had to decide this issue on its own. Although the Canadian conflict of laws rules establish that the enforcing court shall not review the merits of a foreign decision, the Supreme Court of Canada agreed with Iraq's defence, stating that it did not matter that the issue of state immunity had already been decided, and that this issue (as well as the State immunity exception) must be considered within the framework of the law currently applicable in Canada, including public international law. In any case, Iraq's victory was illusory as, ultimately, the Supreme Court of Canada agreed with the British court that Iraq could not rely upon its state immunity.[42]

[40] Morelli 1954, p. 278 ff. and p. 286 ff.

[41] Not yet in force.

[42] Supreme Court (Canada): Kuwait Airways Corp. v. Iraq, Judgment (21 October 2010). 2010 Supreme Court Reports 2: 571.

The case decided by the United Kingdom Supreme Court related to the legal consequences of the Argentinian debt crisis in 2001–2003, and the efforts of worldwide investors to recoup as much as possible of their investments in this country. In 1994, the Republic of Argentina issued a series of sovereign bonds, containing a clause dealing with jurisdiction and immunity in relation to claims against the bonds and subject to New York law. NML Capital Ltd bought a number of these bonds and, in 2003, declared "events of default" based on the subsequent failures by Argentina to pay interest. Refusing to accept the Argentinian offer to restructure its external debt, NML brought a claim in New York seeking payment of the principal amount of the bonds that had become due ($ 284 million). In 2006, the US District Court of the Southern District of New York entered judgment against Argentina in favor of NML for the sum claimed. NML then sought to enforce this judgment against assets held by Argentina in the UK. Argentina applied to have this order set aside, arguing that, as a sovereign State, it was immune from suit under section 1 of the State Immunity Act 1978, which grants general immunity to States unless specific exceptions apply. The Court of Appeal upheld this argument in February 2010. NML subsequently appealed against this judgment before the Supreme Court.

The question before the United Kingdom Supreme Court was whether such an investor could enforce its judgment against assets belonging to the Argentinian State in the United Kingdom, notwithstanding the Argentinian allegation of immunity. In unanimously allowing NML Capital's appeal, the Supreme Court held that it was entitled to do so. In order to determine whether, under English law, Argentina enjoyed State immunity in relation to the recognition and enforcement of the New York judgment, the Court stated that this

> "question ought to be answered in the light of the restrictive doctrine of State immunity under international law. There is no principle of international law under which State A is immune from proceedings brought in State B in order to enforce a judgment given against it by the courts of State C, where State A did not enjoy immunity in respect of the proceedings that gave rise to that judgment. Under international law the question of whether Argentina enjoys immunity in these proceedings depends upon whether Argentina's liability arises out of *acta jure imperii* or *acta jure gestionis*. This involves consideration of the nature of the underlying transaction that gave rise to the New York judgment. The fact that NML is seeking to enforce that judgment in this jurisdiction by means of an action on the judgment does not bear on the question of immunity."

In answering the question whether the foreign creditor, seeking to enforce the New York judgment in the UK, would have been precluded by English law from suing the foreign State, had it chosen to sue it in the United Kingdom, Lords Phillips and Clarke found that the claim would have been upheld by the State Immunity Act 1978, Section 3.1.a. Lords Mance, Collins and Walker, while disagreeing on this point, nevertheless all agreed that Argentina would have been prevented from claiming State immunity in respect of these proceedings by reason of the provisions of Section 31 of the Civil Jurisdiction and Judgments Act of 1982—which gave effect to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 27 September 1968; hereinafter Brussels

Convention)[43]—and by Argentina's submission and waiver of immunity concerning the bonds. Lord Phillips neatly summarized the effect of Section 3.1:

> State immunity cannot be raised as a bar to the recognition and enforcement of a foreign judgment if, under the principles of international law recognized in this jurisdiction, the State against whom the judgment was given was not entitled to immunity in respect of the claim.[44]

Both judgments mentioned by the ICJ support its conclusion that a court seized of an application for *exequatur* of a foreign judgment against a third State has to ask itself whether the respondent State enjoys immunity from jurisdictions, having regard to the "nature of the case in which that judgment was given". The reasoning of the World Court is well constructed and logical. Equally logical and coherent is its conclusion that the Italian courts had violated Germany's jurisdictional immunity by declaring the decisions of the Greek courts on the *Distomo* massacre to be enforceable, for the reason that, according to the ICJ, the Italian courts would have been obliged to grant immunity to that State if they had been seized of the merits of cases identical to those which were the subject of the Greek decisions.

The *weakness* of such a conclusion lies in the fact that its "correctness" depends on the appropriateness of the solutions given by the Court to a number of public international law issues. The ICJ's assertion that the decisions of the Italian courts, granting *exequatur* to the foreign Greek decisions, had violated Germany's jurisdictional immunity is in fact exactly the *same* as that set out by the Court in Section III of the judgment in respect of Germany's first submission. In order to determine whether the Italian courts had breached Italy's obligation to accord jurisdictional immunity to Germany by exercising jurisdiction over Germany with regard to the claims brought before them by various Italian claimants, the ICJ considered each of the Italian arguments separately and rejected all of them individually as well as the idea, suggested by Italy, that they could have worked in conjunction.[45] With regard to the "territorial tort exception", and contrary to what was asserted by the Italian and Greek courts (according to which contemporary customary international law has developed an exception to the principle of State immunity in respect of acts occasioning death, personal injuries, or damage to property in the territory of the *forum* State, even if the acts in question were carried out *jure imperii*),[46] the Court concluded that no territorial exception applied in the cases in question. According to the Court, customary international law continues to require "that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of

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[43] Entered into force on 1st January 1973.

[44] Supreme Court (United Kingdom): NML Capital Limited (Appellant) v. Republic of Argentina (Respondent), 2011 UKSC 31, on appeal from 2010 EWCA Civ 41.

[45] Jurisdictional Immunities, supra n. 1, para 106.

[46] Areios Pagos (Supreme Court, Greece), Full Court: Prefecture of Voiotia v. Federal Republic of Germany, Judgments nos 36/2002 and 37/2002 (28 June 2002), reported under "Facts" of the ECtHR: Kalogeropoulou and Others v. Greece and Germany, 59021/00, Decision (12 December 2002). For a comment on this point see Reinish 2006, p. 816. Serranó 2012, p. 628.

State in the course of conducting an armed conflict".[47] In respect of the Italian argument concerning the subject matter and specific circumstances of the claims in the Italian courts, the Court rejected the argument that the denial of immunity was justified by the *gravity* of the violations and of the unlawful acts (war crimes and crimes against humanity) and that customary international law has developed to a point that a State is not entitled to immunity in cases of violations of the peremptory rules of international law (*jus cogens*). The ICJ concluded that under customary international law (as it currently stands) "a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict". Again, on the relationship between *jus cogens* and the rule of State immunity, the Court rejected the Italian argument that under international law a *jus cogens* rule should override not only "directly" inconsistent obligations under international law, but also obligations under international law that would reduce its *effectiveness* (i.e., jurisdictional State immunity for claims arising out of its breach). The Court excluded the existence of a *conflict* between rules of *jus cogens* and the rule of international customary law which requires jurisdictional immunity to be given, stating that the two sets of rules address different matters, one relating to *substance* and one relating to *procedure*. As the rules on State immunity are "procedural in character", and confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State, the Court asserted that the rules which determine the scope and extent of the jurisdictional immunity of States do not derogate from "substantive rules" which posses *jus cogens* status.[48] Finally, the ICJ also rejected the Italian "last resort" argument, according to which the Italian courts were justified in denying Germany its immunity, because all attempts to secure compensation for the various groups of victims involved in the Italian proceedings had failed; the same was also true for the Greek victims.[49] The Court refused this Italian contention by stating that it could find no basis in State practice "that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternatives of securing redress".[50] In conclusion, the Court held that the decision of the Italian courts to deny immunity to Germany with regard to proceedings brought by the Italian claimants in the Italian courts cannot be justified on the basis of customary international law, and therefore constituted a breach of the obligation owed by Italy to Germany. Accordingly, the Italian courts could not grant *exequatur* to the Greek decision rendered against Germany "without thereby violating Germany's jurisdictional immunity".[51]

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[47] Jurisdictional Immunities, supra n. 1, para 78.

[48] Ibidem, para 95.

[49] Distomo Massacre Case, supra n. 31.

[50] Jurisdictional Immunities, supra n. 1, para 101. According to Zgonec-Rozej 2012, the ICJ departed on this issue from its previous reasoning in the *Arrest Warrant* case, where "the availability of venues argument was referred to in support of the Court's determination".

[51] Jurisdictional Immunities, supra n. 1, para 131.

The assessment of whether the ICJ's decision is "right" from the point of view of the current state of public international law is obviously something that cannot be discussed in this paper.[52] For our purpose, it is sufficient to observe that much of the ICJ's reasoning has been authoritatively criticized by leading public law scholars, who are also judges at the same court. This not to say that the remaining Judges of the World Court are not "leading" scholars in public international law; it is simply that, in our opinion, the authoritative critics of this judgment are very impressive and deserve attention: the correctness of the World Court's judgment cannot only be founded on assuring the certainty of the law[53]; it should also be evaluated in the light of the fundamental principle that immunity from jurisdiction should only be granted when this is consonant "with justice and with the equitable protection of the Parties".[54]

In his *separate* opinion, Judge Bennouna, while agreeing with the operative part of the ICJ's judgment, nevertheless stated that he could not support the *logic* of its reasoning: the Judge started by noting that when the question of jurisdictional immunity arises in connection with international crimes, it raises "fundamental ethical and juridical problems for the international community as a whole, which cannot be evaded simply by characterizing immunity as a simple matter of procedure".[55] According to Judge Bennouna, the Court of Justice should have followed a different approach in order to strike "an equal balance between State sovereignties and the considerations of justice and equity operating within such sovereignties"[56]; the Court could not have rejected the Italian "last resort" argument (as it did in para 103 of its judgment) "on the pretext of the absence of supporting State practice or jurisprudence", rather it should have applied and interpreted the international law on State immunity taking into account the complementary nature of the law governing State responsibility.[57] Judge Bennouna reproached the Court of Justice for having confined its primordial function (serving international justice) within "a narrow, formalistic approach, which considers immunity alone, *strictu sensu*, without concern for the victims of international crimes seeking justice",[58] and for having relied upon a "mechanical" conception of the judicial task by imposing on national judges the rules on immunity "as a preliminary issue, without considering the specific circumstances of each case".[59] Lastly, he regretted that the Court's reasoning "was not founded on the characteristics of contemporary international law, where immunity, as one element of the mechanism for the allocation of jurisdiction, could not be justified if it

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[52] For a recent critical comment concerning the judgment, see Trapp and Mills 2012; Zgnonec-Rozej 2012.

[53] Bianchi 2012.

[54] Higgins 1982, p. 271.

[55] Jurisdictional Immunities, supra n. 1, Separate Opinion of Judge Bennouna, para 9.

[56] Ibidem, para 18.

[57] Ibidem, para 27.

[58] Ibidem, para 28.

[59] Ibidem, para 29.

would ultimately pose an obstacle to the requirements of the justice owed to victims".[60] Such reproaches concerning the ICJ's judgment are so grave as to even question the consistency of Judge Bennouna's adhesion to its operative part.

Judge *Ad Hoc* Gaja, in his *dissenting* opinion, argued (extensively and convincingly) against the ICJ's conclusion that the decision of the Italian courts to deny immunity to Germany could not be justified on the basis of the territorial tort principle.[61]

Judge Cançado Trindade, in his *dissenting* opinion concerning all of the ICJ's findings, discussed at length the international legal doctrine and the growing opinion sustaining the removal of immunity in cases of international crimes, for which reparations are sought by the victims, and concluded that "it is nowadays generally acknowledged that criminal State policies and the ensuing perpetration of State atrocities cannot at all be covered up by the shield of State immunity"[62]; he further argued that to admit the removal of State immunity within the realm of trade relations, or in respect of local personal torts, and at the same time to insist on shielding States with immunity in cases of international crimes, "amounts to a juridical absurdity".[63] Finally, Judge Cançado Trindade argued for the inadmissibility of the Inter-State waiver of the rights of individual victims of grave violations of international law.[64]

The lack of an adequate analysis of the "core issue" of the dispute before the ICJ, i.e., the obligation to make reparations for violations of international humanitarian law, intimately linked to the denial of State immunity, was lengthily discussed by Judge Yusuf in his *dissenting* opinion; Judge Yusuf also disagreed with the reasoning and conclusions of the majority of the Court on the scope and extent of State immunity in international law and the derogations that may be made from it, as well as with the approach adopted by the Court toward the role of national courts in the identification and evolution of international customary norms, particularly in the area of State immunity from jurisdiction for *acta jure imperii* in violation of human rights and humanitarian law. According to Judge Yusuf, the scope of State immunity is "as full of holes as Swiss cheese", and in the light of considerable divergence in the practice of States and in the judicial decisions of their courts, the reasoning followed by the Court—which characterized some of the exceptions to immunity as part to the customary international law, despite the persistence of conflicting domestic judicial decisions on their application, while interpreting other exceptions (similarly based on divergent court decisions), as supporting the non-existence of customary norms—"may give the impression of cherry-picking, particularly where the numbers of cases invoked is rather limited on both sides of the equation".[65]

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[60] Ibidem, para 31.

[61] Jurisdictional Immunities, supra n. 1, Dissenting Opinion of Judge Gaja.

[62] Jurisdictional Immunities, supra n. 1, Dissenting Opinion of Judge Cançado Trindade, para 52.

[63] Ibidem, para 239.

[64] Ibidem, paras 69–72.

[65] Jurisdictional Immunities, supra n. 1, Dissenting Opinion of Judge Yusuf, para 23.

In conclusion, many arguments run against this very conservative judgment and the restrictive interpretation given by the Court of Justice to the continuously evolving doctrine of State immunity. As Amnesty International has convincingly argued in its position paper, the restriction to sovereign immunity advocated by the Italian courts (in relation to claims brought before them by victims of international humanitarian law and crimes against humanity who have been unable to bring their claim for reparation in other fora) should have been considered by the ICJ to be "consistent with established State practice"; this is because this restriction "is narrowly defined, manageable, and routed in established principles of international law" and does not "interfere with the core purpose of sovereign immunity: to ensure the effective orderly conduct of international relations".[66]

3.2 *The External Private International Law Context of the ICJ's Judgment: The European Court of Justice's* Lechouritou *Judgment*

The logical consequence of the ICJ's decision that the Florence Court of Appeal's enforcement of the Greek judgments was in itself incompatible with international law is that the Italian court should have refused it. According to general international law, States are under no obligation to recognize and/or enforce foreign judgments; therefore, a refusal to enforce a foreign judgment entails, in principle, no international responsibility.[67] A problem of conflicting international obligations may nevertheless arise if the State in question (and therefore its national courts) is subject to a treaty commitment to recognize and enforce foreign judgments.

Unsurprisingly, this problem was raised in 2005 by a Greek court, the Patras Court of Appeal, by referring a preliminary ruling to the European Court of Justice (ECJ) in relation to the interpretation of Article 1 of the Brussels Convention, and further amendments. The reference was made in relation to proceedings between Greek nationals resident in Greece and the Federal Republic of Germany, concerning compensation for the financial loss, and non-material damages which the plaintiffs (the descendents of the victims of a massacre carried out by German soldiers on 13 December 1943 in the village of Kalavrita) had suffered as a result of the acts perpetrated by the German armed forces at the time of the occupation of Greece during the World War II.[68] In 1995, these victims (Ms Lechouritou and others) brought an action based on the Brussels Convention (in particular under its Article 5.3–4) in the Kalavrita Court of First Instance, claiming compensation

[66] Amnesty International (2011): Germany v. Italy: The Right to Deny State Immunity When Victims Have No Other Recourse, p. 6 ff.

[67] Michaels 2009, p. 9.

[68] ECJ: Eirini Lechouritou and Others v. Dimosio tis Omospondiakis Dimokratias tis Germanias, C-292/05, Judgment (15 February 2007).

from Germany. In 1998, this court, before which Germany did not enter an appearance, dismissed the claim on the grounds that the Greek courts lacked jurisdiction because the defendant (the Federal Republic of Germany) enjoyed the privilege of immunity in accordance with Article 3.2 of the Greek Code of Civil Procedure. The defendants then appealed in 1999 to the Patras Court of Appeal, which decided (2 years later) to stay the proceedings to await a ruling which was pending at the *Anotato Eidiko Dikastirio* (Special Supreme Court of Greece) in a parallel case concerning the interpretation of international rules on the immunity of sovereign States from legal proceedings. More specifically, that case concerned other claims brought against Germany by Greek nationals before the Greek courts: it is referred to as the *Margellos* case, involving civil claims for compensation for acts committed by the German armed forces in the village of Lidoriki in 1944. The Greek Superior Special Court, seized of the matter according to the Greek Constitution (Article 100.1.f), was requested to decide whether generally recognized rules of international law covered atrocities committed by German troops in the territories under occupation. By six votes to five, the Special Supreme Court decided that Germany was entitled to immunity without any restrictions or exceptions before any Greek civil court for torts committed on Greek territory by its armed forces during World War II.[69] The Special Supreme Court, after an evaluation of the *Al-Adsani* judgment by the European Court of Human Rights (ECtHR),[70] and the *Arrest Warrant* judgment by the ICJ,[71] concluded that—contrary to what was asserted by the lower courts—a customary international law rule (excluding certain acts from the law of State immunity) does not (yet) exist, thus indirectly overruling the *Areios Pagos* in parallel proceedings granting immunity to Germany (in the *Distomo* case).[72]

After this ruling, the Patras Court of Appeal (*Efetio Patron*) decided to stay its proceedings and to refer two questions to the ECJ for a preliminary ruling, by reason of the connection between the claims brought by the appellants and the Community legislation; in short, the Greek Court asked the ECJ whether the Brussels Convention applies to actions for compensation brought by individuals against a Contracting State in respect of loss and damages caused by occupying forces during an armed conflict; second, whether it is compatible with the system of the Brussels Convention for the defendant State to put forward a plea of immunity, with the result, should the answer be in the affirmative, that the very

[69] Anotato Eidiko Dikastirio (Special Supreme Court, Greece): Margellos and Others v. Federal Republic of Germany, Case no. 6/2002, Judgment (17 September 2002). International Law Reports 129: 526.

[70] ECtHR: Al-Adsani v. United Kingdom [GC], 35763/97, Judgment (21 November 2001).

[71] ICJ: Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment (14 February 2002), para 58.

[72] Margellos, supra n. 69, para 14.a–e. See Bartsch and Elberling 2003, pp. 481 ff.

application of the Convention is neutralized in respect of acts and omissions by the defendant's armed forces which occurred before the Convention entered into force.[73]

As to the first question (the applicability of the Brussels Convention), the ECJ (following the opinion of Advocate General Ruiz-Jarabo Colomer, and its settled case law on the concept of "civil matters"), ruled that

> (…) "civil matters" within the meaning of [Art. 1 Brussels Convention] does not cover a legal action brought by natural persons in a Contracting State against another Contracting State for compensation in respect of the loss or damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare in the territory of the first State.[74]

According to the Court, the legal action for compensation brought by the plaintiffs in the main proceedings against Germany (derived from operations conducted by armed forces during the Second World War) are to be considered "one of the characteristic emanations of State sovereignty in particular inasmuch as they are decided upon in a unilateral and binding manner by the competent public authorities and appear as inextricably linked to States' foreign and defence policy".[75] Being *acta jure imperii*, the ECJ concluded that they do not fall within the scope *ratione materiae* of the Brussels Convention. The Court also held that its conclusion could not be affected by the plaintiffs' line of argument set out in the main proceedings, according to which, first, the action brought before the Greek courts against Germany was to be regarded as being of a "civil nature" (covered by Articles 5.3 and 5.4 of the Brussels Convention), and second that acts carried out *jure imperii* "do not include illegal or wrongful actions". In respect of the first objection, the Court ruled that the civil nature of the proceedings is irrelevant in respect of a legal action which arises from an act that does not fall within the scope *ratione materiae* of the Brussels Convention. The Court, and the Advocate General, linked their argumentation to the "cause of action" (the massacre perpetrated by German armed forces) and not to the "subject-matter of the action", i.e., the purpose of the action, stating that the fact that the public authority acted in the exercise of its powers, is sufficient for the exclusion of the claim, based thereon, from the scope of the Convention.[76] Had the Court based its judgment not on the legal relationship between the parties (one of which was exercising public powers) but upon the second criterion (the subject matter of the proceedings), it would have reached the opposite result.[77]

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[73] See ECJ: Eirini Lechouritou and Others v. Dimosio tis Omospondiakis Dimokratias tis Germanias, C-292/05, Op. of Adv. Gen. Ruiz-Jarabo Colomer (8 November 2006), paras 12–16.

[74] Lechouritou, supra n. 68, para 46.

[75] Lechouritou, supra n. 68, para 37.

[76] For an analysis of the Court's criteria on which the exclusion has been based, see Gärtner 2007, pp. 420 ff.; Feraci 2007, pp. 660 ff.

[77] For the position that the *Lechouritou* decision represents a change from prior ECJ jurisprudence, in the sense that the Court accepted as sufficient (in order to exclude this dispute from the scope of the Convention) just one of the two mentioned aspects (the nature of the relation between the parties), see Requejo 2007, p. 208.

As to the second objection, raised by the plaintiffs and the Polish Government, that the concept of acts *jure imperii* does not include wrongful acts, and that serious violations of human rights, such as the massacre carried out on Greek soil, cannot be regarded as *acta jure imperii*, but rather as *acta jure gestionis*, therefore falling within the scope of the Brussels Convention, the Court objected that

> the question as to whether or not the acts carried out in the exercise of public powers that constitute the basis for the main proceedings are lawful concerns the nature of those acts, but not the field within which they fall. Since that field as such must be regarded as not falling within the scope of the Brussels Convention, the unlawfulness of such acts cannot justify a different interpretation.[78]

Thus, as contended by the Advocate General, the wrongfulness of the acts does not affect their classification but rather their consequences. The Advocate General also rejected another objection raised by the Polish Government, according to which public authority must be exercised within the territorial boundaries of a State, with the consequence that operations carried out by armed forces of a State outside its territory may not be regarded as *acta jure imperii*.[79]

It is interesting to note that in 2007 the ECJ arrived (on the basis of a pure international civil procedure/private international law perspective) at the same conclusions reached in 2012 by the ICJ in the Jurisdictional Immunities case on corresponding issues raised in relation to the scope and extent of State immunity. This is true in particular concerning the classification of the acts, on which the proceedings in the various courts had their origin, as *acta jure imperii*, notwithstanding their unlawfulness (which was never contested). The ICJ ruled that the distinction between those *acta* and *acta jure gestionis* (concerning the non-sovereign activities of a State) has to be applied "before" that jurisdiction can be exercised, whereas the legality or illegality of the acts is something that can be determined only in the exercise of that jurisdiction.[80] Analogously, the ECJ ruled that the issue of whether the Brussels Convention applies to the main proceedings based on acts carried out in the exercise of public powers "logically constitutes a prior question", rendering "immaterial" the reference made by the plaintiffs to the substantive rules of the Brussels Convention.[81] Second, the ECJ argued that if the unlawfulness of the acts should be considered to affect their classification, this would raise preliminary questions of "substance" even before the scope of the Brussels Convention can be determined with certainty; something that would run against the objective of that Convention. Furthermore, the Advocate General objected that the suggested approach would also lead to difficulties with regard to liability, because if the acts concerned were to be characterized as *jure gestionis* "it would only be possible to attribute liability to the persons who actually caused the damages rather than to the

[78] Lechouritou, supra n. 68, para 43.

[79] Lechouritou, Op. of Adv. Gen. Ruiz-Jarabo Colomer, supra n. 73, paras 67–69.

[80] Jurisdictional Immunities, supra n. 1, para 60.

[81] Lechouritou, supra n. 68, para 42.

authorities to which they belong".[82] In the main proceedings, the claims were nevertheless brought against Germany and not against the individual soldiers concerned. In view of the reply given to the first preliminary question, the ECJ found that there was no need to answer the Patras Court of Appeal's second question on the compatibility of the privilege of States' jurisdictional immunity from legal proceedings with the system of the Brussels Convention. Should the Court have decided to answer the question, surely it would have followed the opinion of its Advocate General who had anticipated (many years earlier) the procedural/substantive distinction used by the ICJ in its recent judgment. While recognizing that, in respect of the concept of State immunity from legal proceedings, there is "evidence of a tendency to lift State immunity in respect of *acta jure imperii* in cases where human rights are breached", the Advocate General suggested to the Court that it should consider "that State immunity is created as a procedural bar which prevents the courts of one State from giving judgments on the liability of another"; the issue of State immunity must therefore be addressed "before" considering the Brussels Convention. In any case, as stated by the AG, the issue whether States can assert jurisdictional immunity in disputes involving civil claims based on violations of international humanitarian law, as in the present case brought before the ECJ, and its implication with regard to human rights, "is not within the powers of the Court of Justice".[83]

Against this ECJ judgment, Ms Lechouritou and others brought an application before the ECtHR against Germany, the 26 other Member States of the European Union and the European Union itself; according to the plaintiffs the refusal of the ECJ to declare the Brussels Convention to be applicable to their civil compensation claims infringed their rights under Articles 6 and 13 of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; hereinafter ECHR),[84] as well as Article 1 of Protocol no. 1 thereto.[85] On 3 April 2012, the Court declared the application inadmissible against the European Union due to its incompatibility ratione personae with the ECHR (Article 35.3. a), as the EU had not yet acceded to the said Convention. The Court stated, therefore, that its task consisted only of judging whether the 27 Member States of the EU "peuvent être tenus responsables de l'arrêt de la Court de Justice", immediately after rejecting this contention. The Court observed that

> la Cour de Justice, compétente pour interpréter la Convention de Bruxelles en vertu du protocole du 3 juin 1971 (…) a amplement motivé son arrêt et a exposé de manière circonstanciée pourquoi l'action des requérants devant les juridiction grecques ne tombait

[82] Lechouritou, Op. of Adv. Gen. Ruiz-Jarabo Colomer, supra n. 73, para 65.

[83] Ibidem, para 78; on the distinction between jurisdictional immunities of States and the issue of the applicability of the Brussels Convention/Brussels I regulation system, see: Leandro 2007, pp. 766 ff.

[84] Entered into force on 3 September 1953, as amended by Protocol No. 11 (Strasbourg, 11 May 1994), entered into force on 1 November 1998 and Protocol No. 14 (Strasbourg, 13 May 2004), entered into force on 1 June 2010.

[85] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Paris, 20 March 1952), entered into force on 18 May 1954.

> pas sous le coup de cette convention. Rien ne permet de dire que l'interprétation des dispositions de la Convention de Bruxelles par la Cour de Justice était entachée de considérations arbitraires un manifestement déraisonnables, ce qui pourrait amener la Cour à constater une violation de la Convention.[86]

The Court, therefore, concluded that "ce grief est manifestement mal fondé et doit être rejeté en application de l'article 35 §§ 3(a) et 4 de la Convention."[87]

3.3 The Problematic Role of Secondary European Legislation (in the Field of Judicial Cooperation in Civil Matters) on Human Rights Claims Against a State

Another point of relevant interest in the *Lechouritou* judgment is the explicit reference made by the ECJ to European secondary legislation enacted in the field of judicial cooperation in civil matters in order to promote, at the European level, the mutual recognition of judicial judgments in civil and commercial matters, including the abolition of the *exequatur* procedure. This reference was made by the Court in the penultimate paragraph of its judgment in order to substantiate its reasoning that acts perpetrated by a public authority are excluded from the scope of the Brussels Convention. The Court specifically referred to Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims,[88] and to Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.[89] Both provide, in their Article 2.1, that they apply to civil and commercial matters with the *exclusion* of "(…) the liability of the State for acts and omissions in the exercise of State authority (*acta jure imperii*)" without drawing "a distinction in that regard according to whether or not the acts or omissions are lawful".[90] These references had been approved in the doctrine as they reflect "the goal of the Court to enhance a coherent system of Community measures", by dealing with the Brussels Convention as being part of Community/European law, despite its treaty nature.[91] It is worth remembering, in this respect, that the material scope (civil and commercial matters) of Regulation (EC) No. 805/2004 is the same as that of Regulation (EC) No. 44/2001 of 22 December 2000 on the jurisdiction and the recognition and enforcement of judgments in civil and

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[86] ECtHR: Lechouritou and Others v. Germany and 26 other States Members of the European Union, 37937/07, Decision (3 April 2012), available only in French.

[87] Ibidem.

[88] Regulation (EC) no 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European enforcement order for uncontested claims.

[89] Regulation (EC) no 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.

[90] Lechoritou, supra n 68, para 45.

[91] Gärtner 2007, pp. 440 ff.

commercial matters (Brussels I), which (in turn) is identical to that of the Brussels Convention, that it replaced on 1 March 2002.

In our opinion, the affirmed "consistency" between the Brussels Convention and the subsequent European Regulations (enacted by the EU legislator, following the conferral upon it—by the Treaty of Amsterdam[92]—of the competence to legislate in the area of private international law instead of the Member States) is a "forcing" interpretation, in the sense that the decision to amend the scope *ratione materiae* of these Regulations, the successors of the Brussels Convention, has come much later and found its rationale in purely "political" reasons which have nothing to do with the classification of a matter as "civil or commercial" in the sense of Article 1 of the Brussels Convention. Among the multitude of European legislative acts enacted by the European legislator in the field of judicial cooperation in civil matters, Regulation (EC) No. 805/2004 represents the necessary step which is required by the European Council (in its Tampere conclusions) to facilitate access to enforcement in a Member State other than that in which the judgment has been given; the idea is that enforcement should be accelerated and simplified by dispensing with any intermediate measures to be taken prior to enforcement in the Member State in which enforcement is sought. The Regulation in question is exactly designated to enable creditors who have obtained an enforceable judgment in respect of a pecuniary claim, which has not been contested by the debtor, to have it enforced directly in another Member State. Its aim is the elimination of any intermediate measures that are currently necessary for enforcement in various Member States (the *exequatur* procedure). Thus, a judgment that has been certified as a European Enforcement Order by the court of origin must be dealt with, for enforcement purposes, as if it had been delivered in the Member State in which enforcement is sought. The aforementioned provision in Regulation (EC) No. 805/2004, which excludes *acta jure imperii* from its scope of application, (and consequently from Article 1 of the Brussels Convention/Brussels I Regulation, as the ECJ stated in the *Lechouritou* judgment), was not present in the initial Commission Proposal for the Regulation on the European enforcement order.[93] It appeared for the first time in the European Council Common Position (CE) of 6 February 2004.[94] In its Communication to the European Parliament, on 9 February 2004, the Commission explained this amendment to Article 2 by simply stating that it has been introduced "to clarify that the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*) does not constitute a civil and commercial matter and does therefore

[92] Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts (Amsterdam, 2 October 1997), entered into force on 1 May 1999.

[93] See Proposal for a Council Regulation creating a European enforcement order for uncontested claims (COM(2002)159 final—2002/0090(CNS)) OJ C 203E (27 August 2002).

[94] Common Position (EC) no. 19/2004 of 6 February 2004 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a regulation of the European Parliament and of the Council creating a European enforcement order for uncontested claims, OJ C 079 E (30 March 2004), p. 59.

not fall within the scope of this Regulation".[95] This new formulation has subsequently been repeated in several other Regulations, like the already mentioned Regulation (EC) No. 1896/2006 creating a European Order for payment procedures, as well as in Regulation (EC) No. 864/2004 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).[96] This amendment has always been justified as merely "narrative" and for clarification purposes.[97] The Council of the European Union, finally, took the opportunity to recast Regulation (EC) No. 44/2001, in order to introduce, formally, the same amendment in the text of its Article 1.1 of the recent July 2012 "recast proposal of the Brussels I Regulation".[98]

Far from being simply "narrative", or "innocent", as the European legislators pretend, this amendment to the Brussels Convention/Brussels I Regulation's scope *ratione materiae*, introduced during the drafting of the Regulation on the enforcement order, is the result of a specific request advanced by the German delegation during the legislative work in the European Council, exactly in order to clarify that "titles on the liability of the Federal Republic of Germany for war crimes committed during World War II should not be certified as a European Enforcement Order".[99] In order to understand the rationale of this request it is necessary to return to the situation described in the second section of this study: precisely to the Greek judgment in *Prefecture of Voiotia v. Federal Republic of Germany,* in which the Court of First Instance of Livadia (by means of a "default" judgment against Germany) held this State liable to pay compensation amounting

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[95] COM(2004)90 final, Brussels (9 February 2004), 2202/0090 (COD), 8, 3.3.2.

[96] Regulation (EC) no 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-contractual Obligations (Rome II).

[97] Regarding the "Rome II" Regulation, the Common Position of the Council no. 22/2006 (25 September 2006), (OJ C 289E/68, 28 November 2006) states that "In comparison with the original Commission proposal, the scope of the instrument has been clarified and further elaborated. Civil and commercial matters do not cover liability of the State for acts or omissions in the exercise of State authority (*acta jure imperii*)". The adopted Regulation clarifies in recital (7) that "The material scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I') and the Rome Convention on the law applicable to contractual obligations"; Recital (9) states that "Claims arising out of '*acta jure imperii*' should include claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders. Therefore, these matters should be excluded from the scope of this Regulation".

[98] The text has been proposed with a view to adoption as a "compromise package" of the draft general approach set out by the Council (Justice and Home Affairs) at the meeting on 7 and 8 June 2012. See, Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)—First reading- General approach, 10609/12, ADD 1, JUSTCIV 209 CODEC 1495, (1 June 2012).

[99] Council of the European Union, Note from German delegation: Proposal for a Council Regulation creating a European enforcement order for uncontested claims, 11813/03, JUSTCIV 122. CODEC 151; Council of the European Union. Note from German delegation Brussels, 10660/03, JUSTCIV 92. CODEC 856. See also, Kropholler 2005, para 2; Rauscher, Pabst 2006, para 5; Gärtner V 2007, p. 439 (note 104).

to approximately $ 30 million to the relatives of the Greek victims (*Distomo* case).[100] Following the Hellenic Supreme Court's confirmation of the Greek Court of First Instance's decision, this judgment became final. In 2003, pending the drafting of the European Enforcement Order Regulation, the Greek claimants brought proceedings against Germany before the German courts in order to enforce the judgment rendered by the Greek court of Livadia in Germany. We have already recalled that in 2003 the *Bundesgerichtshof* declined to give effect to the Greek judgment in the *Distomo* case, on the ground that the Greek court did not have jurisdiction to hear the case and that this judgment was contrary to the public order exception having been given in breach of Germany's entitlement to immunity.[101] Had Regulation (EC) No. 805/04 been in force in its initial version, without the additional exclusion of *acta jure imperii* from its scope *ratione materiae*, the BGH would been unable to deny *exequatur* to the Greek decision. As already mentioned, Germany did not appear before the Greek court; under the Regulation this would lead to an "uncontested" claim, allowing the claimants to apply for, and obtain, a European enforcement order in Greece, to be directly enforced in another Member State. The elimination of any intermediate measure (the *exequatur* procedure) in order to enforce this judgment abroad would have precluded the German courts from exercising any form of control over the foreign judgment, even in relation to the public order exception. Therefore, the best solution for Germany in order to avoid this result was to prevent the applicability ab initio of the Community/European instruments to the recognition and enforcement of foreign decisions ordering a State to pay compensation to the victims of crimes against humanity and war crimes.[102] Germany, therefore, succeeded in obtaining "political" support among EU Member States (the Council) in order to exclude civil claims for damages resulting from serious violations of human rights and humanitarian law from the substantive scope of application of this and other successor Community/European instruments.

