



Asian Yearbook of International  
Law, Volume 15 (2009)

*Edited by*

B. S Chimini, M. Masahiro, and J. Rehman

BRILL

## ASIAN YEARBOOK OF INTERNATIONAL LAW

Launched in 1991, *The Asian Yearbook of International Law* is a major refereed publication dedicated to international law issues as seen primarily from an Asian perspective, under the auspices of the Foundation for the Development of International Law in Asia (DILA). It is the first publication of its kind edited by a team of leading international law scholars from across Asia. The Yearbook provides a forum for the publication of articles in the field of international law, and other Asian international law topics, written by experts from the region and elsewhere.

Its aim is twofold: to promote international law in Asia, and to provide an intellectual platform for the discussion and dissemination of Asian views and practices on contemporary international legal issues. Each volume of the Yearbook normally contains articles and shorter notes; a section on State practice; an overview of Asian States' participation in multilateral treaties; succinct analysis of recent international legal developments in Asia; an agora section devoted to critical perspectives on international law issues; surveys of the activities of international organizations of special relevance to Asia; and book review, bibliography and documents sections. It will be of use to students and academics interested in international law and Asian studies.

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# **Asian Yearbook of International Law**

published under the auspices of the  
Foundation for the Development of  
International Law in Asia (DILA)

General Editors

B.S. Chimni – Miyoshi Masahiro – Javaid Rehman

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Sandrasegaram Paramalingam

VOLUME 15 (2009)

 **Routledge**  
Taylor & Francis Group  
LONDON AND NEW YORK

First published 2012

by Routledge

2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada

by Routledge

711 Third Avenue, New York, NY 10017

*Routledge is an imprint of the Taylor & Francis Group, an informa business*

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*British Library Cataloguing in Publication Data*

A catalogue record for this book is available from the British Library

*Library of Congress Cataloging in Publication Data*

A catalog record for this book has been requested

ISBN 13: 978-0-415-69037-9 (hbk)

ISBN 13: 978-0-203-14349-0 (ebk)

Typeset in Times

by RefineCatch Limited, Bungay, Suffolk

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## INTRODUCTION BY THE GENERAL EDITORS

We are most pleased to provide the introduction for Volume 15 of the *Asian Yearbook of International Law*. This volume contains a number of articles covering a huge range of topics: the use of force and the crime of aggression in international law, the treaty-making power in China, Illegal Unregulated and Unreported (IUU) Fishing, the examination of the plea of self-defence vis à vis Non-State Actors, the impact of the *North Sea Continental Shelf* cases on the contemporary problems of maritime boundary delimitation in the Northeast Asian seas. The volume also contains a substantial section on State practice of Asian States as well as a section recording the participation of Asian States in open multi-lateral law-making treaties. The book review portion contains reviews of books dealing with such diverse issues as the use of nuclear power in Iran, the personal laws of Muslims and Hindu women in Bangladesh and international investment law.

Our partnership with Routledge has strengthened over the years, and now as partners we are able to produce this volume. We remain thankful for the support provided to us by Routledge in the publication of the present volume. We are once again extremely thankful to Mr Sata Yasuhiko of Tobiko Corporation for his generous support in the donation that allows us to award the Sata Prize to a young international legal scholar who authors an article of outstanding merit in this annual competition. His encouragement and support has allowed us to recognise and reward excellent young academics and scholars. This year's Sata Prize winner is Mr Amin Ghanbari Amirhandeh from Iran for his article entitled "An Examination of the Plea of Self-Defence vis à vis Non-State Actors" (2009), which is published in the current volume.

As previously, we warmly invite distinguished scholars from across the globe to offer critically engaging pieces that relate to Asian approaches to international law topics as well as topics that examine and assess general international law.

Before concluding our introduction we would like to note that our colleague, Professor Thio Li-ann, has decided to step down as the Co-ordinating General Editor of the Yearbook, a position she has held since 2005. We would very much like to thank her for her enormous contributions for the *Yearbook*. Professor Thio has now been succeeded by Professor Javaid Rehman (Professor of Law and Head of School of Law at Brunel University, London). We anticipate that Professor Rehman will conduct his duties as Co-ordinating General Editor with the same enthusiasm and rigour as his predecessor.

*B.S. Chimni*  
*Miyoshi Masahiro*  
*Javaid Rehman*



## ABBREVIATIONS

AJIL	American Journal of International Law
ASIL	American Society of International Law
AYIL	Asian Yearbook of International Law
CYIL	Canadian Yearbook of International Law
ELR	Environmental Law Review
FILJ	Fordham International Law Journal
GWILR	George Washington International Law Review
GYIL	German Yearbook of International Law
HILJ	Harvard International Law Journal
HLR	Harvard Law Review
ICC	International Criminal Court
ICJ	International Court of Justice
ICJ Rep	International Court of Justice Reports of Judgments, Advisory Opinions and Orders
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IJMCL	International Journal of Marine and Coastal Law
ILC	International Law Commission
ILC Yb.	International Law Commission Yearbook
ILM	International Legal Material
ILR	International Law Reports
IO	International Organization
IPCC	Intergovernmental Panel on Climate Change
IRRC	International Review of the Red Cross
JCSL	Journal of Conflict and Security Law
NYIL	Netherlands Yearbook of International Law
ODIL	Ocean Development and International Law
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
RCADI	Recueil des Cours de l'Académie de Droit International
RGDIP	Revue Générale du Droit International Public
RIAA	Reports of International Arbitral Awards
SC Res.	United Nations Security Council Resolution
SJIL	Stanford Journal of International Law
SLR	Sydney Law Review

STL	Stetson Law Review
UN Doc.	United Nations Document
UNFCCC	United Nations Framework Convention on Climate Change
UN GA	United Nations General Assembly
UN GAOR	United Nations General Assembly Official Records
UNTS	United Nations Treaties Series
UNYB	United Nations Yearbook
UST	United States Treaties
Va.JIL	Virginia Journal of International Law
YIEL	Yearbook of International Environmental Law

## ARTICLES



# INTERNATIONAL LAW, THE USE OF FORCE AND THE CRIME OF AGGRESSION: FROM THE CHARTER OF THE UNITED NATIONS TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Sergey Sayapin \*

## INTRODUCTION

A fundamental objective of the modern international legal order, which is founded upon the Charter of the United Nations, is the maintenance of international peace and security. The Charter contains at least 35 references to “peace” as a sought state of international relations and a value protected by international law,<sup>1</sup> and its derivations (e.g., “peaceful”, “pacific”, “peace-loving”) are mentioned in at least nine further Articles of the Charter.<sup>2</sup> To reinforce international peace and security, Article 2(4) of the Charter laid down a stringent restriction on the use of force in international relations, an obligation which was, from its inception, designed to be of a superior legal nature<sup>3</sup> and is now recognised to have acquired the character of customary international law and even that of *jus cogens*. Notably, Professor Peter Malanczuk suggests that this norm is now binding even for the few States which are not members of the United Nations.<sup>4</sup>

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<sup>1</sup> Charter of the United Nations, reprinted in: Malcolm D. Evans (ed.), *Blackstone’s International Law Documents*, 4th edition (London: Blackstone Press Ltd., 1999), at 8–26, Preamble, paras. 5, 6, Articles 1(1, 2), 2(3, 6), 11(1, 2, 3), 12(2), 15(1), 18(1), 23(1), 24(1), 26, 33(1), 34, 37(2), 39, 42, 43(1), 47(1), 48(1), 51, 52(1), 54, 73, 76, 84, 99, 106.

<sup>2</sup> *Ibid.*, Articles 1(1), 2(3), 4(1), 14, 33(1), 35(2), 38, 52(2, 3), 55.

<sup>3</sup> *Ibid.*, Art. 103: “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.”

<sup>4</sup> Malanczuk, P., *Akehurst’s Modern Introduction to International Law*, 7th edition (London and New York: Routledge, 1997), at 309. In turn, A. Randelzhofer specifies that States which are not members of the United Nations “are protected, though not bound” by Article 2(4). See Randelzhofer, A., “Article 2(4)”, in Simma, B. (ed.), *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 1994), at 115.



Permitted uses of force are regulated by a sequence of the Charter's provisions, which is opened with the seventh preambular paragraph: "[T]o ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, *save in the common interest*" (emphasis added). Although the Preamble does not *per se* have a legally binding effect, it does give an indication as to the spirit of the subsequent operative articles. In line with the Preamble's "common interest" clause, Article 1(1) lists "effective *collective* measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression or other breaches of peace" among the purposes of the United Nations.<sup>5</sup> At least two of the United Nations main organs, the General Assembly (Article 12) and the Security Council (Articles 24(1) and 39), were given explicit powers to react, albeit in dissimilar ways, to threats to peace, breaches of peace and acts of aggression. The entirety of Chapter VII ("Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression") and VIII ("Regional Arrangements") are devoted to the maintenance of international peace and security through collective action under the aegis of the United Nations or regional arrangements. More specifically, Article 42 endows the Security Council with the authority to "take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security".<sup>6</sup> Article 43 sets a framework for the conclusion of agreements and arrangements between the United Nations Member States contributing to the maintenance of international peace and security and the Security Council.<sup>7</sup> Article 44 regulates the specific relations between the Security Council and Member States who, not being members of the Security Council, participate in such operations.<sup>8</sup> Article 51 recognises the Member States' "inherent right to

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<sup>5</sup> UN Charter, Article 1(1), emphasis added.

<sup>6</sup> UN Charter, Article 42.

<sup>7</sup> *Ibid.*, Article 43:

- “1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.”

<sup>8</sup> *Ibid.*, Article 44:

“When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.”

self-defence” against armed attacks.<sup>9</sup> Article 53(1) provides that armed force in the form of an “enforcement action” may also be used by the Security Council through regional arrangements.<sup>10</sup> Finally, Articles 53 and 107 address the use of armed force, where necessary, against former enemies in the Second World War.<sup>11</sup>

During the period since the 1999 NATO operation in Kosovo, and especially in connection with the US-led *Operation Enduring Freedom* (Afghanistan) and, subsequently, *Operation Iraqi Freedom* (Iraq), a number of novel doctrines have been put forward with a view to justifying these uses of force – potentially an important development in a field of international law as conservative as the post-1945 *jus ad bellum*,<sup>12</sup> for, at times, these doctrines claimed to be as far-reaching as to be able to modify the Charter’s provisions on the use of force. In contrast, it will be argued in this essay that Article 2(4) and other relevant international law should not be interpreted in too broad a manner,<sup>13</sup> and

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<sup>9</sup> *Ibid.*, Article 51:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

<sup>10</sup> *Ibid.*, Article 53(1): “The Security Council shall, where appropriate, utilise such regional arrangements or agencies for enforcement action under its authority.” On regional arrangements, *see*, for example, Levitt, J., “The Peace and Security Council of the African Union, the use of force and the United Nations Security Council: The Case of Sudan”, in Blokker, N. and N. Schrijver (eds.), *The Security Council and the Use of Force: Theory and Reality – a Need for Change?* (Leiden: Martinus Nijhoff Publishers, 2005), at 213–251.

<sup>11</sup> With the admission of Italy (1955), Japan (1956) and Germany (1973) as “peace-loving nations” (in the language of Article 4 of the Charter) to the United Nations, these provisions became obsolete and were recommended for deletion from the Charter. *See A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change*, UN Doc. A/59/565 (2004), para. 298, published at: <http://www.un.org/secureworld/> (accessed 26 August 2008); *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General*, UN Doc. A/59/2005 (2005), para. 217, published at: <http://www.un.org/largerfreedom/> (accessed 26 August 2008).

<sup>12</sup> As Professor Rein Müllerson so candidly noted, “the legal texts concerning use of force have indeed undergone little, if any, change since the adoption of the UN Charter in 1945. Even General Assembly resolutions on the issue have not contained anything that could be even remotely defined as ‘progressive development of international law’”. *See* Müllerson, R., “*Jus ad bellum*: plus ça change (le monde) plus c’est la même chose (le droit)”, in 7 *Journal of Conflict and Security Law* 149–189 (2002), at 150–151.

<sup>13</sup> Again, in the words of Professor Rein Müllerson, “[i]n the domain of use of force, which is so central to international law that novelties in it may affect the very foundations of this legal system as a whole, significant changes have occurred only after most terrible conflicts, which, using today’s formula, have shocked the conscience of humankind. In such cases, changes in the political configuration of the world, in international law generally and in *jus ad bellum* in particular, have not only coincided in time and space, but have all been caused by the same set of factors and reflect different facets of the same process.” *Ibid.*, at 151.

that any use of force in inter-State relations which is not plausibly compatible with the overarching prohibition contained in Article 2(4) would accordingly constitute a breach of the Charter.<sup>14</sup>

December 14, 2009 will mark the 35th anniversary of the United Nations' Definition of Aggression – an international instrument that sought to reinforce the safeguarding of international peace and security by way of interpreting Article 2(4) of the Charter of the United Nations and defining – albeit in a non-binding way – a key concept in contemporary public international law. In honour of this important anniversary, this essay will recall some landmark features of that Definition and then proceed to analysing the Definition's "parent provision" – Article 2(4) of the Charter – with a view to reaffirming its status as a superior norm of international treaty law and a rule of customary international law. The essay will conclude with the characterisation of Article 2(4) as a peremptory norm of general international law (*jus cogens*) from which no derogation is allowed.

#### ELEMENTS OF AN ACT OF AGGRESSION UNDER THE 1974 DEFINITION OF AGGRESSION

General Assembly Resolution 3314 (XXIX) was adopted on 14 December 1974, as an interpretation of Article 2(4) of the United Nations Charter, with a Definition of Aggression annexed to it.<sup>15</sup> Constructed, to a substantial extent, upon the draft definition of aggression proposed by the Soviet Union in 1933, and upon alternative drafts offered by the Soviet Union and groups of Western and developing States during the 1950s and 1960s,<sup>16</sup> the new Definition was adopted, almost 30 years after the entry into force of the Charter of the United Nations, as a guideline for the Security Council's determination of the existence of an act of aggression<sup>17</sup> and was commonly (although not universally) recognised.<sup>18</sup> A useful interpretative tool, the Definition – as a General Assembly resolution – was nevertheless not legally binding, and the Security Council "never relied on the 1974 Resolution to determine that the given situation constitutes aggression".<sup>19</sup> Although the 1974 Definition lacked a binding legal force and suffered from a number of structural and substantial deficiencies, it is still worth considering here in some detail, as its content

<sup>14</sup> See Schrijver, N., "Challenges to the prohibition to use force: Does the straitjacket of Article 2(4) UN Charter begin to gall too much?", in Blokker and Schrijver, *op. cit.*, n.10, at 36–37.

<sup>15</sup> UN GA Res. 3314 (XXIX), *GAOR* 29th Sess., Supp. No. 31 (1974).

<sup>16</sup> Ferencz, B. B., "Defining aggression: Where it stands and where it's going", 66 *AJIL* 491–508 (1972), at 495.

<sup>17</sup> Garvey, J. I., "The UN definition of 'aggression': Law and illusion in the context of collective security", 17 *Va.JIL* 177, 193–194 (1976–77).

<sup>18</sup> Stone, J., "Hopes and loopholes in the 1974 Definition of Aggression", 71 *AJIL* 224–246 (1977).

<sup>19</sup> Bassiouni, M. C. and B. B. Ferencz, "The crime against peace", in Bassiouni, M. C. (ed.), *International Criminal Law*, 3rd edition (Leiden, Martinus Nijhoff Publishers, 2008), Vol. I, at 313, 334.

has exercised a considerable impact on the drafting of a number of further international instruments, including the definition of the crime of aggression for the purpose of the International Criminal Court.<sup>20</sup>

### **“Chapeau” of the definition**

The 1974 Definition contains a general part followed by an incomplete list of examples of acts of aggression. The general part of the Definition (Article 1) reads as follows:

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

Professor Yoram Dinstein singled out six essential distinctions between this relatively advanced formulation and the primary rule articulated in Article 2(4) of the Charter of the United Nations: (1) the mere threat of force is excluded; (2) the adjective “armed” is interposed before the noun “force”; (3) “sovereignty” is mentioned together with the territorial integrity and the political independence of the victim State; (4) the victim is described as “another” (rather than “any”) State; (5) the use of force is proscribed whenever it is inconsistent with the United Nations Charter as a whole, and not only with the Purposes of the United Nations; (6) a linkage is created with the rest of the Definition.<sup>21</sup> It has been suggested that the adding of a number of extra elements to the definition of aggression was just intended to raise the assessment threshold and accordingly to do away with the possibility of invoking shooting “a few stray bullets across a boundary” as the commission of an act of aggression by a State.<sup>22</sup> However, the impact of this important – indeed, progressive – development in international law could have been more far-reaching. Its more precise wording, in comparison with Article 2(4) of the Charter, could have made the Definition a workable tool for protecting sovereign interests of individual States and for maintaining international peace and security alike, and so would have reinforced the impact of Article 2(4) itself. The problem with the Definition was its

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<sup>20</sup> For a critique of the definition’s drafting process, see, generally, Sayapin, S., “The definition of the crime of aggression for the purpose of the International Criminal Court: Problems and perspectives”, in 13 *Journal of Conflict and Security Law* 333–352 (2008).

<sup>21</sup> Dinstein, Y., *War, Aggression and Self-Defence*, 3rd edition (Cambridge: Cambridge University Press, 2001), at 116.

<sup>22</sup> Article 2 of the Definition provided that alleged acts of aggression or their consequences should be of “sufficient gravity” and that minor incidents of the use of armed force might therefore not constitute aggression, subject to appreciation by the Security Council in accordance with the Charter. For a discussion, Broms, B., “The definition of aggression”, 154 *RCADI* 346 (1977).

recommendatory status of an annex to a General Assembly resolution.<sup>23</sup> If the Definition had been bestowed with an adequate legal force – for instance, by way of approval by the Security Council whose decisions are mandatory for all Members of the United Nations<sup>24</sup> and the carrying out of whose foremost function<sup>25</sup> the Definition was intended to facilitate – it would have become a “harder” source of international law and should have been complied with by States in a more consistent manner.

### Examples of acts of aggression

In furtherance of the general part, Article 3 of the Definition lists possible examples of acts of aggression, regardless of their being accompanied by a declaration of war:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

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<sup>23</sup> UN Charter, Article 11:

“1. The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may *make recommendations* with regard to such principles to the Members or to the Security Council or to both.

2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may *make recommendations* with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion [ . . . ]” (emphasis added)

<sup>24</sup> *Ibid.*, Article 25: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

<sup>25</sup> *Ibid.*, Article 24:

“1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII [ . . . ].”

- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed hands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Notably, each subparagraph of Article 3 refers to an action performed by or on behalf of a State, thereby confirming that aggression is an internationally unlawful act of State committed against another State. The list is by and large comprehensive, probably with one exception in that subparagraphs (a) and (b) seem to be somewhat repetitive, for it is difficult to imagine how an “attack by the armed forces of a State of the territory of another State” (subparagraph (a)) can be carried out without “the use of any weapons” referred to in subparagraph (b) – as has been discussed above, the word “attack” implies its military character and, consequently, the use of weapons.<sup>26</sup> On the other hand, the “[b]ombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State” is possible without “the invasion or attack by the armed forces of a State” prohibited under subparagraph (a), and the singling out of this type of aggression is therefore justified in the end.

Out of these, only the last subparagraph was explicitly pronounced by the International Court of Justice to be declaratory of customary international law.<sup>27</sup> Professor Yoram Dinstein maintains, however, that, possibly, the other portions of the Definition’s Article 3 may as well be regarded as indicative of “harder” international law than the General Assembly resolutions are as a rule.<sup>28</sup> As a matter of fact, the *Nicaragua* case is not an apposite source in which to look for the attitude of the International Court of

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<sup>26</sup> Cf. also Article 51 of the Charter: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an *armed* attack occurs against a Member of the United Nations [ . . . ]” (emphasis added).

<sup>27</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Rep. 1986, paras. 106 *et seq.* As was discussed above, in the 2004 *Wall* Advisory Opinion, the Court found that the lasting occupation by Israel of adjacent Palestinian territories and related administrative measures were in violation of international law. It may be recalled in this regard that “any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof” is also characterised as aggression under subparagraph (a) of the 1974 Definition’s Article 3.

<sup>28</sup> Dinstein, *op. cit.*, n. 21, at 118.

Justice towards the issue in question. In that case, the Court could not practically examine whether or not the subparagraphs (a) to (f) of Article 3 were reflective of customary international law, because the factual basis of the case before the Court was limited to subparagraph (g). The lack of the Court's jurisprudence on subparagraphs (a) to (f) of the 1974 Definition should therefore not be interpreted as the Court's disapproving attitude towards their content but simply as a matter of fact that the Court has not yet had an opportunity to scrutinise their legal force in light of customary international law.

### **Non-exhaustive character of the list**

The genuine problem about the international legal value of the 1974 Definition is that its Article 3 is not exhaustive, and the Security Council may itself determine what other international uses of force may amount to aggression,<sup>29</sup> which, especially in terms of international criminal law, is in contravention of the principle of legality. This autonomy of political assessment accorded to the Council is indeed warranted in light of its required operational flexibility as an international body primarily responsible for the maintenance of international peace and security. However, the *legal* qualification of uses of force as acts of aggression, in order for them to entail specific consequences for States and individuals under applicable international law, should involve more strictly defined assessment criteria and a less politicised procedure than that of the Security Council.

As the Rome Statute of the International Criminal Court's definition of the individual crime of aggression contains a direct reference to the 1974 Definition,<sup>30</sup> it should be noted

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<sup>29</sup> UN GA Res. 3314 (XXIX), Annex, Article 4.

<sup>30</sup> Cf. draft Article 8 bis of the Rome Statute ("Crime of aggression"), document ICC-ASP/7/SWGCA/2 (20 February 2009), at 11–12:

- “1. For the purpose of this Statute, ‘crime of aggression’ means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
2. For the purpose of paragraph 1, ‘act of aggression’ means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
  - (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
  - (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
  - (c) The blockade of the ports or coasts of a State by the armed forces of another State;
  - (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

that the Rome Statute's definition is exhaustive, in accordance with the principle *nullum crimen sine lege*, unlike its "parent provision". Whilst the Security Council is authorised to "determine that other acts constitute aggression under the provisions of the Charter",<sup>31</sup> the Statute does not allow for such an extensive interpretation of crimes within its jurisdiction.<sup>32</sup> Without a doubt a necessary condition, it may still have a certain side effect: even though the catalogue of acts of aggression "borrowed" from the 1974 Definition is quite comprehensive, the Court might not have jurisdiction with respect to some individual acts where a use of force by a State – even a State party to the Statute – against another State, objectively caused by the individual acts in question, would not directly be covered by the Rome Statute's Article 8 bis (2), or where they could not be reconciled with that Article by way of interpretation.

### The problem of the "first use" of force

Under Article 2 of the 1974 Definition, the first use of armed force by a State in contravention of the United Nations Charter constitutes *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.<sup>33</sup> It seems, though, that the reference to the first use of armed force should be read in connection with the circumstance that follows, namely, that such use of armed force must be "in contravention of the Charter".

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- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
  - (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
  - (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."

<sup>31</sup> See n. 29.

<sup>32</sup> ICC Statute, Article 22 ("Nullum crimen sine lege"):

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

<sup>33</sup> UN GA Res. 3314 (XXIX), Annex, Article 2 (first sentence): "The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression . . ."



It is possible, however, that the first use of armed force by a State is actually there but it is minor and leads to no graver consequences (for example, an isolated cross-border shooting incident) but the target State resorts to comprehensive force in overreaction to the trivial incident and thus itself violates the Charter. In such a case, the target State itself might be found guilty of having committed aggression.<sup>34</sup> It must have been for this reason that the first use of force is not as such mentioned in the Rome Statute's Article 8 bis but the key qualification of the potentially aggressive use of armed force – namely, its use in manifest violation of the Charter – is integrated in the provision. It would then be up to the Security Council or the International Court of Justice to assess on a case-by-case basis whether it was the first actual use of armed force or a comprehensive response thereto that would have been in manifest violation of the Charter and hence would have constituted an act of aggression.

### **The discretionary power of the UN Security Council**

In accordance with the Charter, the exclusive power to determine acts of aggression lies with the Security Council,<sup>35</sup> and no other international organ has a similar authority. However, too much space for subjectivity has been left to the Council in the exercise of that power. In practice, from 1946 to 1986, during the period when dozens of international armed conflicts took place,<sup>36</sup> the Security Council passed only two decisions under Article 39 that there was a “breach of the peace” – in the case of Korea in 1950<sup>37</sup> and with regard to the Falklands conflict in 1982.<sup>38</sup> During the same period, the Council referred to “aggression” only in the instances of Israel and South Africa, and determined no more than seven cases of “threat to international peace and security”.<sup>39</sup> The rule contained in the first sentence of Article 2 of the 1974 Definition was thus consistently disregarded. Naturally, the Soviet invasion of Afghanistan on 25 December 1979 was not regarded as an act of aggression,<sup>40</sup> and even the Iraqi invasion of Kuwait on 2 August 1990 was

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<sup>34</sup> Dinstein, *op. cit.*, n. 21, at 117.

<sup>35</sup> UN Charter, Article 39: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

<sup>36</sup> For an overview of 160 international and non-international armed conflicts fought between 1945 and 1985, see Borchardt, U. *et al.*, *Die Kriege der Nachkriegszeit* (New York: United Nations, 1986), at 68.

<sup>37</sup> See Young, J. and J. Kent, *International Relations Since 1945: A Global History* (Oxford: Oxford University Press, 2004), at 146–152.

<sup>38</sup> *Ibid.*, at 573.

<sup>39</sup> Koskeniemi, M., “The place of law in collective security”, 17 *Michigan Journal of International Law* 455–490 (1996), at 458.

<sup>40</sup> Young and Kent note that even friends of the USSR, such as India, were critical over the invasion. In the absence of a negative qualification by the Security Council, it was condemned by the UN General Assembly by 104 to 18 votes. See Young and Kent, *op. cit.*, n. 37, at 493.

termed a breach of the peace and of international security.<sup>41</sup> Given the statistics of veto use in the Security Council between 1945 and 1992,<sup>42</sup> it is not surprising that acts of aggression were determined exceptionally rarely. In most instances, even the manifestly hostile behaviour of States was not qualified by the Council as aggression. But one should likewise acknowledge that the motivation behind such a restrictive application of the concept was far from purely legal. The Security Council is a political body in whose action national interests of its members, especially of permanent members, prevail,<sup>43</sup> and the Council may not be expected to apply rules of international law in the same impartial way as a judicial body should have to apply them. It may thus be asserted with a good degree of certainty that the normative standards for the determination of aggression listed in Article 3 of the 1974 Definition were not often used by the Security Council due to political and procedural circumstances, and not necessarily due to the said Article's inherent substantive deficiencies. Now that a definition of the crime of aggression might soon be adopted for the purpose of the International Criminal Court, the International Court of Justice – as the principal judicial organ of the United Nations – might be given authority to determine acts of aggression, and could be expected to do so in a more impartial manner than the Security Council and on a more sound legal foundation than the General Assembly, in accordance with the Rome Statute. Although the substantive legal source for the Court's determination – Article 8 bis (2) of the Rome Statute – was drawn literally from subparagraphs (a) to (g) of Article 3 of the 1974 Definition of Aggression, and – probably unnecessarily – made an explicit mention of the United Nations General Assembly Resolution 3314 (XXIX), the direct integration of these provisions in the Rome Statute as a matter of its own content elevated them from the rank of “soft law” to the level of international treaty law binding upon the States' Parties, and should, hopefully, make them more workable.

#### NATURE OF STATES' OBLIGATION TO REFRAIN FROM THE THREAT OR USE OF FORCE IN INTERNATIONAL RELATIONS (ARTICLE 2(4) OF THE UN CHARTER)

As the Covenant of the League of Nations and the Kellogg–Briand Pact were unable to prevent the Second World War, it was an aim of those drafting the Charter of the United Nations to remedy the shortcomings of both instruments.<sup>44</sup> The ambitious reform that they undertook to accomplish was without precedent in that it sought to transform the

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<sup>41</sup> Security Council Resolution 660 (1990).

<sup>42</sup> During the said period, the Soviet Union used its veto right 114 times; USA 69; United Kingdom 30; France 18; China 3. See Roberts, A. and B. Kingsbury (eds.), *United Nations, Divided World: The UN's Roles in International Relations*, 2nd edition (Oxford: Clarendon Press, 1993), at 10.

<sup>43</sup> Cf. Link, W., *Die Neuordnung der Weltpolitik an der Schwelle zum 21. Jahrhundert* (München: Verlag C. H. Beck OHG, 1998), at 120; Chauprade, A., *Géopolitique: constantes et changements dans l'histoire* (Paris: Ellipses, 2003), at 767.

<sup>44</sup> See Dinstein, *op. cit.*, n. 21, at 80.

traditional *jus ad bellum*, which had not excluded States' right to use force in furtherance of their foreign policies, into a novel *jus contra bellum*, which not only outlawed war as a legitimate means of settlement of international disputes but also banned uses of military force short of war and even threats to use force in international relations.<sup>45</sup> The substance of this important reform, which now constitutes the foundation of the contemporary international legal order, will be considered below.

### Treaty obligation under Article 2(4)

A provision of paramount importance, Article 2(4) has been referred to as “the cornerstone of peace in the Charter”, “the heart of the United Nations Charter” or the “basic rule of contemporary public international law”.<sup>46</sup> Undoubtedly, Article 2(4) is far better worded than was Article 1 of the Kellogg–Briand Pact, for it prohibits the use of force in general, not only in war, and covers even threats of force. Besides, as was mentioned above, this provision, in conjunction with related ones, creates – at least in theory – an institutional United Nations system of collective sanctions against any offender (Articles 39–51). However, as will be seen, even this major provision is not without ambiguities. As adopted at the San Francisco Conference, Article 2(4) reads:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

This formula raises a number of mutually complementary legal and technical issues. Firstly, whilst formally creating legal obligations only for the United Nations Members, the provision in fact protects Members and non-Members (“any State”) alike. Secondly, it singles out two groups of objects that are protected against unlawful threats or use of force under the Charter: on the one hand, States' territorial integrity and political independence are mentioned as specific examples of protected values; on the other hand, it is also forbidden to issue threats or use force “in any other manner inconsistent with the Purposes of the United Nations”. The dichotomy is deserving of attention inasmuch as these two groups of protected values, although equated in one phrase, are not of the same nature. The Purposes of the United Nations are listed in Article 1 of the Charter and include:

- the maintenance of “international peace and security” and related undertakings to that end (Article 1(1));<sup>47</sup>

<sup>45</sup> Randelzhofer, *loc. cit.*, n. 4, at 111.

<sup>46</sup> *Ibid.*, at 111.

<sup>47</sup> UN Charter, Article 1(1): “To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”

- developing “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”, and taking “other appropriate measures to strengthen universal peace” (Article 1(2));
- developing “international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion” (Article 1(3)); and
- being “a centre for harmonizing the actions of nations in the attainment of these common ends” (Article 1(4)).

Notably, the upholding of States’ territorial integrity and political independence is not mentioned as such anywhere among the organisation’s Purposes. Instead, they are referred to, in a “self-contained” manner,<sup>48</sup> in Article 2(4) among the Principles of the United Nations, as if they were some sort of minimum-level criteria for assessing the gravity of the threat or use of force against any one of the four Purposes of the United Nations specifically listed in Article 1. However, such a literal and isolated interpretation of the reference to territorial integrity or political independence would almost certainly be flawed – otherwise, even a unilateral use of force against a State without breaking off a portion of that State’s territory, or carrying out an armed attack without the goal of subjugating the victim State permanently or lastingly, might be considered lawful. It may therefore be concluded that the two parts of the phrase are to be read in conjunction, and that the Purposes of the United Nations, as objects protected under Article 2(4), are at least of an equal value with the territorial integrity and political independence of States, and probably even enjoy primacy over the latter.

Thirdly, the interpretation of the notion of “force” used in Article 2(4) is critical. It is generally agreed among scholars that this provision covers, in the first place, the threat or use of armed or military force. Although Article 2(4) itself contains no qualification of the term “force”, one may derive this conclusion from the Charter’s related provisions (for example, Articles 41<sup>49</sup> and 46<sup>50</sup> where this qualification can be found), the 1970 Friendly Relations Declarations and from the Charter’s *travaux préparatoires*: it is known, for example, that the proposal Brazil made on 6 May 1945 at the San Francisco Conference with a view to extending the prohibition of force to economic coercion was explicitly – and quite correctly – rejected.<sup>51</sup> In line with this attitude, the first Principle in

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<sup>48</sup> Remarkably, the phrase “territorial integrity or political independence” does not appear anywhere else in the Charter.

<sup>49</sup> UN Charter, Article 41: “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

<sup>50</sup> *Ibid.*, Article 46: “Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.”

<sup>51</sup> Randelzhofer, *loc. cit.*, n. 4, at 112.

the 1970 Friendly Relations Declaration, which interpreted Article 2(4), also dealt solely with military force. A teleological interpretation of the provision should suggest, on the one hand, that the extension of its application to other forms of force would result in leaving States with virtually no means of exerting pressure upon other States that violate international law. In addition, the prohibition of economic, political and other types of coercion was covered in the 1970 Declaration under the heading of non-intervention,<sup>52</sup> and not of the prohibition of the threat or use of force, which suggests, again, that the latter rule concerns, primarily, measures of a military nature.

This conclusion raises the issue of significance of two other types of force – so-called “physical” and “indirect” force. The definitions of both types of force are, for practical reasons, not obvious. An authoritative Commentary to the Charter of the United Nations – importantly, one published before 11 September 2001 – listed as examples of the first type the cross-frontier expulsion of populations, the diversion of international rivers by upstream States, and the spreading of fire across international frontiers (i.e. violent occurrences of a social, natural or technical character not involving the use of means or methods of warfare in the proper sense of the word). Although observing, quite cautiously, that “physical force sometimes can affect a State just as severely as the use of military force”, the Commentary nonetheless excluded physical force from the *rationae materiae* of Article 2(4), on grounds similar to those applicable to measures of political or economic coercion. Furthermore, the Commentary argued, the scope of Article 2(4) need not be extended to cover physical non-military force since, under regular circumstances, the unlawfulness of such acts would follow, in a majority of cases, from other applicable rules of international law, such as the principles of non-intervention or of territorial integrity. Only one explicit reservation was made with respect to this general interpretation:

Exceptions to this might arise where, in extreme situations, the use of physical non-military force may produce the effects of an armed attack prompting the right of self-defence laid down in Art[icle] 51. Only in that particular case could an affected State respond by using armed force, without itself being in violation of Article 2(4). This extensive interpretation of “armed attack”, however, is acceptable only within the narrowest possible limits.<sup>53</sup>

It seems that a modern – and relevant – example of physical non-military force which has, in fact, been capable of producing the effects of an armed attack were the terrorist attacks that occurred on 11 September 2001 in New York, Washington, D.C. and Pennsylvania.<sup>54</sup>

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<sup>52</sup> Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Resolution 2625 (XXV) (1970), *The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter*, para. 2: “No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.”

<sup>53</sup> Randalzhofer, *loc. cit.*, n. 4, at 113 (footnotes omitted).

<sup>54</sup> For an insightful comment on the impact of the 9/11 attacks on international law, see Wellens, K., “The UN Security Council and new threats to the peace: Back to the future”, in 8 *Journal of Conflict and Security Law* 15–70 (2003).

They were of such an unparalleled magnitude that the United Nations Security Council, in its Resolution 1368 (2001), pronounced that “such acts, like any act of international terrorism, [were] a threat to international peace and security”,<sup>55</sup> and stressed “that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts [would] be held accountable”.<sup>56</sup> Several deductions may be drawn from this Resolution for the purpose of our argument. First, the Security Council held “any act of international terrorism” – including the specific ones that took place on 11 September 2001 – to be a threat to international peace and security considerable enough to be commensurate with the invocation by a victim State of its “inherent right of individual or collective self-defence in accordance with the Charter”<sup>57</sup> (i.e. one comparable to an “armed attack” in the sense of Article 51 of the Charter). However, the attacks of 11 September 2001 were, *stricto sensu*, not “armed”, unless the hijacked civilian aeroplanes registered in the United States were to be regarded, by analogy, as “military weapons”. True, the civilian aeroplanes were *used* to perform the destruction they did but, it is submitted, they were not by their primary function meant to be used for killing people and destroying property, and should therefore not be regarded as “weapons” or “means of warfare” in the sense of applicable international law. The Security Council’s reference to Article 51 was therefore appropriate – in the context of the Commentary on Article 2(4) quoted above – in the light of the terrorist attack’s *effects* comparable to those of an armed attack, but not because of the attack’s armed or military nature.

Secondly, the Security Council must have had a reason for not having made, in its Resolution 1368 (2001), a reference to a “breach of the peace” or to an “act of aggression”, although the effect of the terrorist attack was clearly comparable to that of an “armed attack” in the sense of Article 51 of the Charter, and for terming the attack, instead, “a threat to international peace and security”. It must by necessity follow from the Security Council’s careful choice of terminology in the resolution that the word “threat” used in Article 39 of the Charter carries a different technical legal meaning to that in Article 2(4). In other words, a “threat of force” in the sense of Article 2(4) is an infringement less grave than is the “threat to international peace and security” in the sense of Article 39, for the actual use of force – although by a non-State actor – on 11 September 2001 was termed a “threat to international peace and security”, and the use of stronger terms has been avoided. To conclude on this point, the issuance of a threat to use force, without an actual use of force, may not be sufficient to constitute a threat to the peace, a breach of

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<sup>55</sup> In so doing, the Security Council acted in accordance with Article 39 of the Charter, which reads: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” Notably, neither this Article nor any other Article in the Charter defines these terms, and the practical distinction between the three types of situations is left up to the Security Council.

<sup>56</sup> Resolution 1368, adopted by the Security Council at its 4,370th meeting, on 12 September 2001, paras. 1 and 3.

<sup>57</sup> *Ibid.*, 3rd preambular paragraph.

the peace or an act of aggression in the sense of Article 39 of the Charter.<sup>58</sup> On the other hand, *uses* of physical force may be placed by the Security Council in one of the three categories of situations listed in Article 39.

Thirdly, the attack of 11 September 2001 was carried out not by a State, or on behalf of a State, but by a non-State actor on its own behalf. That a breach of the peace or an act of aggression could, under the established theory, only be committed by a State, might be yet another reason for not terming the attack an act of aggression. However, in fact, Article 51 of the United Nations Charter does not specify that an armed attack in respect of which the right of individual or collective self-defence may be invoked must of necessity be committed by a State. It states that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence, *if an armed attack occurs* against a Member of the United Nations” (emphasis added), without specifying the origin of the attack. Accordingly, a literal interpretation of Article 51 suggests that every Member of the United Nations has an inherent right to individual or collective self-defence against *any kind* of armed attack, be it carried out by another State or a non-State entity. The question that remains is therefore that of reconciling Article 51’s requirement that the attack in question be armed, whereas the attack of 11 September 2001 was, as was discussed above, of an extremely violent but still non-military nature; it was the *effect* of the attack that placed it on an equal footing with an armed one. To conclude, the United States, suffering an international terrorist attack, was right in invoking Article 51 but that invocation should have been founded on the quasi-military effects of the physical attack rather than on its ostensibly armed nature. More generally, a State finding itself under an international terrorist attack surely is entitled to repel that attack, including by military means, individually or collectively, without thereby violating Article 2(4), but the precise justification of an invocation of the right to self-defence should depend on the circumstances in each case.

As was discussed above, the scope of Article 2(4) is indeed limited to the proscription of armed force but, notably, this proscription embraces the concept of “indirect force” too. This notion, sometimes inaccurately referred to as “indirect aggression”, stands for a State’s participation in the use of force in another State’s international relations (e.g. by permitting the use of its territory to facilitate that other State’s hostile acts against a third State), or a State’s involvement in the use of intra-State force by militarily organised non-State actors, such as mercenaries, irregulars or rebels, within other States. The latter type of indirect force became particularly widespread after the Second World

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<sup>58</sup> However, the International Court of Justice observed in its *Advisory Opinion on the Threat or Use of Nuclear Weapons* that “[t]he notions of ‘threat’ and ‘use’ of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal”. As Yoram Dinstein notes, “for a threat of force to be illicit, the force itself must be unlawful. Hence, if a State declares its readiness to use force in conformity with Charter, this is not an illegal ‘threat’ but a legitimate warning and reminder. . . Article 2(4) does not require that an illegal threat be accompanied with any concrete demands. A threat of force, not in compliance with the Charter, is unlawful as such.” See Dinstein, *op. cit.*, n. 21, at 81.

War, which tendency led to the inclusion, in 1977, of a specific article against mercenarism in the First Additional Protocol to the 1949 Geneva Conventions, and to the adoption, in 1989, of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries. The practical reasons that States have, on many occasions after 1945, preferred employing indirect force in non-international armed conflicts occurring within other States, rather than openly resorting to “direct” military force in their international relations, are manifold.<sup>59</sup> As a result of such an undesired internationalisation of conflicts in the middle of the twentieth century, States endeavoured to limit the permissibility of the use of indirect force under general international law through an extensive interpretation of Article 2(4). The 1970 Friendly Relations Declaration interpreted the proscription of the use of indirect force in the following manner:

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.<sup>60</sup>

These paragraphs in the Friendly Relations Declaration have gained broad recognition, as the International Court of Justice referred to them – although in a somewhat mechanical manner – in its *Nicaragua* Judgment of 27 June 1986, *inter alia*, with a view to determining the scope of the prohibition of the use of force under customary international law. It is noteworthy, though, that both prohibited modes of action – the organisation or encouragement of irregular forces or armed bands, on the one hand, and the prohibition of participation in acts of civil strife or terrorist acts on the other hand – are worded in such a broad manner that virtually every act of support can fall within the scope of “organising”, “encouraging”, “instigating”, “assisting” or “participating”, which confusing result would almost inevitably lead to blurring the meaning of “armed force” under international law. As this normative effect could hardly be congruent with the object and purpose of Article 2(4), the International Court of Justice made a proper observation in the *Nicaragua* Judgment that not every act of assistance should be regarded as a use of force.<sup>61</sup> However, the Court did not go into further particulars of the matter and did not suggest any helpful criteria for deciding *which* acts of assistance, and *under what*

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<sup>59</sup> The fear of an escalation of violence, consideration for the public opinion against an armed conflict, inadequate military strength, or the evident character of a breach of Article 2(4) can be reasons in a given case for not involving a State’s own forces.

<sup>60</sup> Friendly Relations Declaration, n. 52, *The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations*, paras. 8 and 9.

<sup>61</sup> Thus it characterised the arming and training of the *Contras* by the United States as use of force, but not the mere supplying of funds to them.



*circumstances*, are to be considered a threat or use of force in the sense of Article 2(4). As Professor Albrecht Randelzhofer observes,<sup>62</sup> the only helpful hint, namely that the act of assistance has to be linked to a threat or use of force on the part of the assisting State, in itself leads to no further conclusion, for it merely repeats the question to be answered.

To sum up, the scope of the prohibition of the use of force has not yet been made sufficiently specific with regard to the issue of providing assistance to non-State actors in non-international armed conflicts. Whether Article 2(4) has been breached in a given case can only be determined – preferably judicially – by taking into account and assessing all relevant facts. Two deductions seem to be fairly certain, though: firstly, a violation of Article 2(4) by the assisting State can only be contemplated when the irregular or paramilitary units receiving the support *in fact* perpetrate the use or threat of force in the State where they operate or in another State; and secondly, not every form of assistance constitutes a violation of the prohibition of the use of force laid down in Article 2(4).

### **Obligation under customary international law**

As was discussed above in much detail, Article 2(4) of the Charter of the United Nations constitutes a key rule regulating the use of force in post-1945 international relations. It is generally accepted that any use of force by a State not in conformity with the Charter would constitute a breach of that State's fundamental obligation under international law. In line with this conclusion, a large majority of publicists deem Article 2(4) to be part of customary international law.<sup>63</sup> However, this generalisation is only partially accurate. In its *Nicaragua* Judgment of 27 June 1986, the International Court of Justice held that the use of force was also regulated by *customary* rules of international law, the content of which was not necessarily identical to that of the treaty provision: "As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter. . . by no means covers the whole area of the regulation of the use of force in international relations."<sup>64</sup> The Court held explicitly that the operation of

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<sup>62</sup> Randelzhofer, *loc. cit.*, n. 4, at 115.

<sup>63</sup> The International Law Commission was of the view that "the great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force". See *ILC Yb.* (1966), vol. II, at 247. The view expressed by T. Gazzini may also be noted: "[T]he norms on the use of force embodied in the Charter and those existing under international law are substantially identical because of the interaction between the Charter and customary international law, on the one hand, and the virtual universality of the UN, on the other hand." See Gazzini, T., "The rules on the use of force at the beginning of the XXI century", in 11 *Journal of Conflict and Security Law* 319–342 (2006), at 320.

<sup>64</sup> *Nicaragua* Judgement, n. 27, para. 176. For a contrary position, see *The Legality of United States Participation in the Defense of Viet-Nam*, 4 March 1966, where the United States affirmed that "it should be recognized that much of the substantive law of the Charter has become part of the general law of nations through a very wide acceptance by nations the world over. This is particularly true of the Charter provisions on the use of force", quoted in Falk, R. (ed.), *The Vietnam War and International*

the United Nations Charter did not either “subsume” or “supervene” applicable customary international law,<sup>65</sup> and that “the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content”.<sup>66</sup> Moreover, the Court ruled that nothing should impair the separate applicability of a relevant customary norm, even if a treaty norm and a customary norm were to have exactly the same content.<sup>67</sup> This leads us to the subsequent critical discussion of the International Court of Justice’s view of customary international law prohibiting the use of force between States, as it was reflected in the *Nicaragua* Judgment, with a view to comparing it to the content of Article 2(4).

This much-celebrated Judgment has, in fact, been quite inconsistent on a number of essential points. Having, on the one hand, acknowledged the primacy of the United Nations Charter in the legal regulation of the use of force in international relations, the Court still considered it apposite to “supplant” the Charter’s relevant rules by customary international law applicable to the case. Having further claimed to embark on the determination of such rules, the Court, in fact, did not do so and limited itself to simply concluding that the practice of States must be in “general conformity” with the rules in question, without really considering the particulars of such practice. And, ultimately, at considering the relevant *opinio juris*, the Court seems to have made two errors, one of methodology and one of substance. In the first case, the Court alleged – contrary to established theory – that the State practice required for the formation of a customary rule could be inferred from the *opinio juris* on the subject;<sup>68</sup> in the second, the Court regarded, somewhat inaccurately, a number of non-binding sources as constituting evidence of States’ *opinio juris* on the prohibition of the use of force.

As was noted above, the Court’s point of departure was that the legal regulation of the use of force in international relations was not limited to the United Nations Charter and also included rules of customary international law.<sup>69</sup> The Court referred, by way of

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*Law* (Princeton: Princeton University Press, 1968), at 585. This view is echoed by Professor Roberto Ago: “[I]t would be hard to believe that there can be any difference whatsoever in content between the notion of self-defence in general international law and the notion of self-defence endorsed in the Charter”. See Ago, R., “Addendum to the 8th Report on State Responsibility”, (1980-II) 32 *ILC Yb.* Part 1, at 63; Constantinou, A., *The Right of Self-Defence under Customary Law and Article 51 of the Charter* (Athènes, Bruxelles: Bruylant, 2000), at 204.

<sup>65</sup> *Nicaragua* Judgement, n. 27, para. 174.

<sup>66</sup> *Ibid.*, para. 175.

<sup>67</sup> *Ibid.*

<sup>68</sup> The dual structure of a norm of customary international law has been previously recognised in the *Continental Shelf* case: “It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them”, *ICJ Rep. 1985*, at 29–30, para. 27.

<sup>69</sup> A passage in the Separate Opinion of the Court’s President, Judge Singh, on the interrelation of rules of customary and conventional law on the use of force seems remarkable: “If an issue was raised whether the concepts of the principle of non-use of force and the exception to it in the form of use of force for self-defence are to be characterized as either part of customary international law or that of

providing an example of continued application of customary law alongside the Charter, to Article 51 of the Charter – a State’s inherent right to individual or collective self-defence. Having restated the Charter text that “nothing [in the present Charter] shall impair” the realisation of this inherent right in the event of an armed attack, the Court concluded that Article 51 would only be meaningful on the assumption that the right in question were of a customary nature – even if its present content has been confirmed and influenced by the Charter. Neither did the Charter regulate directly all aspects of the right’s content and ways of implementation: for example, it did not contain any specific rule whereby self-defence would warrant only measures that are proportional to the armed attack and necessary to respond to it efficiently – a rule well established in customary international law. The Court observed likewise that the notion of “armed attack” which, if found to exist, would authorise the exercise of the right of self-defence by the State affected by the attack, was not defined in the Charter, and was not part of either general or particular treaty law either. In the absence of a detailed regulation of the said issues, the Court could not plausibly conclude that Article 51 was a rule which “subsumes and supervenes” customary international law. Instead, it ruled that, with regard to the use of force, customary international law continued to exist alongside treaty law, and that the areas governed by the two sources of law did not overlap exactly.<sup>70</sup>

Although having allegedly been guided in its reasoning, to some extent, by the United Nations’ institutional ideology, the International Court of Justice attempted to direct its view to the gist of rules of customary international law governing the use of force in international relations. This is where substantial problems started emerging. Having taken note that there apparently was a substantial degree of bilateral accord between Nicaragua and the United States as to the content of the applicable customary international law,<sup>71</sup> the Court nevertheless declared its willingness to deal with the matter:

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conventional law, the answer would appear to be that both the concepts are inherently based in customary international law in their origins, but have been developed further by treaty-law. In any search to determine whether these concepts belong to customary or conventional international law it would appear to be a fallacy to try to split any concept to ascertain what part or percentage of it belongs to customary law and what fraction belongs to conventional law. There is no need to try to separate the inseparable . . .” See Separate Opinion of President Nagendra Singh, *ICJ Rep. 1985*, at 152.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Nicaragua* Judgment, n. 27, para. 187: “The United States points out that Nicaragua has endorsed this view [the view of the International Law Commission], since one of its counsel asserted that ‘indeed it is generally considered by publicists that Article 2, paragraph 4, of the United Nations Charter is in this respect an embodiment of existing general principles of international law’”. And the United States concludes:

In sum, the provisions of Article 2 (4) with respect to the lawfulness of the use of force are ‘modern customary law’ (International Law Commission. *loc. cit.*) and the ‘embodiment of general principles of international law’ (counsel for Nicaragua, Hearing of 25 April 1984, morning, *loc. cit.*). There is no other ‘customary and general international law’ on which Nicaragua can rest its claims.