It is, therefore, difficult to support the ECJ's view that the exclusion of the *acta jure imperii* from the scope of the Brussels Convention is justified by its *intrinsic* nature, being that this Convention's (and its successor European Regulations') instruments are simply aimed at enhancing the internal market by facilitating the mutual recognition and enforcement of judgments in civil and commercial matters. The argument that the Brussels Convention/Brussels I Regulation are not "the right instruments" to govern compensation claims arising from "public" matters, like those arising from serious human rights violations,[103] has nothing to do with the *intrinsic* nature of "civil matters" for the purpose of the application of the

[100] Prefecture of Voiotia v. Germany (30 October 1997), supra n. 9.

[101] Distomo Massacre Case, supra n 31.

[102] Requejo 2007.

[103] In favour of the application of the Brussels Convention/Brussels Regulation (and the Lugano Convention) system to the so-called human rights claims, to be heard by the Europaen courts on the basis of the competence criterion set out in Article 5.4, see Kessedjian 2005, p. 158 ff.

European international jurisdiction rules and the following (correlated) benefit of the free circulation of related judgments within the European area of "freedom and justice". This conclusion simply derives from a *political* decision (solicited and obtained by Germany) to exclude governmental liability for serious violations of human rights from the scope of European secondary legislation in order to avoid that the victims' right of compensation could be freely enforced throughout the European area of justice by means of Community/European Regulations.

4 The Negative Impact of the ICJ's Decision on the Role of the National/International Public Order Exception; Critical Assessment of the Formalistic "Procedure/Substance" Distinction with Regard to Criminal and Civil Proceedings

Several consequences at the private international level could be drawn from the ICJ and ECJ judgments commented upon above. According to the latter, the decision on international jurisdiction for civil claims directed at compensation for damages resulting from the exercise of acts of government (amounting to crimes against humanity and/or war crimes) is remitted to the national private international law rules of the Member States. As these legal actions are not covered by the term "civil matters" within the meaning of Article 1 of the Brussels Convention/Brussels I Regulation, the national decisions on these civil claims would not benefit from the free recognition and enforcement system set out at the European level. Any State may reject their recognition and enforcement on the basis of the grounds for refusal available under national law, including the contrary public policy in the State addressed and the court of origin's lack of jurisdiction.

The door left open by the ECJ to the victims of serious violations of human rights and humanitarian law to bring actions for compensation before the national courts has, nevertheless, been closed by the ICJ's 2012 ruling, according to which—under the current state of development of customary international law—a State enjoys jurisdictional immunity from legal proceedings in the domestic courts of another State with respect to its *acta jure imperii*, even if these acts amount to international crimes. The Court stated that municipal judges have to decide on the question of immunity at the very outset of the proceedings, before any consideration of the merits of the case, and that immunity cannot be made *dependent* upon the ground of the gravity of the acts alleged, nor upon the outcome of a "balancing exercise of the specific circumstances of each case to be conducted by the national court before which immunity is claimed".[104] In sum, according to the ICJ, no exception to sovereign immunity exists for "human rights" civil cases.

[104] Jurisdictional Immunities, supra n. 1, para 105.

By rejecting the Italian "substantive normative hierarchy argument" as a possible justification for the Italian courts' denial of immunity to Germany, the ICJ's ruling also condemned the private international law reasoning concerning the "public order exception" followed by the Italian judges who declared the Greek judgment against Germany to be enforceable in Italy. The Italian judges found the Greek decision and the principles informing the national public order to be "perfectly in tune": the solution given by the *Areios Pagos* to the jurisdictional immunity invoked by Germany was "in sync", not only with the development of immunity law at the international level, but also with the absolute primacy that international *jus cogens* rules enjoyed in the Italian legal order. Rules such as the non-derogable norms protecting prisoners of war and those related to crimes against humanity, simply "assumed" by ICJ to be rules of *jus cogens*,[105] have been considered by the Italian judges as an integral part of a "new international/European public order notion", whose function consists precisely of protecting fundamental values of the international community. Fundamental values which correspond, furthermore, to Constitutional provisions imposed on the Italian judges by their national system (Article 10.1 and Article 11 of the Italian Constitution). In reaching this conclusion, the Italian Court of Cassation relied upon the same principle established in its 2004 *Ferrini* decision: that international immunity law has to be interpreted and applied by national judges *consistently* with the fundamental values shared by the international community and embodied in the national public policy exception.[106]

The function and role of the general public policy exception consists, exactly, of ensuring the coherence and the harmony of the internal legal system, in the light not only of the "domestic" values and public interests of the forum State, but also of international principles and values, specifically those established in "imperative" or "mandatory" rules of international law.[107] The Italian judges therefore correctly identified (at the time of the proceedings in question) the principles and fundamental values of the forum State. Second, due to the fact that international *jus cogens* rules enter into the national legal system in accordance with an "inherent logic of a normative hierarchy of norms", the Italian court drew at that time the *logical* consequence of their existence and status (hierarchically higher than any other rule of international law) in the proceedings brought before them: they decided that these rules must prevail over the non-peremptory rule of State

[105] Ibidem, para 94.

[106] Ferrini, supra n. 11. The "substantive" inconsistency found by the Italian court in the internal legal system, in that case as well as in all the others brought before it, concerned competing international values and principles: on the one hand, the paramount values of human rights and human dignity endorsed by *jus cogens* norms and by constitutional principles and, on the other, the recognition of the immunity of States which bars the exercise of jurisdiction in civil claims against the State whose armed forces have committed grave breaches of obligations arising under peremptory norms of general international law. See Jurisdictional Immunities, Counter-Memorial of Italy, supra n. 33, para 4.67.

[107] Sperduti 1954.; Barile 1980; Benvenuti 1977; Lattanzi 1974; Verhoeven 1994; Boschiero 2011, p. 139 ff., p. 154 ff.

immunity, when immunity is invoked by the responsible State in order to avoid its responsibility and to deny to individuals any forms of reparation and compensation. They reached the same conclusion when faced with an application for *exequatur* of a foreign judgment against a third State: in order to reaffirm the principle that a State cannot invoke hierarchically lower rules (those on State immunity) to avoid the consequences of the illegality of its actions, the Italian judges used the public policy exception in a "positive" way; not as a barrier for precluding the recognition and enforcement of the foreign judgment in the forum State, but exactly for the opposite reason: as a means to reaffirm—at the national and international level—the *effectiveness* of these norms, which reflect principles which are widely accepted as fundamental in all the legal systems throughout the world, whose respect for, and compliance with, the national judges are under a *duty* (*obligation*) to guarantee. By declaring the enforceability of the Greek judgment in the forum, the Italian judges also used private international law to comply with the double international obligation imposed on States (and judges) by the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (Article 41.2): not to recognize as lawful a situation which has arisen under serious violations of a peremptory norm of general international law and not to render assistance or aid in maintaining such a situation.

As already recalled, the ICJ rejected the argument that the non-peremptory rule of the jurisdictional immunity of a State should be lifted if not doing so would hinder the enforcement of *jus cogens* rules, even in the *absence* of a direct conflict between the two sets of rules; the Court also stated that extending jurisdictional immunity to a State in breach of international obligations arising under *jus cogens* rules does not amount to recognizing such situations as being lawful or to render assistance and aid in maintaining it.[108] The ICJ's ruling, according to which any interpretation of the international legal system which is *consistent* with the hierarchy of norms is inadmissible with regard to the immunity of the State, will from now on prevent national courts from guaranteeing the supremacy of fundamental human rights and human dignity in their forum, either *directly* by affirming their jurisdiction in proceedings arising out of compensation against third States in respect of *acta jure imperii* (notwithstanding their unlawful nature), or *indirectly* via the operation of the public policy exception mechanism (whatever its use, positive or negative). As to the public policy exception, while it cannot be inferred from the ICJ's judgment that the fundamental values enshrined in international *jus cogens* rules should no longer be considered part of the national/international public policy notion of each State, the ICJ's judgment will nevertheless have a substantive *freezing* effect on its operation in the future. The Court's distinction between questions of substance and procedure, and its finding that the substantive nature of *jus cogens* rules has no impact on the procedural question of State immunity, implies an international obligation for States (and their judiciary) to guarantee jurisdictional immunity to the foreign State whenever they are faced with

[108] Jurisdictional Immunities, supra n. 1, paras 93 and 95. See Costelloe 2012.

a problem of State immunity for *acta jure imperii*, even if committed in violation of international *jus cogens* rules. Municipal judges will always be prevented from hearing these cases brought before them as to their merits, with the consequence that the forum's public policy exception could never come into question. This compression of the public policy exception at the private international law level is not at all to be welcomed, as this is the notion that had *most* contributed to linking the private and public international law reasoning and to develop (at the level of the national legal system) the principles enshrined in international law, with specific regard to human rights international provisions and obligations.

Besides that, the ICJ's strict and formalist argument concerning the procedure/substance distinction between State immunity rules (procedural) and *jus cogens* (substantive) is not at all convincing. In domestic legal systems this distinction, as correctly recalled in the doctrine, has long been criticized by recognizing that procedural rules "may go to the heart of substantive justice", in facilitating or denying a remedy to the claimants.[109] At the international level, the "artificial" distinction between substantive and procedural law had already been condemned, with convincing arguments, in relation to criminal proceedings for serious violations of international peremptory norms, namely the prohibition of torture. In the *Pinochet* case, for example, the House of Lords had concluded (in relation to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984))[110] that the "substantive" prohibition of torture (a *jus cogens* rule) has the overriding force to deprive the rules of sovereign immunity of their legal effects, thus entailing clear "procedural" consequences for the doctrine of State immunity.[111] In its 2012 decision the ICJ did not consider the *Pinochet* judgment to be "relevant", as it concerned the immunity of a former Head of State from criminal prosecution in another State and not the immunity of the State itself, and also because the rationale of this judgment was based on the specific languages of the Torture convention. While it is true that a number a States do not consider the Torture convention to establish universal *civil* jurisdiction, contrary to the opposite opinion expressed by the Committee against torture,[112] the mere idea of *universal jurisdiction* in criminal and/or civil proceedings suggests, as correctly underlined in the doctrine, that "the substance of certain norms has procedural implications" and that the two issues could not be considered "unconnected as a matter of principle".[113] The ICJ's conclusion in its

[109] Trapp and Mills 2012, p. 160.

[110] Entry into force on 26 June 1987.

[111] House of Lords: *Ex parte* Pinochet Ugarte (No. 3) (2000) 1 AC 147, pp. 203 ff. (Lord Browne-Wilkinson). For further comments on the criticized distinction see Muir Watt 2012, p. 546; Talmon 2012.

[112] UN Committee against torture, Conclusions and Recommendations, 34th Session (2–20 May 2005), UN Doc. CAT/C/CR/34/CAN (7 July 2005), paras 4(g), 5(f).

[113] Trapp and Mills 2012, p. 161.

Germany v. Italy judgment, that there is no "inherent" link between rules of *jus cogens* and rules on State immunity, simply ignores the interplay that *ought* to exist between these hierarchically higher norms and any other rule which does not have the same status (like the rules on State immunity) by "preconceiving" (for the purpose of its reasoning) the scope of the former rules as "substantive".

In doing so, the Court artificially separated the imperative precepts of *jus cogens* from their possible implementation and effectiveness, thus attributing to the *jus cogens* rules very limited legal effects. Furthermore, the ICJ did not provide any convincing explanation with regard to the distinction to be made between criminal and civil proceedings, thus relying on the same unconvincing and unexplained conclusions reached by a very strict majority of judges (nine votes to eight) in the well-known case of *Al-Aldsani v. United Kingdom* decided by the ECtHR.[114] This Court (the Grand Chamber), while accepting the prohibition of torture as a norm of *jus cogens* in international law, nevertheless found itself unable "to discern [..] any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the court of another State where acts of torture are alleged". The same unfortunate principle was reiterated by the European Court in the following year, in *Kalogeropoulus and others v. Greece and Germany*[115]; in rejecting an application relating to the refusal of the Greek Government and the German courts to enforce the *Distomo* judgment, the Court said that it was not established "that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity". In their joint dissenting opinion to the *Al-Aldsani* judgment, judges Rozakis, Caflisch, Wildhaber, Costa, Cabral Barrate, and Vajic objected to the main reasoning of the majority of the Court—that the standards applicable in civil cases differ from those applying in criminal matters when a conflict arises between a peremptory rule—as it was given "in the absence of authority"; they also found it to be defective on two other grounds: first, because the English courts, which dismissed the merits of a claim brought by the applicant against the State of Kuwait for an allegation of torture, never resorted to such a distinction in so far as the legal force of the rule on State immunity or the applicability of the 1978 Act to the claim; they simply denied the *jus cogens* status of the rule prohibiting torture. Second, because this distinction "is not consonant with the very essence of the operation of the *jus cogens* rules". The dissenting judges went directly to the heart of the matter considered by the Court, stating that "it is not the nature of the proceedings which determines the effects that a *jus cogens* rule has upon another rule of international law, but the character of the rule as peremptory norm and its interaction with a hierarchically lower rule". The dissenting judges therefore

[114] Al-Adsani, supra n. 70.

[115] Kalogeropoulou, supra n. 46.

concluded that the distinction between "the criminal or civil nature of the domestic proceedings is immaterial", as what really matters is the violation of a *jus cogens* rule.[116] Similarly, Judge Loucaides correctly pointed out, in his dissenting opinion, that the "rationale" behind the principle of international law that those responsible for violations of jus cogens rules must be accountable "is not based only on the objective of criminal law. It is equally valid in relation to any legal liability whatsoever". A conclusion which must be considered to be valid not only in relation to the functional immunity of State officials but also in respect of the immunity of the State itself. The ICJ, in its 2012 judgment, never explained the different rationale behind the distinction between criminal and civil proceedings, nor did it take the opportunity to explain why developments in the criminal context should be ignored in the context of civil proceedings, taking into due consideration that both form part of State immunity and serve the same purpose: "to hold those responsible for crimes under international law accountable and to give the victims access to justice and reparation".[117]

At the private international law level, the link between substance and procedure is enshrined in the *forum necessitatis* "autonomous" ground of jurisdiction, currently available in 10 Member States of the European Union when an appropriate forum abroad is lacking for the plaintiff. As is correctly underlined in an important Study commissioned by the European Commission on the issue of national rules of jurisdiction for cases where the current European law does not provide uniform grounds of jurisdiction in civil and commercial matters, like actions against defendants domiciled in third States (the so-called "residual jurisdiction"),[118] this jurisdiction "of necessity" is traditionally considered to be based on, or even imposed by, the right to a fair trial under Article 6.1 of the ECHR. In some countries (like France), this ground of jurisdiction is also referred to as the general principle of public international law which prohibits the "denial of justice", as it would ensure effective access to justice when there is no other forum available. Even if not presented in this form, it must be emphasized that the proceedings in the Italian courts, setting aside Germany's immunity, had been mainly justified by the necessity to avoid an otherwise inescapable "denial of justice". Italy contended that the Italian courts were justified in asserting jurisdiction against Germany, because all other attempts to secure compensation for the various groups of victims involved in the Italian and Greek proceedings had failed, and had the Italian judges decided to accord Germany the immunity to which it would otherwise have been entitled, no other avenues would have been available to the victims; with the consequence that a denial of justice would have been endorsed by

[116] Al-Adsani, supra n. 70, Joint Dissenting Opinion of Judges Rozakis and Caflisch, Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić, para 4.

[117] Zgonec-Rozej 2012, p. 3.

[118] Study on Residual Jurisdiction, General Report, 3rd Version, 6 July 2007, prepared by Nuyts and al., p. 64 ff.

the Italian judiciary. The so-called "last resort" argument advanced by Italy entailed, therefore, two fundamental aspects, both substantially ignored by the (too abstract and formalist) ICJ judgment: first, the public and private international law right of the victims to have access, as a measure of last resort, to a court (particularly to the courts of the State when serious violations of *jus cogens* rules have been committed, which in the case in question were also the courts of their nationality) when all other avenues have been explored and all prospects of obtaining reparation in other ways have already been exhausted; second, the substantive and inherent link between the procedure and substance of this asserted forum "of necessity": denying the victims' "procedural" right of access to the courts (by according jurisdictional immunity to the responsible State—a rule also of a procedural character), would have meant a denial of their "substantive" right to compensation. The ICJ has not been unaware that, at least, an entire category of Italian victims had been denied compensation on the ground that they have been excluded by Germany from the status of prisoner of war that they were entitled to, and therefore denied access to the Inter-State compensation scheme (para 99). While considering this as a "matter of surprise and regret", the Court nevertheless refused to assess the impact of this failure to make reparations, as well as the absence of alternative means of redress, on the "legality" of the Italian decisions in this specific circumstance. It confined itself to recognizing that "immunity from jurisdiction of Germany in accordance with international law may preclude judicial redress for the Italian nationals concerned", and that these claims "could be the subject of further negotiations involving the two States concerned, with a view to resolving the issue".[119] It is worth remembering, in this respect, that the Italian effort to have an ICJ decision on the question of reparation owed to the Italian victims has been unsuccessful, as the court dismissed the counterclaim in which Italy asked the Court to adjudicate and declare Germany responsible for its ongoing failure to comply with its reparation obligation toward the Italian war crimes victims, on the ground that it did not fall within its jurisdiction, and was therefore inadmissible under Article 80.1 of the Rules of the Court. The Court thought that it was also unnecessary to rule on whether, as Italy contended, international law confers upon the individual victim of a violation of the law of armed conflict "a directly enforceable right to claim compensation".[120] The only rule of the ICJ on the right of reparation, and the corresponding duty to make reparation, is that there is not a *jus cogens* rule under international law "requiring the payment of full compensation to each and every individual victim".[121]

[119] Jurisdictional Immunities, supra n. 1, para 104.

[120] Ibidem, para 108.

[121] Ibidem, para 94.

5 The Consequences for the Fundamental Individual Right to Have Access to Justice and the Right to an Effective Remedy

What are the consequences of the ICJ's decision for the fundamental (private as well as public international law) individual's right to have access to justice? As correctly recognized by Judge Cançado Trindade in his dissenting opinion, the two Parties understood this human right in fundamentally different ways[122]: Germany construed this right very narrowly and argued its limitation with regard to accessing the judicial system of the forum State without discrimination and with full procedural rights. Germany further distinguished the right to have access to justice (and its complementary component, namely the right to an effective remedy) from the question whether the plaintiff has a genuine, substantive, and legal claim. Consequently, it argued that the right to have access to justice had been respected in relation to both the Italian and Greek victims, who had full access to judicial remedies under German law; the decisions of the German courts which rejected reparations were not a *denial of justice* but simply the recognition that these victims did not have the rights which they claimed. For its part, Italy argued that the right of access to justice "is conceived in all systems of human rights of protection as a necessary complement of the rights substantively granted", and that not surprisingly it had been qualified by the Inter-American Court of Human Rights, in the case *Goiburú* "as a peremptory norm of international law in a case in which the substantive rights violated were also granted by *jus cogens*".[123] The same conclusion on the peremptory status of this norm has been reached by Judge Antonio Cassese, the President of the Special Tribunal for Lebanon, in an Order assigning matters to a pre-trial Judge, issued on 15 April 2010, after a lengthy and learned assessment of the status of this right in international customary law (including in international tribunal judgments and in domestic legal systems).[124]

Unlike the Inter-American Court of Human Rights, the ECtHR has refused, starting from its unfortunate *Al-Adsani* judgment, to bring the right of access to justice within the domain of *jus cogens*, and has rather approached this fundamental right from the side of its permissible or implicit "limitations". Not only can this right be temporarily suspended but, in addition, it can be restricted when restrictions are imperatively justified by the need, among other things, to respect personal or functional immunities accorded to the person or to the State against whom or which a

[122] Jurisdictional Immunities, supra n. 1. Dissenting Opinion of Judge Cançado Trindade, paras 73–79.

[123] Jurisdictional Immunities, Counter-Memorial of Italy, supra n. 33, para 4.94, citing IACtHR: Goiburú et al. v. Paraguay, Judgment (22 September 2006).

[124] STL: In the Matter of El Sayed, CH/PRES/2010/01, Order Assigning Matter to Pre-Trial Judge (15 April 2010), para 29.

claim is lodged. It was on this premise that this Court decided, on 12 December 2002, to reject the claims of 257 applicants against Germany and Greece who claimed that the refusal to enforce the *Areios Pagos* decision on the *Distomo* massacre constituted an undue infringement of their right to have access to justice, as laid down in Article 6 (1) of the ECHR and their right to property as established by Article 1 of the Additional Protocol to the Convention. The Court found the applicants' claim to be manifestly ill founded, as the restriction of their right to have access to justice was justified in so far as it pursued the legitimate aim "of complying with international law to promote comity and good relations between States". Regarding the "proportionality" of the restriction, the Court interpreted Article 6 in the light of the relevant norms of the international law on State immunity; referring to its own *Al-Adsani* judgment, the Court concluded that the restrictions on access generally accepted by the community of nations as part of the doctrine of State immunity could not be regarded as "disproportionate". It dismissed the claim based on Article 1 of Protocol no. 1 on the same reasoning.[125] On 31 May 2011, the Court, by means of a "décision sur la recevabilité", dismissed the claim of the Greek plaintiffs (*Sfountouris et autre)* that the German courts' refusal to pay compensation to the victims of the *Distomo* massacre[126] constituted an infringement of their rights as established by a combination of Article 1 of Protocol no. 1 and Article 14 of the ECHR. The Court, after having analyzed the various German decisions, concluded that

> compte tenu de tous les éléments devant elle, (…)l'on ne saurait soutenir que l'application et l'interprétation du droit international et interne auxquelles ont procédé les juridictions allemandes aient été entachées de considérations déraisonnables ou arbitraires.[127]

The Court reasoned that "ne peuvent prétendre avoir une espérance légitime de se voir accorder une indemnisation pour le préjudice subi et que les faits litigieux ne tombent dès lors pas sous l'empire du Protocole no 1. Partant, l'article 14 de la Convention ne trouve pas non plus à s'appliquer."[128]

It is not our task to take a position on the question of whether or not the right to justice has already been elevated to the level of *jus cogens*, and also not on the correctness of the doctrinal affirmation that a *procedural jus cogens* rule is necessarily contained in a *material jus cogens* rule; in other words, that every *jus cogens* rule contains or presupposes a procedural rule which guarantees its judicial enforcement.[129] Nevertheless, it seems difficult to construct the right to have access to justice as a peremptory rule of customary international law, from which the international community, States and other international legal subjects may not

[125] Kalogeropoulo, supra n. 46.

[126] Distomo Massacre Case, supra n. 31.

[127] ECtHR: Sfountouris and Others v. Germany, 24120/06, Decision (31 May 2011).

[128] Ibidem.

[129] Bartsch and Elberling 2003, p. 486 ff.

derogate, where it is widely recognized that this right is not "absolute", as repeatedly held by the ECtHR; many derogations are allowed by the norm itself.[130] In any case, it is worth remembering that all the restrictions allowed for these fundamental rights are not only limited in number, but also subject to stringent requirements: among other things (they must be reasonable and not disproportionate), the restrictions on its scope could not be applied so as to reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. It is not therefore necessary to characterize this rule as belonging to *jus cogens* in order to draw the logical consequence deriving from the ICJ's decision to refuse to exercise the necessary and inherent (in its judicial task) balancing of possible conflicting rights and legal interests brought before it: the ICJ's conclusion that national courts, when faced with a problem of State immunity for *acta jure imperii*, even if committed in violation of international *jus cogens* obligations, must be prevented from hearing the case, implies a real *denial* of the very essence of the right to have access to justice. The right to go before an independent and impartial judge and to have one's claims duly considered by such a judge has nothing to do (of course) with the complementary right to an effective remedy; the existence of the fundamental right of access to justice does not automatically entitle individuals to obtain a "substantive" judicial remedy.[131] The national courts, like the German courts did in respect of the Italian and Greek plaintiffs, could obviously conclude, after considering the merits of the cases brought before them, that the claimants did not have "genuine" substantive rights to make a claim. In order to reject the Italian argument that the right of access to justice entails an obligation to satisfy the complaining party, being directly linked to Germany's ongoing failure to comply with its reparation obligations, the ICJ came to the worst possible conclusion (according to public and private international law): it simply denied all the victims of war crimes and crimes against humanity their fundamental "preliminary" right to have access to a court, and therefore to justice. The Court denied them the very right to resort to the courts, a constituent element of the well-known public and private international law right to a *fair trial*. One may legitimately wonder whether such a form of "blanked" immunity applied by the ICJ, as well as by the ECtHR, in order to block completely any judicial determination of civil rights, without balancing the competing interests and the nature of the specific claims, amount to a real *violation* (being a *disproportionate* limitation) of the right enshrined in Articles 6.1 and 13 of the ECHR,[132] in Article 25 of the American Convention on Human Rights (San Jose, 22 November 1969),[133] and in Article 7.1 of the African Charter on Human and Peoples' Rights (Banjul, 26 June 1981),[134] as well as in Article 6 of the Treaty of

[130] ECtHR: Stegarescu and Bahrin v. Portugal, 46194/06, Judgment (6 April 2010), para 46.

[131] El Sayed, supra n. 124, para 36.

[132] Al-Adsani, supra n. 70, Dissenting opinion of Judge Loucaides.

[133] Entered into force on 18 July 1978.

[134] Entered into force on 21 October 1986.

the European Union (Maastricht, 7 February 1992; hereinafter TUE).[135] As Ms Rosalyn Higgins had observed

> it is severing immunity which is the exception to jurisdiction and not jurisdiction which is the exception to the basic rule of immunity. An exception to the normal rules of jurisdiction should only be granted when international law requires – that is to say, when it is *consonant with justice and with the equitable protection of the parties*. It is not granted 'as of right'.[136]

6 Conclusion

The ICJ's rejection of all the private international law reasoning followed by the various national courts confronted with the issue of the jurisdictional immunity of a third State which is allegedly responsible for *acta jure imperii* in violation of international jus cogens rules had been dictated by the legal impossibility of pronouncing itself on the question of whether the Greek courts had (themselves) violated Germany's immunity in the *Distomo* case. The ICJ's reasoning that the *exequatur* proceeding is an "exercise of jurisdictional power" is certainly correct, but the weakness of the Court's final pronouncement lies in the unconvincing and selective arguments that it used in order to determine that the Italian courts had breached Italy's obligation to accord jurisdictional immunity to Germany in respect of the various claims brought before them by Italian claimants. Furthermore, the ICJ approached the fundamental right to justice not with the due attention to its essence, but focusing (like the ECtHR) on its "implicit" limitations. At the end of the day, the combined effect of the various decisions (rendered by the ICJ, ECtHR, and ECJ) closed any door to the victims of international crimes, not only in respect of the complementary right to an effective remedy for grave breaches of human rights and of humanitarian law, but also (and foremost) with regard to the very universally "recognised" fundamental principle of the "right to a court". The consequence is a judicial codification of an undoubted *denial* of the procedural right *to have access to justice*.[137] By imposing the "preliminary" nature of State immunity from jurisdiction, and totally ignoring the rationale under the Italian "last resort" argument, the ICJ's decision will (from now on) preclude national courts from assessing the merits of the claims, the context in which these claims have been made, and also the balancing of the different factors underlying each case, irrespective of any forum "of necessity" due to the absence of any alternative forum available to the plaintiffs. Furthermore, the Court's conclusion

[135] Entered into force on 1 November 1993, as amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Lisbon, 13 December 2007), entered into force on 1st December 2009.

[136] Higgins 1982, p. 271 (emphasis added).

[137] See Francioni 2008, p. 13 ff.

that immunity could not have any bearing on questions of substance, due to its fundamental formalist substance/procedure distinction, simply (and skilfully) avoided the core issue of the case: whether questions of substance should/could have any bearing on procedural hierarchically lower rules of State immunity. The ICJ's decision also failed to explain why there should be any different rationale in relation at to the inherent link of substance and procedure between criminal and civil proceedings.

Another negative side of the ICJ's decision is its potential deterrent effect on the evolving State practice (discretionally) determining when third States may bar civil claims on the assertion of State immunity rules, taking into due consideration the need for "justice" in the light of the application of the general principles underlying human rights and humanitarian law. The ICJ's 2012 judgement could have a "chilling" effect on national courts, preventing them from moving the international law of State immunity toward a more responsive direction to contemporary international law that demands a growing recognition of the rights of individuals *vis-à-vis* States.[138] One might, for example, seek to draw lessons from the ICJ's judgment, beyond the context of war crimes claims, and declare that the "State sponsors of terrorism" exception in the United States (US) Foreign Sovereign Immunities Act, which allows suits to proceed against "designated" States for certain *acta jure imperii*, is inconsistent with customary international law "as it presently stands".[139] Furthermore, notwithstanding the fact that the ICJ's decision concerned sovereign immunity, and not the right of a sovereign to entertain civil claims for misconduct by "aliens" on foreign territories (with the consequence that the principle of universal jurisdiction was not at issue), the ICJ's decision also could have an impact on this issue. Some (sad) examples can already be deduced from State practice and European legislation. The adverse effect of the ICJ's judgment could be measured, for example, in the US human rights litigation in the US courts: it is easy to measure the strength of the ICJ's *implicit* idea that any extraterritorial exercise of "prescriptive jurisdiction" (like the one practised by the US courts according to the Alien Tort statute) would also violate international law as it currently stands, as a general prohibition of extraterritorial jurisdiction equally rests on the fundamental principles of sovereign equality.[140] This position has already being strongly argued by an *amici curiae* brief filed at the US Supreme Court in the pending *Kiobel v. Royal Dutch Petroleum* case, in which the Supreme Court has been confronted with the question of the liability of corporations under the federal common law that derives from the Alien Tort Statute in a dispute involving "unlawful" conduct in Nigeria by a Nigerian subsidiary of an Anglo-Dutch family of companies. What is interesting to note is that the US Government initially supported, before the Unites States Supreme Court, the plaintiffs' claim that there is no international law limitation on the availability of civil remedies for

[138] Webb 2012.

[139] Keitner 2012.

[140] Stephan 2012. Jurisdictional Immunities, supra n. 1, Separate Opinion of Judge Keith.

human rights violations arising in the territories of foreign sovereigns; the US Government urged a reversal of the Second Circuit judgment arguing that "[c]ourts may recognize corporate liability in actions under the ATS as a matter of federal common law". After the petitioners' supplemental brief, the US Government changed its stance in June 2012 (hence after the ICJ's February 2012 judgement). In its supplemental *amicus brief*, the US Government stated that the Court should not "fashion a federal common-law cause of action" on the facts of this case, where "Nigerian plaintiffs are suing Dutch and British corporations for allegedly aiding and abetting the Nigerian military and police forces in committing [crimes] in Nigeria." It further argued that US Courts should apply *forum non conveniens* and exhaustion doctrines at the very beginning of Alien Tort cases, in order to limit the filing of ATS cases in the US, where there is a slight nexus with the forum.[141]

On the European side, another probable negative consequence of the ICJ's judgment may be recalled: in June 2012, the Council of the European Union adopted a "general approach" with regard to the proposed *recast* of the Brussels I Regulation, its provisions and key recitals, and adopted as "a compromise package" a new draft of this Regulation,[142] completely different from the European Commission's 2011 Proposal.[143] According to the new text, all the provisions for disputes involving third State defendants, suggested by the European Commission, have been deleted together with the new proposed European uniform rule of *forum necessitatis*. This European "political" decision has therefore annulled any hope to have, within the European space of justice and freedom, the operation of the Brussels I Regulation in the broader international order, providing grounds for the jurisdiction of the courts of Member States in *disputes involving third-state defendants*. The most significant innovation of the Commission's proposal consisted precisely in having a new European head of jurisdiction (the *forum necessitatis* rule) able to ensure that the corporate social responsibility of firms with their headquarters or seat in the territory of a Member State may be held accountable for human rights violations by their subsidiaries in third—usually developing—countries, where they are not held to the same European high standards of human rights.[144] After the ICJ's decision, the Council of the European Union has (better)

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[141] Supplemental Brief for the United States as *Amicus Curiae* in partial support of affirmance, No. 10-1941, http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/Kiobel-US-supp-brief-6-13-12.pdf (accessed on 15 June 2012). The U.S. doctrine has read between the lines of this new *writ of certiorari*, explaining that "SG's office and perhaps the Executive Branch generally saw the writing on the wall based on the Court's oral argument and rebriefing order that ATS litigation was going to be shut down based on extraterritoriality—a position the Bush Administration had previously argued. Not wanting to go that far, the SG's office tried to give the Court comfort that cases with no U.S. nexus would not be filed here and other doctrines like forum non conveniens and exhaustion would keep those cases out of U.S. courts." See, Childress 2012.

[142] EU Council, Proposal for a Regulation. General approach, supra n. 98.

[143] On the Commission's 2011 Proposal, see Boschiero 2012, pp. 253–302.

[144] Muir Watt H., The Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters *(Recast),* European Parliament- Directorate-General for Internal Policies 2011, 15.

decided not to extend the application of the Regulation to third-State defendants/situations, thus avoiding any potential accusation of the *extraterritoriality* of European secondary legislation, and consequently also renouncing a specific jurisdictional ground for denouncing, before the European courts, foreign corporations allegedly responsible for serious human rights violations committed abroad.

Another closed door to the victims' enjoyment of their rights came again from the European side: in 2011 the Tribunale ordinario di Brescia (Italy) submitted a reference for a preliminary ruling to the highest court in the European Union, the ECJ, in the course of proceedings between a number of Italian nationals and the Bundesrepublik Deutschland (Federal Republic of Germany) concerning their application for compensation in respect of the harm which they suffered by reason of their deportation, or the deportation of the persons to whom they are the legal successors, during the Second World War. The request for preliminary ruling concerned the issue of the objection of immunity in relation to European Union law, namely the Treaty of Lisbon and the 2000 Charter on Fundamental Rights of the European Union (the Charter).[145] The Italian Tribunal asked the ECJ to pronounce itself on the compatibility of Germany's alleged "civil" State immunity before the Italian courts with Art. 6 (TUE) and Articles 17, 47, 52 of the Charter. It further requested the European Court to pronounce itself on the compatibility of Germany's alleged "civil" State immunity decisions to exclude some European citizens (the victims of war crimes) from the benefits of reparations with the TUE's rules and the European general principle of "*non conceditur contra venire factum proprio*". Finally, the Italian Tribunal asked the ECJ to rule on the compatibility of Germany's jurisdictional immunity with Articles 4.3 and 21 TUE: according to the referring court, the rule on State immunity could exclude the summoned party's civil liability as established by the common European principles common to the law of the Member States (Art. 340 TFUE) for violations of public international law in respect of citizens of another Member State.