It is, in short, inconceivable that this Court could consider the lawfulness of an alleged use of

This concurrence of their [the Parties'] views does not, however, dispense the Court from having itself to ascertain what rules of customary international law are applicable. The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, *inter alia*, international custom "as evidence of a general practice accepted as law", the Court may not disregard the essential role played by general practice. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.<sup>72</sup>

Having so stated, the Court did not require, though, "that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs". In other words, the Court was not of the opinion that, in order for a rule of international law to be recognised as customary, the corresponding State practice must be in exact conformity with the rule. Instead, in order to deduce the existence of customary rules, the Court deemed it sufficient that the practice of States<sup>73</sup> should be in *general* consistency with such rules, and that instances of State conduct inconsistent with a given rule should generally be treated as breaches of that rule, not as indications of the recognition of a new rule:

If a State acts in a way *prima facie* incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then

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armed force without referring to the principal source of the relevant international law – Article 2 (4) of the United Nations Charter.

As for Nicaragua, the only noteworthy shade of difference in its view lies in Nicaragua's belief that "in certain cases the rule of customary law will not necessarily be identical in content and mode of application to the conventional rule".

<sup>72</sup> *Nicaragua Judgment*, n. 27, para. 184.

<sup>73</sup> It has been suggested that both physical and verbal acts of States constitute practice that contributes to the creation of customary international law. *Physical* acts include, for example, the behaviour of the executive, legislative and judicial organs of a State. *Verbal* acts include military manuals, national legislation, national case law, instructions to armed and security forces, military communiqués during war, diplomatic protests, opinions of official legal advisers, comments by governments on draft treaties, executive decisions and regulations, pleadings before international tribunals, statements in international organisations and at international conferences and government positions taken with respect to resolutions of international organisations. See Henckaerts, J.-M. and L. Doswald-Beck (eds.), *Customary International Humanitarian Law. Volume I: Rules* (Cambridge: Cambridge University Press, 2005), at xxxii, xxxiv.

whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.<sup>74</sup>

Having thus concluded, the Court, in fact, refused to probe the practice of States in relation to the prohibition of the use of inter-State force, and focused predominantly on the *opinio juris*, from which it deducted, inaccurately, the conformity of State practice. It seems that the issue of State practice in an area as crucial and delicate as this should have been treated with more attention for, at present, it is not sufficiently clear or measurable. Professor Michael J. Glennon observes that, according to the 2004 Report of the High-Level Panel on Threats, Challenges and Change,<sup>75</sup> “from 1945 to 1989, States used military force numerous times in inter-State disputes. By one count, force was employed 200 times, and by another count, 680 times.” In other words, he goes on, “the panel does not tell us who is right; indeed, it does not seem to care who is right. Apparently, it would not matter whether the rules had been violated 200 or 680 or 6,800 times – the panel seems to suppose the number of violations is irrelevant.”<sup>76</sup> However, he continues, the actual number of violations of a rule *is* important, for at least two reasons:

First [. . .] the report rejects humanitarian intervention by states. The reason, the report says, is that humanitarian intervention by states would pose a fatal risk to the stability of the global order. Yet, how can we know how great the threat would be to the stability of the global order unless we know how stable that order really is – unless we know how effective the current rules actually have been in preventing the use of force?

Second, after the number of violations exceeds a certain point, it is reasonable to conclude that states no longer consent to the rule and that the rule is no longer binding – that it has fallen into desuetude. Without examining the extent of non-compliance, however, it is impossible to know whether the rule is still a good law. Why does the panel assume that the law *is* what it believes the law *should be*?<sup>77</sup>

As concerns the *opinio juris*, the Court did not produce much more clarity either. As was noted above, it was apparent from the Parties' submissions to the Court that they regarded Article 2(4) as being generally reflective of customary international law on the issue in question, and that they did not challenge the obligation emanating from that Article “to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with

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<sup>74</sup> *Nicaragua* Judgment, n. 27, para. 186. However, this conclusion seems to be somewhat simplistic. It would have been more accurate to derive the *opinio juris*, as evidence of States' conviction that their behaviour is in conformity with binding rules of international law, from their practice (in the first place physical acts, but also verbal acts), whereas the inverse methodology is not as convincing. Besides, in practices contrary to established rules of customary international law there is, in fact, an inherent risk that these contrary practices can, over time, “shake” the rules and weaken them.

<sup>75</sup> See n. 11.

<sup>76</sup> Glennon, M. J., “The emerging use-of-force paradigm”, 11 *JCSL* 309–317 (2006), at 311.

<sup>77</sup> *Ibid.*

the purposes of the United Nations". The Court nevertheless felt that it had to go beyond the opinions of the two States involved in the dispute, and to satisfy itself as to the existence in customary international law of a more universal *opinio juris* of the mandatory character of this rule. According to the Court, an adequate *opinio juris* might be inferred from, *inter alia*, the attitude of the parties to the dispute and of other United Nations Members towards relevant General Assembly resolutions, especially towards the 1970 Friendly Relations Declaration (i.e. principally from verbal acts of States):

The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law . . .<sup>78</sup>

As regards the United States in particular, an expression of its long-standing stance towards the prohibition of the use of force was alleged to be found in some of its earlier verbal acts, such as its express approval of a resolution condemning aggression adopted at the Sixth International Conference of American States (18 February 1928), or its ratification of the Montevideo Convention on Rights and Duties of States (26 December 1933) whose Article 11 obliged States Parties not to recognise territorial acquisitions or special advantages that have been obtained by force. In the same spirit, the acceptance by the United States of the principle of the prohibition of the use of force, which is contained in the 1975 Helsinki Final Act's Declaration of principles governing the mutual relations of States participating in the Conference on Security and Cooperation in Europe, whereby the participating States had undertaken to "refrain in their mutual relations, as well as in their international relations in general" from the threat or use of force, was considered to constitute evidence of its official position towards the legal prohibition of the inter-State use of force. In a word, without considering actual State practice, the International Court of Justice held that the acceptance by one of the contending States of the above non-binding declarations and resolutions, most of which had been worded in political – not even legal – terms, proved to a suitable degree the existence of an *opinio juris* prohibiting the use of force in international relations among the States that had participated in the Conference.<sup>79</sup>

This conclusion could not have been more questionable either. In its endeavour to avoid considering the physical behaviour of States, the Court appeared content with acknowledging the contending Parties' approval of certain "soft law" sources (i.e. verbal acts, as evidence of customary international law). Yet, the content of General Assembly resolutions is not necessarily endowed with *opinio juris*, the psychological conviction that their rules do reflect mandatory international law. As H. Hart noted, people or States at times accept rules either because they face criticism and pressure, or because the rules

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<sup>78</sup> *Nicaragua* Judgment, n. 27, para. 188.

<sup>79</sup> *Ibid.*, para. 189.

in question are not obligatory.<sup>80</sup> General Assembly resolutions, in addition to their unsound legal status under the Charter, are always products of policy deals, concessions and political wrestling over the United Nations Member States' national interests. One could hardly have been more accurate in suggesting that, in order for a General Assembly resolution to be regarded as evidence of *opinio juris*, there should be "a sufficient body of state practice for the usage element of the alleged custom to be established without reference to the resolution".<sup>81</sup> Notably, in an earlier Judgment, the International Court of Justice did not recognise a practice as custom due to its having been "so much influenced by considerations of political expediency in the various cases that it is not possible to discern in all this any constant and uniform usage accepted as law".<sup>82</sup> The ambiguous statistics quoted above from the High Panel Report alone lead one to conclude that the understanding of State practice with regard to the legal prohibition of the use of force is neither coherent nor uniform. Besides, the fact that States quite often behave contrary to what they declare in the General Assembly resolutions allows one to suppose that States sometimes vote in the General Assembly on what they believe international law *ought* to be – or *might* be in the future – and not on what it actually *is* at the present stage. In view of States' contradictory practices – especially since the 1999 Kosovo campaign – in the field of the use of force, it therefore makes sense to consider the legal justifications of those various practices in a more detailed manner and to offer conclusions as to the present state of international law on the subject.

### ***Jus cogens* obligation**

In addition to the treaty-based and customary regulation of the prohibition of the use of force in international relations, it may also be useful to reflect on whether or not this prohibition – or at least some elements of it – constitutes a *jus cogens* norm, a peremptory norm of international law.<sup>83</sup> If that is indeed so, the legal consequences of breaches of this prohibition should be quite different from those of customary international law and even Article 2(4) in its – sufficiently important – quality of a Principle of the United Nations.

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<sup>80</sup> Hart, H. L. A., *The Concept of Law* (Oxford: Clarendon Press, 1961), at 56: "There is no contradiction in saying that people accept certain rules but experience no such feelings of compulsion."

<sup>81</sup> Thirlway, H. W. A., *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (Leiden: A.W. Sijthoff, 1972), at 67.

<sup>82</sup> *Asylum Case*, ICJ Rep. 1950, at 277.

<sup>83</sup> Vienna Convention on the Law of Treaties, Article 53 (Treaties conflicting with a peremptory norm of general international law ("jus cogens")): "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

The *jus cogens* rules give rise to *erga omnes* obligations,<sup>84</sup> that is to say, their breaches affect the interests of larger groups of States – indeed, it is alleged, the interests of the community of States as a whole<sup>85</sup> – which suggests that international law should provide States with correspondingly stronger mechanisms for reacting to such breaches, commensurate with their gravity. In this regard, one should refer to Article 41 (“Particular consequences of a serious breach of an obligation under this chapter”) of the Articles on State Responsibility, which were drafted by the International Law Commission and adopted by the General Assembly Resolution A/RES/56/589 of 12 December 2001:

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40.<sup>86</sup>
2. No State shall recognise as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining this situation.
3. This Article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter [Part II: Content of the international responsibility of a State, Chapter III: Serious breaches of obligations under peremptory norms of general international law] applies may entail under international law.

Indeed, Articles 40 and 41 bear a number of serious implications for the qualification of the use of force in contravention of Article 2(4) of the United Nations Charter under international law. Their literal interpretation suggests that a serious breach of Article 2(4) – assuming that it in fact constitutes a peremptory norm of general

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<sup>84</sup> See Лукашук, И., *Право международной ответственности* (Москва, Волтерс КЛУвер, 2004), at 252.

<sup>85</sup> As early as in the eighteenth century, E. de Vattel argued that grave violations by a State of other States’ interests and of the “supreme interest of security of human society” should give those States a right to unite for the punishment of the violator State. See Де Ваттель, Э., *Право народов или принципы естественного права, применяемые к поведению и делам наций и сУверенов* (Москва: Госюриздат, 1960), at 449. In the nineteenth century, I. Bluntschli suggested a classification of international delicts in three groups, depending on their gravity: (a) a State’s failure to comply with its obligations vis à vis other States; (b) a State’s unlawful interference in another State’s legal order or the order of that State’s disposal of its property; (3) an unlawful use of force which leads to the disturbance of peace. In the latter case, “if a violation of international law poses a general threat, it is not only the victim State but also all others having sufficient power to protect international law should resist it.” See Блунчли, И., *Современное международное право цивилизованных народов, изложенное в виде кодекса* (Москва: типография Индрих, 1876), at 283.

<sup>86</sup> 2001 Articles on State Responsibility, Article 40 (“Application of this chapter”):

- “1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.”



international law – should by definition necessitate more far-reaching consequences than it would have if the norm did not possess this status but only had one of “merely” treaty law or customary international law.<sup>87</sup>

Firstly, it follows from Article 40 that a breach of a peremptory norm of general international law can be “serious” – if it involves “a gross or systematic failure by the responsible State to fulfil the obligation” – and “less than serious”, logically, if the obligation in question is breached to a minor degree and not systematically.<sup>88</sup> As was observed above, the Charter makes a distinction, in its Article 39, between three types of breaches of Article 2(4): threats to the peace, breaches of the peace and acts of aggression. Although the Security Council has never produced any normative or practical framework for distinguishing between them, it is obvious that acts of aggression, as the most serious type of breaches among three in this classification, should by necessity fall within the ambit of Article 40 of the 2001 Articles, whereas minor uses of inter-State force, although violating Article 2(4), might not necessarily amount to either of the first two types of breaches, and surely would not meet the requirements of an act of aggression.

Secondly, States are required (“*shall cooperate*”) – not merely allowed or encouraged – to bring to an end, by joint efforts, any serious breach within the meaning of Article 40. Under current international law, such “lawful means” for suppressing acts of aggression include individual or collective self-defence (Article 51), collective enforcement action under the auspices of the Security Council (Chapter VII) or the involvement of regional security arrangements in the maintenance of international peace and security (Chapter VIII). The imperative wording of the provision suggests that victims of serious breaches of peremptory norms of general international law should not be left alone vis à vis States that would have aggressed them. Instead, an end must be put to such an aggression as soon as possible, and States defending the interests of the victim States must thereby use only lawful means and refrain from violating international law.

Thirdly, States are required to refrain from recognising as lawful situations created by serious breaches of *jus cogens*, and from rendering aid or assistance in maintaining such situations. Acts of aggression can lead to a variety of unlawful results, most of which are, in one way or another, related to the status of territory or unlawful reforms in administration and public order. As will be shown below, States and relevant international bodies have indeed refrained from recognising the validity of such measures resulting from unlawful uses of force or violations of the principle of self-determination, which most probably testifies to the respective rules’ status of *jus cogens*.

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<sup>87</sup> The legal consequences of internationally wrongful acts of a lesser gravity than those of serious breaches of peremptory norms of general international law are outlined in Chapters I (“General principles”) and II (“Reparation for injury”) of the Articles’ Part II, and consist in the continued duty of performing the obligation breached (Article 29), of ceasing and not repeating the internationally wrongful act in question (Article 30), and of making full reparation for the injury caused by the internationally wrongful act (Article 31). In turn, full reparation for the injury caused may take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of Chapter II.

<sup>88</sup> In the latter situation, only general rules on the implementation of the international responsibility of States laid down in the Articles (Part II, Chapters I and II) would apply.

And last but not least, Article 41(3) mentions that serious breaches of *jus cogens* norms may also entail “further consequences” under international law. Assuming that Article 2(4) indeed constitutes *jus cogens*, one should of necessity think, among these further consequences, of the individual criminal responsibility of natural persons – political or military leaders of a State – who actively participate in or order the planning, preparation, initiation or waging of aggression committed by that State.<sup>89</sup> Contemporary international law lays down that such leaders are to be held responsible for a crime of aggression, and that their criminal liability may be enforced directly or indirectly. As will be seen below, the determination that an act of aggression – a serious breach of the hypothetical *jus cogens* norm contained in Article 2(4) – has been committed by a State should predictably lead to the identification of individuals who caused that act to happen, and to the determination of their culpability for the act.

Having outlined the specific consequences that the most serious type of breach of Article 2(4) – an act of aggression – would necessitate, if this Article were confirmed to constitute *jus cogens*, the accuracy of attributing this status to Article 2(4) should now be analysed. The corroboration of this assumption should help overcome the problem of assessing the discrepancy which exists between the Charter’s strongly worded prohibition of the use of force and the actual, deplorably frequent, practice of its use by States. In other words, should some contemporary State practices diverging, in serious ways, from Article 2(4) be regarded as testifying to the emergence of new customary rules of international law on the use of force, or should they rather be considered as serious breaches of a peremptory norm of general international law?

The 1969 Vienna Convention’s definition of a peremptory norm of general international law (*jus cogens*) includes a number of elements, the brief consideration of which should be useful for the purpose of this research: (1) a norm in question must be accepted and recognised by the international community of States as a whole; (2) due to its over-arching character, such a norm allows for no derogation in any circumstances; and (3) it is a norm of a lasting, system-building nature, for it can be modified only by a subsequent norm of general international law having the same character. To which extent does the prohibition of the use of force embodied in Article 2(4) of the Charter of the United Nations meet these criteria?

As such, Article 2(4) *is*, by and large, accepted and recognised by the international community of States as a whole. As a Principle of the United Nations, it is binding upon all United Nations Member States and, as was pointed out above, Article 2(4) also provides protection to non-Members, without being formally binding upon them. It has been relied upon in numerous documents adopted by international representative bodies – such as the United Nations General Assembly or the Conference for Security and Cooperation in Europe – and in States’ pleadings before and decisions of the International Court of Justice. Yet, as was observed in the previous section, the practice of applying Article 2(4) during the period since 1945 has not always been consistent with such verbal recognitions. States were breaching the prohibition, directly or indirectly, on a variety of

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<sup>89</sup> Cf. Article 16 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind.

grounds but most frequently invoking the right to individual or collective self-defence, which is referred to in the Charter's Article 51 as a plain exception to the prohibition of the use of force. Article 51 does not, however, itself regulate the implementation of the right in any more detailed manner and leaves the regulation up to States, thereby creating space for all possible kinds of selfish interpretations. One may thus conclude, paradoxically, that Article 2(4) is not contested by States verbally but is in fact breached, more often than not, as a matter of their practice.

Thus turning to the second criterion, we may ask whether there exist – or can possibly exist – any reliable (normative or practical) standards on whose basis one could distinguish with more certainty between legitimate uses of force and “derogations” from the norm in question – which are not allowed, if that norm happens to constitute one of *jus cogens*. Article 2(4) itself contains only one such criterion – against which all relevant State practice, as inconsistent as it is, must be measured: no threat or use of force is to be applied by a State “against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. As was argued above, States’ territorial integrity and political independence enjoy the same degree of protection as other values referred to in the latter part of Article 2(4) (i.e. the Purposes of the United Nations), and are listed for the purpose of providing examples of gravity of uses of force prohibited by the Charter. This reminder is appropriate here as the prohibition of deriving legal title from illegal uses of force, and breaches of the principle of self-determination did acquire, according to Professor Alexander Orakhelashvili,<sup>90</sup> the status of *jus cogens*. In his important treatise on the subject, he agreed with Sir Robert Jennings that a use of force could not result in the acquisition of title if it has been condemned as illegal,<sup>91</sup> and with Professor Charles de Visscher that international law could not treat as lawful the benefits ensuing from the use of force, if it outlaws the use of force in an absolute way.<sup>92</sup> He further reminded that several territorial changes have been regarded as null and void due to their conflict with the peremptory norms in question: for instance, the occupation of East Jerusalem by Jordan since 1948 was considered a breach of Article 2(4) of the Charter, and consequently Jordan was not able to assert its sovereignty over the area,<sup>93</sup> and the Israeli occupation of the West Bank and East Jerusalem was deemed void for an identical reason. Notably, the consequences of the said occupations were not merely denoted as “illegal” – they were deemed null and void, that is to say, no legal effect could be derived from them *ab initio*. Therefore, despite the lapse of time, the said territories are still referred to as occupied territories, and Israel as an occupying power. These unequivocal characteristics have been confirmed by the United Nations Security Council in Resolution 672 (1990) and by the International Court of

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<sup>90</sup> Orakhelashvili, A., *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006), at 218–219.

<sup>91</sup> Jennings, R., *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963), at 54.

<sup>92</sup> De Visscher, C., *Les effectivités du droit international public* (Paris: Pedone, 1967), at 115–116.

<sup>93</sup> See also Cassese, A., “Considerations on the international status of Jerusalem”, 3 *Palestinian Yearbook of International Law* 22 (1986).

Justice in the 2004 *Wall* Advisory Opinion. Professor Antonio Cassese explained these opinions of the key bodies of the United Nations in the following manner:

at present general international law has departed markedly from the principle of effectiveness: de facto situations brought about by force of arms are no longer automatically endorsed and sanctioned by international legal standards. At present the principle of legality is overriding – at least at the normative level – and effectiveness must yield to it.<sup>94</sup>

Professor Orakhelashvili also emphasised that the voidness of a forcible acquisition of territory should result in the nullity of acts emanating from the unlawful exercise of sovereign powers in furtherance of that acquisition.<sup>95</sup> Thus, the International Court of Justice maintained in the *Wall* Advisory Opinion that some of the legislative and administrative measures Israel had exercised in the Occupied Palestinian Territory were to be considered in the context of nullity. The Court noted in particular Israel's legislative and practical attempts to alter the status of Jerusalem in the course of its occupation, "including expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied section", which abuses had previously been emphasised in the Security Council Resolution 298 (1971). The Court further recalled Security Council Resolution 478 (1980) by which a provision in Israel's Basic Law on the status of Jerusalem as the "complete and united" capital of Israel, along with all measures "which have altered or purport to alter the character and status of the Holy City of Jerusalem" were declared null and void.<sup>96</sup> The International Court of Justice also recalled the Security Council's attitude towards "the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967" as being in "flagrant violation" of the provisions of the Fourth Geneva Convention relative to the Occupying Power's rights and responsibilities, especially Article 49. That those settlements had "no legal validity" had previously been held in Security Council Resolutions 446 (1979), 452 (1979) and 465 (1980).<sup>97</sup> The Court ruled that the said legislative and administrative measures were without a legal effect and hence could not alter the status of these territories (including East Jerusalem) as occupied territories, and the continued status of Israel as an Occupying Power was upheld accordingly.<sup>98</sup> The prohibition of the use of force under international law was also relevant in the cases of East Timor, East Jerusalem and Northern Cyprus.

To wrap up on the second criterion, one may suggest, by way of analogy, that, if the prohibition of the use of force against the territorial integrity of States and the principle of self-determination of peoples were found to constitute the rules of *jus cogens*, there

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<sup>94</sup> See Cassese, *loc. cit.*, n. 93, at 32.

<sup>95</sup> Articles 42–56 of the 1907 Hague Regulations lay down the legal framework for the administration of occupied territories by an Occupying Power. In line with those provisions, the Security Council pronounced in its Resolution 497 (1981) that Israel's policies of imposing its laws, regulations and jurisdiction over the occupied Golan Heights were null and void.

<sup>96</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Opinion, ICJ Rep. 2004, paras. 74–75.

<sup>97</sup> *Ibid.*, para. 99.

<sup>98</sup> *Ibid.*, para. 78.

should be little reason to oppose why the other basic values protected by Article 2(4) – such as “*international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion*” (Article 1(3), emphasis added) – as well as the other Purposes of the United Nations might not be protected in the same manner. If that is indeed so, the case for legitimacy of “humanitarian intervention” – an international military tool to stop large-scale violations of fundamental human rights – could become a good deal stronger.

As for the last criterion – that a *jus cogens* norm can be modified only by a subsequent norm of general international law having the same character – it seems to evoke no particular difficulty. It has been observed above that the conservative law regulating the use of force in international relations has experienced virtually no changes since the adoption of the United Nations Charter – and no significant amendment to its text is to be expected in the foreseeable future, due to the complex technicalities of revising a treaty as system-building as the Charter. Indeed, Article 2(4) will not be replaced by an alternative norm having the same status for decades to come, which means that States should have to recognise this Article’s status of a peremptory norm of general international law and to adapt their external policies accordingly, or else learn to meet the continued test of interpreting its content – as a matter of putting the principle of legality into practice, to borrow from Professor Cassese’s statement quoted above – in their favour, in light of their own conflicting practices.

If Article 2(4) indeed constitutes a *jus cogens* norm, the International Court of Justice must have been wrong in its having attributed too much weight, in the *Nicaragua* Judgment, to the rules of customary international law on the use of force – not to speak of the (in)accuracy of the Court’s examination of the subject, which matter has been dealt with above. Whilst a rule of customary international law is indeed capable of complementing – or altering, depending on the purpose of a specific rule – the content and/or the practice of application of a treaty provision by States, a *jus cogens* norm cannot be modified by any contrary practice of States, for any contrary practice would itself constitute a breach of the norm in question. In turn, the gravity of a breach (“serious breach” vs. “less than serious breach”) should determine the range of its legal (general and more specific) consequences – for example, in the case of the commission of an act of aggression by a State, the issue of the individual criminal responsibility of natural persons – the authors of the corresponding crime – should arise, in addition to the responsibility of the delinquent State for an internationally wrongful act. As the foregoing analysis suggests, there are indeed a sufficient number of direct and indirect indications that Article 2(4) does constitute a peremptory norm of general international law. A more comprehensive analysis of the relevant provisions of the 2001 Articles on State Responsibility will now be undertaken, in order to endorse this conclusion.

#### AGGRESSION AS A SERIOUS BREACH OF A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW

As the Articles on State Responsibility were being drawn up, there was an important discussion within the International Law Commission as to whether and how the Articles

should reflect the existence of a “hierarchy” of obligations under public international law and, accordingly, one of breaches of those obligations.<sup>99</sup> The debate involved such contentious issues as the legal nature of international responsibility, the feasibility of imposing responsibility on sovereign States and of implementing a collective “criminal responsibility” of States and governments, the accuracy of the classification of States’ infractions into international delicts and international crimes, and the like. Given that breaches of different obligations under international law obviously should entail qualitatively different legal consequences, an overwhelming majority of the International Law Commission’s members favoured, at the time, the adoption of a two-level classification and the ensuing acceptance of the term “international crime” in the international legal discourse.<sup>100</sup> Accordingly, the Commission’s Special Rapporteur on International Responsibility, Professor Roberto Ago, suggested, in 1976, a classification of breaches of States’ international obligations into international crimes and international delicts:

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject matter of the obligation breached.
2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole.
3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:
  - (a) A serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

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<sup>99</sup> Лукашук, И *op. cit.*, п. 84, at 262–266.

<sup>100</sup> For instance, Professor T. Elias was in favour of the notion “international crime”, Professor E. Hambro used the concept “international criminal acts”, and Professor J. Castañeda underscored that breaches of *erga omnes* obligations – such as acts of genocide – should be regarded as international crimes. See *Ежегодник Комиссии международного права* (1973), том I, заседание 1203, п. 26. However, it should be noted that the sensitive term “international crime” was to be used, for the purpose of the draft Articles, in the words of Professor D. Levin of the Soviet Union, “in the sense of international law, and not in the sense of criminal law, that is to say, the abovementioned conduct of a State [serious breach of an obligation emanating from a fundamental rule of international law] should entail a more severe political condemnation on the part of other States, as well as more severe international sanctions, including collective sanctions from an international organisation or a number of States”. See Певин, Д. Б., *Ответственность государств в современном международном праве* (Москва: «Международные отношения», 1966), at 29. In the International Law Commission’s opinion, the issue of individuals’ criminal responsibility for their role in the commission of international crimes was to be dealt with essentially separately from – although in a functional conjunction with – the responsibility of States, which approach was duly reflected in the 2001 edition of the Articles.

- (b) A serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
  - (c) A serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;
  - (d) A serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.
4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.<sup>101</sup>

This normative proposal took into account post-Second World War developments in international criminal law and is worth mentioning for our purpose inasmuch as it listed aggression, in an explicit manner, among “serious breaches of international obligations of essential importance” (Article 19(3)(a)) and characterised these as international crimes (Article 19(2)). Nonetheless, as the International Law Commission’s attitude towards the legal accurateness of the “criminal responsibility of the State” evolved over time, the final version of the Articles contained no reference to international crimes but dealt with less controversially worded “internationally wrongful acts” (Article 2) and “serious breaches of peremptory norms of general international law” (Article 40). Interestingly, the final edition of the Articles, unlike Professor Ago’s earlier proposal, made no more mention of aggression and offered no other specific examples of serious breaches of *ius cogens* norms. The consequences of this omission are twofold: on the one hand, the formulation included in the Articles’ final edition is comprehensive enough to allow States to react, through lawful means, to a serious breach of *any* peremptory norm of general international law; on the other hand, the range of these norms has not been determined in a clear-cut manner and is capable of further development over time.<sup>102</sup> Although the prohibition of aggression is, under modern international law, among the least dubious of such norms, it does merit a supplementary test.

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<sup>101</sup> *Ежегодник Комиссии международного права* (1976), том II, часть 2, at 110.

<sup>102</sup> As the International Law Commission put it in its Commentary on Article 40, “[i]t is not appropriate to set out examples of the peremptory norms referred to in the text of Article 40 itself, any more than it was in the text of Article 53 of the 1969 Vienna Convention. The obligations referred to in Article 40 arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.” See *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, text adopted by the International Law Commission at its 53rd session, in 2001, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/56/10), at 112.

### Aggression as a serious breach of obligation arising under Article 2(4) of the Charter of the United Nations

There exists considerable evidence that the prohibition of aggression under Article 2(4) of the Charter does indeed constitute a *jus cogens* norm. Opinions to this effect are found in the official proceedings of international judicial and expert bodies, in States' statements at international conferences<sup>103</sup> and in the international legal doctrine. Thus, the International Court of Justice noted in paragraph 190 of the *Nicaragua* Judgment that Article 2(4) "is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law". This affirmative – though cautious – observation took account of the official positions of both Nicaragua and the United States in the case:

Nicaragua in its Memorial on the Merits submitted in the present case states that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations "has come to be recognized as *jus cogens*". The United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a "universal norm", a "universal international law", a "universally recognized principle of international law", and a "principle of *jus cogens*".<sup>104</sup>

The Court's reserved observation was echoed, in a more assertive way, in the Separate Opinion of the President of the Court, Judge Nagendra Singh, who maintained that "the principle of non-use of force belongs to the realm of *jus cogens*, and is the very cornerstone of the human effort to promote peace in a world torn by strife".<sup>105</sup>

The International Law Commission also dealt with the legal implications of characterising the prohibition of aggression as a *jus cogens* norm, especially in the course of the codification work on the Vienna Convention on the Law of Treaties. The Commission maintained that the peremptory norm of general international law forbidding the use of force and acts of aggression had come into existence in 1945,<sup>106</sup> which meant that any treaty designed to instigate aggression against another State made after the entry into force of the Charter would be invalid *ab initio*, and that any acts performed in reliance on

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<sup>103</sup> At the 1968–1969 United Nations Conference on the Law of Treaties, a number of Governments characterised the prohibition of aggression as peremptory: see *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March to 24 May 1968, summary records of the plenary meeting and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), 52nd meeting, paras. 3, 31 and 43; 53rd meeting, paras. 4, 9, 15, 16, 35, 48, 59 and 69; 54th meeting, paras. 9, 41, 46 and 55; 55th meeting, paras. 31 and 42; and 56th meeting, paras. 6, 20, 29 and 51.

<sup>104</sup> *Nicaragua* Judgment, n. 27, para. 190.

<sup>105</sup> Separate Opinion of President Nagendra Singh, *loc. cit.*, n. 69, at 153.

<sup>106</sup> *ILC Yb.*, 1963, vol. II, at 198–199.



such a treaty would be illegal. In its Commentary on Article 50 of its draft Articles on the Law of Treaties, the Commission reiterated its view that “the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*”.<sup>107</sup> The specific discussions on issues arising from the effects of aggression on treaties were concerned, *inter alia*, with the effects of the determination of an act of aggression on the treaty relations of an aggressor State,<sup>108</sup> and the nature and validity of treaties concluded between the victorious States and vanquished aggressors (“case of an aggressor State”).<sup>109</sup>

In its Commentary on the 2001 Articles on Responsibility of States for Internationally Wrongful Acts, the International Law Commission has been even more assertive in pointing out the *jus cogens* character of the prohibition of aggression. Although not having provided any examples of peremptory norms in the final text of the Articles, the Commission gave such examples in its official Commentary on Article 40. Having indicated that such practices as slavery and the slave trade, racial discrimination and apartheid have been prohibited in widely ratified international treaties and conventions without exception, and that the peremptory character of the prohibitions against genocide<sup>110</sup> and torture<sup>111</sup> have also been recognised in a number of national and international judicial decisions, the Commission recalled the International Court of Justice’s conclusions that the basic rules of international humanitarian law applicable in armed conflict were “intransgressible” in character and hence peremptory,<sup>112</sup> and that “[t]he principle of self-determination . . . is one of the essential principles of contemporary international law” and gives rise to the international community’s obligation *erga omnes* to permit and

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<sup>107</sup> *ILC Yb.*, 1966, vol. II, at 247.

<sup>108</sup> In this regard, the Commission discussed “[q]uite apart from any questions of *jus cogens*, the problem . . . of an aggressor being obliged to terminate or withdraw from certain treaties”. See *ibid.*, at 181, 186.

<sup>109</sup> A draft article on the “case of an aggressor State” read as follows: “Nothing in the present articles may be invoked by an aggressor State as precluding it from being bound by a treaty or any provision in a treaty which, in conformity with the Charter of the United Nations, it has been required to accept in consequence of its aggression.” See *ibid.*, at 197. A rephrased version of this article read: “The present articles are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State’s aggression.” See *ibid.*, at 222.

<sup>110</sup> See, for example, the International Court of Justice’s view in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993*, ICJ Rep. 1993, at 439–440. See also the District Court of Jerusalem in the *Attorney-General of the Government of Israel v. Adolf Eichmann* case, 36 ILR 5 (1961).

<sup>111</sup> See the United States Court of Appeals, Second Circuit, in *Filartiga v. Pena-Irala*, 77 ILR 169, at 177–179 (1980); Ninth Circuit, in *Siderman de Blake and Others v. The Republic of Argentina and Others*, 103 ILR 455, at 471 (1992); the United Kingdom Court of Appeal in *Al Adsani v. Government of Kuwait and Others*, 107 ILR 536, at 540–541 (1996).

<sup>112</sup> *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep. 1996, para. 79.

respect its exercise.<sup>113</sup> In the Commission's view, the prohibition of aggression under international law was likewise generally agreed to be regarded as peremptory, for a number of reasons: it was consistent with every State's "legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations",<sup>114</sup> constituted an obligation *erga omnes*,<sup>115</sup> protected "the survival of each State and the security of its people",<sup>116</sup> and a serious breach of this prohibition (i.e. aggression itself) must entail, in addition to the responsibility of the delinquent State, the individual responsibility of State officials who, acting on behalf of the State, would have contributed to the commission of aggression by the State.<sup>117</sup>

Whilst the former characteristics of the prohibition of aggression have been dealt with above, at some length, the latter point – the "serious" level of gravity of a breach in question – requires some more specific scrutiny. The International Law Commission observed that breaches of the prohibitions of aggression and genocide, in order to produce "successful" results, involve large-scale intentional violations and, as such, are "serious" by their very nature.<sup>118</sup> In more normative terms, a serious breach of an obligation under a peremptory norm of general international law is defined in Article 40(2) as one which involves "a gross or systematic failure by the responsible State to fulfil the obligation" under the norm in question. As the Commission explained in its Commentary on the Article, "the word 'serious' signifies that a certain order of magnitude of violation is necessary in order not to trivialize the breach",<sup>119</sup> and relatively less serious cases of breach of peremptory norms are therefore not covered by Chapter III of the 2001 Articles. An act of aggression is a "gross" violation of Article 2(4) of the Charter by definition, for "the term 'gross' refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule".<sup>120</sup> Minor uses of force – even though they too come within the scope of

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<sup>113</sup> According to the International Court of Justice, obligations *erga omnes* "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination". See *Barcelona Traction*, ICJ Rep. 1964, at 32, para. 34. In the *East Timor* case, the Court said that "Portugal's assertion that the right of peoples to self-determination" as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable". See *East Timor (Portugal v. Australia)*, Judgment, ICJ Rep. 1995, para. 29.

<sup>114</sup> See *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, n. 102, at 33.

<sup>115</sup> *Barcelona Traction*, n. 113, at 32, para. 34.

<sup>116</sup> See *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, n. 102, at 127.

<sup>117</sup> Cf. 2001 Articles on State Responsibility, Article 58 ("Individual responsibility"): "These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State."

<sup>118</sup> See *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, n. 102, at 113.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

application of Article 2(4) – do not qualify as acts of aggression as they do not reach the required gravity threshold. In turn, to be regarded as “systematic”, a violation would have to be carried out in an organised and deliberate way.<sup>121</sup>

As Article 40 does not lay down any procedure for determining whether or not a serious breach of an obligation arising under a *jus cogens* norm has been committed,<sup>122</sup> it will now be useful to look into the rules for attributing an act of aggression to the delinquent State under international law, and to consider their implications for the criminal liability of responsible individuals.

### Attribution of aggression to a State under international law

As a general rule, the conduct of an organ of a State, or of a person or entity directed, instigated or controlled by a State, is attributed to that State.<sup>123</sup> This rule has acquired the character of a customary norm of international law and has been emphasised as such in the international legal doctrine. The International Law Commission noted that, in theory, the conduct of all natural or juridical persons linked to a State by nationality, habitual residence or incorporation might be attributed to that State, whether or not they have any direct association with the Government.<sup>124</sup> Yet, such an approach is avoided in international law, in order to limit responsibility to conduct which involves the State as an organisation, and, on the other hand, to recognise the autonomy of persons acting on their own account and not at the instigation of a public authority.<sup>125</sup> Thus, the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs (i.e. as agents of the State).<sup>126</sup> In conformity with this recognised rule, Article 4 (“Conduct of organs of a State”) of the 2001 Articles reads:

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<sup>121</sup> As the International Law Commission explains, the terms are not mutually exclusive, and serious breaches of obligations arising under *jus cogens* norms are usually both systematic and gross. Factors that may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims. *See ibid.*

<sup>122</sup> Paragraph 9 of the Commentary on Article 40 reads that “[i]t is not the function of the articles to establish new institutional procedures for dealing with individual cases, whether they arise under Chapter III of Part Two or otherwise. Moreover, the serious breaches dealt with in this chapter are likely to be addressed by the competent international organizations, including the Security Council and the General Assembly. In the case of aggression, the Security Council is given a specific role by the Charter of the United Nations.” *See ibid.*

<sup>123</sup> Лукашук, И., *op. cit.*, n. 84, at 109.

<sup>124</sup> *See Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, n. 102, at 38.

<sup>125</sup> *Ibid.*

<sup>126</sup> *See, e.g.*, Brownlie, I., *System of the Law of Nations: State Responsibility*, Part I (Oxford: Clarendon Press, 1983), at 132–166; Caron, D. D., “The basis of responsibility: attribution and other trans-substantive rules”, in Lillich, R. B. and D. B. Magraw (eds.), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Irvington-on-Hudson, New York:

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

As the International Law Commission pointed out, attribution as a normative operation must be distinguished from the characterisation of conduct as internationally wrongful; specifically with regard to aggression, the latter aspect has been examined above. By contrast, the distinctive task of attribution is to establish whether an act in question is an act of the State for the purposes of responsibility, and this can be done by showing that an internationally wrongful act – or, for the purpose of this research, a serious breach of an obligation arising under a peremptory norm of general international law, Article 2(4) of the Charter of the United Nations – committed by a State derived from an act performed by an organ of that State.<sup>127</sup> As international law does not, as a general rule, govern the internal organisation of States and the functions of their organs, the domestic law and practice of each State are crucial in determining what constitutes an organ for the purposes of responsibility. In particular, the power to declare a war or, more generally, to engage a State in an international armed conflict is usually possessed by the legislative or the executive, or else is somehow divided between both branches. However, while each State may certainly determine its internal structure and functions through its own laws and practices, international law still has a distinct role to play, as far as States' war-making functions (in both *jus ad bellum* and *jus in bello*) are concerned, in at least two aspects. Firstly, armed conflicts as such are subject to regulation by international law, and therefore *any* decision to involve a State in an international armed conflict taken by that State's relevant organ must of necessity raise the issue of legality of the use of force, and, if its illegality is established as a matter of international law, entail the State's international responsibility and the individual liability of persons who had acted as organs of the State in taking the unlawful decision. Secondly, it should be recalled that "the characterisation of an act of a State as internationally wrongful is governed by international law", and that "such characterisation is not affected by the characterisation of the same act as lawful by internal law".<sup>128</sup> Consequently, *any* decision to use force against a foreign State, even if

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Transnational Publishers, 1998), at 109; Condorelli, L., "L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances", 189 *RCADI* 9 (1984–VI); Dipla, H., *La responsabilité de l'État pour violation des droits de l'homme: problèmes d'imputation* (Paris: Pedone, 1994); Freeman, A. V., "Responsibility of states for unlawful acts of their armed forces", 88 *RCADI* 261 (1955–II); and Przetacznik, F., "The international responsibility of states for the unauthorized acts of their organs", 1 *Sri Lanka Journal of International Law* 151 (1989).

<sup>127</sup> See *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, n. 102, at 39.

<sup>128</sup> See 2001 Articles on State Responsibility, Article 3 ("Characterization of an act of a state as internationally wrongful").

has been taken in accordance with the initiator State's proper domestic laws and procedure, must be tested in light of applicable international law, bearing in mind the overriding *jus cogens* character of Article 2(4) of the Charter of the United Nations. Other applicable sources, such as the 1974 Definition of Aggression, may be helpful for this purpose, as interpretative tools.

## CONCLUSION

Current international law provides a reliable framework for the regulation of the use of force, and its conservatism lasting since 1945 is quite justified. As has been discussed above, the imperative character of Article 2(4) of the Charter of the United Nations derives, on the one hand, from the Charter's superior standing among international treaties, and, on the other hand, from its classification as a peremptory norm of general international law (*jus cogens*). Whereas State practices do, indeed, affect the shaping of customary rules of international law, conflicting practices cannot lessen the validity of a norm of *jus cogens*, and the according reaffirmation of the prohibition of the use of force in inter-State relations is able, it is hoped, to contribute to a better maintenance of international peace and security.

In particular, the International Criminal Court (ICC) could be instrumental in the fulfilment of this task. The Court was given jurisdiction over the crime of aggression, on the condition that this jurisdiction should be exercised "once a provision [of the ICC Statute] is adopted. . . defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime".<sup>129</sup> Importantly, this new definition should "be consistent with the relevant provisions of the Charter of the United Nations"<sup>130</sup> (e.g. with norms that set out predominantly *procedural* conditions for the determination of, and dealing with, acts of aggression). As the First Review Conference of States Parties to the ICC Statute (2010, Uganda) is approaching, the definition of the crime of aggression remains on the top of many international lawyers' agendas.<sup>131</sup> The

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<sup>129</sup> ICC Statute, Art. 5(2), first sentence.

<sup>130</sup> *Ibid.*, second sentence. In fact, the draft definition of the crime of aggression is largely based upon the UN GA Resolution 3314 (XXIX), for the draft text, *see* n. 30.

<sup>131</sup> *See*, for example, Cassese, A., "On some problematical aspects of the crime of aggression", 20 *Leiden Journal of International Law* 841–849 (2007); Kress, C., "The crime of aggression before the first review of the ICC Statute", 20 *Leiden Journal of International Law* 841–849 (2007), at 851–865; and Blokker, N., "The crime of aggression and the United Nations Security Council", 20 *Leiden Journal of International Law* 841–849 (2007), at 867–894. In the framework of the ICC system, substantial work on the definition of the crime of aggression was accomplished by the Preparatory Commission for the International Criminal Court in 1998–2002, and the drafting work is currently being continued by a Special Working Group on the Crime of Aggression under the Assembly of States Parties to the Rome Statute. An initial draft text was suggested by the Special Working Group Chairman in January 2007, and the Group met in four further sessions since then (in June and December 2007, and in June and November 2008). The outcomes of these sessions are reflected, respectively, in the following reports: ICC-ASP/6/SWGCA/INF.1 (25 July 2007), ICC-ASP/6/SWGCA/1 (13 December 2007), ICC-ASP/6/SWGCA/2 (14 May 2008), ICC-ASP/7/20/ Annex II

task of defining the crime of aggression for the purpose of the Statute is in fact more ambitious than it might seem at a first glance. It is submitted that the formulation of an acceptable definition would actually have a broader effect than just that of amending the ICC Statute. This author believes that the new definition should arguably affect the subsequent practice of the UN Security Council as well, even if that indirect effect might, at least initially, be limited to the attitudes of two permanent Security Council members (the United Kingdom and France) and those non-permanent ones who are also parties to the ICC Statute. This suggestion reasonably follows from the requirement that the sought definition be “consistent with the relevant provisions of the Charter of the United Nations”: if it is consistent with the UN Charter, there is no reason why the States Parties to the Rome Statute should not also use its letter and spirit as an appropriate reference in their capacity as Security Council members.<sup>132</sup> Although the Rome Statute’s provisions establish the criminal responsibility of individuals for the commission of the most serious crimes of international concern and do not affect the responsibility of States under international law for internationally wrongful acts, in the case of aggression, the appropriate determinations should be made at both levels. It is hoped that the Rome Statute’s definition of the crime of aggression – if adopted – would progressively reinforce the international legal prohibition of the use of force in international relations and thus contribute to a more peaceful world order.

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(22 November 2008) see the website of the International Criminal Court: <<http://www.icc-cpi.int/Menu/ASP/Special+Working+Group+on+Aggression/>> (accessed on 20 February 2009). In accordance with the Resolution ICC-ASP/5/Res.3 adopted by the Assembly of States Parties, the Group concluded its work during the resumed seventh session of the Assembly in New York from 9 to 13 February 2009. See document ICC-ASP-20090213-PR390-ENG at: <<http://www.icc-cpi.int/NR/rdonlyres/841E4C4C-9093-4671-9A20-B3B80387F5E/0/ICCASPPressRelease20090213PR390ENG.pdf>> (accessed on 20 February 2009).

<sup>132</sup> See Sayapin, *loc. cit.*, n. 20, at 335.



# THE TREATY-MAKING POWER IN CHINA: CONSTITUTIONALIZATION, PROGRESS AND PROBLEMS

Chen Yifeng\*

## GENERAL INTRODUCTION

Compared to 30 or 40 years ago, a dramatic expansion of China's treaty practice as an important aspect of China's international relations can be observed today. Several factors may account for this growth and for the current extensive treaty practice. The primary reason is that China promotes its social and economic development through international cooperation since adopting its so-called Open Policy in 1978. The use of treaties has become an important instrument to stabilize and advance economic intercourse between China and the rest of the world. According to a survey of the first 46 volumes of the Treaty Series of the People's Republic of China,<sup>1</sup> in addition to 373 treaties concerning loans from international organizations, 2,967 treaties concerning economic affairs were concluded by China in the period from 1949 to 1999. That number makes up 45 percent of the overall 6,538 treaties recorded in the Treaty Series for the same half century.<sup>2</sup>

Moreover, China has practiced its policy of good neighborliness on the basis of treaty obligations ever since the establishment of the People's Republic of China in 1949. Agreements concerning cooperation in the areas of investment, trade, culture, judicial assistance, etc., are widely concluded between China and neighboring or regional States. In this regard, China plays a significant role in promoting and maintaining regional peace and development. Furthermore, China actively participates in global cooperation and undertakes its due responsibilities in regard to globalized problems like climate change and combating terrorism and international crime. "In addition to numerous bilateral treaties and agreements concluded with foreign countries, China is now party to over 300 multilateral treaties."<sup>3</sup>

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<sup>1</sup> Treaty Series of the People's Republic of China (entitled 中华人民共和国条约集, zhong hua ren min gong he guo tiao yue ji). The Treaty Series commenced publication in 1957. On the publication of treaties see further sub-section *Publication* at p. 56.

<sup>2</sup> See QIN Xiaocheng, *Studies on the Means and Form of Treaties concluded by the P.R. China* (中华人民共和国缔结条约的形式研究, zhong hua ren min gong he guo di jie tiao yue xing shi yan jiu), Peking University Doctoral Dissertation, 2003, at 21, 25.

<sup>3</sup> XUE Hanqin and JIN Qian, "International treaties in the Chinese domestic legal system", 8 *Chinese Journal of International Law* 299-322 (2009), at 303.



A number of questions then arise. How are treaties concluded in China? Which organs are competent to negotiate and consent to treaties, and according to what procedure? How is the treaty power separated and balanced among relevant State organs? Do the constituent units such as provinces and autonomous zones, under the unitary system of China, possess any degree of capacity to conclude treaties? As China commits itself to the construction of the rule of law, to what extent has China's treaty-making power been constitutionalized?

International law recognizes the capacity of every State to conclude treaties,<sup>4</sup> but the methods and procedures of the exercise of treaty power fall within the domestic jurisdictions of States, the constitutional arrangement of which usually depends on the specific political structure and relevant historical factors. After a brief introduction to the meaning of "treaty" in Chinese law and practice, important questions that arise are investigated in some detail and selected further issues are discussed briefly, from the perspective of the constitutionalization process of China's treaty-making power. In the present study the author does not go into the question of the legal doctrine or political practice in China concerning treaty implementation domestically. That related specialized subject is dealt with elsewhere in books and articles published from the 1990s onwards.<sup>5</sup>

The consideration of the treaty-making power in China in this article is based on China's present law and practice.<sup>6</sup> The present Constitution, promulgated in 1982,

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<sup>4</sup> Vienna Convention on the Law of Treaties (23 May 1969), Article 6.

<sup>5</sup> Some representative works are worthy of mention in this regard. LI Shishi, "The Legislation of China, treaties, and international law" (中国的立法、条约与国际法, *zhong guo de li fa, tiao yue he guo ji fa*), *Chinese Yearbook of International Law* (中国国际法年刊, *zhong guo guo ji fa nian kan*) (1993), at 263–268; LI Zhaojie, "Effect of treaties in domestic law: Practice of the People's Republic of China", 16 *Dalhousie Law Journal* 62–97 (1993); LI Zhaojie, "The effect of treaties in the municipal law of the People's Republic of China: Practice and problems", 4 *AYIL* 185–226 (1994); WANG Tieya, "The status of treaties in the Chinese legal system", 1 *Journal of Chinese and Comparative Law* 1–16 (1995); GONG Renren, "Implementing international human rights treaties in China", in Mendes, Errol P. & Anik Lalonde-Roussy (eds.), *Bridging the Global Divide on Human Rights: A Canada-China Dialogue*, Aldershot: Ashgate, 2003, at 99–110; LI Ming, "The effects of treaties in China should be dealt with via legislation" (应从立法上考虑条约在我国的效力问题, *ying cong li fa shang kao lü tiao yue zai wo guo de xiao li*), 18 *Peking University Law Journal* (中外法学, *zhong wai fa xue*) 351–360 (2006); WANG Wei, *On Basic Theoretical Problems of the Implementation of Treaties in China* (条约在中国适用之基本理论问题研究, *tiao yue zai zhong guo shi yong zhi ji ben li lun wen ti yan jiu*), Beijing: Peking University Press (北京大学出版社, *bei jing da xue chu ban she*), 2007. An important book collects the work of a symposium on this topic, see ZHU Xiaoqing & HUANG Lie (eds.), *The Relations between International Treaties and Domestic Law* (国际条约与国内法的关系, *guo ji tiao yue yu guo nei fa de guan xi*), Beijing: World Knowledge Press (世界知识出版社, *shi jie zhi shi chu ban she*), 2000. For a recent thorough study on the issue in German which provides interesting observations from outside, see Björn Ahl, *Die Anwendung völkerrechtlicher Verträge in China*, Dordrecht: Springer, 2009; for an English summary, see Björn Ahl, "Chinese law and international treaties", 39 *Hong Kong Law Journal* 737–752 (2009).