By an Order of 12 July 2012, the Third Chamber of the Court rejected this reference for a preliminary ruling by stating that "It is clear that the Court of Justice of the European Union has no jurisdiction to take cognisance of the request for a preliminary ruling submitted by the Tribunale ordinario di Brescia (Italy).[146]

The Court recalled that, pursuant to Article 267 TFEU, it can interpret European Union law only within the limits of the powers conferred on it, and that consequently it has no jurisdiction to give a ruling on the interpretation of provisions of international law which bind Member States outside the framework of European Union law. According to the Court of Justice, it has no jurisdiction *ratione materiæ* to rule not only on the interpretation of the general principle of international law relating to State immunity and on the interpretation of the Agreement on German

[145] ECJ: Gennaro Currà and Others v. Bundesrepublik Deutschland, C 466/11, Order (12 July 2012).

[146] ECJ: Gennaro Currà and Others v. Bundesrepublik Deutschland, C-303/5, Order (6 October 2012).

External Debts, to which the European Union is not a party. Even if, admittedly, the European Court of Justice must apply international law (and may be required to interpret certain rules falling within the scope of that law), this could happen (the Court recalls) solely within the context of the competence which has been conferred on the European Union by the Member States. According to the Court, the subject-matter of the case in the main proceedings is excluded from the scope of European Union law, as well as, therefore, the interpretation and application of the principle of international law on the State immunity. In addition the Court declared that it has no jurisdiction *ratione temporis* due to the fact that the dispute in the main proceedings concerned an application for compensation brought by citizens of a Member State against another Member State in respect of events which took place during the Second World War, and thus before the European Communities were established. The Court noted in this respect that the International Court of Justice declared that it had jurisdiction and delivered a judgment on the merits of the case on 3 February 2012 (Germany v. Italy).

By stating that it's impossible to determine whether the law and the conduct of two Member States are in compliance with the provisions of the EU and FEU Treaties and of the Charter provisions when the compatibility concerns an act or an event predating their entry into force, and by stating that the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it, the ECJ rendered a "perfect" judgment from a pure legalist point. Undoubtedly, since the situation in the main proceedings does not come within the scope of European Union law, it is logic for the Court to conclude, therefore, that it does not have jurisdiction and that the provisions of the Charter relied upon cannot, in themselves, form the basis for any new power.

Coming to the substance of the judgement, the European Court of Justice missed a real opportunity to better balance the necessity of granting immunity with the "right to have access to the courts" and the right to an effective remedy in the context of contemporary international law and European public and private international law, which undoubtedly demands that human rights must be taken more seriously, specifically with regard to respect for "due process" solemnly proclaimed in Article 47 of the EU Charter and guaranteed by the European public order exception [147].

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[147] Salerno 2011; Fawcett 2007.

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Uniform International Law on the Carriage of Goods by Sea: Recent Trends Toward a Multimodal Perspective

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1 The Evolution of the Regulation of the International Transport of Goods by Sea: From Brussels to Rotterdam via Hamburg

The International Convention for the unification of certain rules of law relating to bills of lading (Brussels, 25 August 1924; hereinafter 1924 Brussels Convention)[1] was conceived in order to compromise the interests of maritime carriers with those of shippers with the aim being to limit the abuse of freedom of contract.[2] This conception clearly also marked the 1968 Visby Protocol[3] and the 1979 Brussels Protocol,[4] both amending the 1924 Brussels Convention (hereinafter the Hague-Visby Rules) with the sole intent of clarifying certain matters already regulated by such Convention.

[1] Entered into force on 2 June 1931.

[2] Treitel and Reynolds 2001, ch. 9-062 ff.; Karan 2004, p. 21 ff.; Carbone 2010, ch. 5. The preparatory works of the Hague-Visby system were edited by Berlingieri 1997 and by Sturley 1990.

[3] Protocol to amend the International Convention for the unification of certain rules of law relating to bills of lading (Brussels, 23 February 1968), entered into force on 23 June 1977.

[4] Protocol to amend the International Convention for the unification of certain rules relating to bills of lading as modified by the Amending Protocol of 23 February 1968 (Brussels, 21 December 1979), entered into force on 14 February 1984.

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The United Nations Convention on the Carriage of Goods by Sea (Hamburg, 31 March 1978, hereinafter the Hamburg Rules) had the aim of defending cargo interests in a stronger way than provided for by the 1924 Brussels Convention and its amendments. But, despite their promoters' intention, the Hamburg Rules—their drafting style apart[5]—have been largely acknowledged as being along the same line of continuity of the Hague-Visby Rules: indeed, carriers' liability has not been significantly enhanced.[6]

Also, the new discipline adopted in the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam, 23 September 2009, hereinafter the Rotterdam Rules)[7] is substantially consistent with the above-mentioned uniform maritime transportation law currently in force, even if it better defines some of its aspects.[8] The drafters of the Rotterdam Rules have taken into account the reasons why the Hamburg Rules have failed to reach sufficient international consensus,[9] and have come back to a carrier liability scheme similar to that adopted by the Hague-Visby Rules.[10] In particular, the "presumed fault" of the carrier, established by Article 17.2, is based on some fundamental obligations with which the carrier must comply,[11] coupled with a complex (and more precise) *onus probandi* scheme, which is modeled on an amended version of the traditional "excepted perils" system.[12]

However, it would be a mistake to consider the Rotterdam Rules as a mere updating of the Hague-Visby Rules[13]: as a matter of fact, the new 2009 Convention modifies the carrier liability regime currently in force, and takes into account both

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[5] Karan 2004, p. 47.

[6] Asariotis 2002, p. 388; Tetley 2008, pp. 936–937; Lopez de Gonzalo 2008, pp. 80–81, Carbone 2010, ch. 5. For a comment on the first decisions applying the Hamburg Rules see La Mattina 2004, p. 597 ff.

[7] Not yet entered into force. In order to check the ratification status of the Rotterdam Rules see the United Nations Commission on International Trade Law (UNCITRAL) website: www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html. Accessed 10 April 2012.

[8] In general, on the evolution of the preparatory works of the Rotterdam Rules see, *inter alia*, Berlingieri and Zunarelli 2002, p. 3 ff.; Honka 2004, p. 93 ff.; Schelin 2008–2009, p. 321 ff.; Sturley 2009, p. 1 ff.

[9] The Hamburg Rules are in force between a limited number of States (at present 34). In order to check the ratification status of the Hamburg Rules see the United Nations Commission on International Trade Law (UNCITRAL) website: www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html. Accessed 10 April 2012.

[10] Asariotis 2002, p. 389 ff.; Berlingieri 2002, p. 382 ff.; Berlingieri 2004, p. 140 ff.; Berlingieri 2007–2009, p. 279 ff.; Berlingieri et al. 2008, 1173 ff.; Diamond 2008, p. 149 ff.

[11] See Articles 11, 13 and 14.

[12] See Article 17.3. The complexity of the *onus probandi* scheme adopted by the Rotterdam Rules is highlighted by Mbiah 2007–2009, p. 289.

[13] Diamond 2008, p. 149.

the technical evolution of sea transport and a full-fledged assessment of the duties which a modern carrier should fulfill.[14]

No wonder, therefore, that nautical fault has been removed from the list of the "excepted perils" and the Rotterdam Rules provide *not only* the obligation of the carrier to "properly crew (…) the ship (…) during the voyage by sea",[15] *but also* the carrier's "vicarious liability" in relation to every fault of the ship owner's employees and/or agents during the execution of the carriage.[16] Furthermore, the obligation to provide a seaworthy vessel is extended by Article 14.a throughout the entire duration of the sea transport, and no longer exclusively *at its beginning*, as is the case under Article III.1.a of the Hague-Visby Rules. In addition to that, specific obligations have been entrusted to the carrier in order to avoid a negative impact of the carriage on the environment: reference is made, in particular, to the obligations indicated in Articles 15, 17.3.n, and 32 of the Rotterdam Rules.[17]

The Rotterdam Rules have also taken into account some features of the liability regime contained in the Hamburg Rules derogating from that embodied in the Hague-Visby Rules. This is true, in particular, for the liability of the carrier for a delay, which has been envisaged in Article 21 of the Rotterdam Rules. However, such liability for a delay only arises if the goods are not delivered in a timely manner at the place of destination indicated and the contract of carriage provides for a specific date for this purpose; therefore, if there is no special provision regarding the time of delivery, then no such carrier liability can be assessed. Hence, in this respect, Article 21 of the Rotterdam Rules differs not only from the Hague-Visby Rules, where no liability for a delay exists, but also from the Hamburg Rules, whose ambiguous Article 5.2 provides for the liability of the carrier if goods are not consigned at the time established in the transport contract, or "within the time which it would be reasonable to expect from a diligent carrier".[18]

In short, it can be assumed that the Rotterdam Rules continue along the path of the regime of the traditional carrier liability schemes, and yet provide important clarification, as well as innovations with respect to those parts of the Hague-Visby Rules that are no longer consistent with the evolution of the practical needs of maritime transport. In this sense, we do agree with the definitions of the Rotterdam Rules, which have been baptized as "evolutionary and not revolutionary"[19] as well as a fair compromise between "tradition and modernity".[20]

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[14] Sturley 2007–2008, p. 255; Mbiah 2007–2008, p. 290; Carbone 2010, p. 288 ff.

[15] See Article 14.

[16] See Article 18.

[17] Munari and La Mattina 2010, p. 370 ff.

[18] The debate regarding the opportunity to insert in the Rotterdam Rules a provision similar to Article 5.2 of the Hamburg Rules has been recorded during the preparatory works (see UNCITRAL document A/CN.9/645, para 64).

[19] Sturley 2007–2008, p. 255.

[20] Delebecque 2007–2008, p. 264.

2 The Need for a Regulation of Multimodal Transport

Moreover, an important new element of the Rotterdam Rules is established in Article 26 where a specific regime has been introduced for multimodal transport in some particular cases. As a matter of fact, such provision extends—under certain conditions—the period of liability of the maritime carrier to non-sea legs of a certain multimodal maritime transport.[21]

As is known, in the current economic context, international maritime transport appears with more frequency as a mere phase of a multimodal transport.[22] But this kind of transport is not specifically regulated by any international convention, the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24 May 1980, hereinafter the Geneva Convention) never having entered into effect. In this situation, Italian and foreign judges have attempted to determine the legal regime which is applicable to multimodal transport (especially to multimodal maritime transport), in some cases extending the international maritime transport rules currently in force to all (or to part) of the phases of such kind of transport.[23] In particular, where the maritime segment of the carriage was the "prevailing route", the Hague-Visby Rules have often been applied to the entire multimodal transport (and, therefore, even to the non-maritime phases of such multimodal transport)[24]; on the contrary, in other cases the decision is based on the so-called "network liability system", thereby splitting the liability regime of the multimodal carrier and affirming that such a regime varies on the basis of the place where the damage to the goods occurs. In these cases, the Hague-Visby Rules have only been applied if the damage is caused during the maritime phase of a certain multimodal transport.[25]

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[21] Alcàntara 2002, p. 399 ff.; Beare 2002, p. 306 ff.; Berlingieri 2009a, b; Carbone and La Mattina 2008, p. 981 ff.; Glass 2006, p. 306; La Mattina 2010, p. 643 ff.; Nikaki 2006, p. 521 ff.; RØsaeg 2002, p. 316 ff.; Van der Ziel (2009), p. 301 ff.

[22] UNCITRAL docs. A/CN.9/WG.III/WP.29, paras 12–26, and A/CN.9/510, paras 26–32.

[23] See the case law reported by La Mattina 2007, p. 1010.

[24] Trib. Genova, 12 March 1992, 1993 Diritto Marittimo 430; *Moore-McCormack Lines*, *Inc*. v. *International Terminal Operating Co*., 619 F. Supp. 1406 (S.D.N.Y. 1983); *Hoogovens Estel Verkoopantoor* v. *Ceres Terminals, Inc.*, 1984 AMC 1417; *Marubeni-Iida, Inc.* v. *Nippon Yusen Kaisha,* 1962 AMC 1082; *Berkshire Fashions Inc.* v. *MV Hakusan II*, 954 F.2d 874, 881 (3d Cir. 1992); *Hartford Fire Ins. Co.* v. *Orient Overseas Container Lines*, 230 F. 3d 549, 555–556 (CA2 2000); App. Aix-en-Provence, 10 July 1984, 1987 Droit maritime français 84.

[25] App. Roma, 5 January 1948, 1948 Il foro italiano, I, 697; Trib. Genova, 15 April 1950, 1950 Diritto marittimo, 576; App. Milano, 7 November 1950, 1951 Il foro italiano, I, 76; Trib. Milano, 26 February 2004, 2006 Diritto Marittimo, 1220; Cass. (IT), 6 June 2006, n. 13253, 2007 Rivista di diritto internazionale privato e processuale, 407; *Reider* v. *Thompson*, 339 US 113, 1951, AMC 38 (1950); *Compagnie Française de Navigation a Vapeur* v. *Bonnasse*, 19 F.2d 777, 779-780, 1927 AMC 1325, 1329 (2d Cir. 1927); *HSBC Insurance Ltd.* v. *Scanwell Container Line Ltd*, 2001 European Transport Law, 358 ss.; App. Versailles, 25 May 2000, *Merz Conteneurs* v. *Brambi Fruits et al*., www.legifrance.gouv.fr; App. Rouen, 13 November 2001, *Via Assurance* c.

Both of these trends represent positivism and criticism.

On the one hand, the application of the Hague-Visby Rules to multimodal transport irrespective of the localization of the damage to the goods eliminates all doubts concerning the discipline of "non-localized" damages (meaning those damages that arise from an unknown route),[26] but it does not seem at all convincing, because (a) it represents a "strain" for the application of the Hague-Visby Rules, which does not take into consideration routes which are different to the maritime one[27] and (b) it leaves sufficient room for many doubtful aspects with reference to the notion of "prevailing route".

On the other hand, recourse to the "network liability system" does not create compatibility problems with the application of the international "unimodal" conventions and, in particular, with the Hague-Visby Rules, but it does create uncertainty concerning the applicable regime of responsibility which is unpredictable before the damage occurs and which may not be determined at all in the case of "non-localized" damage. Such uncertainty may not only increase litigation, but may also result in increased insurance costs connected with multimodal transport.

In light of such uncertainties, the Supreme Court of the United States in the *Kirby* case[28] inaugurated what has been defined as a "conceptual approach"[29] affirming that a multimodal transport contract that includes a maritime route and a "shorter", but not necessarily "incidental", land route has a maritime nature (unless it results in the different will of the parties to such a contract). Therefore—independently from the identification of the place where eventual damage to the goods occurs—such a multimodal transport contract has to be regulated by the US Carriage of Good by Sea Act (i.e., the Federal legislation on maritime transport where the 1924 Brussels Convention has been implemented). In the case in question the Supreme Court (i) completely overrides the "network liability system" (that—as was said by the Court—may cause "*confusion and inefficiency*"), as it is not relevant in determining where the damage to the goods occurred, and (ii) grants more certainty and predictability to the conclusions of the case law trend indicated above, making it unnecessary to measure with "a ruler" which is the "prevailing" route of a certain multimodal maritime transport in order to determine its applicable legal regime.

(Footnote 25 continued)
Gefco, 2002 Revue de Droit Commercial, Maritime, Aérien et des Transports (Scapel), 30; *Mayhew Foods Ltd.* v. *Overseas Containers Ltd.* [1984] 1 Lloyd's Rep. 317; Oberlandesgericht Hamburg, 19 August 2004, 2004 TranspR, 403. *Contra* see Trib. Genova 11 January 2011, *unpublished*, where it was affirmed that multimodal transport is a "*sui generis*" kind of carriage to which the system of liability provided for by the regulation of each segment of the carriage is not applicable.

[26] Diplock 1972, p. 273.

[27] Berlingieri 2009a, b, p. 33.

[28] *Norfolk Southern Railway Co.* v. *James N. Kirby, Pty. Ltd.* 543 U.S. 14 (2004) 300 F.3d 1300.

[29] Sturley 2005, p. 358.

In the same perspective, in the *Kawasaki* case, the Supreme Court has recently affirmed that a through bill of lading issued abroad by an ocean carrier can apply to the domestic, inland portion of a multimodal transport (providing both for sea and rail carriages), with the consequence that not only the ocean carriage but also the inland carriage will be governed by the US Carriage of Goods by Sea Act.[30]

It is still not possible to verify what the impact of the *Kirby* and *Kawasaki* cases will be on the decisions of Italian and foreign judges. Furthermore, at present we cannot ignore the situation of uncertainty that characterizes the rules which are applicable to multimodal transport due to the absence of an unequivocal case law. Only a specific regulatory intervention that is desired by most parties, and that has resulted in interest in the UNCITRAL, would solve the problem.[31]

3 The Multimodal Transport Regulation Provided for by the Rotterdam Rules and Its Limitations

In this perspective, the drafters of the Rotterdam Rules (and before them, the drafters of the Comité Maritime International (CMI) *Draft Instrument on Transport Law*, on which the Rotterdam Rules are based) have intended to specify the extension, in certain cases, of the application of such regulation to forms of multimodal transport (*door-to-door)* that include a maritime route.[32] In an extreme synthesis, the new convention elaborated on behalf of the UNCITRAL does not have the aim of regulating multimodal transportation *tout court,* but—under certain conditions and in the presence of certain circumstances—only to extend its scope of application in relation to the land and/or air and/or internal waterways route (if any) and/or subsequent to maritime transport. Therefore, the Rotterdam Rules are a little *less* of a "true" multimodal convention (such as the 1980 Geneva Convention) but a little *more* of a convention on maritime transport: correctly, in fact, a "multimodal maritime approach" has been referred to.[33]

In this sense, the Rotterdam Rules, firstly, extend the definition of a "contract of carriage" relevant to its proper scope of application and affirm in Article 1.1 that such a contract shall provide for carriage by sea and may provide for carriage by other methods of transport in addition to the sea carriage; also the combined provisions of Article 5 (entitled "General scope of application") and Article 12 (entitled "Period of responsibility of the carrier") provide that the period of responsibility of the carrier includes the moment from the receipt of the goods until the moment of the delivery of the same goods to the consignee, and that the responsibility of the carrier is not necessarily limited to the phase when the goods

[30] *Kawasaki Kisen Kaisha Ltd.* v. *Regal-Beloit Corp.*, 130 S. Ct. 2433 (2010).

[31] Furrer and Schürch 2010, pp. 402–403.

[32] See note 21 above.

[33] Sturley 2004, p. 146.

are placed on the ship. Furthermore, from Article 5 of the Rotterdam Rules it is possible to deduce that the places of the receipt/delivery of the goods may eventually not coincide with the ports of loading/unloading.

As has therefore been observed, the 1924 Brussels Convention, in its original formulation, was a "*tackle-to-tackle*" convention, the Hague-Visby Rules and the Hamburg Rules were "*port-to-port*" conventions, and, finally, the Rotterdam Rules will become a "*door-to-door*" convention, even if they merely concern "wet" multimodal transports (i.e., multimodal maritime transports).[34] In reality, as already observed above, the text in question is not really a "*door to door*" convention because the scope of application of the Rotterdam Rules is limited *both* under the "subjective" profile as well as the "objective" one.

The scope of application of the Rotterdam Rules is limited under the "subjective" profile because this new convention, once in force, will only be applied (a) to the "contractual" maritime carrier—and this (subject to the "objective" limits mentioned further on) with reference to the services he provides, directly or indirectly, on the maritime route as well as on the land or air or internal waterways route—and (b) to the so-called "maritime performing parties", meaning those individuals who are charged by the same contractual carrier to execute—"during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship" (Article 17)—"any of the carrier obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods" (Article 1.6.a). In other words, the Rotterdam Rules—as implicitly stated in Article 4.1.a—may not be applied towards "non-maritime carriers", unless they operate "exclusively within a port area" (Article 1.7). This limitation has been criticized by some US scholars, who have highlighted the fact that the Rotterdam Rules are not able to attain the results that were recently reached by the Supreme Court in the *Kirby* case, therefore obliging operators to utilize the "*Himalaya Clause*" in order to allow an extension of the regulation for maritime transport to land carriers.[35]

The Rotterdam Rules are also limited under the "objective" profile as they do not provide a uniform regime for all the phases of a multimodal transport—but, by adopting the so-called "network liability system"—only in the case of losses or damage to the goods that are verified *exclusively* on one route. As a matter of fact, Article 26 determines the application of the "international instrument" to such phases (not also the state legislation)[36] specifically shaped for the relevant non-maritime route if the interested party would have stipulated a separate transportation contract and if such an instrument imperatively stipulated ("either at all or to the detriment of the shipper") the provisions that concern the responsibility of the

[34] Berlingieri 2002, p. 382.

[35] Crowley 2005, pp. 1502–1503.

[36] As was said during the preparatory works of the Rotterdam Rules, the word *instrument* was preferred to the term *convention* "in order to include the mandatory regulation of regional organizations": see UN Doc. A/CN.9/WG.III/WP.81 (13 February 2007), note 88.

carrier, the limitation of liability and a time bar. Hence, from an "objective" point of view, the Rotterdam Rules may only be applied with regard to non-maritime routes if: (a) damage to the goods occurs exclusively on a non-maritime route or the damage is not localized (meaning that the route of the transport where the damage occurs is unknown) and (b) there is no mandatory uniform regime of the non-maritime route concerning the responsibility of the carrier, the limitation of liability and a time bar, or, even though there may be such a regime, it does not clash with the corresponding provisions of the new Convention.[37]

The *rationale* of this regulation resides in the will to avoid conflict between the Rotterdam Rules (in the part where it extends its proper scope of application to the non-maritime route) and the "unimodal" conventions which regulate land, air and internal waterway transportation.

Concerning this last proposal, moreover, some scholars have affirmed the superfluous nature of such a disposition considering the fact that there is no conflict amongst the multimodal provisions of the Rotterdam Rules and the scope of application of the "unimodal" conventions, in so far as these—with the exception of what we will state further on[38]—do not have as their objective the regulation of multimodal transport.[39]

Furthermore, the fact that Article 26 of the Rotterdam Rules provides for the application of another "international instrument" to non-maritime routes (but only with reference to the responsibility of the carrier, the limitation of liability and concerning the time bar) implies that for those routes two different responsibility regimes may be contemporaneously applicable: (i) the one that would have belonged to the route if a "unimodal" transport contract would have been executed for that route (i.e., the regime provided for by CMR, COTIF, CMNI or the Montreal Convention), but limited to the above-mentioned aspects of the responsibility of the carrier, the limitation of liability and the time bar, and (ii) that of the Rotterdam Rules, with reference to all the other aspects of the transport contract (amongst these, for example, are the obligations of the shipper, the transport documents, the delivery, the "right of control", the transfer of the rights that arise from the contract…).[40] From this "an obscure patchwork of different regimes which were not designed to complement each other" would arise,[41] that, in any case, would not resolve all the potential conflicts between the new Convention and the other applicable instruments with regard to non-maritime

[37] See UN Doc. A/CN.9/WG.III/WP.78 (21 September 2006), para 18: "the limited network system only comes into play in situations where (…) there might be a conflict between the liability provisions of the draft convention and the liability provisions of the relevant unimodal transport conventions".

[38] See note 43 and the corresponding text.

[39] Arroyo 2001, p. 542; Riccomagno 1998, p. 72.

[40] Faghfouri 2006, pp. 95–114

[41] UN Doc. A/CN.9/WG.III/WP.21/Add.1 (6 February 2002), Annex II, para 44.

transport, thereby not solving the problem of an "overlap" with reference to that which is indicated under point "ii" above.[42]

Finally, with the aim of preventing possible conflicts with other "unimodal" conventions, Article 82—similar to Article 25 of the Hamburg Rules, but with more specific wording—contains a safeguard clause concerning the scope of application of the multimodal transport regulations provided for by other "unimodal" conventions currently in force. Article 82 therefore provides that the Rotterdam Rules do not affect the application of multimodal transport regulations provided for by other conventions to maritime routes.[43]

4 The Period of Liability of the Carrier Under the Rotterdam Rules

Even though the Rotterdam Rules are not a "multimodal convention" *tout court*,[44] they do provide that the maritime carrier is responsible for the whole period during which he has the custody of the goods, not only regardless of the fact that such goods are loaded on board the ship, but also (and above all) regardless of the fact that the receipt of those goods occurs in a maritime port.[45]

Furthermore, the Rotterdam Rules provide for important clarifications in order to specify more effectively the period of liability of the carrier and, in particular, in order to resolve certain doubts regarding their extension which have arisen in the case law applying the Hague-Visby Rules.

First, the Rotterdam Rules have confirmed that—as already specified by the Hamburg Rules—if a public law provision of the *lex loci* of the State where the goods are loaded (or unloaded) compels the carrier to receive such goods from (or to deliver to) a special purpose public enterprise, the period of the carrier's responsibility will start (or will end) only when he receives the goods from (or delivers them to) this entity (Article 12.2).

Second, pursuant to Article 12.3 of the Rotterdam Rules, the period of liability of the maritime carrier can be potentially reduced through an agreement between the parties to the contract of carriage, provided that—in any case—such period cannot start after loading has been commenced and cannot end before unloading has been completed. Bearing this provision in mind, it is clear that the Rotterdam Rules essentially have a "maritime" (not multimodal) nature, because their "core"

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[42] Glass 2006, p. 333 ss.

[43] In particular, the Rotterdam Rules do not affect the application of the following provisions: (a) Article 18.3 of the Warsaw Convention and Article 18.4 of the Montreal Convention on air transport; (b) Article 2 of the CMR Convention on road transport; (c) Articles 1.3 and 1.4 of the CIM—COTIF Convention on railway transport; (d) Article 2.2 of the CMNI Convention on internal waterways transport. On these topics, see RØsaeg 2009, p. 238 ff.

[44] See Sect. 3 above.

[45] Carbone 2010, p. 500 ff.

mandatory regulation applies only to the "maritime" route. That is even more evident considering that Article 13.2 of the Rotterdam Rules—implementing the solutions reached by English case law in respect of f.i.o. and f.i.o.s.t. clauses under the Hague-Visby Rules[46]—provides that the carrier and the shipper may agree that the operations of loading, handling, stowing or unloading can be performed by the shipper himself (or by the documentary shipper or by the consignee): in such a case, the carrier is not liable for any damage to the goods caused by these operations, unless they are performed by a performing party (Article 17.3, under "i").

Finally, the Rotterdam Rules provide a detailed regulation of the parties' rights and duties regarding the termination of the maritime carrier's period of liability.[47] In particular, Article 48 regulates the consequences of the impossibility for the carrier to deliver the goods to the relevant cargo-interested parties. In such a case, the carrier must promptly inform the cargo-interested parties which are indicated in the contract of carriage and, afterwards, if they do not accept delivery, the carrier may, "at the risk and expense of the person entitled to the goods, take such action in respect of the goods as circumstances may reasonably require".[48]

5 Conclusions

Although they are not revolutionary, the Rotterdam Rules for the first time provide a regime concerning the liability of the sea carrier which specifically takes into consideration the development of the sea transport into a "multimodal perspective". The new convention does not regulate any kind of multimodal transport, but—subject to certain conditions—it merely extends its scope of application to non-maritime routes involving "wet" multimodal transport. In other words, the Rotterdam Rules do not provide a "*uniform*" regime of responsibility concerning the multimodal carrier, but—by applying a sort of "*network liability system*"—they try to fill the gaps left open by the "unimodal" conventions currently in force and, in particular, by the Hague-Visby Rules.

Of course, we think that it would have been better to have a complete regulation of multimodal transport[49] and we hope that one day it will be possible to have a truly "*uniform*" system of international transport common to all phases of carriage

[46] Diamond 2008, pp. 148–149.

[47] Diamond 2008, p. 171 ff.

[48] Article 48 provides that such actions, *inter alia*, include: "(a) To store the goods at any suitable place; (b) To unpack the goods if they are packed in containers or vehicles, or to act otherwise in respect of the goods, including by moving them; and (c) To cause the goods to be sold or destroyed in accordance with the practices or pursuant to the law or regulations of the place where the goods are located at the time".

[49] La Mattina 2005, pp. 71–72.

and based upon a sole convention in lieu of several "unimodal" instruments,[50] but—at present—it seems that the ratification of the Rotterdam Rules by the major maritime States, with a view to replacing all the international conventions on the transport of goods by sea currently in force, could be the first reasonable step in order to (partially) resolve the situation of uncertainty that characterizes the subject of multimodal transport.

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[50] Carbone 1976, p. 119; Carbone, 1982, p. 61 ff.; Romanelli 1993, p. 295 ss.; Romanelli 1999, p. 197 ff.

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Freedom of States to Regulate Nationality: European Versus International Court of Justice?

Roberta Clerici

1 The *Nottebohm* Judgment of the International Court of Justice

> (…) international law leaves to each State to lay down the rules governing the grant of its own nationality (…) a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State.

These *dicta* were rendered by the International Court of Justice (ICJ) in its famous 1955 judgment in the *Nottebohm* case (second phase) (hereinafter *Nottebohm* judgment).[1] In these *dicta*, the ICJ primarily reaffirmed the discretion of States to prescribe the conditions for granting their nationality. However, in the same *dicta* the Court also emphasized the relevance of international law in this matter when other States are involved, especially in the field of diplomatic protection.

Almost 60 years have gone by from when this judgment was rendered. Leaving aside the inquiry into the current role of nationality in the field of diplomatic protection,[2] it may be wondered whether nationality is still part of domestic jurisdiction, and which is the role of the principle of effective nationality.

[1] ICJ: Nottebohm (Liechtenstein v. Guatemala), Judgment (6 April 1955), p. 23.

[2] The "standard" circumstances for the exercise of diplomatic protection in favour of stateless individuals, refugees and others persons are well known: see Bariatti 1993, p. 85 ff. In addition to these, an extension of the exercise of diplomatic protection has been maintained: see *ex multis* Koojmans 2004; Milano 2004; Pustorino 2006; Papa 2008; Gaja 2010.

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As for the latter issue, it must be borne in mind that the prerequisite for a genuine link between an individual and a State of which the individual is exclusively a national, as required in the *Nottebohm* judgment, has been strongly criticized in the literature and by subsequent judicial practice.[3] Pursuant to the prevailing opinion, in the *Nottebohm* judgment the Court was influenced by the factual context of the situation, given that Liechtenstein granted its nationality *mala fide*. In fact, the Court pointed out, on the one hand, Nottebohm's "extremely tenuous" connections with the Principality and, on the other, "the existence of a long-standing and close connection between him and Guatemala".

The peculiar nature of this part of the decision has recently been confirmed by the commentary to Article 4 of the Draft Articles on Diplomatic Protection, laid down by the International Law Commission of the United Nations.[4]

Article 4 does not require a State to prove an effective link with its national as an additional factor for the exercise of diplomatic protection, when a national possesses one nationality only.[5]

In any event, the issue of a necessary genuine link has been addressed also with reference to nationality of corporations[6] and of ships, albeit in different terms and sometimes with different solutions. As for ships, the interpretation of the necessary genuine link rendered in the judgment of the International Tribunal on the Law of

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[3] See primarily *Nottebohm*, supra n. 1, Dissenting Opinions of Judges Klaestad, Read and Judge *ad hoc* Guggenheim. The rich literature on this decision is referenced in Weis 1979, pp. 318–321. With a few exceptions, such as De Visscher 1956, Bastid 1956, and more recently Donner 1984, p. 94 ff., Panzera 1984, pp. 91 ff. and 251 ff., the majority of authors have criticised the *Nottebohm* judgment: v. *ex multis* Makarov 1956, Jones 1956, Maury 1958, Knapp 1960, Kunz 1960. These criticisms appear to have not changed with time, as confirmed by the broad survey carried out by Dugard in its First Report, infra n. 11, p. 37 ff. Furthermore, the "genuine link" principle has been expressly rejected in the *Flegenheimer* case (Conciliation Commission established pursuant to Article 83 of the Treaty of Peace with Italy of 10 February 1947: Flegenheimer (United States v. Italy), Decision (20 September 1958)). Like the *Nottebohm* case, the *Flegenheimer* case addressed the diplomatic protection of an individual with a single nationality.

[4] International Law Commission, Draft Articles on Diplomatic Protection with Commentaries, UN Doc. A/61/10 (2006), hereinafter Draft Articles on Diplomatic Protection. With the resolution 65/27 of 6 December 2010 this item was included in the provisional agenda of the fifty-eighth session of the General Assembly.

[5] See the wording in Draft Articles on Diplomatic Protection, supra n. 4, Article 4 and relating commentary.

[6] See the well-known debate concerning ICJ: Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (second phase), Judgment (5 February 1970) also pointed out in the Draft Articles on Diplomatic Protection, supra n. 4, Article 9 and relating commentary and notably in the ILC, Third Report on Diplomatic Protection by Mr. John Dugard, Special Rapporteur, UN Doc. A/CN.4/523 (7 March 2002), p. 2 ff. In its recent judgment in the *Diallo* case, the Court has further ruled out that shareholders injured by a wrong done to the company are entitled to compensation (ICJ: Ahmadou Sadio Diallo (Guinea v. Democratic Republic of the Congo), Judgment (30 November 2010), para 156). See also ICJ: Ahmadou Sadio Diallo (Guinea v. Democratic Republic of the Congo), Judgment (24 May 2007). Cf. Vermeer-Künzli 2007; Andenas 2011.

the Sea in the *Saiga (no. 2)* case[7] remains of paramount importance. As is well known, Tullio Treves relied upon his scholarship and the experience he has gained within the Third United Nations Conference on the Law of the Sea in the laying down of this judgment, as well as of subsequent decisions.[8] These pages are dedicated to him, with consideration and affection.

In spite of the foregoing, the principle of effective (or active) nationality has been evoked by judicial and arbitral courts in situations of the double or plural nationality of individuals, mainly for the aim of determining which State is entitled to the exercise of diplomatic protection against a third State.[9] The Draft Articles on Diplomatic Protection do not require such a prerequisite (see esp. Article 6).[10] On the contrary, recalling recent (although largely contested) case law, Article 7 of the Draft Articles allows the State of "predominant" nationality to bring a claim against a State of which the injured person is also a national.[11]

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[7] ITLOS: M/V "Saiga" (no. 2) (Saint Vincent and the Grenadines v. Guinea) Judgment (1 July 1999). Pursuant to the ITLOS, the purpose of the provisions of 1982 Montego Bay Convention on the Law of the Sea providing for the need for a genuine link between a ship and its flag State "is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States" (para 83).

[8] I will here recall, for all, Tullio Treves' Separate Opinion in the Judgment to the "Grand Prince" judgment (ITLOS: "Grand Prince" (Belize v. France), Judgment (20 April 2001)). In examining the question of the relevant time for the status of the applicant State as the flag State of the vessel, Treves held that Article 292 of the Montego Bay Convention relating to proceedings of prompt release, if considered as a whole, "establishes, for limited purposes, a form of diplomatic protection". See also, in general, Treves 2004, p. 179 ff.

[9] See for example the decision of the Yugoslav-Hungarian Mixed Arbitral Tribunal: Baron Frederic de Born v. Yugoslavia, Case no. 205 (12 July 1926) and, more recently, Marc Dallal v. Iran, 53-149-1, Award (10 June 1983). Comp. also Article 5 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (The Hague, 13 April 1930; entered into force on 1 July 1937, hereinafter 1930 Hague Convention) and Article 4.b of the "Resolution on The National Character of an International Claim Presented by a State for Injury Suffered by an Individual" adopted by the Institute of International Law at its Warsaw Session in 1965.

[10] Paragraph 1 allows a State of nationality to exercise diplomatic protection in respect of its national even where that person is a national of one or more other States. Like Draft Article 4, Article 6.1 does not require a genuine or effective link between the national and the State exercising diplomatic protection.

[11] As is well known, this rule stems from the renowned claim in the *Mergé* case (Conciliation Commissions established pursuant to Article 83 Treaty of Peace with Italy of 10 February 1947: Mergé (United States v. Italy), Decision (10 June 1955)), as well as from about fifty similar claims decided by the Italian-United States Conciliation Commission (reprinted in International Law Reports 1955, p. 455 ff.); this rule was reaffirmed by both the Iran-United States Claims Tribunal in the equally renowned case Nasser Esphahanian v. Bank Tejarat, 31-157-2, Award (29 March 1983), and in several other cases (see Bederman 1993, p. 129) and by the United Nations Compensation Commission established by the Security Council to provide for compensation for damages caused by Iraq's occupation of Kuwait (UN Doc. S/AC.26/1991/7/Rev.1, 17 March 1992, para 11). Nonetheless, the role of the effective or dominant nationality in this circumstance is very much debated, as shown by the broad and careful examination carried out in ILC, First Report on Diplomatic Protection by Mr. John Dugard, Special Rapporteur, UN Doc. A/CN.4/506

In any event, the principle of active nationality—which is often described in terms of the "most real connection"—occupies a strong position in the field of the Private International Law of several States, especially with reference to the application of national law to nationals of two or more States. It is true, however, that the *lex fori* is sometimes held to prevail when the forum State's nationality concurs with the nationality of another State.[12]

2 The State's Freedom to Regulate Nationality in the International Practice

The principle of effective nationality does not entail, *per se*, a real limitation on the sovereign prerogative of each State in determining, according to its municipal law, who its nationals are. It is well known that the principle of the "reserved domain" of States in that matter (i.e. States' freedom to regulate nationality) was assessed by the Permanent Court of International Justice in 1923 (albeit with some inherent limits).[13] The absolute character of the principle of "reserved domain" was immediately trimmed down by the 1930 Hague Convention on Nationality.[14] After having reassessed the freedom of each State in this matter, Article 1 of this Convention prescribes, in fact, that the law of the State "shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality".[15] The peculiar wording of this provision has been mirrored in Article 4 of the Draft Articles on Diplomatic Protection.[16]

(Footnote 11 continued)
(7 March 2000), hereinafter Dugard First Report, pp. 42–54, to which reference is here made also for further case law and doctrinal publications.

[12] See for example Article 9.1 of 1978 Austrian Law on Private International Law, Article 5.1 of 1986 German Law, Article 23.2 of 1987 Swiss Law, Article 19.2 of 1995 Italian Law, Article 3.2 of 2004 Belgian Law. The two latter laws, together with the German law, also provide that the nationality of the forum prevails. For further references, see Davì 1994, p. 88 ff.

[13] PCIJ: Nationality Decrees issued in Tunis and Morocco, Advisory Op. (7 February 1923), p. 23 ff. (see also infra n. 15). The advisory opinion was also rendered in light of the general provision on matters falling "solely" within the "domestic jurisdiction" of States under Article 15.8 of the Covenant of the League of Nations. Such a provision has been reassessed in Article 2.7 of the Charter of the United Nations. On the relevance of these provisions in the present context see Weis 1979, p. 68 ff.

[14] Supra n. 9.

[15] Actually the PCIJ, too, in its advisory opinion in the *Nationality Decrees* case, supra n. 13, had acknowledged as a limitation to the freedom of States the possible existence of international treaties on nationality. As is rather obvious, the provision in Article 1 of the 1930 Convention has a broader scope. Cf. Verwhilgen 1999, p. 122 ff.

[16] This rule also lists some modes of acquiring nationality, e.g. by birth, descent, naturalization, succession of States, or in any other manner, as long as this is "not inconsistent with international law".

Particular attention should be devoted to the substantially identical provision in Article 3 of the European Convention on Nationality (Strasbourg, 6 November 1997).[17] This Convention, just like the 1930 Hague Convention, aims explicitly at codifying the international law rules on the nationality of individuals, in spite of its regional level and of its few ratifications.[18] Regardless of the few ratifications, many domestic laws on nationality, as is the case with the Italian law, comply *per se* with what is prescribed in the European Convention on Nationality.[19]

In light of the foregoing, it is necessary to verify whether rules of international customary law actually impose limitations on the discretion of States concerning the acquisition, retention, loss, and recovery of their nationality.

It is not a matter of drawing a distinction between the validity of a conferment of nationality on the level of domestic law and its opposability at the international level, especially in the field of diplomatic protection.[20] It is, rather, a matter of inquiring into the possible existence of rules of international customary law, and of inquiring whether these rules are capable of imposing general limitations on States, and have an impact on States' discretion, even when the granting or withdrawal of nationality by the former State is not being challenged by another State.

Such an ascertainment is not easy, due to the persistent reluctance of States toward a common *opinio iuris ac necessitatis* in these matters. Such an approach may, on the other hand, be justified because "every State must consist of a collection of individual human beings" determined by the State itself.[21] On the other hand, the European Convention on Nationality could not but respect the different choices of States in granting their nationality, for instance, by birth or by descent; a flexible regulation has been provided by the European Convention on Nationality

[17] Entered into force on 1 March 2000. This provision, too, holds in fact that each State "shall determine under its own law who are its nationals" (para 1); furthermore, "This law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality" (para 2).

[18] The Explanatory Report of the Convention underlines, in particular "a need to consolidate in a single text the new ideas which have emerged as a result of developments in internal law and in international law". Only "some provisions (…) aim to contribute to the progressive development of international law on nationality, for example Chapter VI on State succession and nationality" (para 11). On the other hand, this Convention has been ratified by 20 governments: thus, less than half of the States that are members of Council of Europe. Moreover, there have been no accessions by non-member States, although accession is made possible by Article 28 also for those States that have not partaken in the Convention's drafting.

[19] The substantial identity in the content of the rules is clearly shown in the rules on the acquisition, retention, loss, and recovery of nationality provided in the Italian Law on Nationality, Law no. 91 of 5 February 1992.

[20] This distinction is often made in the analysis of the role of nationality in international law and in the comments on the *Nottebohm* judgment: see e.g. Weis 1979, p. 89 ff.; Carreau 2004, p. 49 ff., 223 ff.; Combacau and Sur 2004, p. 328 f.

[21] See Shaw 2003, p. 584.

also with reference to the acquisition of nationality by naturalisation.[22] In fact, the existence of an international customary principle concerning States' freedom in these matters has been recently reasserted.[23]

Vice versa, possible limitations to States' freedom in granting their nationality may be found in the international rules on the protection of human rights. Such rules may become relevant from two standpoints: the right to have a nationality, and the prohibition against discriminate. As for the former right, the scope of Article 15 of the Universal Declaration of Human Rights (Paris, 10 December 1948), that provides the right of everyone to have a nationality (para 1), together with the prohibition on States arbitrarily depriving individuals of their nationality and denying them the right to change their nationality (para 2), has been downsized by Article 24.3 of the International Covenant on Civil and Political Rights (New York, 16 December 1966).[24] Article 24.3 simply provides the right for every "child" to acquire a nationality; this right was subsequently reaffirmed at Article 7 of the United Nations Convention on the Rights of the Child (New York, 20 November 1989).[25]

The impact of Article 20 of the American Convention on Human Rights (San José, Costa Rica, 22 November 1969)[26]—that recaptures and extends the provision of Article 15 of the Universal Declaration—is much stronger.[27] Starting from an advisory opinion delivered in 1984, the Inter-American Court of Human Rights has often grounded its decisions based upon Article 20 of the American Convention on Human Rights; the Court, in fact, proclaimed that the right to nationality is an "inherent human right recognised in international law".[28] As for the [European] Convention for the Protection of Human Rights and Fundamental

[22] See respectively, Article 6 para 1, 2 and para 3. This latter provision only determines, for naturalisation, a maximum period of residence (10 years before the lodging of an application) which "corresponds to a common standard, most countries of Europe requiring between five and ten years of residence" (Explanatory Report, para 51). Hence, a State Party may fix other justifiable conditions for naturalisation (for example, as regards integration). As to the original acquisition of nationality, it is clear that neither of the two different modes provided by internal laws (that often overlap) satisfies *per se* the "genuine link" requisite (Supra Section 1).

[23] See in this sense, after a thorough examination of State practice and the opinions of authors, Dugard First Report, supra n. 11, p. 35; see also *ex multis* Kelsen 1932, p. 244; Giuliano 1981, p. 358 ff.; Carreau 2004, p. 346 ff.

[24] Entered into force on 23 March 1976.

[25] In general, on these rules (with the exception, of course, of the 1989 Convention), see Donner 1983, p. 147 ff.

[26] Entered into force on 18 July 1978.

[27] Compared to Article 15 of the Universal Declaration of Human Rights, para 2 of Article 20 of the American Convention on Human Rights provides an additional provision on the right of every person to the nationality of the State in whose territory he was born "if he does not have the right to have a nationality". See again Donner 1983, p. 172 f.

[28] The Court also held that the powers of States to regulate matters relating to nationality are circumscribed by their obligations to ensure the full protection of human rights: v. IACtHR: Proposed Amendments to the Naturalisation Provisions of the Constitution of Costa Rica, Advisory Op. (19 January 1984); see also Girls Yean and Bosico v. Dominican Republic, Judgment (8 September 2005); for further references, see Pustorino 2006, pp. 76–77, n. 23.

Freedoms (Rome, 4 November 1950; hereinafter ECHR),[29] it is not intended to apply to issues of nationality.[30] Accordingly, the European Court of Human Rights refrains from examining claims or those parts of claims that address questions of the nationality of individuals.[31]

The existence of an international customary right to nationality could, rather, be inferred from the multilateral conventions on statelessness, and especially from the Convention on the Reduction of Statelessness (New York, 30 August 1961; hereinafter 1961 Convention).[32] This Convention contains many provisions which seek to prevent statelessness, and it is considered as an instrument which implements the customary international rule on the obligation to avoid statelessness.[33] Although the domestic laws on nationality of many States follow such a regulation, several of those same States (such as Italy) did not yet ratify the 1961 Convention.[34] It is, nevertheless, also worth mentioning that a large number of States have ratified the Convention in the past 5 years.

The European Convention on Nationality provides a general safeguard against statelessness, not only with reference to acquisition but especially with reference to the loss of nationality *ex lege* or at the initiative of a State Party or the individual. Article 7, which was moulded on the 1961 Convention, aims at the prevention of an arbitrary deprivation of nationality, and it provides for as many as

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[29] Entered into force on 3 September 1953, amended by Protocol No. 11 (Strasbourg, 11 May 1994), entered into force on 1 November 1998 and Protocol No. 14 (Strasbourg, 13 May 2004), entered into force on 1 June 2010.

[30] The ECHR does not contain any such provisions. Moreover, no relevance may be given to Article 3 of Protocol No. 4 to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto (Strasbourg, 16 September 1963), entered into force on 2 May 1968, which includes the right of nationals to enter and not to be expelled from the territory of the State of which they are nationals. Accordingly, the broad relevance given in the Explanatory Report to the 1997 European Convention on Nationality to the relevance of the principal rules of the ECHR (paras 16–19) seemed to be excessive: consequently, such rules rather address the rights acknowledged to foreign nationals residing in a State Party to the ECHR.

[31] See, e.g., ECtHR: Riener v. Bulgaria, 46343/99, Judgment (23 May 2006) and Kurić and others v. Slovenia, 26828/06, Judgment (13 July 2010)—not final: case refereed to the Grand Chamber; however, in Tănase v. Moldova [GC], 7/08, Judgment (24 July 2010), the European Court addressed the obligations imposed on this State Party by Article 17 of the 1997 European Convention concerning multiple nationality (see also the Chamber Judgment (18 November 2008) paras 47, 106 ff.).

[32] Entered into force on 13 December 1975. See Weis 1979, pp. 124 ff., 163 ff.; Donner 1983, p. 150 ff.; Marescaux 1984, p. 52 ff. and recently Spiro 2011, p. 18 ff. On the other hand, the obligation imposed on Contracting States by Article 32 of the United Nations Convention on the Status of Stateless Persons (New York, 28 September 1954, entered into force on 6 June 1960) is weak, where it provides that they shall "as far as possible facilitate (…) the naturalisation of stateless persons".

[33] See in this sense Explanatory Report to the European Convention on Nationality, para 33.

[34] The rules on the acquisition and loss of nationality, Italian Law no. 91 of 1992, supra n. 19, are in fact largely inspired by the principle of avoiding statelessness: on this issue see Clerici 1993, pp. 309 ff. and 317 ff.

seven cases of legitimate withdrawal. Both Article 7.3 and Article 8.1 (concerning the voluntary renunciation to nationality) provide that the persons concerned do not thereby become stateless, with one main exception that will be addressed later in this chapter.[35]

It seems to be somewhat easier to demonstrate the existence of a rule of international customary law that proscribes any discrimination in the regulation of modes of the acquisition, loss and recovery of nationality. The limitation on the freedom of States in this case is, in fact, supported by several international treaties other than those addressing the protection of human rights. Concerning this aim, the United Nations Convention on the Nationality of Married Women (New York, 20 February 1957),[36] where for the first time the incidence of the husband's *status civitatis* on the wife's nationality was proscribed, must be borne in mind.[37] This Convention's inspiring principle was later transposed in Article 9 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979).[38]

Nonetheless, the prohibition against discrimination based on nationality has acquired a broader scope compared to the prohibition based on gender. A general "right to nationality" is in fact laid down in Article 5.d.iii of the International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966).[39]

On the one hand, Article 5.1 of the 1997 European Convention on Nationality, that expressly proscribes discrimination in the field of nationality on the grounds of sex, religion, race, colour or national or ethnic origin, appears to have been drafted in a certainly more detailed fashion. On the other hand, Article 5.2 shows a more flexible nature where it simply provides that each State "shall be guided" by the principle of non-discrimination between its nationals, whether they are nationals by birth or have subsequently acquired its nationality. The wording of Article 5.2 shows a simple declaration of intent as opposed to a mandatory rule to be followed in all cases. In this case, too, exceptions are allowed.[40]

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[35] Article 7.1.b of the Convention provides an exception to this guiding principle in the case of naturalised persons having acquired their nationality by means of improper conduct (see infra Section 5). Cf. Hall 1999.

[36] Entered into force on 11 August 1958.

[37] The impact of the 1957 Convention on the evolution of municipal laws in this field has been examined by Donner 1983, p. 159 ff.

[38] Entered into force on 3 September 1981. On this provision and on the measures provided by the Convention, see Marescaux 1984, p. 62 ff. The relevance of Article 9 of the Convention as a requirement for States to comply with international standards in the granting of nationality is also pointed out in Draft Articles on Diplomatic Protection, supra n. 4, Commentary to Article 4, pp. 12 and 14, see supra Section 1.

[39] Entered into force on 4 January 1969. Donner 1983, p. 153 ff., points out the broad scope of this provision.

[40] Cf. also para 46 of the Explanatory Report to the European Convention on Nationality that recalls Article 7.1.b of the Convention, supra n. 35.

Both these exceptions and the effort expended by the drafters of the Convention in listing examples of legitimate "distinctions"[41] also show how strong the sovereign prerogatives of the States still are in this matter.

3 The ECJ Facing the Positive Conflicts of Nationalities

As we will see,[42] in the European Union, too, Member States assert their own exclusive competence in regulating nationality. Such an autonomy has been repeatedly acknowledged by the European Union Court of Justice (ECJ).[43]

It is needless to underline here the peculiar nature of EU Law compared to that of other international organizations, especially with regard to the wide range of "freedoms" that EU Law guarantees to Member State citizens, as well as with regard to the "judicial activism" of the ECJ.[44] Suffice it to recall here that the sources of EU Law can be traced back to a series of international treaties and that EU Law has multiple interactions with international law.[45]

As for the criterion of effective nationality, the ECJ case law moves totally away from the case law of international courts. Unlike The Hague Court, the Luxembourg Court has tackled several "preliminary rulings" on the application of EU Law to individuals with two nationalities.

When facing positive conflicts of nationalities, the ECJ constantly refuses to apply the principle of effective nationality, although it is aware that this principle prevails both in international law and in the private international law of its Member States. Even back in the 1980s, when addressing claims for the payment of expatriation allowances filed by officials of the European Communities, the Court held that the concept of effective nationality, "mainly used in private international law", cannot be transferred to a quite different sphere, such as the Staff Regulations, for these officials.[46] Rather surprisingly, though, the same negative judgment was rendered 30 years afterwards in the field of private

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[41] Ibidem, para 42.

[42] Infra, Sections 4 and 5.

[43] As is well known, the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Lisbon, 13 December 2007; hereinafter Lisbon Treaty), entered into force on 1 December 2009, changed many terms of the EU legal order. In directly quoting ECJ case law, it will, however, be necessary to use the previous terms.

[44] A rich and thorough examination of the different aspects is offered by the different contributions collected in Craig and De Búrca 2011.

[45] On such issues see recently Bergé and Forteau 2010.

[46] ECJ: Devred, née Kenny Levick, 257/78, Judgment (14 December 1979), para 14. This dictum was recently reiterated by the EU CST: Jessica Blais v. European Central Bank (ECB), F-06/08, Judgment (4 December 2008), para 108. On the ECJ case law on female officials who used to acquire *ipso iure* their husband's nationality, at times without being allowed to renounce it, cf. infra, Section 5.

international law. In the *Hadadi* judgment, the Court in fact underlined "the imprecise nature" of the concept of effective nationality, due to which "a whole set of factors would have to be taken into consideration, not always leading to a clear result".[47] As for the field of international law, Advocate General Tesauro, in the *Micheletti* case, has strongly pointed out that the origin of the problems relating to effective nationality lies in "a romantic period" of international relations and, in particular, in the concept of diplomatic protection.[48]

Nonetheless, if we consider the peculiar nature of primary and secondary EU Law, these rulings are substantially irrefutable. Leaving aside the specific rulings concerning the officials of the European Communities, it appears clear that the intent of the ECJ is to privilege, concerning individual nationals of both a Member State and a non-member country, the *status civitatis* of the former State. Such a status is in fact apt to ensure the different freedoms granted by the Treaty even in those cases where the status does not overlap with the effective nationality. The leading case in this matter is still the ECJ judgment in *Micheletti*, concerning the right of establishment (now Article 49 Consolidated Version of the Treaty on the Functioning of the European Union, 9 May 2008, entered into force the 1 December 2009; hereinafter TFEU) denied by the Spanish authorities to an Italian national *iure sanguinis* on the ground that this person also held the nationality of Argentina *iure soli* and was last resident in this non-member country. In the opinion of the Luxembourg judges, it is not permissible to interpret EC Law to the effect that, where a national of a Member State is also national of a non-member country, the other Member States may make the recognition of the status of the Community national subject to an additional condition.[49] A similar reasoning was given by the Court in the *Saldanha* judgment on the obligation of lodging a *cautio iudicatum solvi* imposed by the Austrian authorities on a national of both the United States of America and the United Kingdom, living in Florida.[50]

Moreover, the Court cannot avoid extending its preference for the "more favourable" nationality also in favour of nationals of both Member States, e.g.

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[47] ECJ: Laszlo Hadadi (Hadady) v. Csilla Marta Mesko, épouse Hadadi (Hadady), C-168/08, Judgment (16 July 2009), relating to nationality as a connecting factor in jurisdiction pursuant to Regulation (EC) No. 2201/2003 on the jurisdiction, recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility. In this case, the Court correctly considered as equivalent the two Member State nationalities of both spouses. See Lagarde 2010a; Chalas 2010 and, excessively critical, D'Avout 2010.

[48] ECJ: Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria, C-369/90 Op. of Adv. Gen. Tesauro (30 January 1992), p. 4255 f.

[49] ECJ: Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria, C-369/90, Judgment (7 July 1992), para 11. See *ex multis* Jessurun d'Oliveira 1993, Iglesias Buhigues 1993 and, especially critical, Ruzié 1993.

[50] ECJ: Stephen Austin Saldanha and MTS Securities Corporation v. Hiross Holding AG, C-122/96, Judgment (2 October 1997); see Ackermann 1998.

with regard to the right to establishment and the freedom of movement for workers.[51]

Still with reference to the possession of the dual nationality of Member States, in the well-known case of *Garcia Avello*[52] the ECJ refused to evoke both the principle of effective nationality and the opposite principle of the prevalence of the nationality of the *forum*. The utilization of one or the other principle would in any case have led to the application of the Belgian rules on the surnames to two children having both Spanish and Belgian nationalities but residing in Belgium since their birth. The Court seemed to be aware of the provisions imposed by international law, and notably by Article 3 of the 1930 Hague Convention, under which a person having two or more nationalities may be regarded as a national by each of the States whose nationality he possesses. Nevertheless, in the ECJ's opinion, this rule does not impose an obligation, and rather simply provides an option for the Contracting Parties to give priority to the forum's nationality.[53] As usual, the Court seemed to favour the nationality that ensures the freedoms granted by the Treaty. In fact, the enjoyment of the right to bear only the surname which results from the application of the legislation of Spain—whose legislation was the first to determine the children's surname—avoids "serious inconvenience for those concerned at both professional and private levels" in the future.[54]

On the contrary, the ECJ tends to refrain from giving any indications as to the relevant nationality when it considers that the legal situation brought to its attention does not affect any fundamental freedoms of movement under the Treaty[55]; or again, as in *McCarthy* judgment, when the Court notices that the situation of a person "has no factor linking it with any of the other situations governed by European law and the situation is confined in all relevant respects within a single Member State".[56]

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[51] ECJ: Claude Gullung v. Conseil de l'ordre des avocats du barreau de Colmar et de Saverne, 292/86, Judgment (19 January 1988); Mr and Mrs Robert Gilly v. Dir. Services fiscaux Bas-Rhin, C-336/96, Judgment (12 May 1998), both quite interestingly concerning two individuals having dual French and Spanish nationality.

[52] ECJ: Carlos Garcia Avello v. État belge, C-148/02, Judgment (2 October 2003).

[53] Ibidem, para 28.

[54] Ibidem, paras 35–36. This judgment has been criticized by Lagarde 2004, although it is a leading case in the area of EU Law on the right to a name. See *ex multis* Quiñones Escámez 2004, De Groot 2004, Poillot-Peruzzetto 2004 and, recently, Honorati 2010.

[55] ECJ: Belgium v. Fatna Mesbah, C-179/98, Judgment (11 November 1999), concerning the application of the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco (Rabat, 27 April 1976) to a migrant worker having both Moroccan and Belgian nationalities. The ECJ confirmed that the purpose of this Agreement "is not to enable Moroccan nationals to move freely within the Community" (para 36). See also, by analogy, ECJ: Mamate El Youssfi v. Office National des Pensions (ONP), C-276/06, Judgment (17 April 2007).

[56] ECJ: Shirley McCarthy v. Secretary of State for the Home Department, C-434/09, Judgment (5 May 2011). The Court rejected the application of Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States to a female EU citizen who had never exercised her right of free

4 The State's Freedom to Regulate Nationality in EU Law

The *Garcia Avello* judgment is grounded either on the prohibition of any discrimination on the ground of nationality (now Article 18 TFEU) or on the enjoyment of the status of Union citizen (now Article 20 TFEU) which is "destined to be the fundamental status of nationals of the Member States".[57] In the past, the ECJ had already characterized in the same manner the situation of some European citizens with the aim of acknowledging some of their liberties granted by EC Law, such as the right of free movement and residence within the territory of the Member States.[58] The same reference to this fundamental status, in support of the same liberties, was confirmed in the subsequent *Zhu and Chen* case.[59]

Nonetheless, in the recent *Ruiz Zambrano* case, the Luxembourg judges have reached the point of granting a primary and exclusive role to European citizenship.[60] In this decision, the ECJ only recalled the basic rule that grounds such *status* (Article 20 TFEU), with the aim of imposing on a Member State the obligation of granting the right of residence to a third-country national with minor EU citizens children who are dependant upon him, i.e. the obligation to grant him the right of residence within the territory of the Member State of residence and of nationality *iure soli* of his children. In the Court's opinion, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of "the genuine enjoyment of the substance of the rights conferred by virtue of their status" as citizens of the Union.[61]

Although two subsequent judgments have narrowed the extent of this ruling,[62] it remains evident that European citizenship is now capable of a much broader

(Footnote 56 continued)
movement and who had always resided in a Member State of which she was a national and who was also a national of another Member State. Corneloup 2011, p. 499, correctly observes that this case does not address "une situation authentique de circulation", but rather "une situation purement interne déguisée". See also infra n. 62.

[57] Supra n. 49, para 22.

[58] ECJ: Rudy Grzelczyk v. Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve (CPAS), C–184/99, Judgment (20 September 2001), para 31, confirmed *inter alia* in ECJ: Baumbast and R v. Secretary of State for the Home Department, C–413/99, Judgment (17 September 2002), para 82. See recently *ex multis* Dougan 2012, p. 123 ff.

[59] ECJ: Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department, C-2000/02, Judgment (19 October 2004), para 25. Also Recital no. 3 of Directive 2004/38/EC, supra n. 56, provides: "Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence".

[60] ECJ: Gerardo Ruiz Zambrano v. Office national de l'emploi, C-34/09, Judgment (8 March 2011).

[61] Ibidem, para 42. See *ex multis* Mengozzi 2011; Hailbronner and Thym 2011; Van Eijken and De Vries 2011; Houser 2011.

[62] McCarthy, supra n. 56 and ECJ: Murat Dereci and others v. Bundesministerium für Inneres, C-256/11, Judgment (15 November 2011), in which the ECJ ruled out the potential deprivation of the enjoyment of the substance of the rights conferred by virtue of European citizenship: in the

scope compared to the one established by the Treaty on European Union (Maastricht, 7 February 1992; hereinafter TEU).[63] Here, we cannot spend time on the extra rights granted to nationals of Member States compared to the rights that those same States grant to their own nationals,[64] nor on the nature of this nationality defined as a "miracle" in light of its peculiar effects.[65]

It is however important to recall that, regardless of the amendments (at times considered as symbolic) introduced by the Lisbon Treaty,[66] "every national of a Member State" is considered as a citizen of the Union, and that the citizenship of the Union shall "not replace national citizenship".[67] Accordingly, the autonomy of the Member States in the matter of nationality seems to be intact.

Moreover, Declaration No. 2 on nationality of a Member State, annexed by the Member States to the final act of the Maastricht Treaty on European Union, and the decision of the Heads of State and Government, meeting within the European Council at Edinburgh on 11 and 12 December 1992, concerning the definition of the scope *ratione personae* of the provisions of European Union Law referring to the concept of a national, remain in force. More recently, as stated in Article 7.1 of Directive 2004/38/EC on the right of the citizens of the Union and their family members to move and reside freely within the territory of Member States, "Union citizen" means any person having the nationality of a Member State.[68]

Due to the Member States' persistent autonomy in regulating their nationalities, the recommendations of the European Parliament inviting Member States to adopt uniform rules on the attribution of nationality to the nationals of non-member countries resident in the Member States, have gone unheeded.[69]

(Footnote 62 continued)
first case rightly so, in the second, perhaps wrongly. See Rigaux 2012. In the *Murat Dereci* judgment the Court limited itself to examining the situation of the claimants in light of Article 7 of the Charter of Fundamental Rights of the European Union or of Article 8.1 of the ECHR, both concerning respect for private and family life. See a comparison between these two judgments and the *Ruiz Zambrano* case by Benlolo Carabot 2011; Rigaux 2012.

[63] Entered into force on 1 November 1999.

[64] Amid the vast literature on European citizenship, see recently Benlolo Carabot 2007, Morviducci 2010 and Shaw 2011. In particular, these two latter authors stress the value added of this citizenship: Morviducci 2010, p. 7 ff., Shaw 2011, p. 578 f.

[65] In this sense see the opinion of Adv. Gen. Poiares Maduro in the *Rottmann* case, who emphazises: "it strengthens the ties between us and our States (in so far as we are European citizens precisely because we are nationals of our States) and, at the same time, it emancipates us from them (in so far as we are now citizens beyond our States)" (ECJ: Janko Rottmann v. Freistaat Bayern, C-135/08, Op. of Adv. Gen. Poiares Maduro (30 September 2009), para 23).

[66] Article 9 TEU and Article 20 TFEU stipulate: "Citizenship of the Union shall be additional to national citizenship". The "symbolic importance" of this mutation is stressed by Morviducci 2010, pp. 19 ff. and Shaw 2011, p. 599, who point out its potential effects.

[67] See again Arts 9 EU Treaty and 20 TFEU.

[68] Generally, on reassessing the place and scope of the provisions on the free movement of persons and Union citizenship, see O'Leary 2011, p. 534 ff.

[69] European Parliament Resolution 2005/2058 (INI), 27 October 2005 and the motion in European Parliament resolution on problems and prospects concerning European Citizenship

As for the *Micheletti* judgment, the ECJ has constantly reaffirmed that "under international law, it is for each State Member to lay down the conditions for the acquisition and loss of nationality"[70]; such *dictum* makes use of the same wording used in the ICJ's reasoning in the *Nottebohm* judgment.[71] Nevertheless, the *dictum* extends the ICJ's reasoning by adding a reference to the withdrawal of nationality.

To this extent, the ECJ has respected this principle; the Luxembourg judges have in fact stringently applied the Member States' provisions on nationality for determining the scope of the EC Treaty *ratione personae*. In the *Kaur* case, the ECJ accurately followed the indications provided in the 1972 and 1982 Declarations by the Government of the United Kingdom on the definition of the term nationals. As a result, the right to enter or remain in the territory of this State has been denied to a citizen of the United Kingdom and Colonies who had become a British Overseas Citizen under the terms of the British Nationality Act 1981.[72]

The national rules on nationality have also been rigidly applied in situations where they produced the acquisition of nationality *iure soli*, thus potentially resulting in being unwelcome in other Member States or in the same Member State that had adopted them. As for the former case, in the *Zhu and Chen* the United Kingdom claimed that Mrs. Chen's move from the UK to Northern Ireland, with the aim of having her child acquire *iure soli* the nationality of another Member State, constitutes an attempt to improperly exploit the provisions of Community law.[73]

As for the latter case, in the *Ruiz Zambrano*[74] the Belgian government claimed that Mr. Ruiz Zambrano could not rely on the Belgian Law on nationality because he had disregarded the laws of his country. Mr. Ruiz Zambrano (a Colombian national to whom Belgian authorities refused asylum) had not in fact registered his child with the diplomatic or consular authorities, and he had rather followed the procedures available to him for acquiring Belgian nationality *iure soli* for his child and then tried, on that basis, to legalise his own residence. It does not come as a surprise that both the Irish and the Belgian law on nationality have been subsequently amended.[75] In the *Eman and Sevinger* case, the ECJ also considered the

(Footnote 69 continued)
2008/2234(INI), 2 April 2009. This aspect and the implications entailed by the concept of "nationality of residence" (i.e. the possible enjoyment of the European citizens' rights by nationals of non-members countries resident within the territory of EU) are stressed by Morviducci 2010, pp. 19 ff., 22 ff. and Nascimbene 2011.

[70] Micheletti, supra n. 49, para 10. See also Mesbah, supra n. 55, para 29; ECJ: The Queen v. Secretary of State for the Home Department ex parte Kaur, C-192/99, Judgment (20 February 2001), para 19; Zhu and Chen, supra n. 59, para 37.

[71] Supra Section 1.

[72] Supra n. 69. See Hall 2001, p. 355 ff. and, especially critical, Jessurun d'Oliveira 2011, p. 143.

[73] Zhu and Chen, supra n. 59, para 34.

[74] Ruiz Zambrano, supra n. 60.

[75] After all, in his opinion in the *Ruiz Zambrano* case, Adv. Gen. Sharpston acknowledged that "if particular rules on the acquisition of its nationality are—or appear to be—liable to lead to 'unmanageable' results, it is open to the Member State concerned to amend them so as to address

Dutch rules on nationality to prevail over the will of the Dutch government to exclude from elections for members of the European Parliament Dutch nationals resident in overseas countries and territories as referred to in Article 299.3 EC.[76]

Finally, it is worth pointing out that Member States almost always agree on the unilateral nature either of these rules or of these Declarations both when these rules are drafted by other States and when governments partake in the proceedings of preliminary rulings.[77] Consequently, the disapproval expressed by the Italian government towards the government of Romania, concerning the provisions that made it possible for several former nationals of Moldavia and other adjoining States to recover their Romanian nationality, comes as an exception to the general acknowledgement of the other Member States' sovereignty in this matter.[78] Such an approach mirrors the Member States' concern to limit the number of individuals who, by unexpectedly acquiring a Member State's nationality and consequently EU nationality, are granted the right of free movement and residence within the territory of the European Union, and as such within the territories of single Member States.

5 The *Rottmann* Judgment of the ECJ

The *dictum* concerning the exclusive competence of the Member States in regulating their nationalities, as asserted by the ECJ on several occasions starting with the *Micheletti* judgment, is however always stated together with the proviso "having due regard to Community law".[79] The sense of this proviso was originally considered as obscure or concerning respect for the individual's fundamental rights, which had become part of the principles of EU Law under Article 6 of the TEU.[80]

(Footnote 75 continued)
the problem" (Ruiz Zambrano v. Office national de l'emploi, C-34/09, Op. of Adv. Gen. Sharpston (30 September 2010), para 114).

[76] ECJ: Eman and Sevinger v. College Van Burgemeester en Wethouders van Den Haag, C-300/04, Judgment (12 September 2006). On decisions concerning the right to vote for the European Parliament, see Besselink 2008.

[77] See for example the *Kaur* judgment, supra n. 70, para 18. On the lack of objections concerning the attribution of British nationality to Hong Kong residents and of Spanish nationality to the citizens of some Latin America States pursuant to bilateral conventions, cf. Corneloup 2011, p. 515, n. 80.