<sup>6</sup> For a general survey of China's treaty law and practice 1949–1971, done from outside China, see Chiu, Hungdah, *The People's Republic of China and the Law of Treaties*, Cambridge: Harvard University Press, London: Oxford University Press, 1972.

contains some general provisions relating to treaty-making power. In 1990, China enacted the Law of the People's Republic of China on the Procedure of the Conclusion of Treaties (hereafter the Treaty Procedure Law), which specifies in great detail the procedures of treaty conclusion. This law, to a great extent, reflects China's prior treaty practice and also strengthens the lead and control of the Central Government for the purpose of a better implementation of governmental foreign policy.<sup>7</sup> The Treaty Procedure Law has greatly advanced the rule of law-construction process in China's foreign relations areas.<sup>8</sup>

## THE MEANING OF "TREATY" IN CHINESE LAW AND PRACTICE

### Treaty in a broad and a narrow sense

In its broad sense, the term treaty (条约, tiao yue) may be used to refer to any binding international agreement concluded between States, irrespective of its title, including a treaty, convention, agreement, protocol, exchange of notes, memorandum of understanding, jointly agreed communiqué and other documents insofar as the parties intend to create, modify or abolish their rights and obligations within a framework of international law. The Treaty Procedure Law of China defines the term treaty in its broadest sense by stating that the law shall apply to bilateral or multilateral treaties and agreements and other instruments of the nature of a treaty or agreement concluded between the People's Republic of China and foreign States.<sup>9</sup> This broad understanding is in accordance with the prescription of the 1969 Vienna Convention on the Law of Treaties, which provides: " '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".<sup>10</sup> Some Chinese statutes, which authorize the domestic courts to apply international treaties in case of lacuna or incompatibility of the statute with China's international obligations, use the term "international treaties" to refer to all international treaties to which China has subscribed. For example, Article 189 of the 1982 Civil Procedure Law stipulates that, where foreign elements are involved in the proceedings, "If an international treaty concluded or acceded to by the People's Republic of China contains provisions that differ from provisions of this law, the provisions of the international treaty shall apply, except for those on which

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<sup>7</sup> Explanation of the Draft of the Treaty Procedure Law by Minister of Foreign Affairs, QIAN Qichen, before the 15th Meeting of 7th Standing Committee of National People's Congress on 30 August 1990.

<sup>8</sup> For detailed evaluation of the Treaty Procedure Law, see XUE Hanqin, HU Zhiqiang and FAN Kun, "National Treaty Law and Practice: China", in Hollis, Duncan B., Merritt R. Blakeslee & L. Benjamin Ederington (eds.), *National Treaty Law and Practice. Dedicated to the Memory of Monroe Leigh*, Leiden: Martinus Nijhoff Publishers, 2005, at 157–158.

<sup>9</sup> Law of the People's Republic of China on the Procedure of the Conclusion of Treaties (28 December 1990) (中华人民共和国条约缔结程序法, zhong hua ren min gong he guo tiao yue di jie cheng xu fa), Article 2.

<sup>10</sup> Vienna Convention on Law of Treaties (23 May 1969), Article 2(1) (a).

China has made reservations.”<sup>11</sup> This provision was imitated by some subsequent statutes and has become a standard expression of Chinese legal texts.<sup>12</sup> Thus, China’s perception of the scope of a treaty is not different from that generally accepted in international law.

However, it is noticeable that the same term treaty (条约, *tiao yue*) is used narrowly by the Constitution and in some other laws. The terminology of the Constitution is inclined to a parallel but distinct employment of the terms treaty (条约, *tiao yue*) and agreement (协议, *xie yi*). For example, Article 67 of the Constitution authorizes the Standing Committee of the National People’s Congress to decide on the ratification and abrogation of treaties and important agreements (条约和重要协议, *tiao yue he zhong yao xie yi*), and Article 89 authorizes the State Council to conduct foreign affairs and conclude treaties and agreements (条约和协议, *tiao yue he xie yi*) with foreign States. An intentional separation of treaties and agreements may indicate a narrower scope of treaties envisaged by the drafters of the Constitution in relation to its broadest sense. But the Constitution provides no definite explanation of the meaning of treaties as used in it. Nor does the 1990 Treaty Procedure Law clarify this issue. However, some clues may be inferred or presumed from the wording of the Treaty Procedure Law. It seems that in no case shall an agreement concluded in the name of governmental departments be titled treaty.<sup>13</sup> And the political treaties, such as those of friendship and cooperation, peace, etc., shall probably only use the term treaty, instead of agreement, in the title of these documents.<sup>14</sup> The term treaty used in the Treaty Procedure Law includes in practice important documents not titled treaty, such as “charter” and “constitution” of international institutions, or conventions and protocol, etc. As the State Council in China is competent to approve treaties in some cases, the connotation of a treaty is broader than that found in the French constitutional practice, where the word treaty relates only to treaties ratified by the President.<sup>15</sup> In brief, the Chinese constitutional practices show that the term treaty in respect of the treaty-making power refers to the most important treaties that involve serious international commitments, irrespective of whether the specific title of an instrument contains the word treaty or not.

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<sup>11</sup> The Civil Procedure law was revised in 2007, and this article is renumbered as Article 236 in the new law.

<sup>12</sup> A list of the laws and regulations promulgated by the Standing Committee of the National People’s Congress or State Council, which stipulate the application of treaties in relation to the respective law or regulation until 9 December 2004, and a list of judicial interpretations issued by the Supreme Court involving the application of treaties in relation to certain laws and regulations until 9 December 2004, are unofficially collected. See WANG Wei, *On Basic Theoretical Problems of the Implementation of Treaties in China* (条约在中国适用之基本理论问题研究, *tiao yue zai zhong guo shi yong zhi ji ben li lun wen ti yan jiu*), Beijing: Peking University Press (北京大学出版社, *bei jing da xue chu ban she*), 2007, at 94–97, 98–99.

<sup>13</sup> It can be inferred from Article 5 of the Treaty Procedure Law, which, in comparison to the “treaties and agreements” negotiated and signed in the name of the state or government, intentionally leaves out the word treaties in stating “with respect to the negotiations and signing of agreements in the name of a government department of the People’s Republic of China . . .”

<sup>14</sup> Law of the People’s Republic of China on the Procedure of the Conclusion of Treaties, Article 7.

<sup>15</sup> Eisemann, Pierre Michel and Raphaële Rivier, “National treaty law and practice: France”, in Hollis et al. (eds.), *op. cit.*, n. 8, at 254.

In practice, the treaties with the definite designation of treaty comprise less than 2 percent of the documents of treaty nature concluded by China. “Agreement, protocol and exchange of note are the three principal designations of the documents, the sum of which constitutes approximately 80 percent of the overall treaty practice.”<sup>16</sup>

Although the scope of treaty in a narrow sense is far from clear, and often the differentiation of treaty and agreement is not rigidly apparent, it is advisable to be aware of the possible different meanings of references to treaties as used in different legal texts in order to avoid misunderstanding.

### **Forms: written and oral agreement**

As an established rule of international law, a treaty does not necessarily exist in written form, notwithstanding the fact that the 1969 Vienna Convention defines and applies to treaties in written form only. Oral agreement between States is rare in international practice especially as a result of the relatively recently expanding domestic constitutional practices of parliamentary control over diplomatic activities of the executive where the treaties are to be submitted in written form, subject to parliamentary review and ratification.<sup>17</sup>

Oral agreement in China’s treaty practice is exceptional, as China generally prefers to conclude treaties in written form for the obvious reasons of clarity and reliability. There exists, however, at least one case of oral agreement in China’s diplomatic practice. An agreement on resolving border clashes was made orally in the course of three hours of negotiation between Premier Zhou Enlai and Premier A. Kosygin of the Soviet Union at Beijing Airport in 1969. Its oral form resulted from China’s subsequent failure to obtain a written form of that agreement from the Soviet Union. This agreement, nevertheless, was executed faithfully by both parties.<sup>18</sup>

The 1990 Treaty Procedure Law has no mandatory requirement regarding the form of a treaty. Therefore, it may be reasonably inferred, first, that the possibility of conclusion of an oral agreement is not excluded, and second, that the Treaty Procedure Law equally applies to the oral agreement insofar as relevant and applicable.

### **Governmental treaties and agreements, and ministerial agreements**

The Constitution would appear to envisage two kinds of treaties: State treaties referred to as “treaties and important agreements” in Article 67 and Article 81, and governmental treaties referred to as “treaties and agreements” in Article 89.

In contrast to the State treaties and governmental treaties with solid constitutional bases, there also exist the ministerial agreements concluded by governmental departments with

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<sup>16</sup> QIN Xiaocheng, *op. cit.*, n. 2, at 38.

<sup>17</sup> For a similar opinion, see McNair, Arnold, *The Law of Treaties*, Oxford: Clarendon Press, 1961, at 7–8.

<sup>18</sup> For details, see QIN Xiaocheng, “Oral international agreement and China’s relevant practice”, 4 *Chinese Journal of International Law* 465–479 (2005).

foreign governmental departments, which are not expressly mentioned in the Constitution. However, ministerial agreements have been a long-accepted practice of a constitutional nature, ever since the establishment of the People's Republic of China in 1949.<sup>19</sup> The treaty competence of the governmental departments may be deemed to be derived from the administrative jurisdictions over the subject matters conferred by the Constitution and laws. A Decree issued by the State Council in 1958 for the first time formally recognized the treaty competence of the governmental departments.<sup>20</sup> The 1990 Treaty Procedure Law, which in many respects codifies China's existing practice, also expressly recognizes the treaty competence of the governmental departments within their respective jurisdictions and functions. Thus the ministerial agreements are recognized as a form of treaty in China's treaty law and practice, and therefore they are binding on China directly at the international level under international law. Some, but not all of them – usually depending on their importance – are also published in the Treaty Series of the People's Republic of China (中华人民共和国条约集, *zhong hua ren min gong he guo tiao yue ji*). The ministerial agreements are mainly executed by the governmental departments, and the question of their legal force within the domestic legal system is not fully clear either in theory or practice so far.<sup>21</sup>

### Agreements of a non-treaty nature

State contracts (合同, *he tong*) concluded by China with other States or private entities do not belong to the category of treaties. Agreements made between China and a private entity, in any case, shall not be taken as treaties. China may also make contracts concerning commercial affairs with foreign States. Since the beginning of the People's Republic, State contracts are treated differently from treaties, as evidenced by a decree of 1952 on the applicable measures in the making of treaties and contracts.<sup>22</sup> Although State contracts are subject to the review and approval procedure specified in that decree, this is principally due to their importance, not because they were taken as treaties.

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<sup>19</sup> It is observed that from 1949 to 1967, China concluded about 2,000 treaties in a broad sense with more than 70 states. See Johnston, Douglas M. and Hungdah Chiu, *Agreements of the People's Republic of China 1949–1967: A Calendar*, Cambridge, Mass.: Harvard University Press, 1968, at 218–222. A majority of these treaties and agreements were signed by the governmental ministries and in practice they were exempted from ratification or approval requirement.

<sup>20</sup> *The Regulations of State Council Concerning the Procedure of Concluding Treaties with Foreign States*, issued in 1958, revised in 1962, and abrogated by the Standing Committee of the National People's Congress on 24 December 1987.

<sup>21</sup> It is interesting to note the French attitude in this regard, that the ministerial agreements do not bind the state, only the signatory agency. See Eisemann and Rivier, *loc. cit.*, n. 15, at 255. British practice is also similarly conservative toward this issue, see Sinclair, Ian, Susan J. Dickson, and Graham Maciver, "National treaty law and practice: United Kingdom", in Hollis et al. (eds.), *op. cit.*, n. 8, at 729–730.

<sup>22</sup> Decision of the Council of Administrative Affairs on the Uniform Measures of Concluding Treaties, Agreements, Protocols, Contracts, and etc. with Foreign States, adopted by the Council of Administrative Affairs on 14 September 1951, and approved by the Commission of Central People's Government on 7 August 1952.

In practice, some cities and provinces have produced some forms of joint documents with their counterparts abroad, like “sister city” agreements, memoranda on investment preference, etc. Such agreements are not treaties or agreements in the sense discussed above and they are not governed by international law. They represent, at most, a form of expression of common intent between the authorities involved in the exercise of their respective competences. They are not binding from an international law perspective, although the commitments involved are usually performed in good faith.

## THE TREATY-MAKING POWER AND PROCEDURE IN CENTRAL STATE AUTHORITIES

### **Negotiation and signature of treaties**

The initiation and negotiation of treaties are the responsibility of the executive as the Constitution authorizes the State Council to conduct foreign relations and conclude treaties and agreements with foreign States.<sup>23</sup> However, the qualified authorities and applicable procedure to the negotiation and signature of a specific treaty vary in accordance with the designation of the Chinese party specified in the treaties concerned. China may conclude treaties with other States in the name of (1) the People’s Republic of China, (2) the Government of the People’s Republic of China, or (3) the governmental departments of the People’s Republic of China.<sup>24</sup> The title of treaties does not have any direct bearing on their domestic effects, which depend rather on the authority of the State organs actually expressing the consent of the State in a constitutional sense.

In the case of a treaty or agreement to be negotiated and signed in the name of the Government of the People’s Republic of China, the Ministry of Foreign Affairs – or the governmental department concerned after consultation with the Ministry of Foreign Affairs – shall make a recommendation and draw up a draft treaty or agreement of the Chinese side and, submit it to the State Council for examination and decision.

Agreements to be negotiated and signed in the name of a governmental department of the People’s Republic of China concerning matters within the scope of functions and powers of the department concerned shall be decided upon by the department alone or after consultation with the Ministry of Foreign Affairs.

China’s treaty practice, before the enactment of the Treaty Procedure Law in 1990, also included the treaties concluded in the name of the head of the State. It is also a general practice worldwide, endorsed by international law. This practice was written into the draft of the Treaty Procedure Law, but deleted by the Standing Committee of the National People’s Congress without further explanation. As a result, the practice of concluding treaties in the name of the head of the State is now suspended. The new practice risks putting the Chinese government in an awkward position in cases where the

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<sup>23</sup> Constitution of the People’s Republic of China (4 December 1982), Article 89.

<sup>24</sup> Law of the People’s Republic of China on the Procedure of the Conclusion of Treaties, Article 4.

foreign treaty partner prefers to conclude a treaty on behalf of the head of the State due to its own constitutional or political considerations.

### Ratification and approval procedure

Domestic ratification and approval relates to the procedure for competent organs to express the State's consent to treaties and agreements within a constitutional framework. This domestic procedure has to be distinguished from that of States expressing consent internationally.<sup>25</sup> A ratification act by domestic authorities is internationally validated by exchanging instruments of ratification between contracting parties, or through submitting the ratification instrument to the depositary. Consequently, the point of time when the instrument of ratification comes into effect at domestic level and international level is not necessarily the same.

According to the Constitution, the ratification of "treaties and important agreements" shall be decided by the Standing Committee of the National People's Congress. The Treaty Procedure Law specifies the "treaties and important agreements" as follows: (i) treaties of friendship and cooperation, treaties of peace and similar treaties of a political nature; (ii) treaties and agreements relating to territory and delimitation of boundary lines; (iii) treaties and agreements relating to judicial assistance and extradition; (iv) treaties and agreements that contain stipulations inconsistent with the laws of the People's Republic of China; (v) treaties and agreements that are subject to ratification as agreed by the contracting parties; and (vi) other treaties and agreements subject to ratification.<sup>26</sup> This provision broadened the application of the ratification procedure compared to previous law and practice.<sup>27</sup>

From 1954 to October 2002, 254 international treaties and agreements were ratified by the Standing Committee of the National People's Congress.<sup>28</sup> According to the author's survey of the ratification decisions published in the Bulletin of the Standing Committee of the National People's Congress of the People's Republic of China (中华人民共和国全国人民代表大会常务委员会公报, *zhong hua ren min gong he guo quan guo ren min dai biao da hui chang wu wei yuan hui gong bao*), another 107 treaties were

<sup>25</sup> Prof. Li Haopei has emphasized the difference of domestic ratification procedure and ratification in international law sense, see Li Haopei, *An Introduction to the Law of Treaties* (条约法概论, *tiao yue fa gai lun*), Beijing: Law Press (法律出版社, *fa lu chu ban she*), 1986, at 74.

<sup>26</sup> Law of the People's Republic of China on the Procedure of the Conclusion of Treaties, Article 7.

<sup>27</sup> In 1954 the Standing Committee of the National People's Congress in its 1st Meeting adopted the "Decision on the Ratification Procedure of Treaties concluded with Foreign States" which provided that peace treaties, treaties of non-aggression, treaties of friendship, alliance and mutual assistance, and all other treaties subject to ratification as agreed by the contracting parties including agreements, are to be ratified in accordance with the Constitution.

<sup>28</sup> For the number and the detailed list of the ratified treaties, see Sun, Weiben, *Working Manual of the People's Congress* (人大工作手册, *ren da gong zuo shou ce*), 2nd edn., Beijing: China Democracy & Legal System Press (中国民主法制出版社, *zhong guo min zhu fa zhi chu ban she*), 2003, at 302–309.

ratified in the period from 28 December 2002 to 31 October 2009. Accordingly, 361 treaties were ratified by the Standing Committee of the National People's Congress from 1949 to 31 October 2009.

After the signature of a treaty or an important agreement, the Ministry of Foreign Affairs, or the governmental department concerned in conjunction with the Ministry of Foreign Affairs, shall submit the text of the instrument to the State Council for examination and verification; the State Council shall then refer it to the Standing Committee of the National People's Congress for decision on ratification. While the State Council shall make the primary decision whether a treaty or agreement belongs to the "treaties and important agreements", it is unclear whether this decision may be overruled by the Standing Committee of the National People's Congress. Theoretically the answer is affirmative, but no relevant practice on this point has ever occurred. The President of the People's Republic of China shall ratify the treaty or agreement in accordance with an affirmative decision of the Standing Committee of the National People's Congress.<sup>29</sup> The instrument of ratification shall be signed by the President and countersigned by the Minister of Foreign Affairs. The positive decision of the Standing Committee of the National People's Congress imposes a duty on the President to ratify the treaty concerned. The President has no discretion to refuse to ratify a treaty on which the Standing Committee of the National People's Congress has already adopted a positive decision. Therefore, the role of the President in treaty practice is purely of representative and procedural nature.

A portion of the treaties and agreements other than "treaties and important agreements" are subject to approval of State Council, if they are prescribed by the State Council in its own regulations or agreed by the contracting parties to be so. The power of the State Council to conclude treaties and agreements with foreign States as stipulated in the Constitution is construed to also include the independent treaty-making competence in certain areas, apart from the power to initiate and negotiate treaties. In cases where the treaties and agreements are subject to the approval of the State Council, then the Ministry of Foreign Affairs, or the governmental departments in conjunction with the Ministry of Foreign Affairs, shall submit them to the State Council for decision. The instrument of approval shall be signed by the Premier of the State Council, but may also be signed by the Minister of Foreign Affairs.<sup>30</sup> However, it is not clear under the Treaty Procedure Law what kinds of treaties and agreements require the approval of the State Council. The State Council has not issued any regulations on this point yet, although it is authorized by the Treaty Procedure Law to enact regulations to implement the law. However, as mentioned above, in case of treaties negotiated in the name of the People's Republic of China or its government, the texts of the draft treaties are to be submitted to the State Council for examination and decision before they are formally signed, and there is usually no need for the double, or even redundant, approval of the State Council after the signature of those treaties in domestic procedure. Accordingly, for a number of treaties in which China participates in the negotiation and drafting, the approval power of the State Council

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<sup>29</sup> Constitution of the People's Republic of China (4 December 1982), Article 81.

<sup>30</sup> Law of the People's Republic of China on the Procedure of the Conclusion of Treaties, Article 8.



is actually exercised in the form of prior scrutiny during the negotiation phase, this being the case for the conclusion of many treaties concerning investment, taxation, civil aviation, etc.

With regard to all the other agreements whose constitutional validity requires neither ratification nor approval, the State Council and governmental departments concerned are constitutionally competent to express consent to the agreements internationally upon signature. There are no requirements of prior authorization, notwithstanding the prior scrutiny requirement of the texts in the negotiation phase; the making of these treaties belongs to the autonomous power of the governmental authorities. Theoretically, two possibilities exist as to the agreements falling within this category: those agreements concluded in the name of State or government shall be submitted by the governmental departments concerned to the State Council for the record, and the agreements concluded in the name of the governmental departments are to be submitted by these departments to the Ministry of Foreign Affairs for registration.<sup>31</sup> It is noticeable that the Ministry of Foreign Affairs does not possess necessary authority to scrutinize the departmental or ministerial agreements.<sup>32</sup> Several governmental ministries, for the purpose of strengthening the internal administration of treaty activities, have issued related regulations on that issue.<sup>33</sup>

### **Accession to and acceptance of multilateral treaties and agreements**

The Treaty Procedure law also stipulates the domestic procedures as to the participation of China in multilateral treaties and other agreements by the methods of accession and acceptance.

In regard to the accession to multilateral treaties, the applicable procedure depends on the subject matter of the treaty concerned. If it belongs to the “treaties and important agreements”, the Ministry of Foreign Affairs, or the department concerned under the State Council in conjunction with the Ministry of Foreign Affairs, shall make a recommendation after examination and submit the text to the State Council for examination and verification; the State Council shall then refer it to the Standing Committee of the National People’s Congress for decision on accession. To accede to a multilateral treaty or agreement other than “treaties and important agreements”, the Ministry of Foreign Affairs or the department concerned under the State Council in conjunction with the Ministry of

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<sup>31</sup> *Ibid.*, Article 9.

<sup>32</sup> In contrast, the conclusion of ministerial agreements in Germany requires the prior consent of the Ministry of Foreign Affairs. The German practice in this regard is noteworthy as it provides some comparative experience.

<sup>33</sup> For example, the General Office of the Ministry of Foreign Trade and Economic Cooperation issued the Circular on Regulating the Administration of Multilateral and Bilateral Economic Treaties by the Ministry on 4 May 1997; the Ministry of Communications issued the Regulations on the Procedure of Negotiation, Signature, and Administration of International Treaties, Conventions, and Agreements on 22 May 2000.

Foreign Affairs shall make a recommendation after examination and submit the text to the State Council for decision on accession.<sup>34</sup>

Acceptance is the legal technique in the law of treaties by which a State may become a party to a multilateral treaty by submitting an instrument of acceptance. The Treaty Procedure Law provides the possibility of accepting a multilateral treaty. The decision to accept a multilateral treaty or an agreement shall be made by the State Council. In the case of a multilateral treaty or agreement containing clauses of acceptance, which is signed by the Chinese representative or does not require any signature, the Ministry of Foreign Affairs, or the governmental department concerned in conjunction with the Ministry of Foreign Affairs, shall make a recommendation after examination and submit it to the State Council for decision on acceptance.<sup>35</sup> The acceptance procedure is further discussed when we consider the differentiation of consent procedure in international and constitutional contexts below.

### Reservation to treaties

According to the 1969 Vienna Convention on the Law of Treaties, reservation means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State.<sup>36</sup>

No reservation has ever been made by China in regard to bilateral treaties.<sup>37</sup> China has made some reservations and some declarations to multilateral treaties. These reservations generally fall into the following two kinds. First, as a matter of well-established principle in China's treaty practice, reservations are made without exception in regard to the clause involving the mandatory third-party dispute resolution, such as submitting a dispute to the International Court of Justice. For example, China made reservation against Article 66(2) of the United Nations Convention against Corruption (31 December 2003),<sup>38</sup> the Article 24(1) of the International Convention for the Suppression of the Financing of Terrorism (9 December 1999),<sup>39</sup> Article 35(2) of the United Nations Convention against Transnational Organized Crime (15 November 2000),<sup>40</sup> Article 66 of the Vienna Convention on the Law of Treaties (23 May 1969), etc. Second, in a few cases where the treaty clauses are inconsistent with China's domestic order and relevant reservations are expressly or implicitly permitted by the treaty, China may make relevant reservations. For example, China made reservation against Article 15 (1) of the WIPO Performances

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<sup>34</sup> Law of the People's Republic of China on the Procedure of the Conclusion of Treaties, Article 11.

<sup>35</sup> *Ibid.*, Article 12.

<sup>36</sup> Vienna Convention on Law of Treaties, Article 2.

<sup>37</sup> *See loc. cit.*, n. 8, at 161.

<sup>38</sup> For the treaty text, *see* United Nations Doc. A/Res/58/4.

<sup>39</sup> For the treaty text, *see* United Nations Doc. A/Res/54/109.

<sup>40</sup> For the treaty text, *see* United Nations Doc. A/Res/55/25.

and Phonograms Treaty (20 December 1996) as the treaty expressly allows the parties to do so. Pursuant to Article 33, China also made reservation against Chapter Two except for Article 15, of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (18 March 1970). China also reserved against Article 10 of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (15 November 1965) through stating its objection to the means of sending judicial documents prescribed in that provision.

It is interesting to note that upon giving its signature or ratification, China also makes interpretative declarations in some cases. Interpretative declarations, as compared to the reservations that modify the legal rights and obligations of the treaty parties concerned, only clarify some issues while leaving the substantive rights and obligations intact.

Two typical kinds of interpretative declarations are made. The first category involves how the treaty obligation is to be implemented in China. For example, in its ratification of the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (23 May 1993), China made an explanatory declaration on which organs shall undertake the respective responsibilities stipulated in the convention. In ratifying the Convention on International Interests in Mobile Equipment (16 November 2001) and the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment (16 November 2001), China made an extensive clarification on the implementation of various treaty clauses, mainly concerning the aspects of private international law. These interpretative declarations are meaningful as, internationally, they clarify the official interpretation, and practical means of implementation, of the relevant articles from the Chinese side, and domestically, in the view of the author, the operative clauses of these declarations shall bind on relevant governmental authorities, domestic courts, and private persons and entities. In addition, it may facilitate relevant private entities to exercise their treaty-guaranteed rights in China. The second category is concerned with the territorial application of treaties. China shall clarify in its declaration if the treaty concerned does not apply to Hong Kong or Macao. For example, in ratifying the Convention for the Safeguarding of the Intangible Cultural Heritage (17 October 2003), China made it clear that the convention shall not apply to Hong Kong for the time being; China also declared that the Convention for the Unification of Certain Rules for International Carriage by Air (28 May 1999) shall not apply to Hong Kong until China notifies otherwise, etc. Notwithstanding some possible doctrinal controversy, these declarations are characterized by the Chinese government firmly as interpretative declarations and not subject to the acceptances or objections of other treaty parties in particular, compared to reservations under the law of treaties.

Reservations and declarations could be made by the government upon signature or at the time of submitting its ratification instrument. Any reservation or declaration made by the government shall be submitted in affiliation with the treaty text to the Standing Committee of the National People's Congress for its decision. It is still unclear whether the Standing Committee of the National People's Congress may also make reservations in its decision of ratification as the Senate of the United States of America does.

However, the reservations made by other treaty parties shall not be sent to the Standing Committee of the National People's Congress for advice or decision. The government alone is competent to decide whether to accept or oppose the reservations, or even to oppose the application of the treaty between the reserving State and China.

### **Amendment to, abrogation of and withdrawal from treaties**

The procedures for amendment to, abrogation of and withdrawal from treaties and agreements concluded by the People's Republic of China shall follow *mutatis mutandis* the procedures for the conclusion of the treaties and agreements in question.<sup>41</sup> It is interesting to note here that abrogation and withdrawal shall apply to the procedure of conclusion, which means that the abrogation of and withdrawal from "treaties and important agreements" are subject to the consent of the Standing Committee of the National People's Congress. This is divergent from the practices of some countries, such as the United States of America, the United Kingdom and Germany, where it is the prerogative of the executive to abrogate or withdraw from treaties.

Nevertheless, some other important treaty issues are not touched upon by the Treaty Procedure Law. The extension of the validity of a treaty with expiration date shall also follow the same procedure subject to which it was, or should be, concluded. For example, in its 7th meeting of April 1979 the Standing Committee of the 5th National People's Congress adopted the resolution not to extend the Sino-Soviet Treaty of Friendship, Alliance and Mutual Assistance concluded in 1950. As to the power to suspend a treaty, it also lacks statutory prescription. The author is of the opinion that it should fall within the discretion of the executive.

### **Miscellaneous issues: depository, registration and publication**

#### *Depository*<sup>42</sup>

Signed originals of bilateral treaties and agreements concluded in the name of the People's Republic of China or the Government of the People's Republic of China, and copies of multilateral treaties and agreements certified as true by the depository States or international organizations concerned, shall be deposited with the Ministry of Foreign Affairs.

Signed originals of bilateral agreements concluded in the name of the governmental departments of the People's Republic of China shall be deposited with these departments.

It is rare for China to serve as the international depository State of a multilateral treaty. Only recently has China become the depository State of regional treaties in a few cases. Examples include the 2001 Constitution of Shanghai Cooperation Organization,<sup>43</sup> and the 2001 Shanghai Convention on Combating Terrorism, Separatism and Extremism.<sup>44</sup>

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<sup>41</sup> Law of the People's Republic of China on the Procedure of the Conclusion of Treaties, Article 19.

<sup>42</sup> *Ibid.*, Article 14.

<sup>43</sup> Constitution of Shanghai Cooperation Organization, Article 25.

<sup>44</sup> Shanghai Convention on Combating Terrorism, Separatism and Extremism, Article 18.

*International registration*<sup>45</sup>

According to Article 102 (1) of the Charter of the United Nations, every treaty and every international agreement entered into by any Member of the United Nations after the Charter comes into force shall, as soon as possible, be registered with the Secretariat and published by it. In order to implement China's undertakings in this aspect, the Treaty Procedure Law designates the Ministry of Foreign Affairs to register the treaties and agreements concluded by China with the Secretariat of the United Nations in accordance with the relevant provisions of the United Nations Charter. In practice, no treaties were registered by China with the Secretariat of the United Nations until 1985<sup>46</sup> as a result of the exclusion of the government of the People's Republic from accreditation at the United Nations until 1971.<sup>47</sup> The first treaty which China registered with the Secretariat of the United Nations was probably the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (hereafter Sino-British Joint Declaration on Hong Kong), which was signed and ratified by China respectively in 1984 and 1985, and registered with the Secretariat of the United Nations in 1985.<sup>48</sup>

The Treaty Procedure Law also contemplates the possible registration obligation within other institutional frameworks. Treaties and agreements that require registration with other international organizations shall be registered by the Ministry of Foreign Affairs or the governmental departments concerned in accordance with the respective constitutive documents of the international organizations.

*Publication*

The text of a treaty or an important agreement that the Standing Committee of the National People's Congress has decided to ratify or accede to shall be published in the Bulletin of the Standing Committee of the National People's Congress of the People's Republic of China (中华人民共和国全国人民代表大会常务委员会公报, *zhong hua ren min gong he guo quan guo ren min dai biao da hui chang wu wei yuan hui gong bao*).<sup>49</sup> Treaties and agreements approved by the State Council are usually also published in the Bulletin of the State Council of the P.R. China (中华人民共和国国务院公报, *zhong hua ren min gong he guo guo wu yuan gong bao*).

According to the Treaty Procedure Law, treaties and agreements concluded by China shall be compiled by the Ministry of Foreign Affairs into a collection of the Treaties of

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<sup>45</sup> Law of the People's Republic of China on the Procedure of the Conclusion of Treaties, Article 17.

<sup>46</sup> See The Notification of the General Office of State Council concerning the Issues of Registering Treaties with the Secretariat of the United Nations, 25 February 1985.

<sup>47</sup> GA Resolution 2758, "Restoration of the lawful rights of the People's Republic of China in the United Nations", 25 October 1971.

<sup>48</sup> 1399 UNTS 33–87.

<sup>49</sup> Law of the People's Republic of China on the Procedure of the Conclusion of Treaties, Article 15.

the People's Republic of China.<sup>50</sup> The first volume of the Treaty Series of the People's Republic of China, published in 1957 and reprinted in 1960, retrospectively collected the treaties concluded by China from 1949 to 1951. By 2009, 54 volumes of the Treaty Series had been published. The latest volume, published in 2009, compiled the treaties concluded by China in 2007.

An important note is, however, to be added here. The Treaty Series does not include all the documents that may be considered of treaty nature participated in by China. To take an example for illustration, 6,538 treaties from 1949 to 1999 are collected in the Treaty Series as counted by Qin, Xiaocheng,<sup>51</sup> but, according to another resource, about 14,040 treaties were concluded by the People's Republic of China by 1999.<sup>52</sup> Quite a few reasons may account for the phenomenon of differences in counting the total number of treaties of the People's Republic of China: for instance, many treaties concluded by the governmental departments are of minor importance, or concern the governmental departments only and not private persons; or the treaty nature of the documents is not made clear or is uncertain; or the commitments in documents are executed and finished immediately after conclusion, or simply in order to save the space of the Treaty Series, etc. In any case, treaties and agreements ratified by the Standing Committee of the National People's Congress or approved by the State Council are for sure collected in the Treaty Series. The present author concurs with Qin Xiaocheng that the Treaty Series contains the most important part, whether by form or content,<sup>53</sup> of the treaties concluded by China, within the reporting period of the series.

## THE TREATY-MAKING POWER OF SPECIAL ADMINISTRATIVE REGIONS: THE EXAMPLE OF HONG KONG

### Introduction

As a unitary State, the power to conduct foreign relations is bestowed solely upon the Central Government of China in the Constitution. The constituent units – provinces, autonomous regions and municipalities directly under the Central Government – do not possess any legal power of diplomatic relations, including treaty-making power. However, after China's recovery of Hong Kong and Macao respectively in 1997 and 1999, and the enactments of their basic laws, this monopolistic structure has changed.

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<sup>50</sup> *Ibid.*, Article 16.

<sup>51</sup> Qin, Xiaocheng, *op. cit.*, n. 2, at 21.

<sup>52</sup> See Zhang, Yiqin, "A concise comment on the procedure of the review and approval of treaties in China" (简述我国条约批准程序, *jian shu wo guo tiao yue pi zhun cheng xu*), in Zhu, Xiaoqing and Huang, Lie (eds.), *The Relations between International Treaties and Domestic Law* (国际条约与国内法的关系, *guo ji tiao yue yu guo nei fa de guan xi*), Beijing: World Knowledge Press (世界知识出版社, *shi jie zhi shi chu ban she*), 2000, at 238.

<sup>53</sup> Qin, Xiaocheng, *op. cit.*, n. 2, at 16.

The author concentrates here on the treaty-making power of the Hong Kong Special Administrative Region, yet to a great extent the situation in Macao is very similar. In the 1986 Sino–British Joint Declaration on Hong Kong, China declared as one item of its basic policy regarding Hong Kong that Hong Kong shall enjoy a high degree of autonomy. This policy is implemented in detail through the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (中华人民共和国香港特别行政区基本法, *zhong hua ren min gong he guo te bie xing zheng qu ji ben fa*, hereafter “the Hong Kong Basic Law”). The treaty-making power of Hong Kong is a reflection of its high degree of autonomy in international aspects.

The treaty competence of Hong Kong originates from the authorization of the Central Government pursuant to the Hong Kong Basic Law.<sup>54</sup> In this sense, it is fundamentally different from the treaty competence that the subsidiary units in federal States may entertain. For example, in Germany the treaty competence of the States (Länder) under German Basic Law, although limited, springs directly from their statehood and is independent from any authorization of the Central Government.<sup>55</sup> As the treaty competence of Hong Kong derives from the authorization of the Central Government, there are three important inferences. The first is that the competence of Hong Kong shall not exceed that possessed by the Central Government. Second, in cases where there is no express authorization by the Hong Kong Basic Law, it must be presumed that the treaty competence concerned remains in the hands of the Central Government, not those of the Hong Kong Government. Third, the Hong Kong Basic Law confers the exercise of the treaty power onto administrative authorities<sup>56</sup> and the exercise of treaty power is thus not subject to the review of the Legislature of Hong Kong as long as it does not interfere with the competence of the Legislature.

The specific treaty competence of Hong Kong as stipulated in the Hong Kong Basic Law can be subdivided into five categories.

### **Autonomous treaty power**

According to Article 151 of the Hong Kong Basic Law, Hong Kong may on its own, using the name “Hong Kong, China”, maintain and develop relations and conclude and implement agreements with foreign States and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields. This clause constitutes a very general and broad anticipatory authorization in the above-mentioned fields. Hong Kong may, within its discretion, conclude treaties in these fields in good faith. When

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<sup>54</sup> Article 13(2) of the Hong Kong Basic Law stipulates: “The Central People’s Government authorizes the Hong Kong Special Administrative Region to conduct relevant external affairs on its own in accordance with this law.”

<sup>55</sup> Basic Law for the Federal Republic of Germany (8 May 1949), Article 32.

<sup>56</sup> See Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (4 April 1990), Article 62.

concluding such treaties, Hong Kong shall take due care of the national interest and not conclude treaties inconsistent with its non-sovereign status.<sup>57</sup> The purpose and object of the treaty should not contravene the Hong Kong Basic Law. With regard to national defense or diplomatic matters, which are reserved competences of the Central Government as stated in the Sino–British Joint Declaration on Hong Kong, Hong Kong is not entitled to conclude treaties because of its constitutional incompetence in these fields.

### **Treaty power subject to the authorization of the Central People’s Government**

The Hong Kong Basic Law also stipulates the treaty power of Hong Kong subject to the specific authorization of the Central Government. The statute of the Hong Kong Basic Law involves three fields: judicial assistance, air service and visa abolition. First, the Hong Kong Government may, with the assistance or authorization of the Central People’s Government, make appropriate arrangements with foreign States for reciprocal juridical assistance.<sup>58</sup> Second, as to all scheduled air services to, from or through Hong Kong, which do not operate to, from or through the mainland of China, the Hong Kong Government may, under specific authorizations from the Central People’s Government, renew or amend air service agreements and arrangements previously in force; negotiate and conclude new air service agreements providing routes for airlines incorporated in Hong Kong and having their principal place of business in Hong Kong and providing rights for over-flights and technical stops; and negotiate and conclude provisional arrangements with foreign States or regions with which no air service agreements have been concluded.<sup>59</sup> Third, the Central Government shall assist or authorize the Hong Kong Government to conclude visa abolition agreements with foreign States and regions.<sup>60</sup>

In practice, the authorization mechanism has been extensively used from 1 July 1997, on which date Hong Kong was recovered by China. Until 21 July 2006, 289 cases of authorization had been made by the Central Government to Hong Kong as to the negotiation, conclusion and amendment of bilateral agreements on various issues.<sup>61</sup> For example, on 25 July 1997, the Central Government made a general authorization to Hong Kong as to the negotiation and conclusion of administrative agreements or arrangements with

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<sup>57</sup> See Chen, Xuemei, “On the right and restriction of Hong Kong SAR to join in international organizations and international treaties” (论香港特别行政区参加国际组织和国际条约的权力和限制, lun xiang gang te bie xing zheng qu can jia guo ji zu zhi he guo ji tiao yue de quan li he xian zhi), in 4 *Law Journal* (法学杂志, fa xue za zhi) 152–154 (2007), at 154.

<sup>58</sup> Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Article 96.

<sup>59</sup> *Ibid.*, Article 133.

<sup>60</sup> *Ibid.*, Article 155.

<sup>61</sup> Information provided on the home page of the Commissioner’s Office of China’s Ministry of Foreign Affairs in Hong Kong Special Administrative Region, <http://www.fmcopecr.gov.hk/chn/sgwj/>, last visited on 1 May 2010.



foreign States on issues of visa abolition.<sup>62</sup> It is also noteworthy that the scope of authorizations has gone beyond the fields mentioned in Hong Kong Basic Law. On 7 July 1997, the Commissioner of China's Ministry of Foreign Affairs in Hong Kong Special Administrative Region, Ma, Yuzhen, conveyed an authorization letter from the Central Government to the Hong Kong Chief Executive which authorized Hong Kong to conclude bilateral agreements with other countries in the following fields: over-flight of air services, investment promotion and protection, surrender of fugitive offenders, transfer of sentenced persons, and judicial assistance on criminal matters.<sup>63</sup> Acting under the terms of this authorization, Hong Kong concluded, for example, 10 treaties on transfer of sentenced persons, in the period from 1 July 1997 to 15 April 2009,<sup>64</sup> and seven treaties on investment promotion and protection, from 1 July 1997 to 2 July 2009.<sup>65</sup>

### **The right to participate in international organizations**

According to Article 152 of the Hong Kong Basic Law, Hong Kong may, using the name "Hong Kong, China", participate in international organizations and conferences not limited to States. Article 116 of the Hong Kong Basic Law, which deals with its status as a separate customs territory, specifies that Hong Kong may, using the name "Hong Kong, China", participate in relevant international organizations and international trade agreements (including preferential trade arrangements), such as the General Agreement on Tariffs and Trade, and arrangements regarding international trade in textiles.

Two points are noteworthy here. The first is that Hong Kong's competence to join international organizations should not exceed the scope of the autonomous power stipulated in Article 151 of the Hong Kong Basic Law, or as authorized by the Central Government. Second, although Hong Kong's treaty competence comes from the authorization of the Central Government, it is even broader than that of constitutive States of a federation.

### **The right to participate in diplomatic relations of the Central People's Government**

The Hong Kong Basic Law contemplates two possibilities of Hong Kong's participation in the diplomatic relations of the Central Government.

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<sup>62</sup> See a speech by Ma, Yuzhen, the Commissioner of China's Ministry of Foreign Affairs in Hong Kong Special Administrative Region, <http://www.fincoprc.gov.hk/chn/sgwj/zyjh/t41637.htm>, last visited on 1 May 2010.

<sup>63</sup> Treaties on transfer of sentenced persons and judicial assistance on criminal matters are all concluded by Hong Kong after its restoration on 1 July 1997.

<sup>64</sup> For the detailed information of the treaties, see <http://www.legislation.gov.hk/ctable5ti.htm>, provided by the Department of Justice of Hong Kong, last visited on 1 May 2010.

<sup>65</sup> For the detailed information of the treaties, see <http://www.legislation.gov.hk/ctable2ti.htm>, provided by the Department of Justice of Hong Kong, last visited on 1 May 2010.

First, as to negotiation, representatives of the Hong Kong Government may, as members of delegations of the Government of the People's Republic of China, participate in negotiations at the diplomatic level directly affecting the region conducted by the Central People's Government.<sup>66</sup>

Second, representatives of Hong Kong Government may, as members of delegations of the People's Republic of China, participate in international organizations or conferences in appropriate fields limited to States and affecting the region, or may attend in such other capacity as may be permitted by the Central People's Government and the international organization or conference concerned, and may express their views, using the name "Hong Kong, China".<sup>67</sup>

### **The right to be consulted in the treaty activities of the Central People's Government**

The status of Hong Kong as a special and autonomous region is also guaranteed by the Hong Kong Basic Law in regard to the treaty activities of the Central Government. Whether the international agreements to which the People's Republic of China is or becomes a party shall apply to Hong Kong, is to be decided by the Central People's Government only after seeking the views of the Hong Kong Government.<sup>68</sup>

Article 132 of Hong Kong Basic Law specifies the consultant role of the Hong Kong Government in the field of air services. In concluding all air-service agreements providing for air services between other parts of China and other States and regions with stops at Hong Kong, and air services between Hong Kong and other States and regions with stops at other parts of China, the Central Government shall take account of the special conditions and economic interests of Hong Kong and consult the Hong Kong Government.

## SELECTED FURTHER ISSUES

### **The harmonization of internal power and treaty power**

Treaty power, as part of diplomatic power, cannot effectively exist and operate without the necessary support of the internal competence of the related authorities. Internal competence embraces the competence of the State to act externally, and it is sometimes said that internal competence and external competence are two sides of the same coin. To harmonize the internal power and external power has been the general principle of the constitutional practice of many States. The rationale underlying this principle is to ensure the proper performance of the treaty commitments of States. Only if the authorities

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<sup>66</sup> Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Article 150.

<sup>67</sup> *Ibid.*, Article 152.

<sup>68</sup> *Ibid.*, Article 153.

making international undertakings are also competent in their domestic implementation, may the treaty obligation be properly and faithfully executed and avoid the failure of implementation owing to the unwillingness or unavailability of other competent authorities.<sup>69</sup> Such constitutional harmonization can also avoid the conflicts of powers between State authorities where one entertaining internal competence may be divergent, with the other enjoying parallel external competence. This principle is evidenced by constitutional practice in the United States, Germany, France and the Netherlands, and is also reflected in the practices of external relations of the European Community.

The harmonization principle is also noticed by Chinese international lawyers. As Xue, Hanqin comments, “the Constitution does not specifically define the relationship between the treaty-making power and legislative power.”<sup>70</sup> But this principle is only partly adhered to in China’s treaty law and practice. Two issues are to be discussed in detail from the standpoint of harmonizing the internal competence and treaty power of State organs.

#### *The treaty power of the National People’s Congress*

The harmonization principle primarily concerns the treaty power of the National People’s Congress. According to the Constitution, the National People’s Congress is the highest organ of State power.<sup>71</sup> It shall exercise the power to amend the Constitution, and to enact and amend basic statutes concerning criminal offences, civil affairs, the State organs and other matters.<sup>72</sup> The Standing Committee of the National People’s Congress, as the Congress’s permanent body, shall enact and amend statutes with the exception of those that should be enacted by the National People’s Congress. The situation in respect of the treaty power is, however, different. As already mentioned, the ratification of all treaties and important agreements shall be decided by the Standing Committee of the National People’s Congress. Therefore, the National People’s Congress is excluded from treaty procedure, notwithstanding the subject matters of some treaties falling within its constitutional power.

Then concerns arise as to the implementation of some treaties: what if a treaty requires amendments of the Constitution or some basic statutes within the exclusive legislative power of the National People’s Congress? Theoretically, if the National People’s Congress refused to enact or amend the relevant laws that might be necessary for the purpose of implementing the treaty concerned, then China could be in the position

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<sup>69</sup> The United Kingdom seems somewhat special as the treaty-making power is the prerogative of the Crown. However, “it is and has been consistent policy of successive United Kingdom Governments to secure the enactment by the Parliament of any legislation necessary for the execution and application of a treaty in the United Kingdom before the United Kingdom Government expresses its consent to be bound by the treaty.” See Sinclair, etc., *loc. cit.*, n. 21, at 735.

<sup>70</sup> Xue, Hanqin and Jin, Qian, *loc. cit.*, n. 3, at 301.

<sup>71</sup> Constitution of the People’s Republic of China (4 December 1982), Article 57.

<sup>72</sup> *Ibid.*, Article 62.

of violating its treaty obligation at the international level. Of course, the National People's Congress may alter or annul inappropriate decisions of the Standing Committee of the National People's Congress, according to the Constitution.<sup>73</sup> However, its decision on the annulment of a treaty ratification is only valid internally; its international effect is not guaranteed and depends on the relevant rules of international law. If the treaty in question is already binding on China and does not permit unilateral withdrawal, then China could be accused of breach of an international agreement. Presuming that the National People's Congress must act in accordance with the treaty obligation that China has undertaken, it follows that the Standing Committee of the National People's Congress may dictate to its superior organ, the Congress itself, the logic of which may appear somewhat anomalous.

In practice, there are cases where the National People's Congress is involved in China's treaty practice. The first case concerned the Sino-British Joint Declaration on Hong Kong. It is within the exclusive power of the National People's Congress to decide on the establishment of special administrative regions and the systems to be instituted there.<sup>74</sup> Therefore, the Standing Committee of the National People's Congress was competent in deciding on ratification of the Sino-British Joint Declaration on Hong Kong but incompetent in its domestic implementation. Thus, the Chinese Government faced the very problems discussed above. Finally, the Sino-British Joint Declaration on Hong Kong was submitted by the State Council to the 6th National People's Congress, which adopted its decision to ratify the Sino-British Joint Declaration on Hong Kong.<sup>75</sup> The ratification practice of the National People's Congress casts some doubt on its constitutionality. The Constitution exclusively bestows the power to decide on the ratification of treaties and important agreements to the Standing Committee of the National People's Congress and not to the National People's Congress as such, although the former is inferior to the latter. A possible legal basis for this practice could be found by resorting to the residual power of the National People's Congress to "exercise such other functions and powers as the highest organs of State power should exercise" as stipulated in Article 62 of the Constitution. A further case concerned the Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macao (hereafter Sino-Portugal Joint Declaration on Macao). Maybe being aware of the constitutional legitimacy of the practice regarding the Sino-British Joint Declaration on Hong Kong two years earlier, this time the State Council submitted the text of the Sino-Portugal Joint Declaration on Macao to the National People's Congress for consideration shortly after the initialing of the text by the Minister of Foreign Affairs, Wu, Xueqian. Then the National People's Congress adopted a resolution to authorize the Standing Committee of the National People's Congress to review and ratify the

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<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*, Articles 31, 62.

<sup>75</sup> The Decision of the 3rd Meeting of the 6th National People's Congress on ratifying the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 10 April 1985.

Sino–Portugal Joint Declaration on Macao after its signature on 11 April 1987.<sup>76</sup> Accordingly, the Standing Committee of the National People’s Congress decided to ratify the Sino–Portugal Joint Declaration on Macao in June 1987.