[78] Cf. Margiotta and Vonk 2010, p. 26–27, 34. In his opinion in the *Rottmann* case, Adv. Gen. Poiares Maduro points out that the Community principle of sincere cooperation laid down by Article 10 EC could be affected if a Member State were to carry out, without consulting the Commission or its partners, an unjustified mass naturalisation of nationals of non-member States (Rottmann, Op. of Adv. Gen. Poiares Maduro, supra n. 65, para 30).

[79] Micheletti, supra n. 49.

[80] See for example Condinanzi et al. 2006, p. 14 ff.; and formerly Closa 1995.

If the truth were to be told, the Court had only once previously scrutinized and set aside the application of some norms on the nationality of a Member state, and notably the Italian provisions (now repealed) that attributed *ipso iure* to a foreign woman this *status civitatis* by virtue of her marriage, making it impossible for the woman to renounce such a status. In the judges' opinion, the EC rules concerning the payment of expatriation allowances to officials of the European Communities must be interpreted in such a way as to avoid any unwarranted difference of treatment between male and female officials who are, in fact, placed in comparable situations.[81] Even though the ECJ had implicitly given a negative appraisal of the Italian provisions, it must be pointed out that the Court was nevertheless addressing a case of dual nationality, i.e. a case regarding the choice between a person's two *status civitatis*.[82]

On the other hand, the status of EU nationals has, over time, acquired a scope and a role which are progressively more relevant to the point of being qualified as a "fundamental status". In the light of the Member States' approach to this matter, it was not easy to foresee control by the ECJ on the requisites to this status, i.e. on the manner of acquisition and withdrawal of their nationalities.

Nonetheless, the judicial activism of the Court reached this goal in the renowned *Rottmann* case.[83] Going beyond the self-restraint shown by the Advocate General in his detailed and at times emphatic opinion, the ECJ has brought clarity concerning the way in which Member States must have due regard, in exercising their powers within the sphere of nationality, to European Union Law.

In the case in point, Mr Rottmann, an Austrian national by birth, had acquired German nationality by naturalisation. However, the authorities of the Land of Bavaria decided to withdraw this naturalisation with retroactive effect on the ground that it had been obtained fraudulently, since Rottmann had not disclosed the fact that he was the subject of a judicial investigation in Austria.

According to Austrian law, Rottmann's naturalisation in Germany had the effect of losing his Austrian nationality, without the withdrawal of his naturalisation in Germany implying that he automatically recovered his nationality of origin. On final appeal against the judgments issued by the Bavarian courts, the German Federal Administrative Court (*Bundesverwaltungsgericht*) referred some questions to the Court of Justice on the application of European Union Law. The German Court wanted in particular to ascertain whether Article 17 EC Treaty (now Article 20 TFEU) allows a decision to withdraw naturalisation, the effect of which would entail the loss of Union citizenship for the person concerned who would thereby be rendered stateless.

The ECJ first reaffirmed once again that the conditions for the acquisition and loss of nationality fall within the competence of each Member State "under

[81] ECJ: Jeanne Airola v. Commission of the European Communities, C-21/74, Judgment (20 February 1975), paras 10–11. V. Corneloup 2011, p. 501 ff.

[82] Supra Section 3.

[83] ECJ: Janko Rottmann v. Freistaat Bayern, C-135/08, Judgment (2 March 2010).

international law".[84] Moreover, the Court recalled either Declaration No. 2 on nationality of a Member State, annexed to the final act of the EU Treaty, or the decision of the Heads of State and Government, meeting within the European Council at Edinburgh on 11 and 12 December 1992.[85] Nevertheless, on such an occasion such acts are considered as simple instruments for the interpretation of the EC Treaty with no other effects.[86]

The ECJ further specified peremptorily that the situation of a citizen of the Union becoming stateless as a result of the withdrawal of his nationality falls, "by reason of its nature and its consequences", within the ambit of European Union Law.[87] In fact, the person concerned loses the status of a citizen of the Union conferred by Article 17 EC, which is "intended" (and not "destined", as it had been in previous rulings)[88] to be the fundamental status of nationals of the Member States. Consequently, such a decision to withdraw nationality is amenable to judicial review carried out in the light of European Union Law. Under this review, it should be checked whether the decision in question is justified by a reason relating to public interest and whether it respects the principle of proportionality.[89]

The Court considers that withdrawing naturalisation because of deception corresponds to a reason relating to public interest based both on the protection of the special relationship of solidarity and good faith between the Member State concerned and its nationals, and on the reciprocity of rights and duties. That decision is, moreover, in keeping with the rules of international law. The ECJ is in fact aware that Article 8.2 of the 1961 Convention on the Reduction of Statelessness provides for the deprivation of nationality if it is acquired by means of misrepresentation or by any other act of fraud. The ECJ is also aware that Article 7.1.b and 7.3 of the 1997 European Convention on Nationality does not prohibit a State Party from depriving a person of his nationality, even if he thus becomes stateless, when that nationality was acquired by means of fraudulent conduct, false information or the concealment of any relevant fact attributable to that person.[90]

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[84] Ibidem, para 39. The English version has a different wording. Nevertheless, the difference can be considered to be the result of an oversight, in light of the fact that the other versions of this ruling (like the previous judgments cited by the Court) provide this significant indication.

[85] Supra Section 4.

[86] Rottmann, supra n. 83, para 40. On the contrary, Adv. Gen. Poiares Maduro held, in his opinion, that these declarations share the same legal status as the EU treaties. As pointed out (supra Section 4), in the *Kaur* judgment, supra n. 70, also the ECJ had assigned meaningful relevance to these instruments.

[87] Ibidem, para 42.

[88] Ibidem, para 39. Interestingly, the different wording does not seem to be apparent in the Italian version of the judgment. In any event, the new wording has been used in the subsequent judgments of *Ruiz Zambrano*, *McCarthy* and *Dereci* (supra Sections 3 and 4).

[89] Rottmann, supra n. 83, paras 43, 48, 55.

[90] Ibidem, paras 51–52. Moreover, in the Court's opinion, that conclusion is in keeping with the general principle of international law that no one can be arbitrarily deprived of his nationality, that principle being reproduced in Article 15.2 of the Universal Declaration of Human Rights and in Article 4.c of the European Convention on Nationality. Indeed, when a State deprives a person

Once it assessed the legitimacy, in principle, of the German decision withdrawing naturalisation on account of deception, the ECJ held that it is, nevertheless, for the national court to ascertain whether the decision to withdraw nationality observes the principle of proportionality so far as concerns the consequences it entails for the person concerned in the light of European Union Law, "in addition, where appropriate, to examination of the proportionality of the decision in the light of national law".[91]

Eventually, the Court (seemingly) refrained from ruling on the question concerning the recovery of nationality by Rottmann's birth because, on the one hand, the withdrawal of naturalisation had not become definitive and, on the other, no decision concerning his status had been taken by Austria. However, the ECJ warned that the duty of the Member States to exercise those powers having due regard to European Union Law (i.e. with regard to the principle of proportionality) applies "both to the Member State of naturalisation and to the Member State of the original nationality".[92]

The holding in this judgment is clearly ground-breaking on a number of issues. First, the Luxembourg Court carried out its controlling function in a matter which seemingly belongs to the internal competence of the Member States, not only from the standpoint of international law, but also from the standpoint of the EU legal order. It is no coincidence that eight Member State governments, supported by the Commission, submitted observations to the Court in this case.[93] It also seems redundant to recall that the matter of nationality touches upon the very core of each State.

Second, the Court's *dicta* addressed not only national provisions on the withdrawal of nationality, but also the provisions on the recovery of Member States' nationality, and are as such capable of affecting the acquisition of the *status civitatis*. Finally, the ECJ introduced, in such a delicate matter, the principle of proportionality, and most of all it enjoined national courts to apply the rules on nationality of their States (which doubtlessly have constitutional relevance) under the EU Law criteria indicated by the Court itself.[94]

(Footnote 90 continued)
of his nationality because of his legally established acts of deception, such deprivation cannot be considered to be an arbitrary act (para 53). The provisions herein cited have been examined supra, Section 2. According to the Explanatory Report to the 1997 European Convention on Nationality, Article 7.3 constitutes "one limited exception" to the aim of protecting the right to a nationality by preventing a stateless status (para 34).

[91] Rottmann, supra n. 83, para 55.

[92] Ibidem, para 62. The ECJ added that when a decision on the recovery of the nationality of origin has been adopted by Austrian authorities, the Austrian courts will, if necessary, have to determine whether it is valid in the light of the principles referred to in this judgment (para 63).

[93] Ibidem, paras 37–38.

[94] In the Court's opinion that it is for the national court to take into consideration the potential consequences that such a decision entails for the person concerned and, if relevant, for his family, with regard to the loss of rights inherent in citizenship of the Union. In this respect, it is necessary to establish, in particular, whether this decision is justified in relation to the gravity of the offence

As is foreseeable, this ground-breaking decision has given rise to strong doctrinal reactions in the opposite direction.;[95] Some authors have strongly criticised the Court's invasion in a field that is still imbued with the principle of "reserved domain";[96] others have approved the ECJ's orientation,[97] at times sensing in the relationship between European citizenship and nationality the confirmation of a "pluralism of citizenship" or the beginning of a "relative autonomy" of European citizenship[98] or, again, an "embryon de fédéralisation du droit de la nationalité des Etats membres".[99]

Regardless of the fact that the Court's attitude has often been considered (at times in a critical way) to be prudent,[100] the preoccupation with verifying the compatibility of some State provisions on nationality with the holding in the *Rottmann* judgment has also been raised.[101] It seems to be too early to predict what the Member States' reactions will be, however,[102] although an increase in challenges to domestic decisions in the field of nationality can be foreseen.[103]

On the other hand, it would be naïve to underestimate the peculiarity and the potential of EU Law compared to other examples of international regional cooperation.

(Footnote 94 continued)
committed, to the lapse of time between the naturalisation decision and the withdrawal decision, and to whether it is possible for that person to recover his original nationality (ibidem, para 56).

[95] As usual, the majority of these comments are available on the ECJ's website, next to the text of the decision.

[96] Jessurun d'Oliveira 2011, p. 149, observes that the "creeping usurpation of competences" by the Court leads to a decoupling of nationality and Union citizenship. More cautious, but still negative, is the evaluation by Corneloup 2011, p. 506 ff.

[97] E.g. De Groot and Seling 2011, p. 150, consider this ruling "a *milestone* in the sphere of nationality law".

[98] In the former sense Davies 2011, p. 9; in the latter sense Kostakopoulou 2011.

[99] Lagarde 2010b, p. 555; the federal model is also recalled by Heymann 2010, p. 6 and Kochenov 2010, p. 1831.

[100] Pataut 2010, p. 620, considers this decision "prudent et lourd des potentialités". On the contrary, in the opinion of Kochenov 2010, p. 1843, the application of proportionality in cases of statelessness indicates "the dangerous limitations" of thinking about fundamental rights in Europe.

[101] French, Dutch and German provisions are addressed, respectively, by Lagarde 2010b, p. 556; De Groot and Seling 2011, p. 155 ff. and Davies 2011, p. 8; Shaw 2011, p. 595 ff.

[102] For example, Davies 2011, p. 6, considers an instrument stronger than a declaration to be necessary if the Member States intend to protect their competence; Golynker 2011, p. 20, wishes to see a harmonisation of nationality laws, but fears a stricter stance by Member States. In the correct opinion of Corneloup 2011, p. 516, having regard to the lack of EU specific competence, some limitations to the freedom of Member States can only be introduced by means of an international treaty.

[103] Shaw 2011, p. 595 ff.

However, here we simply want to address the specific attitude of the ECJ towards some consolidated principles of international law. We have already assessed that the Luxembourg judges, unlike international courts, expressly and repeatedly avoid applying the principle of effective nationality to positive conflicts of nationality.[104]

Moreover, comparing the ICJ's *Nottebohm* judgment[105] with the ECJ's *Rottmann* judgment, it may be stressed that, although both decisions are grounded on the international principle concerning States' freedom to regulate nationality, the effects that these two decisions have are visibly different.

As we have pointed out, the *Nottebohm* judgment only states the ineffectiveness in international law—i.e., concerning diplomatic protection—of a person's *status civitatis* when such a status lacks the prerequisite of effectiveness. However, this ruling remained isolated in the following international practice, both legislative and judicial. *Vice versa*, a careful look at the *Rottmann* judgment shows that the ECJ has not simply scrutinized in which manner the Member States exercise their exclusive competence in this field, but it has also enjoined precise limitations to this competence.

In fact, the Court's invitation to national judges to ensure a higher level of guarantees for the individual can be valued when the national rules already provide for judicial control on the loss (or acquisition) of respective nationalities.[106] However, the ECJ seems to impose such a scrutiny also when this is not provided by the Member States' legal order, and it seems to enjoin domestic courts to state the reacquisition of nationality when such a recovery is not provided by their laws.[107]

This entails that the Luxembourg Court disregards the Hague Court. After all, unlike the Advocate General, in the *Rottmann* Judgment (as in its previous rulings) the ECJ refrained from referring to the *Nottebohm* judgment.[108] Hence, although the specific wording of the two Courts on a State's sovereign prerogative to regulate nationality by respective municipal law might suggest the idea of a "cross-fertilization", such a consonance is merely an apparition. The *Rottman* case might stand as an example of the "fragmentation of international law": two perspectives the content of which has been widely analysed by my friend Tullio, with his usual lucid thoughts.[109]

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[104] As shown by the different reasoning in the decisions mentioned above, supra Sections 1 and 3.

[105] Supra Section 1.

[106] Such a positive consequence has also been underlined by Savino 2011, p. 9.

[107] As pointed out by the ECJ as regards the position of the Austrian judges, supra n. 92. On the contrary, the Adv. Gen. stressed in his opinion that "Community law does not impose any such obligation, even though, failing such restoration, the applicant in the main proceedings remains stateless and, therefore, deprived of Union citizenship" (para 34).

[108] Either the *Nottebohm* judgment, supra n. 1, or the advisory opinion in the Nationality Decrees case, supra n. 13 are, however, recalled by the Adv. Gen. in his opinion (para 18).

[109] Treves 1999, 2007, 2012.

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Jurisdiction, Fair Trial and Public Policy: The *Krombach* and *Gambazzi* Cases

Franco Mosconi

1 The Death of Kalinka Bamberski and the Acquittal of Krombach in Germany

Two cases in which national and international courts have been recently involved deserve, in my view, to be illustrated and compared.

The first one relates to a long dispute between Mr Dieter Krombach (hereinafter "K"), a doctor of German nationality, and a French citizen, Mr André Bamberski (hereinafter "B").

B's daughter Kalinka, a 14-year-old girl of French nationality, died in Lindau, Germany, at K's house, where she was staying on holiday with her brother and her mother. The latter, after divorcing from B, had married K.

The complex circumstances surrounding the death of the very young Kalinka drew the attention of the German authorities which launched an investigation against K, whose liability was ultimately excluded.

However, B, the girl's father, was so convinced of K's liability that he repeatedly but unsuccessfully requested the German competent authorities to take further action. Before the German case was dropped, he also lodged a complaint with the French competent authorities with the result that, by virtue of the fact that the young victim was a French national, they opened a preliminary investigation against K.

These proceedings in which B also introduced a civil claim for moral damages had an opposite outcome compared to the German one: by a judgement of 9 March 1995, the Paris Assize Court, which had previously issued a warrant for his arrest,

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sentenced K *in absentia* to 15 years' imprisonment,[1] finding him "guilty of violence resulting in involuntary manslaughter".[2]

The same Assize Court, a few days later, on 13 March 1995, ordered K to pay B a sum of money to compensate his moral damages and to bear the cost of the proceedings. Also, this part of the proceedings was held *in absentia*. It has to be noted that K tried on different occasions to be represented by his lawyers in the proceedings, in order to make submissions concerning both criminal and civil allegations made against him. He was nonetheless denied the possibility to be represented, pursuant to the French applicable law at that point in time, which prohibited representation for absent defendants who had not surrendered to the authorities as a result of an arrest warrant. And K had explicitly expressed his intention not to go to France as this would have made him subject to an arrest.

It is not irrelevant to mention that—as it is made clear by the ruling of the European Court of Human Rights (ECtHR)—both German and French proceedings have experienced efficient judicial cooperation between the two States and that, in any case, the extradition of German citizens is clearly excluded by Article 16, second paragraph, of the *Grundgesetz* of 23 May 1949.[3] In this regard a lateral circumstance of this case can also be recalled, which is reported in the same Strasbourg judgement.

In January 2000, K was arrested in Austria pending the hearing of a request for his extradition submitted by France. Nonetheless, the Innsbruck Court of Appeal (*Oberlandesgericht Innsbruck*) shortly afterwards ordered his release, considering that, taking into account the decision issued by the German authorities not to proceed against him, K could not be detained for the purpose of extradition.

As reported by the Strasbourg judgement, the Innsbruck Court of Appeal also relied upon Article 54 of the Schengen Convention of 19 June 1990, implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French

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[1] The European Court of Human Rights (ECtHR) in its judgement in Krombach v. France recalled the following: "The Assize Court explained in its judgement that if the applicant had reported to the Authorities, it would have been able to discontinue the in absentia procedure and the applicant would have been able to make any requests that would assist in his defence when complying with that mandatory procedural requirement. It also reminded the applicant's lawyers, who were present at the hearing, that Article 630 of the Code of Criminal Procedure prohibited representation for absent defendants and laid down their submissions were inadmissible" (ECtHR: Krombach v. France, 29731/96, Judgment (13 February 2001), para 46). Article 630 of the French Code of Criminal Procedure has been repealed by Law no. 2004-204.

[2] This can be read at para 15 of the 28 March 2000 judgment issued by the European Court of Justice (ECJ: Dieter Krombach v. André Bamberski, C-7/98, Judgment (28 March 2000)); the judgement issued by the ECtHR reports that K. "was founded guilty of voluntary assault on his stepdaughter unintentionally causing her death" (ECtHR: Krombach, supra n. 1, para 45).

[3] The European Convention on Extradition (Paris, 13 December 1957), entered into force on 18 April 1960, at that time in force between France and Germany, conferred to the contracting parties the power to deny extradition of their own citizens (Article 6.1.a) and Article 16.II of the fundamental law of the Federal Republic of Germany drastically states: "It is not allowed to extradite a German citizen".

Republic on the gradual abolition of checks at their common borders[4]; this provision, which reflects the principle *ne bis in idem*, states the following:

> A person who has been finally judged by a Contracting Party may not be prosecuted by another Contracting Party for the same offences provided that, where he is sentenced, the sentence has been served or is currently being served or can no longer be carried out under the sentencing laws of the Contracting Party.

2 Krombach's Conviction in France, the Ruling of the European Court of Justice and the Subsequent Decision of the Bundesgerichtshof

In the meantime, B had already triggered the procedure foreseen by the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 27 September 1968; hereinafter Brussels Convention of 1968),[5] filing an application before a German court in order to obtain the enforcement of the ruling issued by the Assize Court of Paris, ordering K to pay compensation. At the first and second instances, German judges admitted B's application, while the *Bundesgerichtshof*, resorted to by K pursuant to Article 41 of the Brussels Convention, considering that there were some uncertainties related to the interpretation and application of the Convention itself referred the matter to the European Court of Justice (ECJ) asking the following questions:

> (1) May the provisions on jurisdiction form part of public policy within the meaning of Article 27, point 1 of the Brussels Convention where the State of origin has based its jurisdiction as against a person domiciled in another Contracting State (first paragraph of Article 2 of the Brussels Convention) solely on the nationality of the injured party (as in the second paragraph of Article 3 of the Brussels Convention in relation to France)?
> (…)
> (2) May the Court of the State in which enforcement is sought (first paragraph of Article 31 of the Brussels Convention) take into account under public policy within the meaning of Article 27, point 1, of the Brussels Convention that the criminal court of the State of origin did not allow the debtor to be defended by a lawyer in a civil-law procedure for damages instituted within the criminal proceedings (Article II of the Protocol of 27 September 1968 on the interpretation of the Brussels Convention) because he, a resident of another Contracting State, was charged with an international offence and did not appear in person?
> (…)

[4] Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders (19 June 1990), entered into force on 1st September 1993.

[5] Entered into force on 1st January 1973.

> (3) May the Court of the State in which enforcement is sought take into account under public policy within the meaning of Article 27, point 1, of the Brussels Convention that the court of the State of origin based its jurisdiction solely on the nationality of the injured party (see Question 1 above) and additionally prevented the defendant from being legally represented (see Question 2 above)?

The judgement issued by the ECJ on 28 March 2000 (after hearing the opinion of Advocate General Saggio submitted on 23 September 1999) is a very relevant one as regards the free circulation of judgements within the Member States of the European Community and now of the European Union, namely as far as it relates to the power assigned to States to invoke the public policy exception and the power assigned to the Court, if requested, to assess the limits that States will have to respect.[6]

The first question raised by the *Bundesgerichtshof* was answered by the Court in a very negative way. The (alleged) conflict with public policy cannot allow the judge responsible for recognition and enforcement to dispute the jurisdiction of the judge *a quo* (apart from some particular cases foreseen by Article 28 with regard to insurance, contracts with the consumers and with regard to exclusive jurisdiction set by Article 16).

In addressing the second question, the Court maintained that the fact that the ruling to be acknowledged or enforced came from a criminal court had been clearly considered by the Convention negotiators: they did not only foresee in this regard a particular provision related to optional jurisdiction (Article 5.4) but also considered it namely with regard to recognition in Article II of the Protocol annexed to the Convention,[7] which is the provision on which major doubts on interpretation were raised by the *Bundesgerichtshof*.

In this regard, relying not only on its precedents but also on some decisions issued by the ECtHR—that the same Court would recall a few months later in the ruling Krombach v. France—the Court concluded

> that recourse to the public-policy clause must be regarded as being possible in exceptional cases where the guarantees laid down in the legislation of the State of origin and in the [Brussels] Convention [of 1968] itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin, as recognised by

[6] The reasoning of the Court is remarkable when stressing that fundamental rights form an integrated part of the general principles of law whose observance the Court ensures and that, for such a purpose, the Court drew inspiration from the constitutional traditions common to Member States and from the guidelines supplied by international treaties for the protection of human rights. Nonetheless, it has to be noted that the issue of the impact of individual fundamental rights has faced a progressive simplification further to the adoption of the Charter of Nice and now with the "constitutionalisation" that has affected it pursuant to Article 6.1 of the Treaty establishing the European Union (as amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Lisbon, 13 December 2007), entered into force on 1st December 2009).

[7] Brussels Convention of 1968, Protocol Annexed.

> the EC[t]HR. Consequently, Article II of the Protocol cannot be construed as precluding the court of the State in which enforcement is sought from being entitled to take account, in relation to public policy, as referred in Article 27, point 1, of the Convention, of the fact that, an action for damages based on an offence, the court of the State of origin refused to hear the defence of the accused person, who was being prosecuted for an intentional offence, solely on the ground that the person was not present at the hearing.[8]

Actually, Article II of the Protocol states that "without prejudice to any more favourable provisions of national laws, persons domiciled in a Contracting State who are being prosecuted in the criminal courts of another Contracting State of which they are not nationals for an offence which was not intentionally committed may be defended by persons qualified to do so, even if they do not appear in person" and that "however, the court seized of the matter may order appearance in person; in the case of failure to appear, a judgement given in the civil action without the person concerned having had the opportunity to arrange for his defence need not to be recognised or enforced in the other Contracting States".[9]

Almost twenty years later, the Court recalled its precedent[10] where the restriction to offences unintentionally committed, as addressed in the above paragraph, was construed as meaning that the Convention clearly seeks to deny the right to be defended without appearing in person to persons who are being prosecuted for offences which are sufficiently serious to justify this. Nonetheless, the Court—as already noted—held that the literal interpretation of Article II of the Protocol cannot be shared as the effectiveness of the right of defence and the relevance of its infringement in the proceeding *a quo* have to be duly considered in order to check the compliance of the enforcement of the foreign decision with the public policy of the *forum*.[11]

Issuing its ruling in positive terms, the Court of Justice therefore stated the following:

> [T]he court of the State in which enforcement is sought can, with respect to a defendant domiciled in that State and prosecuted for an intentional offence, take account, in relation to the public-policy clause in Article 27, point 1, of the [Brussels] Convention [of 1968], of the fact that the court of the State of origin refused to allow that person to have his defence presented unless he appeared in person.[12]

In this way, then, the Court held that the provision of the Protocol, even if explicitly related only to unintentional infringements, is also applicable with

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[8] ECJ: Krombach, supra n. 2, para 44.

[9] The Jenard Report explains that this provision, that certainly "includes road accidents", is based on the Benelux Treaty and it "is relevant as in some legal orders, namely France, Belgium and Luxembourg, criminal decisions have to be deemed as *res judicata* as far as they concern subsequent claims for damage and therefore it is essential that the alleged liable person "can exercise his right of defence since the criminal proceeding has started".

[10] ECJ: Siegfried Ewald Rinkau, C-157/80, Judgment (26 May 1981), para 12.

[11] Along the same lines, Advocate General Saggio had advised this in his opinion (paras 29–32, in particular para 31).

[12] ECJ: Krombach, supra n. 2, para 45.

regard to intentional infringements, as otherwise the recognition of the judgement would have to be refused as it is contrary to public policy.[13]

Along the same lines, the Court of Justice was immediately followed by the referring court. Actually, the *Bundesgerichtshof*, in its ruling of 29 June 2000,[14] accepted the claim submitted by K and invoked the *ordre public clause* to exclude the enforcement of the French judgement which had ordered K to pay compensation to B.

3 Article 61 of Regulation (EC) No. 44/2001

Nonetheless, it is the Community legislator itself which seems to depart from the reasoning of the Court of Justice. Article 61 of Regulation No. 44/2001, Brussels I,[15] finally adopted on 22 December 2000, which replaces the Brussels Convention of 1968, actually mirrors Article II of the Protocol to the Convention. One may be surprised by this correspondence with the wording of 1968 when it is considered that in the past more than one ruling of the Luxembourg judges had led to the introduction of specific amendments to the Convention at the time of Accession Conventions which followed the progressive enlargement of the European Community.

It must nonetheless be noted that the time that had elapsed between the judgement of the Court of Justice in the case of Krombach v. Bamberski and the adoption of Regulation No. 44/2001 is very short and, moreover, the wording of the Regulation is the outcome of a long and complex drafting exercise which also led to the revision of the Lugano Convention between the Member States of the European Community and those belonging to the EFTA.

As a matter of fact, Article 61 of Regulation No. 44/2001 is literally mirrored in Article 61 of the Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (Lugano, 30 October 2007),[16] just as, on the other hand, Article II of Protocol No. 1 to the first Lugano Convention of

[13] This is the reasoning of Pocar in the Explanatory Report on the Lugano Convention of 2007 (in Official Journal of European Union, C 319, 23 December 2009; the Italian version is also published in Rivista di diritto internazionale privato e processuale (2010), p. 244 ss.). In the opinion delivered by Advocate General Kokott in the Gambazzi case one can read the following: "In Krombach the Court itself could establish that the proceedings before the court of the State constituted a manifest breach of the fundamental right to a fair trial" (ECJ: Marco Gambazzi v. Daimler Chrysler Canada Inc. and CIBC Mellon Trust Company, C-394/07, Judgment (2 April 2009), para 46).

[14] 53 Neue Juristische Wochenschrift, 2000, p. 3289.

[15] European Union, Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

[16] Entered into force on 1st January 2010.

16 September 1988[17] literally reproduced Article II of the Protocol to the Brussels Convention of 1968. This is due to the fact that the experts group of representatives from the EC and EFTA Member States assigned with the task of updating the Brussels and Lugano Conventions in 1997 had already reached an agreement on the revised text in April 1999, which remained "frozen" for many years.[18]

4 The Judgement of the European Court of Human Rights in *Krombach v. France*

Immediately after being sentenced by the Assize Court of Paris, K. filed a complaint with the European Commission of Human Rights alleging that France had breached his right to a fair trial (Article 6 of the European Convention on Human Rights and Fundamental Freedoms (Rome, 4 November 1950))[19] and his right to have his conviction or sentence reviewed by a higher tribunal (Article 2 of Protocol n. 7).[20] Further to the amendment to the control mechanism assigned to the Commission, as introduced by Protocol no. 11, the matter had been referred to the (third Section of the) ECtHR. The judgement, dated 13 February 2001,[21] offers a detailed reconstruction of all the facts related to the death of Kalinka Bamberski, supported by a careful reference to the rules which were then applicable to the proceedings in France.

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[17] Protocol no. 1 on Certain Questions of Jurisdiction, Procedure and Enforcement to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano, 16 September 1988).

[18] A reference to this circumstance can be found at point 5 of the preamble to Regulation No. 44/2001, whilst an extensive and detailed reconstruction of what occurred is offered by the Explanatory Report of the Lugano Convention, written by Fausto Pocar. The Report mentions that the group of experts discussed the provision of Article II of the Protocol, opting eventually for its maintenance also "in order to avoid forceful interference in the criminal law of the States in a Convention dealing with civil and commercial matters" (para 65). Nonetheless—as the Report noted—what has now become Article 61 of Regulation No. 44/2001 and of the Lugano Convention of 2007, has to be read in the light of the Court of Justice's ruling in the Krombach case.

[19] Entered into force on 3 September 1953.

[20] Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Strasbourg, 22 November 1984), entered into force on 1 November 1988.

[21] ECtHR: Krombach, supra n. 1. In their ruling the Strasbourg judges acknowledged the preliminary ruling proceedings held in Luxembourg, quoting the ECJ in the part reproduced above (para 53), and admitted that, further to the judgement of the Court of Justice, the *Bundesgerichtshof* had dismissed Bamberski's application for an order to enforce the civil judgement delivered by the French Assize Court.

After recalling its case law with regard to proceedings *in absentia*, starting from the case Colozza v. Italy,[22] the Court highlighted that in the case at stake it was not disputed that

> the applicant had clearly manifested an intention not to attend the hearing before the Assize Court and, therefore, not to represent himself. On the other hand – it is noted in the ruling – the case file shows that he wished to be defended by his lawyers, who had been given authorities to that end and were present at the hearing.[23]

The following, in my view, is the crucial paragraph:

> Although not absolute, the right for everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial. A person charged with a criminal offence does not lose the benefit of this right merely on account of not being present at the trial. Even if the legislature must be able to discourage unjustified absences, it cannot penalise them by creating exceptions to the right to legal assistance.[24]

Moreover:

> Lastly, the Court observes that the applicant's lawyers were not given the permission to represent their client at the hearing before the Assize Court on the civil claims. To penalise the applicant's failure to appear by such an absolute bar on any defence appears manifestly disproportionate.[25]

Even with regard to the right to obtain a review, the ruling maintains that there had been a breach:

> The Court attaches weight to the fact that the applicant was unable to obtain a review, at least by the Court of Cassation, of the lawfulness of the Assize Court's refusal to allow the defence lawyers to plead.

In the end—according to the judgement's conclusion—

> by virtue of Articles 630 and 639 of the Code of Criminal Procedure taken together the applicant, on the one hand, could not be and was not represented in the Assize Court by a lawyer, and, on the other, was unable to appeal to the Court of Cassation as he was a defendant in absentia. He therefore had no real possibility of being defended at first instance or of having his conviction reviewed by a higher court.[26]

Nonetheless, it is worth mentioning, at least incidentally, that despite the clear wording of these sentences that seem to address direct criticism towards the provisions themselves, the Court, obviously fully aware that this fell outside of its remit, immediately drew attention to the case at stake to dispute the circumstance that those same provisions had not been applied by the French judges, who might have interpreted them in a way that would allow K to be defended.

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[22] ECtHR: Colozza v. Italy, 9024/80, Judgment (12 February 1985).

[23] ECtHR: Krombach, supra n. 1, para 88.

[24] Ibidem, para 89.

[25] Ibidem, para 90.

[26] Ibidem, para 100.

5 Krombach's Kidnapping and the Current Criminal Proceedings in France

It was actually reported by the media that in October 2009 B arranged for K to be kidnapped and released in France, in order for him to be arrested. The French judges confirmed his imprisonment and, based on the rules governing proceedings *in absentia*, on 29 March 2011 the proceedings against him started before the Assize Court of Paris, the same judicial authority which had previously sentenced him *in absentia* in 1995. As for B, he will have to be prosecuted as the instigator of the kidnapping which nonetheless, according to the Court, does not undermine the legitimacy of the proceedings against K.[27] After an adjournment when K needed hospital treatment, on 22 October 2011 the Assize Court of Paris sentenced him to 15 years imprisonment, the same punishment as in 1995.

6 Gambazzi and Daimler Chrysler Before the European Court of Justice

The Court of Justice relied on its judgement of 2000 in the case of Krombach to deliver its ruling in the case of Gambazzi v. Daimler Chrysler Canada Inc. and CIBC Mellon Trust Company.[28] On this occasion, it was the Court of Appeal of Milan which had referred a preliminary ruling to the Court of Justice concerning the interpretation of Article 27.1 of the Brussels Convention of 1968, that is to say on the exception of public policy with regard to the recognition of a foreign judgement. The Court of Justice also made interesting remarks about two other issues: the proper notion of a decision and the relevance for both the Court of Justice and the national courts of member States of Swiss rulings pursuant to the Lugano Convention of 1988. Nonetheless, it is not possible to further elaborate on these issues in this context.

The main issue addressed by the Court in the judgement delivered in the case of Gambazzi is related to the possibility to invoke the public policy exception to refuse the recognition and enforcement in Italy of two related judicial decisions, issued in the United Kingdom, which ordered Mr Gambazzi (hereinafter "G"),

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[27] The issue, which reads in Latin *male captus bene detentus* and seems to answer in the affirmative, has been frequently addressed both by literature and the case law. It must nonetheless be noted that, differently from the circumstances of the case at hand, in most of the cases the responsibility to arrest the person prosecuted or convicted can be directly or indirectly assigned to the State which has an interest in triggering a judicial procedure against the person or to enforce a criminal sanction which has already been imposed. Recently the expression *extraordinary rendition* has also been frequently used whenever the person concerned is arrested by foreign officers and this happens with the agreement or support of the local State. On this point, Carella 2009, pp. 111–123; Pedrazzi 2009, pp. 681–694.

[28] Gambazzi, supra n. 13.

domiciled in Switzerland, to pay damages to two legal entities registered in Canada. The judgement does not clarify on which grounds the compensation was due nor when the concerned proceedings started in the United Kingdom and not even on which grounds the High Court of Justice (of England and Wales), Chancery Division, had acknowledged its own jurisdiction.[29] These issues are clearly irrelevant for the purpose of recognition as is clearly mentioned in Articles 28.3 and 29 of the Convention. It then emerges from the ruling of the Court of Justice that in March 1997 the Swiss national competent authorities jointly served on G the application filed before the High Court, Chancery Division, together with the order issued by the High Court itself which, on the one hand, restrained G on a temporary basis from dealing with some of his assets ('freezing order') and, on the other hand, instructed him to disclose details of his assets and certain documents in his possession concerning the principal claim ('disclosure order').[30]

It was also ascertained that G regularly appeared before the High Court but he

> did not comply, or at least did not fully comply, with the disclosure order. The High Court then, on application by Daimler Chrysler and CIBC, made on 10 July 1998 an order which barred Mr Gambazzi from taking any further part in the proceedings unless he complied, within the prescribed time-limit, with the obligations regarding disclosure of the information and documents requested ("unless order"). Mr Gambazzi made several appeals against the freezing order, the disclosure order and the unless order. All those appeals were dismissed. On 13 October 1998, the High Court made a new "unless order". Since Mr Gambazzi did not, within the prescribed time-limit, completely fulfil the obligations laid down in the new order, he was held to be in contempt of court and was excluded from the proceedings ("debarment"). By judgement of 10 December 1998, supplemented by an order of 19 March 1999 ("the High Court judgements"), the High Court entered judgement as if Mr Gambazzi was in default and allowed the applications of Daimler Chrysler and CIBC, ordering Mr Gambazzi to pay them damages (…) with interest and incidental expenses. On application by Daimler Chrysler and CIBC, the Corte d'appello di Milano (…), by order of 17 December 2004, declared the High Court judgements to be enforceable in Italy. Mr Gambazzi appealed against that order. He claims that the High Court judgements cannot be recognised in Italy, on the ground that they are contrary to public policy within the meaning of Article 27(1) of the Brussels Convention, because they were made in breach of the right of the defence and of the adversarial principle.[31]

At this stage the Milan Court stayed the proceedings and referred the case to the Court of Justice for a preliminary ruling.

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[29] On this point see the in-depth essay by Cuniberti 2009, pp. 685–714. Particularly relevant is the reconstruction of the discussions over many months between the applicants and the English judge—which G and the other defendants were unaware of—before obtaining the authorisation to serve the application together with the decisive *interim* measures. The enforcement of the British judgements concerned was applied for not only in Italy but also in the United States, in France, in Switzerland and in Monaco, and Cuniberti's contribution, which analyses these proceedings and the ruling of the Court of Justice, also informs us that the case had also been referred to the ECtHR, "mais elle ne daigna pas s'y intéresser" (p. 686).

[30] Gambazzi, supra n. 13, para 11.

[31] Ibidem, paras 12–18.

In essence, the question referred to the Court relates to the possibility of relying on the public policy clause to refuse the recognition and enforcement of a judicial decision delivered at the end of a proceeding in which

> the court of the State which handed down that judgement denied the unsuccessful party which had entered an appearance the opportunity to present any form of defence following the issue of a debarring order.[32]

7 The Judgement of the European Court of Justice

The ruling of the Court of Justice contains many references to the former Krombach case, to which it is related in the part where it reaffirms that the exercise of the rights of the defence occupies a prominent position in the organisation and conduct of a fair trial and is one of the fundamental rights which deserve to be duly protected. It is true, as acknowledged by the Court, that those rights appear to have been oppressed in order to ensure the accurate and effective use of the judicial power and that with regard to civil proceedings many States impose sanctions on parties who rely on inappropriate delaying tactics. Nonetheless, sanctions of this kind, as clarified by the Court, "may not (…) be manifestly disproportionate to the aim pursued, which is to ensure the efficient conduct of proceedings in the interests of the sound administration of justice".[33]

Whereas the Court acknowledged that G was prevented from any participation in the proceedings *a quo* and that this kind of exclusion represented "the most serious restriction possible on the right of defence",[34] the Court held that "such a restriction must satisfy very exacting requirements if it is not to be regarded as a manifest and disproportionate infringement of those rights".[35]

At this point, it might be relevant to recall that in the past the Court of Justice was quite sceptical towards legal tools which are peculiar to the British civil procedure system, stating that the framework defined by the Brussels Convention of 1968 (and by Regulation No. 44/2001) prevents British judges from considering themselves as *forum non conveniens*[36] and, moreover, from issuing anti-suit injunctions.[37]

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[32] Ibidem, para 19.

[33] Ibidem, para 32.

[34] Ibidem, para 33.

[35] Ibidem.

[36] ECJ: Andrew Owusu v. N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others, C-281/02, Judgment (1 March 2005).

[37] ECJ: Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA, C-159/02, Judgment (27 April 2004); ECJ: Allianz SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc., C-185/07, Judgment (10 February 2009).

In the pertinent Gambazzi ruling, the Court held, on the contrary, that it is the responsibility of the judge of the requested State—that is to say of the Italian judge—to verify that in the proceedings *a quo* a disproportionate infringement of defensive rights has effectively occurred, but it also provides valuable guidance on how this verification should be performed, which implies a thorough assessment of the English proceedings *a quo*.

Actually the Court maintained that the following had to be taken into account:

> in the present case, not only the circumstance in which at the conclusion of the High Court proceedings, the decisions of that court – the enforcement of which is sought – were taken, but also the circumstances in which, at an earlier stage the disclosure order and the unless order were adopted.[38]

And then it followed:

> With regard, first, to the disclosure order, it is for the national court to examine whether, and if so to what extent, G had the opportunity to be heard as to its subject-matter and scope, before it was made.

The referring judge also had to examine

> what legal remedies were available to Mr Gambazzi, after the disclosure order was made, in order to request its amendment or revocation. In that regard, it must be established whether he had the opportunity to raise all the factual and legal issues which, in his view, could support his application and whether those issues were examined as to the merits, in full accordance with the adversarial principle, or whether on the contrary, he was able to ask only limited questions. With regard to Mr Gambazzi's failure to comply with the disclosure order, it is for the national court to ascertain whether the reasons advanced by Mr Gambazzi, in particular the fact that disclosure of the information requested would have led him to infringe the principle of protection of legal confidentiality by which he is bound as a lawyer and therefore to commit a criminal offence, could have been raised in adversarial court proceedings.
>
> Concerning, second, the making of the unless order, the national court must examine whether Mr Gambazzi could avail himself of procedural guarantees which gave him a genuine possibility of challenging the adopted measure.
>
> Finally, with regard to the High Court judgements in which the High Court ruled on the applicants' claims as if the defendant was in default, it is for the national court to investigate the question whether the well-foundedness of those claims was examined, at that stage or at an earlier stage, and whether Mr Gambazzi had, at that stage or at an earlier stage, the possibility of expressing his opinion on that subject and a right of appeal.[39]

Based on all these verifications, the Court of Justice stated that

> it is for the national court to carry out a balancing exercise with regard to those various factors in order to assess whether, in the light of the objective of the efficient administration of justice pursued by the High Court, the exclusion of Mr Gambazzi from the proceedings appears to be a manifest and disproportionate infringement of his right to be heard.[40]

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[38] ECJ: Gambazzi, supra n. 13, para 41.

[39] Ibidem, paras 41–45.

[40] Ibidem, para 47.

8 The Decision of the Court of Appeal of Milan Not to Invoke Public Policy

The Court of Appeal of Milan had to deal with the case once again in the light of the guidance provided by the Court of Justice. The ruling of 24 November–14 December 2010[41] confirms the declaration of enforcement relating the English decisions which was issued at first instance. Actually, the Court of Appeal considered that G could have complied with the provisions of the judge *a quo* and that in any case he was really granted the possibility to challenge each of the decisions which had subsequently led to his exclusion from the proceedings.

Nonetheless, I think that it can be argued whether the referring judge had followed, both in the wording and in the rationale, the guidance provided by the Court of Justice.

I am not convinced that, with regard to the judgements whose enforcement was requested, the ruling from Milan has thoroughly verified that the grounds of the claim against G had been duly considered by the judge *a quo* and that G had had "the possibility of expressing his opinion on that subject and a right of appeal".[42]

For the Milan judges the exclusion of G from the proceedings *a quo* has to be considered as a very severe sanction but not unreasonable or disproportionate—and then not of such a nature to justify the application of the public policy clause—with regard to the procedural choice made by G to focus his defence on the matter of the lack of jurisdiction of the British court rather than on the orders that were issued in sequence. Taking for granted the presumption of enforceability resulting from the Convention (and Regulation No. 44/2001), it also cannot be disputed that the recognition judge cannot challenge the assessment of his jurisdiction by the judge *a quo*, but that is not the issue in my view. The Court of Milan stated the following: "Gambazzi non ha *completamente* adempiuto, entro il termine fissato, agli obblighi di cui all'ultima ordinanza ed è stato così ritenuto colpevole di contempt of Court (oltraggio alla Corte) ed escluso dal procedimento, proseguito in assenza dello stesso sino alla sentenza di condanna in data 10.12.1998; la questione relativa alla giurisdizione è stata ancora una volta riproposta innanzi alla House of Lords che, con sentenza in data 12 ottobre 2000, l'ha definitivamente rigettata".[43]

To my mind, the judges in Milan should have asked themselves if the fact that G had been extruded by the proceedings and subsequently found guilty *in absentia* by British judges well before their jurisdiction was ascertained, was really needed for the sound administration of justice and therefore did not generate an unreasonable and disproportionate infringement of the right of defence.

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[41] Rivista di Diritto Internazionale Privato e Processuale (2011), 47:1057.

[42] ECJ: Gambazzi, supra n. 13, para 45 and the Advocate General's opinion, paras 25–27, 48.

[43] Emphasis added.

9 Some Final Remarks

G can still challenge the judgement of the Court of Appeal of Milan by filing an application before the *Corte di Cassazione* (Article 41 of the Convention and Article 44 of Regulation No. 44/2001). So far, the impression is that the Milan judges and the *Bundesgerichtshof* followed a different approach. Can this be justified by the fact that whilst Gambazzi is a Swiss national with no domicile in Italy but in Lugano, Krombach—as highlighted by the Court in its ruling, although with a reasoning that might sound misleading—is a German citizen with his domicile (at that time) in Germany?

I would be inclined to say no and it should certainly not be the case. As far as the identification of the jurisdiction responsible for receiving the application for enforcement is concerned, the Convention makes a clear difference based on the circumstance that the defendant has a domicile or not in the requested State (Article 32.2 of the Brussels Convention of 1968; less explicitly in Article 39.2 of Regulation No. 44/2001), but from this distinction we cannot maintain that the requested State can or even shall better protect the parties who are domiciled in its territory.

What one can probably say—or, better, repeat—is that in the Krombach case the infringement of defence rights was directly related to the features of the French legal system, whilst in the Gambazzi case we are faced with many *interim* measures imposed by the judicial authorities.

It is also worth mentioning what Article 111 of the Italian Constitution, with a relatively recent provision, states: "La giurisdizione si attua mediante il giusto processo regolato dalla legge. Ogni processo si svolge nel contraddittorio tra le parti, in condizioni di parità, davanti a giudice terzo ed imparziale".

In a different and more general perspective it must also be noted that the elimination of the public policy exception has been included for some time now amongst the measures to facilitate the implementation of the principle of the mutual recognition of judgements between the member States of the Union, although both European institutions and member States are significantly reticent in their moving towards this direction.

It is true that the recent proposal submitted by the European Commission in order to review Regulation No. 44/2001[44] foresees that a decision issued in a member State and thereby enforceable can also be enforced in the other member States "without the need for a declaration of enforceability" (Article 38.2). Nonetheless, the defendant has "the right to apply for a refusal of recognition or enforcement of a judgement where such recognition or enforcement would not be permitted by the fundamental principles underlying the right to a fair trial" (Article 46.1).

[44] European Commission, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM (2010) 748 def./2, 14 December 2010–3 January 2011.

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Part X
European Union Law

Some Reflections on the Principle of Consistent Interpretation Through the Case Law of the European Court of Justice

Antonino Alì

1 Introductory Remarks: The Coherence of a Legal System and the Principle of Consistent Interpretation

This article examines the case law of the Court of Justice of the European Union (ECJ) concerning the so-called principle of "consistent interpretation".

"Consistent interpretation" is an expression used, both at the domestic and international level, to describe a method on the basis of which a rule is interpreted in the light of other rules belonging either to the same legal system or to other external systems.

In this sense, it could be said that consistent interpretation may have an *intra*-systemic significance, and also an *inter*-systemic one. The first case concerns the interpretation of a rule of a legal order in the light of another rule from the same legal order. In the second case, the reference parameter consists of one or more rules belonging to a different legal order.

In domestic legal systems the subject is well known both in the first sense in particular as regards the interpretation of ordinary law in conformity with the Constitution of a State, and also in the second sense in relation to the interpretation of domestic law so that it is consistent with international law or EU law.

Moving from the national level to the European Union level, it is possible to be faced with the same type of interpretative problems in relation to the interpretation of secondary law in conformity with primary law (the EC/EU founding treaties). Additionally, in the same way this interpretative method may also have an inter-systemic value, in particular as regards the interpretation of EU law in conformity with international law.

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Although an analysis of the profound reasons that lie at the heart of the need for consistent interpretation is beyond the scope of this article, it could be observed that the rationale behind this interpretative method is grounded more generally on the need for coherence—the elimination of contradictions/conflicts—within a legal order.[1]

From a practical point of view, considering that a coherent legal system is nothing more than an ideal system because almost all legal systems contain a certain level of incoherence, "consistent interpretation" could be, as far as possible, a useful means for the removal of divergences between two or more norms without resorting to the modification of those norms through the legislative process. In other words, it is first a duty of the interpreter to interpret those rules in a way that could reduce or eliminate contrasts (anomalies).

Sometimes this method is imposed by law normatively at the highest level as stated in Article 10(2) of the Spanish Constitution, which authoritatively states the duty to interpret "(t)he norms concerning the fundamental rights and freedoms recognised by the Constitution in conformity with the Universal Declaration on Human Rights and the international treaties and agreements on the same matter ratified by Spain".[2] However, more frequently the use of this technique is a choice of the interpreter (if not a duty!).

"Consistent interpretation" can be ascribed to a particular systemic interpretation which is adaptive interpretation ("*interpretazione adeguatrice*").

In very general terms, it is possible to underline that "consistent interpretation" is an interpretative method employed in relation to the interpretation of a norm of a lower degree with respect to a higher degree rule. In this sense, the topic appears to be strictly connected with the principle of the hierarchy of norms within a legal system understood in a broad sense. In this regard, it has been emphasised that it is possible to have: (a) a material superiority (such as the one between the constitution and the law), (b) a structural superiority (such as the one between primary law and the delegated legislation) and (c) an axiological superiority (such as the one between general or fundamental principles of the legal order or of a specific sector).[3]

Being mostly an interpretation in conformity with a (material or structural) superior norm, it is understandable why, according to some authors, a consistent interpretation appears obvious. Indeed, the validity of the lower norm is dependent on conformity with the superior one. So, a consistent interpretation answers first to some logical standards which are also *inherent* in any legal system.[4] It is a consequence of the same essence of a legal order/legal system.[5]

The problem of consistent interpretation also emerges when the rules belong to different legal orders, or more generally when there is a legal obligation to respect

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[1] Bobbio 1960, p. 69, D'Amico and Randazzo 2009, Sorrenti 2006, Modugno 2010.

[2] Cassese 1985, p. 404.

[3] In these terms, see Guastini 2011, p. 302.

[4] Eeckout 2011, pp. 355–357 describes this as an "obvious consequence".

[5] Guastini 2011, pp. 292–306.

rules of another system (even when this obligation is "reinforced" by the case law of the Court of Justice; see the principle of the primacy of EU law).

The following sections aim to highlight the use of the method of "consistent interpretation" in the case law of the Court of Justice and the problems concerning the interpretation of national law in conformity with EU law and the interpretation of EU law in conformity with international law.

2 The "Indirect Effect of Directives" and Interpretation in Conformity with Directives

During the past few decades there has been a considerable increase of interest in the principle of "consistent interpretation" in relation to the evolution of the practice of the ECJ. The topic has been developed in the context of the broader discussion on the indirect effect of EU law and, in particular, on the alternative means to ensure the effects of directives.[6]

It is well known, in fact, that in dealing with Member States not complying with their duty to transpose directives the Court of Justice has developed the principle of the "direct effect of directives", and more specifically the direct effect of clear, precise and unconditional provisions of non-transposed (or incorrectly transposed) directives.

Although, according to the well-known cases of *Marshall* and *Faccini Dori,* the horizontal direct effect of directives is not allowed,[7] the Court has nevertheless conceived and developed a series of tools to ensure the effectiveness of EU law in situations of non-compliance by Member States, such as the doctrine of State liability[8] and the doctrine of indirect effect through consistent interpretation. These possibilities have mainly been thought of as alternative methods to endow non-implemented directives with some effect.

It is quite clear (and obvious) that national measures for transposing a directive should be interpreted in the light of the same directive. It could be said that in this case the duty of consistent interpretation is grounded on "structural" superiority and, in more general terms, on a "material" one.

It is not the case that the Court of Justice underlines that, in the light of the third paragraph of Article 288 TFEU (ex 249 TEC),[9] "(n)ational courts must presume

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[6] Chalmers et al. 2010, pp. 294–300.

[7] ECJ: M. Helen Marshall v. Southampton and South-West Hampshire Area Health Authority, C-271/91, Judgment (2 August 1993); Paola Faccini Dori v. Recreb Srl, Judgment (14 July 1994).

[8] ECJ: Andrea Francovich and Danila Bonifaci and Others v. Italian Republic, C-6/90 C-9/90, Judgment (19 November 1991); Brasserie du Pêcheur SA v. Federal Republic of Germany and The Queen v. Secretary of State for Transport ex parte Factortame Ltd and Others, C-46/93 C-48/93, Judgment (5 March 1996).

[9] "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods".

that the Member State, following its exercise of the discretion afforded it under that provision, had the intention of fulfilling entirely the obligations arising from the directive concerned" (…) "[t]hus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned".[10]

The application of the principle of consistent interpretation (more precisely, the duty to interpret so as to be in conformity) is strictly related to the violation of duties connected with a directive and is triggered by an incorrect transposition or by the lack of national provisions necessary to comply with a directive.

Consistent interpretation acquires particular relevance in situations of a failure to transpose a directive. On the one hand, if the directive is properly transposed, consistent interpretation should be ensured by the same implementation of the directive. On the other hand, if national legislation does not meet the requirements of the directive, there remains a need for consistent interpretation which, as we will underline, affects the entire legal system.

In this sense, the duty of consistent interpretation which belongs to the national judge goes hand in hand with the other remedies created by the Court in a "pathological" context. It amounts to a reinforced consistent interpretation in the context of the "permanent emergency" of the late transposition of the directives by the Member States.

It is therefore quite understandable why the Court argues that "(t)he requirement for national law to be interpreted in conformity with Community law is *inherent in the system of the Treaty*, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it".[11]

It is well known that the starting point of the duty to interpret national law in accordance with EU law can be found in *Von Colson,* in which the Court stated that: "the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement (…) a directive, (…) national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 (…) It is for the national court to interpret and apply the legislation adopted for the implementation

[10] ECJ: Teodoro Wagner Miret v. Fondo de Garantía Salarial, C-334/92, Judgment (16 December 1993), para 20 and, more recently, Bernhard Pfeiffer and Others v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV, C-397/01 to C-403/10, Judgment (5 October 2004).

[11] Pfeiffer, supra n. 10, para 114, emphasis added.

of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law".[12]

The further development (or better an "extension") of this case is *Marleasing,* in which, recalling *Von Colson* in para 8, the Court underlined that: "(…) the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty".[13]

This last case, according to some authors, brought some uncertainty into the consideration of the widening process of interpretation.[14]

On this particular point the Court seems to distinguish between situations in which "[t]he principle of interpretation in conformity with directives must be followed in particular where a national Court considers (…) that the pre-existing provisions of its national law satisfy the requirements of the directive concerned"[15] and other hypotheses in which "the national provisions cannot be interpreted in a way which conforms with the directive (…)".[16] If that is the case, the principle of interpretation in conformity with directives cannot be applied and "the Member State concerned is obliged to make good the loss and damage sustained as a result of the failure to implement the directive in their respect".[17]

The Court has also clarified that from the entry into force of a directive, "the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive".[18] It seems that in this case the method of interpretation is more focused on mere

[12] ECJ: Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen, C-14/83, Judgment (10 April 1984) (emphasis added), paras 26–28.

[13] ECJ: Marleasing SA v. La Comercial Internacional de Alimentacion SA, C-106/89, Judgment (13 November 1990); see, more recently, ECJ: Deutsche Lufthansa AG v. Gertraud Kumpman, C-109/09, Judgment (10 March 2011), paras 52–55.

[14] de Búrca 1992, p. 215; Drake 2005, p. 329; Dashwood 2006–2007, p. 81; Craig 2009, p. 349. See recently ECJ: Francesca Sorge v. Poste Italiane SpA, C-98/09, Judgment (24 June 2010), paras 51–54.

[15] Wagner Miret, supra n. 10, para 21.

[16] Ibidem, para 22.

[17] Ibidem, para 22; see, also, Francovich, supra n. 8.

[18] ECJ: Konstantinos Adeneler and Others v. Ellinikos Organismos Galaktos (ELOG), C-212/04, Judgment (4 July 2006), para 123.

compatibility than on the conformity of national law with the directive. What really matters is that the interpretation could have negative effects on the future transposition of the directive by the Member State.

Although, as already underlined, *Marleasing* has raised a series of issues with regard, in particular, to the extension of the interpretative process, such a process cannot amount to a substantial disapplication of the contrary norm. According to the Court of Justice, it is for the national judge to understand which is the limit of resistance—according to his legal traditions—"for stretching" the interpretation of the national rule so as to make it consistent with EU law.

National judges are required to do "whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it".[19] In this regard, however, it has been underlined that English courts have developed relevant opinions as to the limits of the interpretative obligation.[20] An assessment that the Court delegates to the national courts as seems to be confirmed by the fact that consistent interpretation is a duty to be accomplished "as far as possible". It is in fact true that the obligation of a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law has its limits in the interpretation *contra legem* or contrary to the "general principles of law, particularly those of legal certainty and non-retroactivity".[21]

An important element which should be taken into consideration is that the duty of consistent interpretation is an obligation for all the authorities of the member States which is "imposed" by the Court to complete and enhance the effectiveness of EU law.[22] In other words, the concept of "consistent interpretation" already known—and applied—within the legal systems of the EU Member States in relation to international law is reinforced with a precise duty to guarantee the effectiveness of EU law, and more generally to enforce and to strengthen the principle of sincere cooperation in Article 4(3) TEU.[23]

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[19] ECJ: Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique, Préfet de la région Centre, C-282/10, Judgment (24 January 2012), para 27.

[20] Betlem and Nollkaemper 2003, pp. 587–588; Betlem 2002, p. 397

[21] ECJ: Kiriaki Angelidaki and Others v. Organismos Nomarkhiaki Aftodiikisi Rethimnis and Dimos Geropotamou, C-378/07 to 380/07, Judgment (23 April 2009), paras 197-200; Dominguez, supra n. 19, paras 23–28.

[22] Casolari 2012, p. 401.

[23] According to which: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives". Chalmers et al. 2010,

3 The Interpretation of Secondary EU Law in Conformity with International Law

It is worth underlining that very limited attention has been specifically devoted to the subject of the interpretation of EU law in conformity with international law.[24] Maybe one of the reasons for this is that the focus has been traditionally placed on the problem of the direct effect, within EU law, of the provisions of some international treaties and some well known restrictive interpretations of the Court concerning the effects of WTO rules.[25]

In general terms, the phenomenon examined in this section is the reflection at the EU level of the same principle developed at the domestic level in relation to the interpretation of domestic law in the light of international law.

On a different level, it is well known that, for example, in the last ten years in Italy this topic has been particularly taken into consideration, as a consequence of the "Titolo V" modifications to the Italian Constitution. The new text of Article 117(1) affirms the duty for State and Local (*Regioni*) legislative organs to respect the commitments descending from the EU legal order as well as international obligations. Fairly intense case law by the Italian Constitutional Court has clarified the scope of this article and has outlined the effect of the introduction of this rule both for the Court itself and for ordinary judges. In particular, restating a principle that had already been affirmed even before the amendments to Article 117(1), the Constitutional Court has clarified that "[..] *it is for the ordinary judge to interpret the domestic rule in conformity with international law within the limits allowed by the text of the norms*".[26] A consistent interpretation of domestic norms in fact

(Footnote 23 continued)
p. 300 underline, not without surprise and concern, that from the notorious case of Pupino the Court of Justice seems to offer and "alternate basis for indirect effect: the general obligation residing in the objective of ever closer union set out in Article 1(2) TEU". See, also, ECJ: Hans Just I/S v. Danish Ministry for Fiscal Affairs, 68/79, Judgment (27 February 1980).

[24] See recently Casolari 2012; Gattinara 2012; Peters 1997; Eeckout 2011.

[25] The bibliography on the subject is too long, see Dordi 2010, Bonafé 2012, Gattinara 2012, Bronckers 2008. ECJ: Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Others v. Council of the European Union and Commission of the European Communities, C-120/06 C-121/06/P, Opinion of Adv. Gen. Poiares Maduro (20 February 2008), paras 22–52. A particular kind of consistent interpretation seems to be the one which interprets EU law with reference to the European Convention on Human Rights. See also Article 52(3) which authoritatively states that "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection". Although interesting, the subject cannot be further developed in this paper. Official Journal C 83 of 30.3.2010.

[26] Corte Costituzionale: Judgment no. 349/2007 (22 October 2007), para 6.2, emphasis added. A fairly rich recent case law by the Constitutional Court of Italy has dealt with the "consistent interpretation" of national law with the European Convention on Human Rights.

helps in the correct implementation of international obligations and prevents situations that could generate the international responsibility of the State.

At the EU level, the Court of Justice has also affirmed in clear terms that "(…) when the wording of secondary Community law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the Treaty rather than the interpretation which leads to its being incompatible with the Treaty".[27] At the same time the Court has affirmed that "an implementing regulation must also be given, if possible, an interpretation consistent with the provisions of the basic regulation"[28] In both cases, the Court calls for consistent interpretation based on a material superior norm.[29]

Article 216(2) of the TFEU according to which the "(a)greements[30] concluded by the Union are binding upon the institutions of the Union and on its Member States" is fundamental in this regard. According to the ECJ, the provisions of an international treaty concluded by the Union form an integral part of the Union legal order and are therefore applicable within the Union.[31]

In what is considered the leading case in the field of interpretation in conformity with international law, the Court of Justice, after recalling the method of consistent interpretation between norms belonging to the same legal order, states clearly that "the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements".[32]

An interpretation which is consistent with international law should therefore be used not only when its provisions are intended specifically to give effect to an international agreement concluded by the Community and also—as a consequence

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[27] *Inter alia* ECJ: Commission of the European Communities v. Council of the European Communities, C-218/82, Judgment (13 December 1983), para 15.

[28] ECJ: Dr Tretter GmbH & Co. v. Hauptzollamt Stuttgart-Ost, C-90/92, Judgment (24 June 1993), para 11 and Deutsche Tradax GmbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 38/70, Judgment (10 March 1971), para 10.

[29] See para 1.

[30] According to the case law of the Court of Justice international law generally has a similar effect. See ECJ: Yvonne van Duyn v. Home Office, 41/74, Judgment (4 December 1974), para 22; A. Racke GmbH & Co. V. Hauptzollamt Mainz, C-162/96, Judgment (16 June 1998), paras 45–46.

[31] ECJ: R. & V. Haegeman v. Belgian State, C-181/73, Judgment (30 April 1974), para 5; Meryem Demirel v. Stadt Schwäbisch Gmünd, C-12/86, (30 September 1987), para 7 and Irène Bogiatzi, married name Ventouras v. Deutscher Luftpool and Others, C-301/08, Judgment (22 October 2009), para 23. See Cannizzaro 2002, Cannizzaro 2012, Gianelli 2004

[32] ECJ, Commission of the European Communities v. Federal Republic of Germany, C-61/94, Judgment (10 September 1996), para 52. Without too much emphasis the Court had already affirmed that "Since agreements regarding the Common Customs Tariff were reached between the Community and its partners in GATT the principles underlying those agreements may be of assistance in interpreting the rules of classification applicable to it". ECJ: Interfood GmbH v. Hauptzollamt Hamburg-Ericus, 92/71, Judgment (26 April 1972), para 6.

of a "material hierarchy"—regardless of the fact that the secondary acts have been specifically adopted to give effect to international obligations[33] and even in the absence of an explicit reference to international law in the secondary legislation.[34] In this respect, the problem of this method being applied to international treaties does not appear to be very different from the one analysed in the case of directives.[35]

A fairly interesting aspect of the doctrine of consistent interpretation lies in the use of this method in relation to the WTO system. It is well known in general terms that, although the agreements form part of the Community legal order, the WTO cannot be relied upon before a tribunal.

However, according to the Court, "it is necessary to supply an interpretation in keeping with the TRIPs Agreement (…) although no direct effect may be given to the provision of that agreement at issue".[36] In other words the Court distinguishes between the lack of direct effect and the necessity to provide a consistent interpretation. The absence of the first does not exclude the second. In this way, a consistent interpretation supplements the lack of direct effect of the WTO rules.

Last but not least, the position of the Court concerning the limits to the interpretation of EU law with international law should be recalled. In the notorious *Kadi* judgment the Court, after recalling in para 291 that EU law "must be interpreted, and its scope limited, in the light of the relevant rules of international law", added in paras 303–304 that Article 307 TEC (now Article 216 TFEU) "cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union. Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those

[33] It is worth noting, as Adv. Gen. Trstenjak observes in his opinion in the *SGAE* case, that it should be taken into account if "the intention of the Community legislature was to introduce a new concept at Community level, without it being linked with pre-existing concepts in international (…) law" ECJ: Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles SA, C-306/05, Op. of Adv. Gen. Trstenjak (13 July 2006).

[34] ECJ: Irène Bogiatzi, married name Ventouras v. Deutscher Luftpool and Others, C 301/08, Op. of Adv. Gen. Mazák (25 June 2009), para 48.

[35] ECJ: Società Consortile Fonografici (SCF) v. Marco Del Corso, C-135/10, Judgment (15 March 2012), para 51; Commission v. Germany, supra n. 32, para 52; Gianni Bettati v. Safety Hi-Tech Srl., C 341/95, Judgment (14 July 1998), para 20; and Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles SA, C-306/05, Judgment (7 December 2006), para 35.

[36] ECJ: Merck Genéricos—Produtos Farmacêuticos Lda v. Merck & Co. Inc. and Merck Sharp & Dohme Lda, C-431/05, Judgment (11 September 2007), para 35; for some recent cases in which the Court has interpreted EU law in the light of international legal obligations, see Football Association Premier League Ltd and Others v. Media Protection Services Ltd, C-403/08 and C-429/08, Judgment (4 October 2011), para 189; and The Queen on the application of International Association of Independent Tanker Owners (Intertanko) and Others v. Secretary of State for Transport, C-308/06, Judgment (3 June 2008), para 52.

fundamental rights". Although Article 216(2) provides that international treaties concluded under the conditions set out in that article are binding on the Institutions and on Member States "(t)hat primacy at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part".[37]

4 Should Primary EU Law Be Interpreted in the Light of International Law?

As we have pointed out in the last section, the Court seems to link the principle of an interpretation which is consistent with international law to the issue of the primacy of international treaties (or customary law) over secondary law.

However, a delicate question emerges as to whether also EU primary law should be interpreted in the light of international law.

In this respect, the participation of the European Union in the Convention on Access to information, public participation in decision making and access to justice in environmental matters (Aarhus, 25 June 1998; hereinafter the "Convention") poses some interesting problems.[38]

All the EU Member States (with the exception of Ireland) are parties to the Convention. The European Community signed the Convention on 25 June 1998 and approved it through Council Decision 2005/370/EC. The EC has thus been a party to the Convention since 17 May 2005.[39] Article 9(3) of the Convention requires each contracting party to ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.[40] The EU institutions have adopted the implementing provisions indicating the criteria for giving standing to "members of the public".[41] However, it has been underlined that those criteria of locus standi, according to the decisions

[37] ECJ: Yassin Abdullah Kadi and Al Barakaat International Foundation, C-402/05P and C-415/05 P, Judgment (3 September 2008) paras 306–308.

[38] On the Aarhus Convention see Pallemaerts 2011a and the bibliography at pp. 415–440; Pitea 2009, p. 221.

[39] With the entry into force of the Treaty of Lisbon from 1 December 2009, the European Union (EU) has succeeded the European Community in its obligations arising from the Convention.

[40] Para 4 states that "[i]n addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible".

[41] Regulation EC 1367/2006 of the European Parliament and the Council of 6 September 2006 OJ 2006 L 264/13; Commission Decision 2008/50/EC of 13 December 2007, OJ L 13/24.

taken by the Court of First Instance (now the General Court) in the last few years, have been those laid down in Article 263(4) of the Treaty on the Functioning of the European Union (TFEU) which are notoriously quite restrictive.[42]

The Court of Justice has not ruled on any Aarhus-related pleas raised in actions for annulment but it has been argued that in the case of an appeal falling within the scope of Article 9(3) of the Convention "there are special legal circumstances that would justify an interpretation of the rules on locus standi in a manner consistent with the Union's international obligations under the Convention".[43] This case would raise the problem of the consistent interpretation of an article of primary law (Article 263 TFEU) with an international treaty (the Aarhus Convention) binding on the EU and the Member States.

It is quite clear that in this hypothesis consistent interpretation could solve what appears to be a potential treaty conflict.[44]

In this regard, the Compliance Committee of the Aarhus Convention[45] has underlined in its Conclusions and Recommendations in the Client Earth case[46] that if the case law of the EU Courts (concerning direct access to EU judges) will continue, "unless fully compensated for by adequate administrative review procedures, the Party" (the EU) "would fail to comply with Article 9, paragraphs 3 and 4, of the Convention". The Committee has therefore recommended a change to the case law by providing a new interpretation of Article 267(4) TFEU that is consistent with the entry into force of the Aarhus Convention.

However, as has been emphasised in *Microsoft* by the Court of First Instance, the principle of consistent interpretation "applies only where the international agreement at issue prevails over the provision of Community law concerned. Since an international agreement, such as the TRIPS Agreement, does not prevail over primary Community law, that principle does not apply where, as here, the provision which falls to be interpreted is Article 82 EC".[47] The Court added that "under the guise of the principle of consistent interpretation, Microsoft (was) "in reality simply challenging the legality of the contested decision on the ground that it is contrary to Article 13 of the TRIPS Agreement (…)" which according to determined case law "(…) WTO agreements are not in principle among the rules in the light of which the Community judicature is to review the legality of measures adopted by the Community institutions".[48]

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[42] For a complete analysis of the case law of the CFI/General Court see Pallemaerts 2011a, b.

[43] Pallemaerts 2011a, b, p. 311.

[44] See Klabbers 2009, pp. 211–219, 2012, p. 111, Lavranos 2009, p.119.

[45] Treves et al 2009.

[46] Report of the Compliance Committee—Findings and recommendations with regard to communication ACCC/C/2008/32 submitted by the non-governmental organisation ClientEarth, adopted 14 April 2011.