These two cases represent differing approaches to resolving the issue of discrepancy of internal power and treaty power, either through ratification by the National People’s Congress or through prior authorization. The prior authorization approach in the Sino–Portugal Joint Declaration on Macao case seems more satisfactory. However, the effective operation of both approaches is based on the self-restraints and political cooperation of related State authorities.

Similar problems also exist in some other important fields. For example, the Standing Committee of the National People’s Congress shall decide to ratify the treaties and agreements that contain stipulations inconsistent with the laws of the People’s Republic of China, but it is only competent to enact, when the National People’s Congress is not in session, partial supplements and amendments to statutes enacted by the National People’s Congress, provided that they do not contravene the basic principles of these statutes.<sup>77</sup> What if the treaty to be ratified is conflicting with the Constitution or the basic principles of these statutes? Another example concerns the accession of China into international institutions, which involves a financial burden on the member States. The approval of the State budget is also within the exclusive power of the National People’s Congress.<sup>78</sup> The Standing Committee of the National People’s Congress can only “examine and approve, when the National People’s Congress is not in session, partial adjustments to the plan for national economic and social development and to the State budget that prove necessary in the course of their implementation”.<sup>79</sup> Despite that, according to the Treaty Procedure Law, treaties involving financial burden are subject either to the ratification of the Standing Committee of the National People’s Congress or the approval of the State Council. The National People’s Congress is deprived of the opportunity to express its opinion in this regard.

*The discrepancy between legislative power and treaty power of the Standing Committee of the National People’s Congress*

The Legislation Law of the People’s Republic of China enacted in 2000 (hereafter the Legislation Law) stipulates that the following matters can only be dealt with through national law: (i) State sovereignty; (ii) the establishment, organization and functions and powers of people’s congresses, people’s governments, people’s courts and people’s procurators at all levels; (iii) the system of regional national autonomy, the system of special

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<sup>76</sup> The Decision of the 5th Meeting of the 6th National People’s Congress on Authorizing the Standing Committee of the National People’s Congress to review and ratify the Joint Declaration of the Government of the People’s Republic of China and the Government of the Republic of Portugal on the Question of Macao, 11 April 1987.

<sup>77</sup> Constitution of the People’s Republic of China (4 December 1982), Article 67.

<sup>78</sup> *Ibid.*, Article 62.

<sup>79</sup> *Ibid.*, Article 67.

administrative region, and the system of self-government among people at the grassroots level; (iv) criminal offences and their punishment; (v) the deprivation of the political rights of a citizen, or compulsory measures and penalties involving restriction of personal freedom; (vi) expropriation of non-State assets; (vii) fundamental civil institutions; (viii) fundamental economic system and basic fiscal, tax, customs, financial and foreign trade systems; (ix) litigation and arbitration systems; and (x) other matters, the regulation of which must be carried out through enactment of national law by the National People's Congress or the Standing Committee thereof.<sup>80</sup>

The legislative competences are concurrent for the National People's Congress and the Standing Committee of the National People's Congress in the sense that the former may enact and amend basic laws governing criminal offences, civil affairs, the State organs and other matters, and the latter may, when the National People's Congress is not in session, partially supplement and amend laws enacted by the National People's Congress, but not in contradiction to the basic principles of such laws. In addition to this concurrent legislative competence, the Standing Committee of the National People's Congress has exclusive power to enact and amend laws other than the ones to be enacted by the National People's Congress.<sup>81</sup>

On the other hand, the treaties and important agreements subject to the ratification of the Standing Committee of the National People's Congress are more limited in scope. Article 7 of the Treaty Procedure Law refers, by the expression "treaties and important agreements", to the following subject matters: (i) treaties of friendship and cooperation, treaties of peace and similar treaties of a political nature; (ii) treaties and agreements relating to territory and delimitation of boundary lines; (iii) treaties and agreements relating to judicial assistance and extradition; (iv) treaties and agreements containing stipulations inconsistent with the laws of the People's Republic of China; (v) treaties and agreements subject to ratification as agreed by the contracting parties; and (vi) other treaties and agreements subject to ratification.<sup>82</sup>

It has been noted that the scope of Article 7 of the Treaty Procedure Law, and that of Article 8 of the Legislation Law, is not identical, and treaty ratification procedures do not cover all legislative competence of the National People's Congress and its Standing Committee. Article 7(5) of the Treaty Procedure Law provides that, if a treaty requires possible amendment or repeal of pre-existing domestic laws as adopted by the National People's Congress and the Standing Committee, it has to be submitted to the Standing Committee for ratification, even if it does not fall within the categories of treaties as prescribed in Article 7 of the Treaty Procedure Law.<sup>83</sup> However, the approach of conflict triggering ratification is not entirely satisfactory, as it may be the case that a treaty approved by the State Council only supplements and does not conflict with a law enacted by the National People's Congress and its Standing Committee, or that the National People's Congress and its Standing Committee have not exercised the legislative power

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<sup>80</sup> Legislation Law of the People's Republic of China (15 March 2000), Article 8.

<sup>81</sup> *Ibid.*, Article 7.

<sup>82</sup> Law of the People's Republic of China on the Procedure of the Conclusion of Treaties, Article 7.

<sup>83</sup> See Xue, Hanqin and Jin, Qian, *loc. cit.*, n. 3.

on the subject matters the treaty proposes to regulate. Should it so happen, the treaty power of the executive would interfere or overlap with the legislative power of the National People's Congress and its Standing Committee. Thus the view expressed by Xue, Hanqin is reasonable in asserting that "any treaty that affects the above-mentioned matters shall be subject to the domestic procedure of the Standing Committee of the National People's Congress for ratification or accession".<sup>84</sup> Similar constitutional practice of France also may shed light on this issue. Through a broad construction of Article 53 of the French Constitution, the legislative approval procedure of the Parliament in fact applies to any treaties within the ambit of legislative matters.<sup>85</sup> A better solution might be to revise the definition of "treaties and important agreements" in the Treaty Procedure Law and keep it in accordance with the legislative competence of the National People's Congress and its Standing Committee.

### The role of constituent units

The possibility of enlarging the role of constituent units in China's treaty practice attracts the special interest of a Chinese international lawyer. As the regional development in China is unbalanced, and the economic and social needs of differing regions are diverse, it would be necessary to take into consideration the regional interests particularly affected, especially those of the undeveloped regions, in treaty practices of the Central Government. Compared with Hong Kong's broad right to participate in the treaty activities of the Central Government, in addition to its autonomous treaty power, the provinces, autonomous regions and municipalities directly under the Central Government are not competent to conclude international treaties.<sup>86</sup> In my opinion, it is not necessary or advisable to confer treaty power upon these constituent units, but it is meaningful to get such constituent units involved and consult their opinions when their interests are specially affected by or directly concerned with a treaty.

This proposal may rely on some support from constitutional clauses regarding the preferential treatment and self-government of the autonomous regions. According to the Constitution, in developing natural resources and building enterprises in the national autonomous areas, the State shall give due consideration to the interests of those areas.<sup>87</sup> In addition, the organs of self-government of the national autonomous areas independently administer educational, scientific, cultural, public health and physical culture affairs in their respective areas; sort out and protect the cultural legacy of the nationalities; and work for the development and prosperity of their cultures.<sup>88</sup> It is arguable that the treaty

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<sup>84</sup> *Ibid.*, at 302.

<sup>85</sup> Eisemann and Rivier, *loc. cit.*, n. 15, at 259–260.

<sup>86</sup> However, they are competent in enacting Local Regulations, Autonomous Regulations and Separate Regulations pursuant to the Legislation Law.

<sup>87</sup> Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Article 118.

<sup>88</sup> *Ibid.*, Article 119.

activities of the Central Government shall not impair the right of national autonomous areas to self-government in the above-mentioned areas.

The formal participation of the constituent units in China may eventually involve constitutional change of institutional arrangements. The workable solution for the present would be through voluntarily inviting the representatives of the constituent units to participate in the Central Government's treaty-making activities where the Central Government deems it necessary.

### **The differentiation of consent procedure in international and constitutional contexts**

The Treaty Procedure Law provides the possibilities of accession to and acceptance of a multilateral treaty. The accession to multilateral treaties and agreements is subject to ratification, provided the subject matter involved qualifies it to be within the category of "treaties and important agreements" as listed in the Treaty Procedure Law. Therefore, in this case, a positive decision by the Standing Committee of the National People's Congress on the accession to a multilateral treaty is also subject to the ratification of the President for its constitutional validity.

As to the acceptance procedure, the Treaty Procedure Law provides that the decision to accept a multilateral treaty or an agreement shall be made by the State Council. The differentiated treatment of accession and acceptance here is somewhat strange. The drafter of the Treaty Procedure Law apparently took the position that the acceptance procedure applies to treaties of minor importance.<sup>89</sup> This position results from a confusion of consent procedure in international and constitutional contexts. The acceptance may generally apply to treaties of minor importance, but it is not necessarily the case. It may also be possible that a treaty contains an acceptance clause but falls within the scope of "treaties and important agreements" in the Treaty Procedure Law. In this case, the treaty should also be ratified by the Standing Committee of the National People's Congress. In other words, the consent of a State to a treaty may be effected through the acceptance clause of the treaty concerned; nevertheless, in domestic treaty procedure it may require constitutional ratification. There is no necessity to distinguish acceptance and accession in domestic procedure. The accession procedure can also apply to acceptance, and Article 12 of the Treaty Procedure Law should be deleted.

The methods adopted to give consent on the international stage and at a domestic level are not necessarily identical, and they must not be confused with each other. The 1969 Vienna Convention on the Law of Treaties provides broad possibilities of expressing the consent of a State to be bound by a treaty at the international level through signature, exchange of instruments constituting a treaty, ratification, acceptance, approval, accession, etc.<sup>90</sup> These terms refer to different situations in which the State may become a party

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<sup>89</sup> See n. 7.

<sup>90</sup> Vienna Convention on Law of Treaties (23 May 1969), Article 11.



to a treaty under international law. They need not and do not necessarily have corresponding mechanisms in a domestic legal system.

For the purpose of treaty procedure within the domestic context of China, it is submitted that all the other means of expressing consent except for ratification – such as signature, exchange of instruments constituting a treaty, acceptance, approval or accession – shall be subject to the test of “treaties and important agreements”, “agreements subject to the approval to the State Council” and others. The different treaty procedures and techniques that are involved at the international and domestic levels should preferably be clarified in a future amendment of the Treaty Procedure Law.

## CONCLUSIONS

After a retrospective survey of the law and practice of treaty-making activities in China, some tentative conclusions may be reached based on the above observations.

First, treaty practice has been and remains part and parcel of China’s international relations. The extensive conclusion of treaties resulted from the needs of international cooperation for the domestic economic construction since China’s Open Policy from 1978 and also, increasingly, from the needs of China’s participation in the international system today. This phenomenon demonstrates positively that, to a large extent, China is getting beyond the painful experience and long-lasting memory of the unequal so-called treaties imposed by the powerful Western States over the period of a century from the 1840s.<sup>91</sup> China has shown an increasingly positive attitude toward international law and especially treaties, in particular since 1978, by recognizing that the treaty instrument could be useful to stabilize foreign relations and promote international cooperation in various ways.

Second, the author has no hesitation or doubt whatsoever in concluding that great achievements have been made as to the constitutionalization of treaty-making practice since 1949, influenced by and as an important facet of China’s rule of law construction and democratization process since the 1980s. The treaty power, as its domestic counterpart, also has to be legitimized, and so is restricted in the meantime in domestic political life where definite institutions will warrant their effective participation through proper procedures. The treaty-making power is mainly distributed between the executive and the legislative. The principle of separation and supervision of power is in fact practiced, and the Standing Committee is assured of retaining a final say on many vital issues of the State. It is also noted that, even in the case of lacuna, both the State Council and the Standing Committee have in fact shown great respect for the Constitution and tried their best to respect the authority of the National People’s Congress. An effective and well-functioning legal system with regard to treaty-making practice has formed. Two legal experiences emerge from China’s treaty practice in this regard: one is that China has

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<sup>91</sup> For a survey of the history of unequal treaty regimes imposed on China, see Wang, Tieya, “International law in China: Historical and contemporary perspectives”, 221 *RCADI* 195–369 (1990), at 226–262.

constantly placed great emphasis on its treaty-making activities since the beginning of the People's Republic of China. Practical experiences are absorbed and consolidated in its laws and regulations. The other legal experience is that the political organs have, in fact, practiced and do practice their treaty-making power in a mutually respecting and self-restrained way.

Third, the executive, especially the constitutive governmental departments, is playing a substantial role in the treaty-making practice of China. From the perspective of power allocation, the initiation and negotiation of treaties and making reservations to treaties all belong to the prerogatives of the executive. With the exception of treaties and important agreements subject to the ratification of the Standing Committee of the National People's Congress, more than 99 percent of treaties and agreements are subject to the full discretion of the executive. And measuring by number, more than 90 percent of treaties concluded by China are in fact various agreements produced by governmental departments with their international counterparts. The author is of the opinion that, for the purpose of internal self-control, the Ministry of Foreign Affairs may be considered empowered with necessary substantive supervision and scrutinization of other governmental departments in treaty-making activities, and, from the perspective of democratization, the Standing Committee of the National People's Congress may be allowed a wider participation in the treaty practice.

Fourth, the treaty practice of Hong Kong has shown that a constituent unit under a unitary-State system, through proper arrangement, can still possess broad and substantial foreign power including treaty-making. The situations of Hong Kong and Macao are influenced by their particular historical and political context. They nevertheless also render some useful experience for China, in particular how to balance the national consideration and local interest, and to give due respect to the latter in the treaty practice of the central government.

Fifth, the law and practice of China's treaty-making, while undergoing continuing evolution and improvement, is far from perfect. This article has selected certain relevant issues and discussed them as concisely as possible. For the purpose of improving the relevant legal regimes, some outstanding questions involve the substantive power of the State organs such as any discrepancy between the internal and external competences, and some involve legal techniques concerning terminology. As a revision of the Treaty Procedure Law has been listed on the agenda of the Chinese Government, it is considered that these questions could and should be given proper attention in the future revision process.



# POST-LOSC LEGAL INSTRUMENTS AND MEASURES TO ADDRESS IUU FISHING

Dikdik Mohamad Sodik\*

## INTRODUCTION

In recent years, the international community has been faced with increased illegal, unregulated or unreported (IUU) fishing problems,<sup>1</sup> which occur in all capture areas. The problems include the practice of vessels re-flagging to escape from flag-State controls, unregulated high seas fishing activities occurring outside the exclusive economic zone (EEZ), insufficiently selective fishing gear, and lack of sufficient cooperation between States. The increasing problem of unregulated fishing on the high seas, including the practice of re-flagging vessels or registering vessels in countries that operate open registers, are contributory factors in the depletion of marine resources.

In this connection, the 1982 Law of the Sea Convention (LOSC) provisions concerning flag-State control over fishing vessels operating on the high seas are inadequate, which has led to a proliferation of “flags of convenience”. The LOSC is also inappropriate and inadequate as a legal framework to be used by the international community to govern the conservation and exploitation of fisheries resources, particularly high seas fisheries.<sup>2</sup> The 1982 United Nations Convention on the Law of the Sea (hereinafter the LOSC) has failed to clearly define the scope of cooperation for shared stocks, straddling stocks and highly migratory species. The LOSC was inadequate to deal with the continued depletion of these world fish stocks. The management of high seas fisheries, including the regime of fisheries monitoring, control and surveillance monitoring and enforcement, is also inadequate in many areas.

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<sup>1</sup> The definition and scope of IUU fishing are discussed in Section 2.

<sup>2</sup> Joyner, Christopher C. “Compliance and enforcement in new international fisheries law”, 12 *Temple International Law & Comparative Law Journal* 272 (1998).

Since the 1990s, the United Nations (UN), through the Food and Agriculture Organization (FAO), has taken concerted action to find a global solution to the IUU fishing problem. Consequently, a number of binding international fisheries instruments have been negotiated to supplement the LOSC in order to effectively address IUU fishing. The most significant of these instruments include the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels (FAO Compliance Agreement),<sup>3</sup> and the Agreement for the Implementation 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 (the 1995 UN Fish Stocks Agreement).

The purpose of this article is to provide an analysis of the post-LOSC legal instruments for fisheries management to address the problems of IUU fishing. The principal legal instruments are the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement. The FAO Compliance Agreement addresses issues related to re-flagging and flag of convenience by focusing in particular on flag-State responsibility. Essentially, the FAO Compliance Agreement obliges States Parties to control the activities of their vessels on the high seas in order to ensure that such vessels do not undermine international fishery conservation and management measures.<sup>4</sup> The UN Fish Stocks Agreement attempts to deal with the IUU fishing problem by providing a framework for compatibility of conservation and management measures, international cooperation, non-members of regional fisheries management organizations (RFMOs), duties of the flag State, and compliance and enforcement.<sup>5</sup>

This article concludes with an analysis of the international legal framework to address IUU fishing by discussing the measures adopted in relevant binding international fisheries' instruments to address the problem. The article considers the extent to which these binding international fisheries instruments build on the frameworks under the LOSC to combat IUU fishing at global and national levels. It analyses the role of RFMOs in promoting the conservation and management of fisheries resources and addresses issues related to fishing by vessels of non-Parties and cooperating non-Parties. The article focuses on the role of these two binding instruments and examines the significance of the instruments for the LOSC.

It is argued that the former legal instruments represent an important contribution to the latter instruments essentially in four aspects by:

- (1) filling the gaps in the LOSC's provisions;
- (2) strengthening the LOSC's regime;

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<sup>3</sup> FAO, *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*, Adopted at the 27th Session of the FAO Conference, 24 November 1993.

<sup>4</sup> Currie, Duncan E.J., "Options to manage deep sea bottom trawling in the Western and Central Pacific Ocean", SPC/FFA Workshop on High Seas Bottom Trawling 29–30 March 2006, Noumea, New Caledonia, Pacific Islands Forum Fishery Agency, at 7.

<sup>5</sup> Hayashi, Moritaka, "Global governance of deep-sea fisheries", 19 *IJML* 296 (2004).

- (3) supplementing the LOSC; and
- (4) filling the gap in the LOSC.

However, there are still IUU fishing-related issues that need to be addressed by these agreements, such as control of fishing activities by transport and support vessels, the rights and obligations of third parties to RFMOs and IUU fishing in deep-sea fisheries (DSFs).

In an effort to address the problems, in addition to the above legally binding instruments developed at the global level to combat IUU fishing, the international community has also developed non-binding instruments<sup>6</sup> to fill the gap and support the implementation of the multilateral fisheries-related agreements. Non-binding instruments, often referred to as 'soft law', provide policy guidance for States and RFMOs to support international and national efforts to combat IUU fishing. Such policy guidance includes the 2008 FAO International Guidelines for the Management of Deep-Sea Fisheries in the High Seas. The inability of the UN Fish Stocks Agreement to effectively address IUU fishing in DSFs has led to the adoption of these International Guidelines. The common commitment to fight IUU fishing activities in DSFs expressed in the 2008 FAO International Guidelines placed emphasis on the crucial responsibilities of States and RFMOs to conserve and manage deep-sea fisheries. The 2008 International Guidelines fill the lacuna and strengthen the LOSC and the UN Fish Stocks Agreement dealing with sustainable fisheries management in DSFs.

Another important action at the regional level to implement legally binding international instruments in fisheries management and combat IUU fishing was the adoption of the 2007 Regional Plan of Action to Promote Responsible Fishing Practices (including Combating IUU Fishing) in the Region (the RPOA). The RPOA has been formulated within the context of the LOSC, the FAO Compliance Agreement and the UN Fish Stocks Agreement. It urges its members to strengthen and implement five high-priority actions; namely the current resource and management situation in the region, regional capacity building, coastal-State responsibilities, developing port-State measures, and strengthening the Marine Conservation Society (MCS) system.

This paper is divided into six parts. After this introduction, we consider the activities that are considered to be IUU fishing. The next section reviews the background to the FAO Compliance and the UN Fish Stocks Agreements. This will be followed by discussion about the FAO Compliance Agreement for combating IUU fishing. The next section examines the provisions of the UN Fish Stocks Agreement for battling IUU fishing, and their implementation in various RFMOs, cooperation arrangements and constraints of combating IUU fishing. We will also analyse defects of the two legally binding international instruments and discuss the two non-legally binding instruments; namely the 2008 FAO International Guidelines for the Management of Deep-Sea Fisheries in the High Seas, and the 2007 Regional Plan of Action to Promote Responsible Fishing Practices (including Combating IUU Fishing) in the Region (the RPOA). Finally, some conclusions are offered.

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<sup>6</sup> The important non-binding instruments in this respect are the Regional Plan of Action of 2007 and the 2008 International Guidelines for the Management of Deep-Sea Fisheries in the High Seas.

## DEFINITION AND SCOPE OF IUU FISHING\*

There are three components of IUU fishing; namely (a) illegal fishing, (b) unregulated fishing, and (c) unreported fishing. The generally accepted definition of each of the components of IUU fishing is provided by the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA–IUU).

**Illegal fishing**

Paragraph 3.1 of the IPOA–IUU defines illegal fishing as fishing activities:

- 3.1.1 conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;
- 3.1.2 conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or
- 3.1.3 in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.

Illegal fishing occurs in marine capture areas both under the national jurisdiction of coastal States and under the competence of regional fisheries management organizations (RFMOs), and on the high seas.<sup>7</sup> Illegal fishing in national waters covers two main activities. The first activity involves fishing conducted by both domestic and foreign vessels without proper authorization. The second encompasses fishing activities that contravene the terms and conditions of a valid license.<sup>8</sup> Illegal fishing involves a range of activities such as incursions (poaching) into the exclusive economic zones (EEZs) and inshore areas by foreign fishing vessels; non-compliance by fishers with the terms of their fishing

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\* This section was previously published in Sodik, Dikdik Mohamad, “Non-Legally Binding International Fisheries Instruments and Measures to Combat Illegal, Unreported and Unregulated Fishing”, 15 *The Australian International Law Journal*, 132–134 (2008). Reprinted with permission.

<sup>7</sup> Fitzpatrick, John, “Measures to enhance the capability of a flag state to exercise effectiveness control over a fishing vessel”, Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation with FAO, Sydney, Australia, 15–19 May 2000, at 1.

<sup>8</sup> Edeson, William, “Closing the gap: The role of ‘soft’ international instruments to control fishing”, 20 *Australian Yearbook of International Law*, 14–15 (1999).

licenses; fishing by unlicensed vessels; and unlicensed fishing in restricted areas.<sup>9</sup> Another type of illegal fishing is the use of destructive fishing methods such as explosives and poisons, small-meshed fishing nets, and highly destructive fishing gears.<sup>10</sup>

At a regional level, illegal fishing also occurs when member States of RFMOs fail to comply with the organization's conservation and management measures.<sup>11</sup> In this context, the term illegal fishing is used to refer to activities that contravene either national or international laws. These practices often go undeterred either because of the lack of political will or the lack of capacity of national or regional bodies to enforce existing fisheries laws.<sup>12</sup>

### Unregulated fishing

Paragraph 3.3 of the IPOA–IUU defines unregulated fishing as fishing activities:

3.3.1 in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or

3.3.2 in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.

From the above definition, it is apparent that unregulated fishing is commonly undertaken by vessels flying the flag of non-members of RFMOs. As a result, these vessels do not consider themselves to be bound by the conservation and management measures adopted by RFMOs.<sup>13</sup> To evade internationally agreed conservation and management rules, the

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<sup>9</sup> Doulman, David J., “Global overview of IUU fishing and its impacts on national and regional efforts to manage fisheries sustainability: The rationale for the conclusions of the 2001 FAO International Plan of Action”, Report of the Expert Consultation on Fishing Vessels Operating Under Open Registries and Their Impact on Illegal, Unreported and Unregulated Fishing, Miami, Florida, United States of America, 23–25 September 2003, *FAO Fisheries Report No. 722*, at 29.

<sup>10</sup> Drammeh, Ousman K. L., “Illegal, unreported and unregulated fishing in small-scale marine and inland capture fisheries”, Expert Consultation, *loc. cit.*, n. 7, at 1.

<sup>11</sup> Bray, Kevin, “Illegal, unreported and unregulated fishing”, in Nordquist, Myron H. and John Norton Moore (eds.), *Current Fisheries Issues and the Food and Agriculture Organizations of the United Nations*, The Hague/Boston/London: Martinus Nijhoff Publishers, 2000, at 122.

<sup>12</sup> Juda, Lawrence, “Rio plus the evolution of international marine fisheries governance”, 33 *ODIL* 119 (2002).

<sup>13</sup> Sumaila, U. R., “The cost of being apprehended fishing legally: Evidences and policy implications”, Paper Submitted to the IUU Workshop, 19–20 April 2004, Directorate for Food, Agriculture and Fisheries, Fisheries Committee of OECD, at 3.



owners of the fishing vessels “re-flag” or register their vessels in, and fly the flags of States that are not members of RFMOs. The States that offer their flags to such vessels are generally referred to as “flags of convenience” (FOCs) or “open-registry” States.<sup>14</sup> These States and their fishing vessels are often categorized as “free riders”. The term unregulated fishing also refers to the harvesting of fish in areas where there are no management measures.<sup>15</sup> Unregulated fishing activities are also caused by the ineffective application of international regulations at the national and regional levels.<sup>16</sup>

Thus, the concept of unregulated fishing is a narrow one. It mainly applies to two circumstances; namely, fishing activities in areas covered by RFMOs by vessels without nationality and by vessels whose flag States are not members of RFMOs. The term unregulated fishing also applies to fishing on high seas areas where there are no arrangements established to manage the resources and activities in such areas such as unregulated DSFs among others. In this case, it can be said that unregulated fishing results largely from the failure of the international community to establish RFMOs or from the inability of flag States to discharge their responsibilities over their vessels.