[47] GC/CFI: Microsoft Corp. v. Commission of the European Communities, T-201/04, Judgment (17 September 2007), para 798; see in this regard Casolari 2012, p. 407.

[48] Microsoft, supra n. 47, paras 800–801.

It may be noted that although the method of consistent interpretation presupposes, as we noted in the introduction, a "hierarchical" relationship, nothing prevents the Court from choosing between more interpretative options and selecting one that engenders conformity with international law. This may well be the case when the interpretative options are compatible with primary law.

As regards the relationship between the Aarhus Convention and the EU Treaty's *locus standi* rules, it should be noted that in this case the issue is not so much the suitability of the EU judicial system, but rather the consistently restrictive case law of the ECJ in relation to actions brought by individuals. In other words, resorting to an interpretation which is consistent with international law would be an opportunistic choice aimed at avoiding the deterioration of a non-compliance scenario with the Aarhus Convention.

In *Defrenne*,[49] for example, the Court emphasised that Community law must be interpreted in light of any other rule of international law, and it interpreted Article 119 EC, namely a rule of primary law, in accordance with ILO Convention no. 100 on Equal Pay (1951). In this sense, it should be emphasised that in those cases in which the agreement or, more generally, international law has been interpreted by the Court as a threat to the autonomy of the system or of its fundamental principles, the reaction has been in the sense of a strong affirmation of the supremacy of EU law over international law as occurred in *Kadi*[50] and in the Opinion on the European Economic Area.[51]

5 Concluding Remarks

There is a fundamental difference between the principle of consistent interpretation as developed by the Court in relation to directives and international law. The first was framed by the Court as an obligation for the national judge to interpret, as far

[49] ECJ: Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena, 43/75, Judgment (8 April 1976), paras 56/58; see Peters 1997, p. 72; according to Casolari 2012 p. 412 this judgment "reveals and implicit application of the principle of systemic integration contained in Article 31(3)(c) of the Vienna Convention on the Law of the Treaties of 1969; see also Casolari 2008, p. 353 and the bibliography at note 6; see Klabbers 2012, pp. 110–112.

[50] In Kadi I, supra n. 37, para 304 the Court affirms that: "Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights".

[51] ECJ: Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, Opinion 1/91 (14 December 1991); according to the Court: "It follows that in so far as it conditions the future interpretation of the Community rules on free movement and competition the machinery of courts provided for in the agreement conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community" (ibidem, para 46).

as possible, domestic law in the light of the Directive in question. In the integrated perspective of the Court on the relationship between the legal order of the EU and that of the Member States, the focus is on a clear obligation for all national authorities and in particular for judges.

The consistent interpretation principle, already known in relation to international law by the judges of the Member States, was used by the Court of Justice for its "own" purposes. The Court intended to strengthen and to specify the principle taking into account the effectiveness of EU law[52]: ensuring the effectiveness (albeit indirectly) of non-implemented (or incorrectly implemented) EU rules. It is therefore not a coincidence that even if at the founding of the consistent interpretation method there is a structural and material superiority, and the Court has emphasised the importance of consistent interpretation for the enrichment of the legal sphere of individuals.

In this sense the purposes of this interpretative method are no different from those highlighted by the Court in the fundamental case of *Van Gend & Loos*: reinforcing the rights of individuals which national courts must protect.[53]

Coming now to the interpretation of EU law in the light of international law, it should be observed that this is primarily a "duty" for the Court of Justice itself. It has been correctly observed that the duty of consistent interpretation in this case is strictly connected with the principle of respect for international agreements as codified in Article 216(2) TFEU.[54]

A consistent interpretation provides for, on the one side, the importance of international law in the EU legal system.

In this sense, the most striking limit to an interpretation which is consistent with international law is the violation of primary rules of EU law. That is the case when international obligations contrast with the interpretation of primary law (as in Kadi or in Opinion 1/91).[55] In those hypotheses, the Court has clearly stated that these are contradictions that cannot be resolved with the use of an interpretive method.

There is, however, one aspect that seems to link the two different applications of the consistent interpretation method: the paradox that in both cases it works as a tool to "circumvent", on the one hand, the limits set in the case law of the Court of Justice concerning the vertical effect of directives and, on the other, the limits in relation to the effects of WTO rules.[56]

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[52] Casolari 2012, pp. 401 and 407 underlines the importance of the full effectiveness of EU law in the ECJ case law.

[53] ECJ: NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, 26/62, Judgment (5 February 1963).

[54] Casolari 2012, pp. 404–407.

[55] Kadi I, supra n. 37; Opinion 1/91, supra n. 51.

[56] See Gattinara 2012, p. 271; Tancredi 2012, p. 252.

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La Cour de Justice de l'Union Européenne se prononce sur l'importation de produits fabriqués dans les territoires palestiniens occupés: verre demi plein ou verre demi vide?

Matteo Fornari

1 Introduction

Dans le cadre d'une controverse en matière douanière entre une société allemande, la *Brita Gmbh*, et l'administration douanière du port de Hambourg (*Hauptzollamt Hambourg-Hafen*), avec arrêt du 25 février 2010[1] la Cour de Justice de l'Union Européenne (UE) s'est prononcée sur le domaine d'application territoriale des accords d'association entre la Communauté Européenne et l'État d'Israël (Bruxelles, le 20 novembre 1995)[2] et entre la Communauté Européenne et l'Organisation pour la Libération de la Palestine (OLP), agissant pour le compte de l'Autorité Palestinienne de la Cisjordanie et de la Bande de Gaza (Bruxelles, le 24 février 1997).[3]

Stipulés dans le cadre du Partenariat méditerranéen promu par la Conférence Ministérielle Euro-méditerranéenne tenue à Barcelone en novembre 1995, le but de ces accords d'association est de favoriser l'intégration politique et économique entre l'UE et les États membres avec les autres États qui donnent sur la Méditerranée, en favorisant en même temps le dialogue politique. Dans ce but, ces accords d'association favorisent la création de zones de libre échange grâce à l'interdiction d'imposer des taxes douanières sur les marchandises et sur les produits en provenance de l'État partie à l'Accord, pas membre de l'UE, et importés dans un État membre de l'UE.

[1] CJUE : Brita GmbH c. Hauptzollamt Hamburg-Hafen, C-386/08, arrêt (25 février 2010).
[2] Entré en vigueur le 1er juin 2000.
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On sait que, en 1967, à la suite de la Guerre des six jours, Israël a militairement occupé la Cisjordanie, compris Jérusalem Est, la Bande de Gaza et les Hauteurs du Golan, en commençant une activité constante d'édification de colonies de peuplement où il a favorisé (et favorise jusqu'à aujourd'hui) le déplacement de ses citoyens. De plus, l'occupation prolongée a permis à Israël d'exploiter ces territoires et d'exporter dans des États tiers des biens et des marchandises qui y sont produits. Donc, les États européens importateurs de ces produits se sont souvent trouvés devant le problème de savoir si les admettre ou moins, exempts de droits douaniers, sur leur territoire. Comme il est bien aussi connu, la politique d'expansion israélienne dans les territoires occupés a plusieurs fois été condamnée par le Conseil de sécurité des Nations Unies, qui a souvent déclaré comme nulles et non avenues les mesures législatives adoptées et les activités qu'Israël a entreprises pour modifier le statut de ces territoires et leur composition démographique.

Dans le cas en examen, le problème de l'importation de produits fabriqués dans les territoires palestiniens soumis à l'occupation militaire étrangère a été résolu dans le cadre du droit communautaire, mais la question analysée par la Cour de Justice de l'Union Européenne présente des aspects intéressants aussi au niveau du droit international. Il suffit d'anticiper ici que, dans ce cas, la décision communautaire et la position prise à ce propos par certains organes des Nations Unies, en premier lieu par le Conseil de sécurité, ne semblent point se coordonner.

2 Objet de l'affaire

Le problème de l'application de l'exemption fiscale à quelques produits en provenance des territoires occupés a été soumis à la Cour de Justice de l'UE le 30 juillet 2008 par la Section fiscale du Tribunal (*Finanzgericht*) d'Hambourg. Tel organe judiciaire avait été saisi le 10 juillet 2006 par la société *Brita GmbH*, qui importe en Europe des appareils pour la préparation d'eau pétillante et de sirops produits par une société israélienne, la *Soda Club Ltd*, dont l'usine de production est située à Mishor-Adumin, une colonie israélienne en Cisjordanie, à l'est de Jérusalem. La *Brita* recourait au *Finanzgericht* puisqu'elle contestait les droits douaniers que l'administration douanière du port d'Hambourg lui imposait pour l'importation en Allemagne des appareils produits par la *Soda Club*. Selon l'administration douanière il existait, en effet, des doutes fondés sur le fait qu'ils n'étaient pas produits en Cisjordanie; de tels doutes persistaient déjà depuis 2003, lorsque les autorités douanières allemandes demandèrent à l'administration douanière israélienne si les marchandises en question avaient été produites dans les colonies israéliennes en Cisjordanie, dans la Bande de Gaza, à Jérusalem Est ou sur les Hauteurs du Golan. À une telle demande il ne suivit aucune réponse de la part des autorités israéliennes.[4] Les autorités douanières allemandes décidaient

[4] Brita, supra n. 1, par. 33.

alors de refuser la concession à *Brita* du régime fiscal préférentiel sur les produits importés, car il n'avait pas été possible d'établir avec certitude que ces marchandises étaient produites sur le territoire d'Israël et qu'elles rentraient donc dans le cadre d'application de l'Accord UE-Israël.

Pour obtenir l'annulation de cette décision, *Brita* agissait auprès du Tribunal fiscal de Hambourg, qui décidait de suspendre la procédure et de soumettre à la Cour Européenne quelques questions préjudicielles, résumées par cette dernière dans les termes suivants: 1) si les autorités douanières de l'État membre d'importation pouvaient nier la concession du régime préférentiel prévu par l'Accord UE-Israël au cas où les marchandises intéressées étaient originaires de la Cisjordanie; 2) si les autorités douanières de l'État d'importation étaient liées par la preuve de l'origine des marchandises intéressées et par la réponse des autorités douanières de l'État d'exportation,[5] étant donné que ces dernières avaient déclaré que les marchandises étaient « originaires d'une zone sujette à la juridiction douanière d'Israël ».[6]

3 L'arrêt de la Cour

Parmi les dispositions de l'Accord d'association EU-Israël relèvent dans le cas d'espèce l'art. 8, selon lequel « [l]es droits de douane à l'importation et à l'exportation ainsi que les taxes d'effet équivalent sont interdits entre la Communauté et Israël » et l'art. 83, qui définit le domaine territorial de l'Accord en établissant que la discipline ici contenue s'applique « au territoire de l'État d'Israël ». En outre, l'art. 2.2 du Protocole n. 4 joint à l'Accord d'association définit « produits originaires » d'Israël les produits entièrement obtenus en Israël, ainsi que les produits obtenus ici et contenant des matières pas entièrement obtenues sur son territoire, à condition que ces matières aient fait l'objet en Israël de travail ou de transformation suffisantes; et l'art. 32 du même Protocole discipline la procédure de contrôle de la preuve d'origine. Un tel contrôle est effectué « par sondage » par les autorités douanières de l'État d'importation, au cas où elles auraient des doutes fondés en ce qui concerne l'authenticité du document qui accompagne la marchandise, le caractère originaire des produits ou le respect des autres conditions prévues par ce Protocole (par. 1). Sur demande des autorités douanières d'importation, le contrôle est effectué par les autorités douanières du pays d'exportation, qui doivent les informer de leurs résultats au plus tard dans les dix mois (par. 5). En cas de doutes fondés et en l'absence de réponse à l'expiration de ce délai, les autorités de contrôle refusent le bénéfice du traitement préférentiel (par. 6).

[5] *Ibidem*, par. 33 et par. 59.

[6] *Ibidem*, par. 32.

L'Avocat Général dans ses conclusions, observe en outre que l'Accord intérimaire israélo-palestinien sur la Cisjordanie et la Bande de Gaza (Washington, le 28 septembre 1995) revêt une certaine importance. Ceci est un aspect qui n'a pas été considéré par la Cour mais qui aurait peut-être mérité d'être repris dans sa décision. Avec l'Accord de 1995 le territoire de la Cisjordanie a été divisé en trois zones (A, B et C) et Israël s'est engagé à transférer les pouvoirs et les responsabilités du gouvernement militaire et de l'administration israélienne civile à un Conseil palestinien, créé par élections. Dans la zone C, dans laquelle rentre l'installation où se trouve le siège productif de *Soda Club*, Israël maintient seulement une compétence exclusive en matière de sûreté, tandis qu'il a transféré à l'autorité palestinienne aussi bien le pouvoir de conclure des accords économiques avec des États ou des organisations internationales, (art. IX.5.b.1 de l'Accord de 1995) que les pouvoirs en matière de commerce et industrie, y compris l'activité d'importation et d'exportation de marchandises et de produits (Annexe III, Appendice I, art. 6, de l'Accord de 1995).

En ce qui concerne le premier problème, c'est-à-dire si l'État d'importation pouvait nier le régime préférentiel prévu par l'Accord UE-Israël lorsque les marchandises intéressées étaient originaires de la Cisjordanie, la Cour répond de manière positive. Même l'Accord UE-OLP prévoit le pouvoir des autorités douanières palestiniennes de délivrer des certificats d'origine pour les marchandises produites en Cisjordanie; autrement dit, les deux Accords d'association, bien que poursuivant le même objectif (la création d'une zone de libre échange entre les parties), ont une sphère territoriale nettement distinguée, qui permet aux autorités compétentes la délivrance de certificats d'origine seulement pour les marchandises produites et provenant de l'intérieur des respectifs territoires. Par conséquent reconnaître aux autorités douanières d'Israël le pouvoir de délivrer des certificats d'origine pour les produits en provenance de la Cisjordanie équivaudrait à priver les autorités palestiniennes des pouvoirs spécifiques prévus dans l'Accord UE-OLP et à leur imposer l'obligation de ne pas exercer ces mêmes pouvoirs. On arriverait ainsi à créer une obligation pour un sujet tiers sans son consentement, en violation de la règle coutumière codifiée dans l'art. 34 de la Convention de Vienne sur le droit des traités (Vienne, 23 mai 1969).[7] Donc, la Cour observe que les certificats délivrés par une autorité douanière différente de celle expressément indiquée dans l'Accord d'association ne peuvent être considérés valables (par. 57).

En ce qui concerne le deuxième problème, c'est-à-dire si les autorités douanières allemandes étaient liées par la déclaration des autorités douanières israéliennes qui, après un contrôle *a posteriori*, avaient attesté que les marchandises étaient originaires d'une zone sujette à la juridiction d'Israël, la Cour de Justice a d'abord observé que, comme règle générale, le contrôle *a posteriori* sur l'origine effective des marchandises (prévu par l'art. 32 de l'Accord UE-Israël) est basé sur un système de reconnaissance mutuelle, c'est-à-dire que, dans un délai de dix mois, le contrôle des autorités douanières de l'État d'exportation doit être

[7] Entrée en vigueur le 27 janvier 1980.

effectué et le résultat de tel contrôle est, en principe, contraignant pour les autorités de l'État d'importation.[8]

Mais dans le cas d'espèce – la Cour observe – le caractère obligatoire de ce résultat ne peut pas être opposé aux autorités douanières allemandes qui, donc, peuvent nier le traitement préférentiel aux produits objet de l'affaire. La Cour arrive à cette conclusion en partant de la prémisse que « [l]'Union considère (…) que les produits obtenus dans les localités qui sont placées sous administration israélienne depuis 1967 ne bénéficient pas du traitement préférentiel défini dans cet accord »[9]; que, selon l'art. 32.6, du Protocole n. 4 à l'Accord CE-Israël, si la réponse des autorités douanières israéliennes à la demande de contrôle *a posteriori* des certificats d'origine avancée par les autorités douanières allemandes ne comporte pas de renseignements suffisants pour déterminer l'origine réelle des produits, les autorités douanières de l'État d'importation doivent nier le bénéfice du traitement préférentiel relatif aux dits produits[10]; que les autorités douanières israéliennes n'ont fourni aucune réponse précise aux autorités douanières allemandes visant à vérifier si tels produits avaient été fabriqués dans les colonies de peuplement israéliennes en Cisjordanie, dans la bande de Gaza ou sur les Hauteurs du Golan.[11]

4 Importation de produits fabriqués dans les territoires arabes occupés et droit communautaire

Sous l'aspect du droit communautaire, l'arrêt en examen confirme la position plusieurs fois soutenue par l'Union Européenne concernant la défense d'importation par les États membres de produits provenant des colonies de peuplement israéliennes dans les territoires occupés avec bénéfice de traitement tarifaire préférentiel prévu par l'accord d'association UE-Israël. Telle politique a été affirmée en 1997 en ce qui concerne l'importation de jus d'orange provenant d'Israël. En cette occasion, la Commission européenne, dans un avis aux importateurs, les renseignait sur le fait qu'il y avait des soupçons justifiés à propos de la régularité des certificats de circulation présentés dans la Communauté pour l'importation de ces produits en provenance d'Israël, et elle les avertissait de prendre les précautions nécessaires car l'importation de ces produits pouvait déterminer une obligation douanière.[12] En 2001 la Commission confirmait que « Israël a délivré, pour des produits obtenus dans les territoires placés sous son administration depuis

[8] Brita, supra n. 1, par. 60 et s.

[9] *Ibidem*, par. 64.

[10] *Ibidem*, par. 65.

[11] *Ibidem*, par. 66.

[12] Avis aux importateurs – Importations effectuées d'Israël dans la Communauté, Journal Officiel C 338 (8 novembre 1997), p. 13.

1967, des preuves d'origine qui, selon la Communauté, ne leur ouvrent pas le bénéfice du régime préférentiel défini dans les accords »[13]; et, encore, en 2005 la Commission confirmait que « le régime préférentiel sera refusé aux marchandises pour lesquelles la preuve d'origine indique que la production conférant le statut d'origine a eu lieu dans une ville, un village ou une zone industrielle placée sous administration israélienne depuis 1967 ».[14] Suite aux vérifications, donc, l'UE est passée de la négation du traitement préférentiel à un seul produit à la négation de toute une série de marchandises fabriquées dans les colonies situées sur le territoire palestinien.

Le système de contrôle sur la provenance des marchandises israéliennes importées dans le territoire de l'UE a été renforcé le 1er février 2005, avec l'entrée en vigueur d'un accord technique pour la réalisation de l'Accord d'association UE-Israël, adopté le 12 décembre 2004 par le Comité de coopération douanière UE-Israël. Comme prévu par l'accord technique, les entreprises israéliennes exportatrices sont tenues à indiquer sur les certificats d'origine de leurs marchandises l'endroit précis de production avec le code postal de la localité. La délégation de la Commission européenne à Tel Aviv, en coopération avec les ambassades des États membres de l'UE en Israël, a rédigé une liste des colonies de peuplement israéliennes, pour faciliter la détermination des produits importés dans l'UE, qui ne jouissent pas du traitement préférentiel douanier puisque en provenance des territoires palestiniens sous administration israélienne. Les États membres de l'UE semblent se conformer à cette politique. Par exemple, le 26 mars 2009 la Direction britannique du fisc et des entrées douanières, en promulguant un *Customs Information Paper* adressé aux sociétés d'importation de marchandises et de produits d'Israël, faisait remarquer que ce mécanisme de contrôle était entré en vigueur.[15]

Si maintenant le droit communautaire semble avoir clarifié le problème de l'imposition des tarifs douaniers sur les biens provenant des colonies israéliennes, il faut remarquer d'autre part que tel problème s'est prolongé jusqu'à aujourd'hui à cause de l'éclaircissement manqué (et peut-être voulu) de la portée territoriale de l'Accord d'association UE-Israël prévu par son art. 83, qui parle de « territoire de l'État d'Israël ». À défaut de tout éclaircissement, cette disposition a été interprétée de manière extensive par Israël, de sorte à faire rentrer aussi les territoires sous son administration militaire (et rentrant, donc, dans sa juridiction douanière, comme spécifié par les autorités douanières israéliennes dans l'affaire *Brita*[16]). Ce manque de clarté a été souligné plusieurs fois par la même UE. Pendant la réunion du 20 novembre 2001 du Conseil d'Association UE-Israël, l'UE soulignait :

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[13] Avis aux importateurs – Importations effectuées d'Israël dans la Communauté, Journal Officiel C 328 (23 novembre 2001), p. 6.

[14] Avis aux importateurs – Importations effectuées d'Israël dans la Communauté, Journal Officiel C 20 (25 janvier 2005), p. 2.

[15] Tariff Preference: Importation of Goods from Israel – Custom Information Paper (09) 19. http://customs.hmrc.gov.uk.

[16] Brita, supra n. 1, par. 32.

> «la grande importance qu'elle attache à l'application correcte de toutes les dispositions de l'Accord d'association et elle a notamment manifesté une fois encore son souci de voir Israël respecter le champ d'application territorial de l'accord (…). Malheureusement, les efforts entrepris pour résoudre cette question de manière satisfaisante n'ont pas abouti jusqu'ici ».[17]

Cette carence dans l'application de l'Accord UE-Israël et l'exigence que les autorités douanières israéliennes indiquent l'endroit de production sur tous les certificats d'origine ont été confirmées par le Conseil d'Association dans les successives réunions annuelles (octobre 2002, novembre 2003, décembre 2004[18]).

Il faut signaler, d'autre part, que la position critique de l'UE *vis-à-vis* d'Israël à propos de l'exportation de produits fabriqués dans les colonies et dans les territoires occupés résulte récemment plus nuancée. Dans la déclaration finale de la Dixième Session du Conseil d'Association UE-Israël (22 février 2011) l'Union Européenne s'est en effet limitée à observer en termes généraux « the importance of the Technical Arrangement between the EU and Israel on products originating from settlements in the framework of the Association Agreement ».[19]

5 Importation de produits fabriqués dans les territoires arabes occupés et droit international

L'arrêt de la Cour de Justice en examen ici fournit en outre l'occasion pour avancer quelques considérations relatives à la conformité de la politique d'Israël (et de l'UE) au sujet de la « gestion » des territoires palestiniens occupés et des marchandises et des produits qui y sont fabriqués, en particulier à la lumière de la position prise au cours des années par les Nations Unies en ce qui concerne le problème de la colonisation israélienne des territoires palestiniens occupés. L'Assemblée générale et le Conseil de sécurité des Nations Unies ont plusieurs fois condamné la politique d'expansion d'Israël dans les territoires occupés en déclarant nulles, dans leurs résolutions, certaines dispositions nationales visant à annexer des parties de ces territoires et à altérer la composition démographique de la population présente. Il s'agit, en ce qui concerne l'action du Conseil de sécurité, des soi-disant « mesures atypiques », c'est-à-dire de ces mesures de caractère coercitif, pas expressément prévues dans la liste des mesures n'impliquant pas l'emploi de la force envisagées par l'art. 41 de la Charte des Nations Unies, mais

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[17] Deuxième Session du Conseil d'Association UE-Israël, doc. 14271/01 (20 novembre 2001), p. 1.

[18] Troisième Session du Conseil d'Association UE-Israël, doc. 13329/02 (21 octobre 2001), par. 3; Quatrième Session du Conseil d'Association UE-Israël, doc. 14796/03 (17-18 novembre 2003), par. 15; Establishment of the European Union's Position for the Fifth Meeting of the EU-Israel Association Council, doc. 15638/04 (13 décembre 2004), par. 40.

[19] Tenth Meeting of the EU-Israel Association Council Statement of the European Union (22 février 2011), disponible sur http://eeas.europa.eu.

auxquelles le Conseil a recouru fréquemment pour souligner l'illégitimité d'une situation créée par le comportement d'un État.

Sur la question israélo-palestinienne le Conseil de sécurité a adopté des résolutions envisageant des « mesures atypiques », en particulier à partir de la Guerre des six jours de 1967, lorsqu'Israël a commencé sa politique d'expansion dans les territoires occupés militairement. L'action du Conseil dans l'adoption de mesures atypiques *vis-à-vis* d'Israël s'insère dans le cadre de deux lignes directrices, toujours confirmées dans ses résolutions: l'inadmissibilité de l'acquisition des territoires palestiniens obtenus avec l'emploi de la force armée; et la définition d'Israël comme « puissance occupante ». Le « fil conducteur » de ces résolutions est, comme anticipé, la non reconnaissance de situations territoriales illégitimes et la déclaration d'invalidité de certains actes législatifs nationaux adoptés par Israël. Par exemple, avec la rés. 252(1968), adoptée le 21 mai 1968, le Conseil affirmait que « toutes les mesures et dispositions législatives et administratives prises par Israël, y compris l'expropriation de terres et de biens immobiliers, qui tendent à modifier le statut juridique de Jérusalem ne sont pas valables et ne peuvent pas modifier ce statut ».[20]

La condamnation des mesures législatives et des expropriations opérées dans la partie orientale de Jérusalem était confirmée, *inter alia*, par la rés. 267(1969)[21] et par la rés. 298(1971).[22] Même la pratique d'Israël d'établir des colonies dans les territoires palestiniens occupés en 1967 a été définie par le Conseil sans aucune « validité en droit » (voir, par exemple, par. 1 de la rés. 446(1979) du 22 mars 1979[23]).

Enfin, le Conseil a condamné les dispositions législatives et administratives prises par Israël en vue de modifier le statut des territoires occupés. Par exemple, la rés. 478(1980) du 20 août 1980 n'a pas reconnu l'adoption de la soi-disant « loi fondamentale » adoptée par le Parlement israélien le 30 juillet 1980 qui a déclaré Jérusalem la capitale d'Israël. Avec cette résolution le Conseil a en effet considéré « que toutes les mesures et dispositions législatives et administratives prises par Israël, la Puissance occupante (…) en particulier la récente 'loi fondamentale' sur Jérusalem, sont nulles et non avenues et doivent être rapportées immédiatement ».[24] Comme conséquence de la non reconnaissance de la « loi fondamentale », le Conseil demandait aux États membres des Nations Unies d'accepter cette décision et de retirer de Jérusalem leurs missions diplomatiques.[25]

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[20] NU doc. S/RES/252 (21 mai 1968), adoptée avec 13 votes et deux abstentions (Canada et États-Unis), par. 2.

[21] NU doc. S/RES/267 (3 juillet 1969), par. 3 et 4, adoptée à l'unanimité.

[22] NU doc. S/RES/298 (25 septembre 1971), par. 3, adoptée avec 14 votes et une abstention (Syrie).

[23] NU doc. S/RES/446 (22 mars 1979), adoptée avec 12 votes et 3 abstentions (Norvège, Royaume-Uni et États-Unis).

[24] NU doc. S/RES/478 (20 août 1980), adoptée avec 14 votes et une abstention (États-Unis), par. 3.

[25] *Ibidem*, par. 5.

La même approche a été suivie en ce qui concerne l'annexion par Israël des Hauteurs du Golan (occupées avec la Guerre des six jours), réalisée avec une loi de 1981. Avec la rés. 497(1981) du 17 décembre 1981, le Conseil a en effet décidé « que la décision prise par Israël d'imposer ses lois, sa juridiction et son administration dans le territoire syrien occupé des Hauteurs du Golan est nulle et non avenue et sans effet juridique sur le plan international »,[26] et a conséquemment exigé qu'Israël « rapporte sans délai sa décision ».[27] Sur la question israélo-palestinienne il y a donc de nombreuses résolutions contenant la condamnation de certaines mesures prises ou d'actions menées par Israël ou de situations territoriales créées par cet État.[28]

Cependant, du contenu des résolutions susmentionnées, il paraît évident que la condamnation ou la non reconnaissance de situations territoriales illégitimes ou de certaines règles législatives ne peut pas (ou mieux, ne réussit pas à) produire des effets « concrets » à l'intérieur de l'État qui a tenu le comportement ou a adopté les mesures législatives objet de dénonciation. Autrement dit, déclarer nulle et non avenue l'annexion au territoire israélien de Jérusalem Est et des Hauteurs du Golan, ou condamner les colonies de peuplement dans les territoires occupés, ne détermine pas nécessairement un changement de la politique d'Israël qui, en effet, maintient toujours en vigueur ces lois et les colonies dans les territoires occupés (comme, du reste, la condamnation de l'annexion du Koweït par l'Iraq, contenue dans la rés. 662(1990), n'a pas déterminé le retrait iraquien).

Évidemment, l'efficacité des mesures « atypiques » prévues dans les résolutions du Conseil doit être cherchée *en dehors* du domaine territorial de l'État sanctionné. C'est-à-dire qu'il reviendra aux autres États de ne pas appliquer sur son propre territoire et dans son propre système juridique les mesures législatives d'Israël déclarées illégitimes par le Conseil de sécurité. Il s'agit, donc, de nier les effets extraterritoriaux éventuellement produits par la normative nationale ou par la situation territoriale illégitime condamnée par l'organe des Nations Unies. La non reconnaissance continue des effets extraterritoriaux produits par la législation d'un État, comme demandé par le Conseil, produirait donc l'effet d'empêcher la formation d'un titre juridique valable sur le territoire occupé par la puissance occupante.

Dans cette optique on doit apprécier les résolutions du Conseil de sécurité qui nient les effets juridiques extraterritoriaux de l'occupation israélienne des territoires palestiniens. Cela dit, il n'apparaît pas facile d'établir la valeur juridique des résolutions susmentionnées. S'il s'agissait de décisions, les États membres des Nations Unies seraient alors tenus à ne pas importer de produits ou de

[26] NU doc. S/RES/497 (17 décembre 1981), adoptée à l'unanimité, par. 1.

[27] *Ibidem*, par. 2.

[28] Le Conseil a recouru à la condamnation et au désaveu de certaines situations quand il s'est aussi occupé d'autres crises, comme dans la question du Sud-ouest africain, de l'Afrique du Sud et de l'invasion du Koweït par l'Iraq. Voir la rés. 276(1970), NU doc. S/RES/276 (30 janvier 1970) ; la rés. 554(1984), NU doc. S/RES/554 (17 août 1984) ; la rés. 662(1990), NU doc. S/RES/662 (9 août 1990).

marchandises commercialisés par Israël en provenance des territoires occupés. Au soutien de la valeur obligatoire de ces résolutions, on peut observer que, même s'il n'a pas expressément qualifié la politique d'Israël dans les territoires occupés comme « menace contre la paix », le Conseil a reconnu « les conséquences graves que la politique de colonisation ne peut manquer d'avoir sur toute tentative visant à parvenir à une paix d'ensemble, juste et durable au Moyen-Orient »[29]; il a déclaré que les pratiques consistant à établir des colonies de peuplement « font gravement obstacle à l'instauration d'une paix générale, juste et durable au Moyen-Orient »[30] (en soulignant donc le danger de l'élargissement de la crise à toute la région); il a souligné que les actions d'Israël à Jérusalem peuvent porter préjudice « aux intérêts de la communauté internationale, ou à une paix juste et durable ».[31] Il s'est en outre déclaré profondément préoccupé par l'adoption de la « loi fondamentale » sur Jérusalem « avec tout ce que cela implique pour la paix et la sécurité »[32] et que « constitue une violation du droit international »,[33] de plus que « cette action fait gravement obstacle à l'instauration d'une paix d'ensemble, juste et durable au Moyen-Orient ».[34] On peut donc estimer que la politique d'Israël, en élargissant la crise à toute la région, constitue une menace à la paix.

De plus, le caractère contraignant de ces résolutions serait confirmé par le ton catégorique des paragraphes opérationnels, avec lesquels le Conseil a demandé à Israël de mettre fin à sa politique dans les territoires occupés (« [c]onfirme de la façon la plus explicite » et « [i]nvite instamment Israël »,[35] « [d]emande d'urgence une fois à Israël »,[36] « [d]écide » et « [e]xige »,[37] « [c]ensure dans les termes les plus énergétiques »,[38] « [d]éplore vivement »[39]), et par le fait que souvent le Conseil a décidé de se réunir par la suite pour adopter éventuellement d'autres mesures dans le but d'induire Israël à démordre de ses actions.[40]

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[29] Rés. 465(1980), NU doc. S/RES/465 (1 mars 1980), Préambule.

[30] Rés. 446(1979), NU doc. S/RES/446 (22 mars 1979), par. 1 ; rés. 465(1980), NU doc. S/RES/464 (1980), 19 février 1980, par. 5.

[31] Rés. 298(1971), NU doc. S/RES/298 (25 septembre 1971), par. 4.

[32] Rés. 478(1980), NU doc. S/RES/478 (20 août 1980), Préambule.

[33] *Ibidem*, par. 2.

[34] *Ibidem*, par. 4.

[35] Rés. 298(1971), NU doc. S/RES/298 (25 septembre 1971), par. 3 et 4.

[36] Rés. 267(1969), NU doc. S/RES/267 (3 juillet 1969), par. 5.

[37] Rés. 497(1981), NU doc. S/RES/497 (17 décembre 1981), par. 1 et 2.

[38] Rés. 267(1969), NU doc. S/RES/267 (3 juillet 1969), par. 3; rés. 478(1980), NU doc. S/RES/478 (20 août 1980), par. 1.

[39] Rés. 465(1980), NU doc. S/RES/465 (1 mars 1980), par. 6.

[40] Rés. 267(1969), NU doc. S/RES/267 (3 juillet 1969), par. 7 ; rés. 446(1979), NU doc. S/RES/446 (22 mars 1979), par. 7; rés. 465(1980), NU doc. S/RES/465 (1 mars 1980), par. 9; rés. 497(1981), NU doc. S/RES/497 (17 décembre 1981), par. 4.

D'autre part, le fait que le Conseil n'a pas utilisé l'expression « menace à la paix » dans ces résolutions[41] porterait à conclure qu'il considère la situation en examen pas encore si grave pour intervenir avec des mesures coercitives; et aussi l'emploi de l'expression « demande aux États membres », pour demander aux États de ne pas reconnaître la situation territoriale créée par Israël ou de retirer les ambassades de Jérusalem, ferait pencher pour le caractère non obligatoire de ces requêtes.

S'il n'est point facile d'établir si les résolutions du Conseil ici examinées prévoient l'obligation pour les États de ne pas importer de produits ou de marchandises fabriqués dans les colonies israéliennes, il faut cependant considérer que cette obligation devrait découler, du moins indirectement, de l'interdiction pour la puissance occupante d'exploiter les ressources du territoire occupé dans son exclusif intérêt. Cette interdiction trouve son fondement dans le principe de l'inadmissibilité de l'acquisition de territoires obtenus avec la force armée; principe affirmé par le Conseil de sécurité depuis 1967 dans presque toutes les résolutions relatives au problème des territoires arabes occupés (dans lesquelles il a aussi explicitement défini Israël comme « puissance occupante ») et confirmé maintes fois par l'Assemblée générale,[42] dont la valeur coutumière a été confirmée par la Cour internationale de justice.[43] L'interdiction d'exploiter les ressources d'un territoire occupé doit être aussi évaluée à la lumière de quelques instruments de droit international de guerre et humanitaire, comme le Règlement IV concernant les lois et coutumes de la guerre sur terre (La Haye, le 18 octobre 1907)[44] et la Convention IV relative à la protection des personnes civiles en temps de guerre (Genève, le 12 août 1949),[45] l'application desquels aux territoires arabes occupés a été confirmée maintes fois par le Conseil de sécurité lui-même et par la Cour internationale de justice dans son avis de 2004 sur les *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*.[46] Du régime de l'occupation de guerre s'ensuit que la puissance occupante n'acquiert pas la souveraineté sur le territoire, mais exerce seulement une autorité *de facto*; l'occupation doit être une situation temporaire, les droits de l'occupant sur le territoire sont transitoires et accompagnés par l'obligation de respecter le droit et

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[41] Par contre, l'Assemblée générale a qualifié expressément le comportement d'Israël comme une menace contre la paix et la sécurité internationales. Voir, par exemple, la rés. ES-10/2, NU doc. A/RES/ES-10/2 (5 mai 1997).

[42] Voir, par exemple, la Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les États conformément à la Charte des Nations Unies, NU doc. A/RES/2625(XXV) (24 octobre 1970).

[43] CIJ : Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. États-Unis), arrêt (27 juin 1986), par. 98 et s.; CIJ : Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif (9 juillet 2004), par. 87.

[44] Annexé à la Convention (IV) concernant les lois et coutumes de la guerre sur terre (La Haye, le 18 octobre 1907), entré en vigueur le 26 janvier 1910.

[45] Entrée en vigueur le 21 octobre 1950.

[46] Mur dans le territoire palestinien, supra n. 43, par. 90 et s.

l'administration existante; dans l'exercice de ses pouvoirs, la puissance occupante doit concilier ses nécessités militaires avec le respect des intérêts et des besoins de la population. Enfin, l'occupant ne peut pas exercer son autorité pour réaliser ses intérêts ou satisfaire les besoins de sa population. En aucun cas il peut exploiter les habitants, les ressources du territoire occupé pour les intérêts de son territoire ou de sa population. En partant de ces prémisses, la Cour a reconnu l'illégitimité des colonies israéliennes,[47] en rappelant en particulier la violation de l'art. 49.6 de la Convention IV de Genève.[48] Cette constatation est particulièrement significative, si on rappelle comment la question posée à la Cour ne concernait pas la conformité ou non au droit international des colonies israéliennes, mais avait seulement pour objet les conséquences de l'édification d'un mur (même si, comme observé par la Cour, les deux problèmes ne font qu'un[49]). Le fait que la Cour ait souligné la nécessité de s'occuper de la licéité des colonies – en reprenant et en confirmant à ce propos la position du Conseil de sécurité – peut donner une idée de comment cette problématique est particulièrement ressentie par les organes des Nations Unies et de la communauté internationale.

Comme l'établissement de colonies dans les territoires occupés constitue un fait illicite international d'Israël, de cette situation découlent les conséquences « typiques » de la responsabilité internationale de l'État, déterminées par la Commission du droit international dans le Projet d'articles sur la responsabilité de l'État pour fait internationalement illicite.[50] Il s'agit de l'obligation de mettre fin au comportement illicite et le rétablissement de la situation qui prévalait avant la violation, ou de prêter une indemnisation proportionnée au cas où il ne serait pas possible d'effectuer une restitution en forme spécifique.[51] Pour ce qui relève ici, il faut cependant souligner que la situation créée par Israël dans les territoires occupés détermine aussi des obligations pour les autres États, en particulier l'obligation de ne pas reconnaître la situation que *de facto* Israël est en train de créer dans les territoires avec sa politique d'expansion et l'obligation de ne fournir aucune assistance ou aide qui consentirait à Israël de maintenir ou de continuer la construction des colonies. Voilà, donc, que l'obligation de ne pas prêter assistance à Israël se traduit dans l'interdiction pour les États d'importer dans leur territoire national des marchandises ou des biens produits dans les colonies israéliennes.

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[47] Mur dans le territoire palestinien, supra n. 43, par. 120.

[48] Article 49.6 : « La Puissance occupante ne pourra procéder à la déportation ou au transfert d'une partie de sa propre population civile dans le territoire occupé par elle ».

[49] Mur dans le territoire palestinien, supra n. 43, par. 122 : « le tracé choisi pour le mur consacre sur le terrain les mesures illégales prises par Israël et déplorées par le Conseil de Sécurité » ; et par. 133 : « cette construction, combinée à l'établissement des colonies de peuplement (…) tend à modifier la composition démographique du territoire palestinien occupé ».

[50] Commission du droit international, Projet d'articles sur la responsabilité de l'État pour fait internationalement illicite, NU doc. A/56/10 (2001) ; approuvé par l'Assemblée Générale avec rés. 56/83, NU doc. A/RES/56/83 (28 janvier 2002).

[51] *Ibidem*, art. 28 et s. La Cour a déterminé les mêmes conséquences *vis-à-vis* Israël pour la construction du mur ; cf. Mur dans le territoire palestinien, supra n. 43, par. 149 et s.

Cette conclusion semble confirmée par le fait que les considérations de la Cour internationale de justice sur les conséquences de l'édification d'un mur peuvent aussi s'appliquer en ce qui concerne les conséquences de l'installation des colonies israéliennes dans les territoires occupés. Les deux actions d'Israël ici considérées violent, en effet, les mêmes règles de droit international. En particulier, comme l'édification du mur, la construction des colonies détermine aussi la violation du droit international humanitaire – *inter alia*, l'art. 49 de la Convention IV de Genève, qui interdit à la puissance occupante de transférer sa population civile dans le territoire occupé, et l'art. 53 de la même Convention, qui interdit à l'occupant de détruire les biens meubles ou immeubles de la population soumise à l'occupation.[52] On peut donc considérer que les réactions des États tiers face à ces deux situations (construction du mur et établissement des colonies) doivent être les mêmes. Et partant de la prémisse – comme confirmé par la Cour dans son avis – qu'Israël a violé des obligations *erga omnes*, en particulier l'obligation de respecter le droit à l'autodétermination du peuple palestinien et les obligations du droit international humanitaire, il s'ensuit, comme observé par la Cour, « que tous les États sont dans l'obligation de ne pas reconnaître la situation illicite découlant de la construction du mur dans le territoire palestinien occupé, y compris à l'intérieur et sur le pourtour de Jérusalem-Est. Ils sont également dans l'obligation de *ne pas prêter aide ou assistance au maintien de la situation créée* par cette construction » (italiques ajoutés).[53]

6 Conclusions

À la lumière de tout ce qui a été observé jusqu'ici, on peut conclure que ce que la Cour de Justice de l'Union européenne a décidé dans l'arrêt ici examiné n'est point satisfaisant du point de vue du droit international. La Cour s'est évidemment limitée à répondre au *petitum*, c'est à dire si les produits objet de l'affaire pouvaient jouir du traitement préférentiel. Dans le raisonnement qui a porté à la formulation de la décision, avec un peu plus de « courage juridique » elle aurait néanmoins pu mettre en évidence, *obiter dictum*, la contrariété au droit international de l'exportation par Israël dans les États membres de l'Union européenne de produits et marchandises fabriqués dans les territoires occupés ou dans les colonies édifiées dans les mêmes territoires. Elle aurait pu rappeler les résolutions du

[52] La construction du mur, selon un tracé qui pénètre dans les territoires occupés, a causé la destruction de champs cultivés, de puits, de serres et l'arrachement d'arbres fruitiers et d'oliviers ; cf. Mur dans le territoire palestinien, supra n. 43, par. 133. Même l'édification des colonies de peuplement entraîne souvent la disparition de champs cultivés, la réquisition de territoires et la destruction d'immeubles palestiniens : voir Rapport du Comité spécial chargé d'enquêter sur les pratiques israéliennes affectant les droits de l'homme du peuple palestinien et des autres Arabes des territoires occupés, NU doc. A/64/339 (9 septembre 2009), par. 58.

[53] Mur dans le territoire palestinien, supra n. 43, par. 159.

Conseil de sécurité susmentionnées et tenir compte, par exemple, « des lignes guides » de la Communauté européenne sur le problème moyen-oriental formulées dans la Déclaration de Venise du 13 juin 1980, où les États membres s'engageaient à « n'accepte[r] aucune initiative unilatérale qui ait pour but de changer le statut de Jérusalem » (par. 8), reconnaissaient que « les colonies de peuplement israéliennes représentent un obstacle grave au processus de paix au Moyen-Orient » et soulignaient que « ces colonies de peuplement ainsi que les modifications démographiques et immobilières dans les Territoires arabes occupés sont illégales au regard du droit international » (par. 9). En partant de ces prémisses, c'est un contresens que d'estimer illégitimes les colonies de peuplement et puis permettre l'importation de biens et produits fabriqués dans les territoires occupés.

Il faut aussi considérer que le principe de légalité affirmé par le Conseil de sécurité en condamnant ces situations territoriales – et qui résulte essentiellement du principe de l'inadmissibilité de l'acquisition des territoires palestiniens obtenus avec la force armée – se heurte inévitablement avec la situation *de facto* déterminée par la même occupation territoriale illégitime. L'on se trouve donc face à la contraposition entre le principe de légalité internationale et le principe d'effectivité ou, si l'on veut, du « fait accompli » que l'État occupant cherche à réaliser et à renforcer au cours du temps. S'opposer aux effets produits par une situation territoriale illégitime apparaît particulièrement difficile si l'on considère que l'État occupant continue, évidemment, à entretenir et développer ses relations internationales avec les autres sujets de la société internationale; rapports légitimes, si ils produisent des effets à l'intérieur de son propre territoire, mais qui peuvent créer des incertitudes ou une certaine « confusion juridique » si l'État occupant cherche à impliquer dans ses relations internationales, à son avantage exclusif, aussi le territoire étranger illégitimement administré (par exemple, en exportant des biens ou des marchandises produits dans le territoire occupé). En de pareilles circonstances, il appartient aux autres sujets internationaux de s'opposer à la situation que la puissance occupante veut créer dans le territoire occupé et à opérer d'une manière telle à (ré)affirmer la légalité internationale et à s'opposer à la politique du « fait accompli ». Les résolutions du Conseil de sécurité ici analysées ne font que réaffirmer l'engagement des États tiers de méconnaître une situation territoriale illégitime et les actions de l'État occupant qui ont pour but de rendre non modifiable la situation.

Addressing Irregular Immigration Through Criminal Penalties: Reflections on the Contribution of the ECJ to Refining and Developing a Complex Balance

Bruno Nascimbene and Alessia Di Pascale

1 Introductory Remarks

The significant increase in migration in recent decades has raised concerns regarding the management and control of flows, particularly those of irregular migrants. The tools and mechanisms for containment have thus been progressively placed at the center of the debate not only nationally, but also supranationally. In this context the European Union (EU), to which specific competence in this matter was attributed by the Treaty of Amsterdam,[1] although shared with Member States, has played an important role by adopting numerous provisions since 1999.[2]

Besides the issue of controlling illegal immigration as a whole, the debate is, however, being increasingly focused worldwide on the so-called criminalization of irregular migrants. In recent years, in fact, many states have gradually introduced criminal penalties applicable to people who enter, re-enter, or stay illegally on their

Sections 1, 3, 4, 7 have been written by Bruno Nascimbene and Sects. 2, 5, 7 by Alessia Di Pascale

[1] Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts (Amsterdam, 2 October 1997), entered into force on 1 May 1999.

[2] With regard to the immigration policy of the European Union, see, among the many contributions, De Bruycker and Urbano de Sousa 2004; Nascimbene 2009; Favilli 2010; Kaddous and Dony 2010; Adinolfi 2011.

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territory, instead of resorting to administrative measures. As for Italy, it is worth recalling the heated debate that followed the introduction of the crime of illegal immigration in 2009 in the Consolidated Act regulating Immigration and the Status of Foreigners (Legislative Decree no. 286/98, hereinafter Consolidated Act). Pursuant to the newly introduced Article 10*bis* of the Consolidated Act, unless the fact constitutes a more serious offence, the alien who enters or remains on the national territory in breach of immigration law requirements commits a criminal offence punishable with a fine of between 5,000 and 10,000 euros.[3]

The adoption in Italy of increasingly coercive measures for the purpose of preventing the phenomenon, semantically placed in so-called security packages, fits into an international context of the criminalization of irregular migrants. A trend which is observable particularly since the last decade, exacerbated by the impact of the political terrorist attacks in 2001 and then which spread in many countries: in the European Union, the United States, and also in South-East Asia and Australia.[4]

The following considerations dwell on an analysis of recent developments concerning this issue at the international level and within the European Union whereby, in 2011, the EU Court of Justice provided significant guidance on the scope of relevant EU legislation, precisely in relation to the application of criminal sanctions against third-country nationals on the ground of their illegal entry and/or stay.

2 The Evolution of the Treatment of Foreigners in the International Context

Leaving aside considerations of the effectiveness and appropriateness of criminal sanctions which are applicable to the entry and illegal stay of foreigners, related to both immigration and criminal policy,[5] from a legal point of view, the theme lends itself to some reflections concerning the relationship between the foreigner and the State which are also functional to an examination of the evolution of the treatment of aliens.

In "classic" international law, the control of persons entering the territory, and their ultimate expulsion, were in fact considered to be among the prerogatives of state sovereignty. At the end of the nineteenth century, in the Preamble to the International Rules on the Admission and Expulsion of Aliens it was asserted that "for each State, the right to admit or not admit aliens to its territory or to admit them only conditionally or to expel them is a logical and necessary consequence of

[3] On the most recent changes to Italian immigration legislation and in particular on the use of criminal tools, see Renoldi 2009; Caputo 2009; Masera 2009.

[4] See Fernandez et al. 2009; Di Pascale, forthcoming.

[5] On these aspects see in particular Viganò 2010.

its sovereignty and independence."[6] These principles have also found expression in the case law of the European Court of Human Rights (ECtHR), which on numerous occasions stated that each State has the right to control the entry, residence, and expulsion of foreigners.[7]

In respect of these statements, the definition of the standard treatment of the foreigner today appears, however, to be significantly influenced by the international law of human rights, which supplements or replaces, as necessary, the standard itself. This view is largely shared in the legal literature,[8] which emphasizes the contribution of international instruments on human rights, first and foremost the UN Charter and the Universal Declaration of Human Rights. A summary of this approach is United Nations General Assembly Resolution no. 40/144 (1985) which approved the "Declaration on human rights of individuals who are not citizens of the country in which they live".

In recent decades the status of foreigners appears to have evolved, primarily thanks to the emphasis on the principle of nondiscrimination, that together with that of equality is one of the key principles of the international system of human rights. Affirmed in the Universal Declaration of Human Rights (Article 2) and the UN Charter (Article 1), the prohibition of discrimination has found an express recognition in all international instruments protecting human rights. It is used with increasing frequency to evaluate the possibility and legitimacy of limitations to the status of aliens. As was stated by the Special Rapporteur Weissbrodt (in his final report, summarizing the general principles and exceptions applicable to the rights of noncitizens), international human rights law requires the equal treatment of citizens and noncitizens.[9] Exceptions to this principle may only be made if they are to serve a legitimate State objective and are proportional to the achievement of that objective.

In light of the current trends, the issue of suitable tools to control illegal immigration, and especially the use of criminal sanctions, has given rise to different positions.

Worthy of particular mention are the reflections and the analysis which are taking place both within the United Nations, in particular through the work of the Special Rapporteur for the human rights of migrants, and in a regional context by the Council of Europe Commissioner for Human Rights. In recent years, they have both repeatedly dealt with this profile.

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[6] Preamble to the International Rules on the Admission and Expulsion of Aliens, adopted by the Institute of International Law on 9 September 1892.

[7] Among the many decisions, see especially ECtHR: Abdulaziz, Cabales and Balkandali v. United Kingdom, 9214/80-9473/81-9474/81, Judgment (28 May 1985).

[8] For a recent analysis see Nascimbene 2013; see previously Villani 1987; Tiburcio 2001; Bogusz 2004; Weissbrodt 2008; Chetail 2007; Benvenuti 2008; Nascimbene and Di Pascale 2010; Aleinikoff and Chetail 2003; Pisillo Mazzeschi et al. 2010; Flauss 2011.

[9] Prevention of discrimination. The rights of noncitizens, drafted by the Special Rapporteur Weissbrodt, appointed by the Commission for Human Rights of the UN Subcommittee for the promotion and protection of human rights, who concluded his work in 2003, UN Doc. E/CN. 4/Sub. 2/2003/23 (26 May 2003).

In 2011, the EU Court of Justice upheld some important principles on the subject, ruling on the "Return Directive".[10] First, this took place with the judgment of April 28, 2011 *(El Dridi),* issued in relation to a provision of the Italian legislation and in a context of default in the transposition of the Directive, and subsequently in its judgment of 6 December 2011 *(Achughbabian*) that provided further interpretative guidance.[11] It is worth noting that the Court of Justice has jurisdiction to give preliminary rulings on the interpretation of EU law (primary and secondary) under Article 267 of the Treaty on the Functioning of the European Union (TFUE),[12] the subject of its examination being the rules adopted by the EU institutions, which are the outcome of a decision process that sees the full involvement of the Member States within the Council. It is therefore an interpretation formulated in the light of the principles underlying the law of the European Union, also based on provisions that express the views of States (the Council), in a context (immigration) which is, furthermore, an especially sensitive issue.

Particularly interesting is therefore a comparison with other positions at the international level, expressing concerns oriented toward the development of absolute values and guided or determined, therefore, by the need to protect fundamental rights, rather than underlying concerns related to the protection of state prerogatives.

3 The "Return Directive" and the Judgment of the ECJ in the *El Dridi* Case: The Partial Fulfillment by the Italian Legislature

In EU migration policy, measures to tackle illegal immigration have aroused great interest since the establishment of the new competence. The regulatory action in this area (around 20 acts) has been mainly aimed at strengthening the control and surveillance of EU external borders, facilitating the return of undocumented migrants, and also at defining the penalties, whether administrative or criminal,

[10] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348 of 24 December 2008, p. 98.

[11] ECJ: Hassen El Dridi, alias Soufi Karim, C-61/11 PPU, Judgment (28 April 2011); see also the position of Advocate General Mazák. See the comments in Guida al diritto, 2011, 25, p. 9 ff.; Amalfitano 2011; Favilli 2011; Giliberto 2011; Viganò and Masera 2012; Raffaelli 2011; Liguori (2011) ECJ: Alexandre Achughbabian v. Préfet du Val-de-Marne, C-329/11, Judgment (6 December 2011).

[12] As renamed and amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Lisbon, 13 December 2007), entered into force on 1st December 2009.

applicable against those (carriers, but also employers) who are involved in illegal immigration.[13]

Among these measures the "Return Directive" is of particular importance. Adopted after three years of negotiations, it has provoked strong reactions from various parties (associations, trade unions, and also many governments of Latin American and African countries), focusing in particular on compatibility with fundamental rights. In implementing the Hague Programme, which had called for the establishment of an effective policy on expulsion and return, the Directive introduced a uniform framework for all Member States, both in relation to the expulsion of illegal immigrants and detention for the purpose of their removal.[14]

As mentioned above, in recent times the ECJ has pronounced itself on two occasions in relation to the legitimacy of criminal sanctions imposed on irregular migrants, in one case referring to Italian rules, in the other to French legislation, thus contributing to better defining the limits within which national authorities can act.

(a) The judgment in *El Dridi* concerned the possible incompatibility, then being retained, of certain Italian standards: in particular Article 14.5*ter,* of the Consolidated Act in relation to Articles 15 and 16 of the Return Directive which regulate the detention of foreigners and defining the terms and conditions thereof. The Court of Justice criticized not only the specific provision which made noncompliance with the order of the police authority to leave the country within a given deadline punishable with imprisonment, but also "any [other] provision of Legislative Decree no. 286/1998 which is contrary to the result of the Directive".[15] The national rules in question were in fact held to be contrary to the spirit and the effectiveness of the Directive, because they pursued an aim which was opposite to that underlying the Directive itself: essentially, the imprisonment of illegal migrants instead of a voluntary return. Purposes that, obviously, must be kept in mind in assessing the correctness of the transposition.

The national legislation in question was therefore declared incompatible with the Directive, resulting in the obligation not to apply it by the courts and national authorities, in view of the direct effect of the relevant provisions (Articles 3 and 16). The Court had also stated on a previous occasion that Article 15 had immediate application.[16]

The Court emphasized and reminded the national court that in so doing it should take due account of the principle of retroactivity concerning the more lenient penalty *(lex mitior),* which forms part of the constitutional traditions common to the Member States and has the nature of a general principle of EU

[13] For a detailed analysis of the measures adopted by the EU in the field of irregular migration see Merlino and Parkin 2011. See also Di Pascale et al. 2011; Nascimbene and Di Pascale 2011.

[14] For a commentary on the Directive see Maiani 2008/2009; Baldaccini 2009.

[15] See El Dridi, supra n. 11, para 61.

[16] ECJ: Said Shamilovich Kadzoev (Huchbarov), C-375/09 PPU, Judgment (30 November 2009).

law.[17] The Italian courts (both criminal and administrative courts) have correctly followed this principle.

(b) The judgment has various profiles of interest, both with regard to EU law and national law, particularly in relation to the more recently adopted transposition legislation.

First, it represented the first application of the urgent preliminary ruling procedure (pursuant to Article 104*ter* of the Rules of Procedure of the Court) in a case concerning a person who is being detained. The procedure took place quickly (after just over two months), thereby fully responding to the need for urgency.[18]

Second, the judgment contains an extensive analysis of the Directive; in particular, it sets out specifically the procedure to be applied by each Member State for returning third-country nationals whose stay is irregular, as stated in Articles 6.1 and 6.6, and determines the order of the various successive stages of that procedure. The Directive—states cannot disregard this when transposing it—"does not allow those States to apply stricter standards in the area that it governs."[19] Priority is, first of all, to be given to voluntary compliance: this purpose should have been taken duly into account also by the Italian legislature, whereas with Law no. 129/2011, also adopted to transpose the Directive, the forced removal procedure seems to be privileged. A voluntary return is provided for (and it could not be otherwise), but is being presented as an alternative to coercive measures, and in contrast, therefore, with the objective pursued by the Directive. Only in two cases may Member States limit or deprive the alien of his or her liberty by resorting to detention: (a) when the state enforces the decision to return in the form of removal (because of the risk of absconding or the person concerned poses a risk to public policy, public security, or national security, he/she has not been granted the period for voluntary compliance, or if granted, such period has not been observed); (b) when, after assessing the individual condition of the person concerned, there is a risk that removal is impaired by his/her conduct. Exceptional circumstances, therefore, are intended in a restrictive sense.

Being a deprivation of liberty, detention is moreover subject to stringent limits: it must have a duration for as short a period as possible and be only maintained as long as removal arrangements are in progress and executed with due diligence, should be reviewed at reasonable intervals and must in any case cease as soon as it appears that there is no longer a reasonable prospect of removal. The deprivation of personal liberty, then, is only instrumental to the objective pursued by the Directive, i.e., voluntary return.

Third, the judgment emphasized the importance of the protection of human rights and recalled, in this regard, European Court of Human Rights case law,

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[17] In these terms, see among others, ECJ: Criminal proceedings against Silvio Berlusconi, Sergio Adelchi and Marcello Dell'Utri and Others, Joined Cases C-387/02, C-391/02 and C-403/02, Judgment (3 May 2005), paras 67–69; Jager v. Amt fur Landwirtschaft Butzow, C-420/06, Judgment (11 March 2008), para 59.

[18] On this procedure see: Condinanzi and Mastroianni 2009; Tizzano and Gencarelli 2009.

[19] See El Dridi, supra n. 11, para 33.

according to which the principle of proportionality requires that the detention of a person against whom a deportation or extradition procedure is under way should not continue for an unreasonable length of time, that is, its length should not exceed that required for the purpose pursued.[20]

All these concerns appear, however, to have been disregarded by the Italian legislature that should have expressly referred to them in particular in transposing the Directive through Law n. 129/2011.

4 The Successive Position Taken by the ECJ: The Judgment in *Achughbabian*

The principles expressed in the judgment in *El Dridi* were further confirmed and clarified in the judgment in *Achughbabian*.[21] The preliminary ruling had been referred by a French Court in relation to a provision contained in the Code on the entry and residence of foreigners and the right to asylum (CESEDA), Article 621.1, which provides for the punishment of imprisonment being imposed on a third-country national by reason of his illegal entry or presence in the country.

In this respect, the ECJ has reaffirmed its guidance that neither Directive 2008/115/EC, which concerns, as stated above, the return of irregular migrants, nor the relevant rules contained in the Treaty on the functioning of the European Union preclude, in principle, Member States from having competence in criminal matters in the area of illegal immigration and stay. Therefore, states may legitimately classify the irregular residence of third country nationals as an offence and lay down criminal sanctions, including imprisonment.

Confirming the *El Dridi* judgment, the Court reiterated, however, that Member States cannot apply criminal legislation capable of imperiling the realization of the aims pursued by the said directive, thus depriving it of its effectiveness. It is therefore in light of this parameter that the examination of the legality of the procedure must be conducted. If the aim of the Directive is the return of third-country nationals, "clearly, the imposition and implementation of a sentence of imprisonment during the course of the return procedure provided for by Directive [….] does not contribute to the realisation of the removal which that procedure pursues" and consequently national legislation such as that at issue is "likely to thwart the application of the common standards and procedures established by the Directive and delay the return."[22]

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[20] ECtHR: Saadi v. United Kingdom [GC], 13229/03, Judgment (28 January 2008). For some remarks on the subject, the limits of deprivation of liberty and the conditions or standards to be met, see Nascimbene 2011.

[21] For a commentary see Raffaelli 2012.

[22] See in particular paras 37 and 39.

If it is true that the detention of a person against whom a return decision has been issued falls within the scope of the Directive and can be intended as a "measure" provided under Article 8 of the Directive, i.e., coercive measures that may be adopted by the State to enforce a return decision, the penalty of imprisonment in the course or during the return procedure is not an appropriate coercive measure, however. It is, in fact, such as to impede the application of the rules and procedures established by the Directive. This leads to the conclusion that detention during the return procedure impairs or hinders the enforcement of the return decision and is inconsistent with the Directive.

Member States may not provide for the imprisonment of third-country nationals illegally staying in cases where these persons (under the rules and procedures established by the Directive) must be removed and may, at most, subject them to detention in view of the preparation and implementation of such removal. The directive does not prevent, and therefore allows, the imposition of criminal sanctions against third-country citizens who are subject to a return procedure and who reside illegally on the territory of a Member State where there is no justifiable reason that precludes the return, under the limitation mentioned above: i.e., sanctions cannot be applied in the course or during the procedure.[23]

5 The Limits to the Adoption of Criminal Sanctions Against Irregular Migrants: The Principle Stated by the ECJ

Where a foreign national staying illegally has not left the country voluntarily, either because (in very exceptional cases) he/she could not benefit from this procedure in the absence of certain conditions, or because he/she did not comply with the deadline for removal, he/she can be expelled, taking all necessary measures, including coercive measures.

If immediate removal is not possible, and if other less coercive measures cannot be applied, Member States may resort to detention that (as mentioned) is instrumental and is still a *last resort* measure, serving only to prepare for the return, in compliance with the principle of proportionality and the fundamental rights of the person. The Court's warning is clear: states cannot "remedy the failure of coercive measures" (such as detention) adopted in order to carry out a forced removal.[24] The principle established in *El Dridi*, then reiterated in *Achughbabian*, is a general principle.

The consequences of this rule are important in immigration matters. Pursuant to Italian law, after the end of detention, the alien is again expelled, but the same reasons that previously allowed for a forced removal do not allow a voluntary

[23] Paras 46 and 48.

[24] See El Dridi, supra n. 11, para 58.

return after the issuance of the (new) measure of removal; thus, the behavior of the alien integrates the offence examined by the Court. This "perverse" national system was in fact criticized, and the national courts (not only the referring judge), due to the effect *erga omnes* of the ECJ preliminary rulings, have taken this into account, marking the fate of completely incompatible standards with EU law.[25]

Despite a critical reading proposed by some members of the government, the ruling has called into question the *rationale* of the criminalization of irregular entry and stay of foreigners. This implied a change to the Italian legislation in force, as in fact happened (though Law no. 129/2011),[26] although as mentioned above, many of the principles expressed by the ECJ were not adequately addressed; but overall, the impact is even broader and would require a "rethinking" of a general nature that has not yet taken place in Italy, despite the doubts and questions that arise for those who must interpret and apply the relevant legislation.

6 The Criminalization of Irregular Migrants and the Positions of the Council of Europe Commissioner for Human Rights and the Special Rapporteur on the Human Rights of Migrants

Compared to the position taken by the ECJ in relation to the interpretation of EU law, different approaches have been affirmed in other contexts at the international and European level.

(a) The appointment by the United Nations Commission on Human Rights of a Special Rapporteur "for the human rights of migrants", with the task, variously articulated, to verify and control the conduct of States regarding the protection of human rights, to provide communications to governments, visits, and conduct thematic studies,[27] confirms the interest in the issue of the rights of foreigners.

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[25] On *erga omnes* effectiveness and, in particular, the obligations of the State following a judgment on an "order for reference from which it is apparent that the legislation is incompatible with Community law", the national authorities having "to take the general or particular measures necessary to ensure that Community law is complied with in their territory", see ECJ: Office national des pensions v. Emilienne Jonkman and Hélène Vercheval and Noëlle Permesaen v. Office national des pensions, Joined Cases C-231 to C-233/06, Judgment (21 June 2007), paras 36–41 (with reference to the case law).

[26] With the Law Decree no. 89 of 23 June 2011, converted with amendments by the Law no. 129 of 2 August 2011, the Consolidated Act was amended to transpose Directive 2008/115/EC, in light of the statements upheld by the EU Court of Justice.

[27] The first appointment occurred in 1999; the mandate has been extended and renewed over the years and in June 2011, during the 17th session of the UN Human Rights Council, the new Special Rapporteur, Mr. François Crépeau, was appointed to remain in office until 2014. See Morrone 2005.

In this context some significant statements in relation to the treatment of irregular migrants can be discerned. In particular, the report prepared in 2010 by the Special Rapporteur on the human rights of migrants, Bustamante, was specifically dedicated to the impact of the criminalization of migrants, on their protection and their enjoyment of fundamental rights. The Special Rapporteur stated clearly that migration policies that take into account only the aspects related to security and border control are absolutely lacking in humanitarian terms, and have a negative impact on migrants' enjoyment of fundamental rights, without actually discouraging illegal immigration. The (negative) consequences of the criminalization of migration in relation to the enjoyment of fundamental rights have been well underlined and States were reminded of their responsibility concerning the disproportionate use of criminal justice as an instrument to repress irregular flows.[28]

His successor, appointed in 2011, has continued in the same direction and has taken an even clearer position, stating before the UN General Assembly in October 2011 that "illegal immigration is not an offense."[29] He therefore emphasized the requirement that, where measures of an administrative nature are taken as is often the case with detention in view of the expulsion of irregular migrants, adequate procedural safeguards and access to an effective remedy must be ensured.

To confirm the change of perspective in framing the treatment of foreigners and the evolution of the theme, it is worth noting some of the statements made by the new Special Rapporteur on the same occasion. He affirmed that migrants are entitled to equal rights with citizens on the basis of the *International Bill of Human Rights.* Only two exceptions are allowed: the right to vote and stand for elections and the right to enter and stay in another country. All other rights then belong to everyone, regardless of their legal *status.* Any distinctions based on the status of foreigners can be made, provided, however, that they are not discriminatory and that they are justified in light of the system for the protection of fundamental rights.

This is an important statement which attaches primary importance to the protection of individual rights, without further reference to the sovereignty of the State. The latter still retains the right to regulate the access and residence of foreigners, but the framework of fundamental rights marks the limits of its action in this area.

(b) In the European regional context, the position taken by the Council of Europe Commissioner for Human Rights should be mentioned. Established in 1999, the Commissioner's mandate is generally related to the protection of human rights, whose situation in the Member Countries must be assessed (playing field missions and publishing ad *hoc* reports*).* The protection of the fundamental rights of various categories of foreigners, especially the most vulnerable of these

[28] Report of the Special Rapporteur on the human rights of migrants, Mr. Jorge Bustamante, of 3 August 2010, A/65/222.

[29] Statement by Mr. François Crépeau, Special Rapporteur on the Human Rights of Migrants to the 66th session of the General Assembly, Third Committee—Item 69 (b), (c), 21 October 2011, para 3. www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11523&LangID=E. Accessed 10 June 2012.

(women, children, minorities), is a key area of its action. The Commissioner has therefore devoted increasing attention to the issue of the criminalization of migrants. Thus, in an opinion adopted in 2008, the Commissioner stated that criminalization is a disproportionate measure which exceeds the legitimate interest of a State to control its borders. The application of criminal sanctions against illegal immigrants would lead to their assimilation with the carriers or employers who, in many cases, exploit, thereby contributing to their (unfortunate) exclusion. The statement that irregular immigration should be considered only an administrative offence is therefore clear.[30]

Other positions have been expressed in recent times, confirming the view that the criminalization of irregular migration is the wrong answer to a complex social phenomenon.[31]

7 Concluding Remarks

The treatment of undocumented migrants, and the tools that can be legitimately used to discourage and curb irregular migration, are now an issue of central importance.

The debate, increasingly lively and interesting, not only in legal terms, highlights in particular the search for a new balance between conflicting interests. It also represents an opportunity to assess the evolution of the theme of the treatment of aliens, where the focus seems to shift from state sovereignty to the protection of fundamental rights.

The ECJ in its recent case law has provided important guidance on the matter. While recognizing the legitimacy of criminal sanctions against anyone who has violated the rules on entry and stay, the Court in fact seems to be trying to limit their application as much as possible, especially in relation to the most relevant of coercive measures, i.e., detention, stressing the value of fundamental rights and reminding States of their obligations pursuant to EU law principles.

A ruling that represents a significant attempt in finding a balance in an increasingly interrelated field such as immigration and human rights.

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[30] Commissioner for Human Rights, It is wrong to criminalize migration, Viewpoint (29 September 2008). www.commissioner.coe.int. Accessed 10 June 2012.

[31] Criminalisation of Migration in Europe: Human Rights Implications, Issue Paper commissioned and published by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, 2010, CommDH/IssuePaper(2010)1. https://wcd.coe.int/ViewDoc.jsp?id=1579605&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679. Accessed 10 June 2012. See in the past the views of the Working Group on Arbitrary Detention (WGAD), that already in 1998 noted that "criminalizing irregular entry into a country exceeds the legitimate interest of a State to Regulate and control irregular immigration, and can lead to unnecessary detention", Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1999/63 (18 December 1998).

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Special Tribunal for Lebanon

Investor/State and Claim Disputes

International Centre for Settlement Of Investment Disputes: http://icsid.worldbank.org/

North American Free Trade Agreement (NAFTA)

Iran-US Claims Tribunal

Other

European Union www.curia.eu

Court of Justice of the European Community/Union

Court of First Instance/General Court

Civil Service Tribunal