### **Unreported fishing**

Unreported fishing is defined in paragraph 3.2 of the IPOA–IUU as fishing activities:

3.2.1 which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or

3.2.2 undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.

Unreported fishing is thus a subset of the definition of illegal fishing and unregulated fishing. Failure to report catches to the competent authorities by fishing vessels or flag States may be illegal if it is done in contravention of reporting regulations. Alternatively, unreported fishing may also be unregulated if there are no rules requiring the reporting of catches.

Section IV of the IPOA–IUU, titled “Implementing of Measures to Prevent, Deter and Eliminate IUU Fishing”, is the core of the IPOA–IUU, which provides a list of recommendations for States. In order to prevent, deter and eliminate IUU fishing; paragraph 10 of the IPOA–IUU requires all States to give full effect to relevant norms of international law, in particular as reflected in the LOSC. Another important recommendation of the

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<sup>14</sup> Balton, David A., “Dealing with the bad actor’s of ocean fisheries”, Paper Submitted to the IUU Workshop, n. 13, at 2.

<sup>15</sup> Juda, *loc. cit.*, n. 12, at 119.

<sup>16</sup> Kuemlengan, Blaise, “National legislative options to combat IUU fishing”, Expert Consultation, *loc. cit.*, n. 7, at 6.

IPOA–IUU is for all States to ratify, accept or accede to the LOSC, the 1995 UN Fish Stocks Agreement and the 1993 FAO Compliance Agreement.<sup>17</sup> The following sections provide an analysis of the non-binding and binding international instruments to address IUU fishing, which will highlight the measures that States would need to adopt to address the problem effectively.

## BACKGROUND TO THE FAO COMPLIANCE AND THE UN FISH STOCKS AGREEMENTS

Chapter 17 of Agenda 21<sup>18</sup> deals with the sustainable use and conservation of marine-living resources of the high seas as well as those under national jurisdiction.<sup>19</sup> From 1982 to 1992, fisheries on the high seas considerably expanded to represent approximately 5 per cent of the total world landings. This expansion led to the need for more effective fisheries management. As Brown (1994) aptly notes in relation to the situation in the early 1990s:

the management of high seas fisheries, including the adoption, monitoring and enforcement of effective conservation measures, is inadequate in many areas and some resources are over-utilized. There are problems of unregulated fishing, overcapitalization, excessive fleet size, vessels re-flagging to escape controls, insufficiently selective gear, unreliable databases and lack of sufficient cooperation between States.<sup>20</sup>

To address these problems, paragraph 17.49 of Agenda 21 calls upon States to take effective action at both regional and global levels to ensure that high seas fisheries are managed in accordance with the LOSC and, in particular, to give full effect to the provisions of the Convention on straddling stocks and highly migratory species; negotiate international agreements for the effective management and conservation of fish stocks; and define and identify appropriate management units.<sup>21</sup>

Paragraph 17.49(e) of Agenda 21 explicitly calls upon the United Nations to convene an international conference to address the problems of straddling and highly migratory

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<sup>17</sup> IPOA–IUU, para. 11.

<sup>18</sup> Juda, Lawrence, “Changing national approaches to ocean governance: The United States, Canada, and Australia”, 34 *ODIL* 163 (2003).

<sup>19</sup> Tsamenyi, Martin and Felicity Woodhill, “Sustainable use of large migratory fish in the Southern and Indian Oceans: Gaps in the international legal framework”, Centre for Maritime Policy University of Wollongong, Australia for Traffic Oceania and WWF, October 1999, at 17.

<sup>20</sup> Brown, E. D., *The International Law of the Sea* (Volume 1 Introductory Manual), Brookfield USA, Singapore and Sydney: Dartmouth Aldershot, 1994, at 321.

<sup>21</sup> Current Legal Development on United Nations Conference on Environment and Development, Agenda 2, Chapter 17 “Protection of the Oceans, all Kinds of Seas, including Enclosed and Semi-Enclosed Areas and the Protection, Rational Use and Development of their Living Resources”, 7 *International Journal of Estuarine and Coastal Law* 310 (1992).

stocks and to do so in a manner fully consistent with the provisions of the LOSC and, in particular, the rights and obligations of coastal States and States fishing on the high seas.<sup>22</sup> In addition, Agenda 21 urged States to:

- ensure that fishing activities by vessels flying their flags on the high seas were conducted so as to minimise incidental catch;<sup>23</sup>
- take effective action consistent with international law to monitor and control fishing activities by their vessels to ensure compliance with applicable conservation and management rules;<sup>24</sup>
- take effective action consistent with international law to deter re-flagging of vessels as a means of avoiding compliance with applicable conservation and management rules for fishing activities on the high seas;<sup>25</sup>
- cooperate within regional and global fisheries bodies and, where they do not exist, establish such organizations;<sup>26</sup> and
- join regional high seas fisheries management organizations in situations where the State has an interest in a high seas fishery regulated by that organization.<sup>27</sup>

As in the case of high seas fisheries, a number of threats to the sustainable use of living resources were identified. These threats include: local over-fishing; overcapitalization and excessive fleet size; unreliable data; under-valuation of catch; unauthorized fishing by foreign fleets; and competition between artisanal and large-scale fishing and between fishing and other types of activities. A final threat to note is ecosystem degradation and insufficiently selective fishing gear.<sup>28</sup>

In relation to fisheries under national jurisdiction, Agenda 21 further urges States to cooperate through bilateral and multilateral agreements to develop technical and financial cooperation to enhance the capacities of developing countries and develop agreed criteria for the use of selective fishing gear and practices to minimize waste in the catch of target species and non-target species.<sup>29</sup> States are also urged to enhance capacity building in areas of data and information, scientific and technological measures, and human resource development, so as to enable them to participate effectively in the conservation and sustainable use of marine-living resources under national jurisdiction.

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<sup>22</sup> Juda, *loc. cit.*, n. 12, at 113.

<sup>23</sup> Agenda 21, Chapter 17, Protection of the oceans, all kinds of seas, including enclosed and semi-enclosed seas, and coastal areas and the protection, rational use and development of their living resources, Rio de Janeiro, Brazil, 3–14 June 1992, para. 17.50.

<sup>24</sup> *Ibid.*, para. 17.51.

<sup>25</sup> *Ibid.*, para. 17.52.

<sup>26</sup> *Ibid.*, para. 17.58.

<sup>27</sup> Juda, *loc. cit.* n. 12 See Agenda 21, para. 17.59.

<sup>28</sup> Levy, Jean-Pierre and Gunnar G. Schram (eds.), *United Nations Conference on Straddling Fish Stocks and Highly Migratory Species* (Selected Documents), The Hague/Boston/London: Martinus Nijhoff Publishers, 1996, at 4.

<sup>29</sup> Agenda 21, para. 17.87.

The issues of high seas fisheries embodied in Agenda 21 were also discussed in various other international meetings held in conjunction with the UN Conference on Environment and Development (UNCED) negotiations or immediately thereafter. The most relevant meeting was the Conference on Responsible Fishing convened by the Food and Agriculture Organization (FAO), held in Cancun, Mexico on 6–8 May 1992. This meeting led to the development of the FAO Code of Conduct on Responsible Fisheries, following the “Cancun Declaration”.<sup>30</sup> In response to the Cancun Declaration and the concerns expressed in Agenda 21, the FAO held a Technical Consultation on the High Seas in September 1992. The meeting produced two international instruments, namely the FAO Compliance Agreement and the FAO 1995 Code of Conduct for Responsible Fisheries.<sup>31</sup> In another development, based on the UNCED recommendation, Resolution No. 47/1992 was adopted by the UN General Assembly in December 1992, convening the Conference on Straddling Fish Stocks and Highly Migratory Species.<sup>32</sup>

#### THE FAO COMPLIANCE AGREEMENT

The FAO Compliance Agreement came into force on 24 April 2003. This Agreement was concluded as an integral part of the FAO Code of Conduct for Responsible Fisheries<sup>33</sup> to support the implementation of the LOSC concerning flag-State control over fishing vessels operating on the high seas,<sup>34</sup> which will be discussed later. Although the original impetus behind the FAO Compliance Agreement was to deal with the problems of activities by vessels flying flags of convenience, it subsequently developed into an instrument setting out the responsibilities of all flag States.<sup>35</sup> There are two primary objectives of the FAO Compliance Agreement. The first is to encourage States to ensure that the activities of their fishing vessels operating on the high seas comply with international conservation and management needs. The second objective is to promote international cooperation for achieving sustainability of high seas fisheries management,

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<sup>30</sup> Orrego Vicuna, Francisco, *The Changing of International Law of High Seas Fisheries*, Cambridge: Cambridge University Press, 1999, at 129.

<sup>31</sup> Balton, David A. and Dorothy C. Zbiczy, “Managing deep-sea fisheries: Some threshold questions”, 19 *IJML*, 248–249 (2004).

<sup>32</sup> Hayashi, Moritaka, “The Straddling and Highly Migratory Fish Stocks Agreement”, in Hey, Ellen (ed.), *Developments in International Fisheries Law*, The Hague/London/Boston: Kluwer Law International, 1999, at 57.

<sup>33</sup> Doullman, David J., “Code of conduct for responsible fisheries: Development and implementation considerations”, in Nordquist and Moore (eds.), *op. cit.*, n. 11, at 314.

<sup>34</sup> Flewelling, C. P., Cormann Culliman, David A. Balton, R. P. Sautter and J. E. Reynolds, “Recent trends in monitoring, control and surveillance systems for capture fisheries”, *FAO Fisheries Technical Paper No. 415*, Rome: FAO, 2002, at 17.

<sup>35</sup> Warner-Kramer, Deirdre M. and Krista Canty, “Stateless fishing vessels: The current international regime and a new approach”, 5 *Ocean and Coastal Law Journal* 232 (2000).

through the collection and dissemination of data on the activities of high seas fishing vessels.<sup>36</sup>

### Definition and application of the 1993 FAO Compliance Agreement

Article I(b) of the FAO Compliance Agreement defines “international conservation and management measures” as:

measures to conserve or manage one or more species of living marine resources that are adopted and applied in accordance with the relevant rules of international law as reflected in the 1982 United Nations Convention on the Law of the Sea. Such measures may be adopted either by global, regional or sub-regional fisheries organizations, subject to the right and obligations of their members, or by treaties or other international agreements.

The above definition covers not only fish, but all living marine resources. In this regard, agreed measures for whales and other cetaceans, corals and other marine living organisms all fall within the scope of the FAO Compliance Agreement. These provisions reinforce the provisions of Articles 63(2)–67 and 116–119 of the LOSC. These provisions require cooperation among States whose vessels carry out fishing activities on the high seas<sup>37</sup> and address the role of RFMOs in achieving the purposes and objectives of the international conservation and management measures in relation to high seas fisheries.

Article I(a) of the FAO Compliance Agreement defines a “fishing vessel” as any vessel used or intended for the purposes of the commercial exploitation of living resources. This definition includes mother ships and any vessels directly engaged in such fishing activities.

Article II(1) applies the FAO Compliance Agreement to all fishing vessels that are used or intended for fishing on the high seas.<sup>38</sup> More importantly, Article II(2) provides that States may exempt fishing vessels of less than 24 metres in length from complying with the Agreement,<sup>39</sup> unless the exemption would undermine the purposes and objectives of the Agreement. In this regard, paragraph 3 of the same article allows riparian coastal States that have not yet declared exclusive economic zones (EEZs) to agree, either directly or through appropriate RFMOs, to establish a minimum length of fishing vessels below which the Agreement will not apply.

An example of a region to which Article II(3) may apply is the Mediterranean Sea. In this region, coastal States are yet to declare EEZs. As a result, the region includes

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<sup>36</sup> Moore, Gerald “The Food and Agriculture Organization of the United Nations Compliance Agreement”, 10 *IJML*, 413–414 (1995).

<sup>37</sup> Balton, David A., “The Compliance Agreement”, in Hey (ed.), *op. cit.*, n. 32, at 47.

<sup>38</sup> Picard, M. Johanne, “International law of fisheries and small developing states: A call for the recognition of regional hegemony”, 31 *Texas International Law Journal* 338 (1996).

<sup>39</sup> Edeson, William, “Implementing the 1982 UN Convention, the FAO Compliance Agreement and the UN Fish Stocks Agreement”, in Nordquist and Moore (eds.), *op. cit.*, n. 11, at 162.

significant areas of high seas close to shore. It follows that the coastal States in this region may establish a minimum length for fishing vessels, below which the FAO Compliance Agreement will not apply, and which differs from that provided in the agreement.<sup>40</sup> Nevertheless, they must take effective measures to ensure that they are not undermining international conservation and management measures.<sup>41</sup>

### Flag-State responsibilities

The FAO Compliance Agreement is primarily concerned with the responsibility of flag States to authorize vessels to fish on the high seas and promote increased transparency through exchange of information. The main provision of the Agreement in this regard is stipulated in Article III, which enumerates a number of obligations for flag States over their fishing vessels operating on the high seas.<sup>42</sup> This article is seen as the most significant provision of the FAO Compliance Agreement in terms of achieving monitoring, control and surveillance (MCS) goals<sup>43</sup> and is examined in more detail in the following paragraphs.

Broadly, Article III(1)(a) imposes a duty on each State to take necessary measures to ensure that any vessel flying its flag does not engage in any activity undermining the effectiveness of conservation and management measures. Moreover, Article III(2)(a) provides that a flag State cannot allow fishing vessels entitled to fly its flag to be used for fishing on the high seas unless the vessel has been authorized by the appropriate authority or authorities of that flag State. An important follow-up to these provisions is Article III(3), which requires States to authorize any fishing vessels entitled to fly its flag to fish on the high seas only when the State is able to exercise its responsibilities effectively. The FAO Compliance Agreement further imposes an obligation upon States Parties to implement a licensing system and some other form of authorization for their vessels to fish on the high seas. The agreement also establishes exclusive flag-State jurisdiction and the right of freedom of fishing on the high seas.<sup>44</sup>

The above provisions cover three fundamental rules associated with implementing flag-State responsibilities. First, a flag State has an obligation to control its vessels which undermine the effectiveness of international conservation and management measures.<sup>45</sup>

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<sup>40</sup> Moore, *loc. cit.*, n. 36, at 415.

<sup>41</sup> Moore, Gerald, "The FAO Compliance Agreement", in Nordquist and Moore (eds.), *op. cit.*, n. 11, at 82. See also FAO Compliance Agreement, Art. III(1)(b).

<sup>42</sup> Churchill, Robin, *The Meaning of the Genuine Link Requirement in Relation to the Nationality of Ships*, A Study Prepared for the International Transport Workers' Federation, October 2000, at 66.

<sup>43</sup> Flewelling, Culliman, Balton, Sauter and Reynolds, *loc. cit.*, n. 34

<sup>44</sup> Carr, Christopher J. and Harry N. Scheiber, "Dealing with a resource crisis: Regulatory regimes for managing the world's marine fisheries", UCIAS Edited Volume 1, *Dynamics of Regulatory Change: How Globalization Affects National Regulatory Policies*, 2002, at 20.

<sup>45</sup> Bederman, David J., "CCAMLR in crisis: A case study of marine management in the southern ocean", in Scheiber, Harry N. (ed.), *Law of the Sea: The Common Heritage and Emerging Challenges*, The Hague/Boston/London: Martinus Nijhoff Publishers, 2000, at 190.

Second, a flag State is required to prevent unauthorized fishing on the high seas. Third, and most importantly, a flag State must ensure that it can effectively control its vessels fishing on the high seas prior to issuing any licenses to be used for fishing in the area.<sup>46</sup> These fundamental rules are a reflection of the basic requirement that a State may only authorize the use of its flag if it can effectively exercise its responsibilities under the FAO Compliance Agreement. Significantly, these requirements constitute a response to problems associated with the re-flagging of fishing vessels to States that are either unwilling or unable to enforce international conservation and management measures.<sup>47</sup> An important issue that has arisen is the question of the lack of effective control of “flag of convenience” (FOC) States, which has caused IUU fishing. Although these FOC States are members of an RFMO, they may be reluctant to comply with the organization’s conservation and management measures.

It has to be borne in mind that Article 90 of the LOSC gives the flag State the right to sail vessels flying its flag. Article 91 gives States the right to fix conditions for the grant of nationality, for the registration of vessels and for the right to fly its flag. It also imposes the condition that there must be a genuine link between the flag and the vessel. What constitutes “genuine link” is not defined by the LOSC.<sup>48</sup> Article 94(2) of the LOSC places on a flag State certain obligations and the duty to control its own flag-State vessels. It is obliged to maintain a register for its vessels.<sup>49</sup> Article 94(6) of the LOSC authorizes a State that believes a vessel is not subject to effective flag-State control to report that belief to the flag State. It is then obliged to investigate the matter and take appropriate action. This provision has led to a proliferation of “flags of convenience” – the owners of fishing vessels re-flag their vessels in, and fly the flags of, “open-registry” States. These States have lax registration requirements and exercise little, if any, regulatory control.<sup>50</sup>

The FAO Compliance Agreement enumerates the responsibilities of flag States in more detail than those in the LOSC.<sup>51</sup> Notably, the FAO Compliance Agreement requires that there be a “genuine link” between the right to fly the flag of a State and the right to

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<sup>46</sup> Serdy, Andrew, “Law of the sea aspects of the negotiations in the WTO to harmonize rules of origin”, 22 *IJMC* 244 (2007).

<sup>47</sup> Juda, *loc. cit.*, n. 12, at 121.

<sup>48</sup> Karandawala, Geeta and Barrie Lewarn, “Implications for shipping and maritime transport”, in Tsamenyi, Martin, Sam Batemen and John Delaney (eds.), *The United Nations Convention on the Law of the Sea: What It Means to Australia and Australia’s Marine Industries*, Wollongong Paper on Maritime Policy No. 9, New South Wales, Australia: Centre for Maritime Policy, University of Wollongong, 1996, at 109.

<sup>49</sup> White QC, Michael, “Marine law-maritime safety, pilotage, port state control, marine pollution”, in Tsamenyi, Batemen and Delaney, *op. cit.*, n. 48, at 196.

<sup>50</sup> Carr, Christopher J., “Recent developments in compliance and enforcement for international fisheries”, 24 *Ecology Law Quarterly* 847 (1997), at 849.

<sup>51</sup> Tsamenyi, Martin and Lara Manarangi-Trott, “The implications of the WCPFC for Australia’s maritime regulation and enforcement”, *Papers in Australian Maritime Affairs No. 11*, in Heath, Rachael and Barry Snushall (eds.), *Protecting Marine Resources: Boundary Delimitation, Resource Conflicts and Constabulary Responsibilities*, Centre for Maritime Policy, University of Wollongong and Australian Navy (2003), at 92.

fish on the high seas. This is an important development as it provides a means for States to control vessels flying their flags.<sup>52</sup> Over time, the “genuine-link” requirement may become a rule of customary international law, which will make it more difficult for vessel owners to re-flag to countries that are either unable or unwilling to enforce international fisheries regulations.<sup>53</sup>

The FAO Compliance Agreement created a direct linkage between fishing-vessel registration and licensing systems. Specifically, Article III(4) provides that the authorization to fish on the high seas will be deemed to have been cancelled if a vessel ceases to be entitled to fly the flag of that State Party.

Article III(5) of the FAO Compliance Agreement deals with the problem of non-compliant vessels. Paragraph (a) of this article prevents a flag State from authorizing an IUU fishing vessel previously registered in another State Party to the FAO Compliance Agreement, unless the flag State is satisfied that any period of suspension by another State Party of an authorization for such fishing vessel to fish on the high seas has expired, and that no authorization has been withdrawn by another State Party within the last three years. This provision is also applied to fishing vessels previously registered in a non-State Party to the FAO Compliance Agreement in order to ensure that sufficient information is available to the party concerned on the circumstances in which the authorization to fish was suspended or withdrawn.

According to Judith Swan, the FAO Compliance Agreement is an effective means of restricting the freedom of vessels with a poor compliance record from re-flagging to another State. She draws particular attention to the fact that a State may only authorize the “non-compliant” vessels to fish if it is satisfied that the vessel will observe agreed conservation and management measures.<sup>54</sup> David Balton notes that while the FAO Compliance Agreement does not regulate the act of re-flagging directly, the agreement prohibits the new flag State from authorizing a re-flagged vessel to fish on the high seas in circumstances where the vessel has a record of non-compliance with international conservation and management measures.<sup>55</sup>

The underlying aim of Article III(5) of the FAO Compliance Agreement is to ensure that vessels operating on the high seas act in a manner consistent with the objective and purpose of international conservation and management measures. The above measures may constitute an effective tool to curb illegal fishing, which is undertaken in the context of an international regulation.

Article III(6) of the FAO Compliance Agreement obliges flag States to ensure that their fishing vessels are marked in accordance with internationally recognized standards, such as the FAO Standard Specifications for the Marking and Identification of Fishing Vessels. In addition, Article III(7) requires flag States to ensure that vessels authorized to fish on the high seas provide relevant information on their activities, including their

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<sup>52</sup> Swan, Judith, “Fishing vessels operating under open registers and the exercise of flag state responsibilities: Information and options”, *FAO Fisheries Circular No. 980*, Rome: FAO, 2002, at 11.

<sup>53</sup> Warner-Kramer and Canty, *op. cit.*, n. 35, at 233.

<sup>54</sup> Swan, *loc. cit.*, n. 52, at 12.

<sup>55</sup> Balton, *loc. cit.*, n. 37, at 50.



fishing activities, their catches and landings of fish. This provision is intended to ensure that the fishing activities, areas of fishing and fish catches are properly documented, monitored and verified.

Article III(8) of the FAO Compliance Agreement requires flag States to take enforcement action against any of their fishing vessels that violate the provisions of the FAO Compliance Agreement. This provision contains sanctions that may be undertaken against fishing vessels committing serious violations such as the “refusal, suspension or withdrawal of the authorisation to fish on the high seas”.<sup>56</sup> To this end, the flag State has to adopt, enforce and publicize relevant municipal laws and regulations adopted consistently with the FAO Compliance Agreement. This will become a basis for each State Party to impose sanctions against illegal fishers on the high seas. The legal measures of RFMOs in controlling the practice of IUU fishing are entirely dependent on flag States being prepared to enforce and monitor the activities of their fishing vessels. The enforcement and monitoring of the activities of flag States need to be supported by the establishment of appropriate legislation to manage fisheries and the technical capabilities of such States to implement such a framework.

### **Exchange of information concerning records of fishing vessels**

One significant point about the FAO Compliance Agreement is that it applies to all high seas fishing activities where international and conservation measures are applicable.<sup>57</sup> The FAO Compliance Agreement imposes a number of obligations upon States in relation to the collection and dissemination of information from fishing vessels operating on the high seas in order to combat IUU fishing. These obligations are examined in more detail in this section.

Article IV of the FAO Compliance Agreement requires States to take measures as may be necessary to ensure that the activities of vessels flying their flags and fishing on the high seas are recorded.<sup>58</sup> Article IV should be read in conjunction with Article VI concerning the exchange of information, particularly on fishing activities, areas of fishing, catches and landing of fish catches. The international fisheries community shows increasing concern over unreported fishing undertaken in the area of competence of a relevant RFMO. The fish catch has not been reported or has been misreported in violation of the reporting procedures of that organization.

The significance of international legal regulation of fishing reporting obligation in the context of IUU fishing is to achieve a situation where all fishing activity and related

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<sup>56</sup> Rayfuse, Rosemary, “Countermeasures and high seas fisheries enforcement”, 51 *Netherlands International Law Review* 60 (2004).

<sup>57</sup> Orebeck, Peter, Ketil Sigurjohnsson and Ted L. McDorman, “The United Nations Straddling and Highly Migratory Species Agreement: Management, enforcement and dispute settlement”, 13 *IJMCL* 113 (1998).

<sup>58</sup> Nomura, Ichiro, “Distant water state perspectives”, in Nordquist and Moore (eds.), *op. cit.*, n. 11, at 186.

operations are reported more effectively. This is particularly in order to achieve more reliable stock assessments and a better understanding of the implications for fisheries management.<sup>59</sup> The purpose of this reporting duty is to monitor and report to the flag State, RFMOs and other bodies as necessary.

Exchange of information also includes records of fishing vessels authorized to fish on the high seas, any addition to and any deletion from the record, and activities of fishing vessels that engaged in IUU fishing.

Article VI(1) requires States to make certain information available to the FAO pertaining to the records of vessels authorized to fish on the high seas. These include: (a) the name of the fishing vessel, registration number, previous names (if known) and port of registry; (b) previous flag (if any); (c) International Radio Call Sign (if any); (d) name and address of owner or owners; (e) where and when built; (f) type of vessel; and (g) length. Further, Article VI(2) requires States to make additional information available to the FAO for the purpose of recording information on the same vessels, including: (a) the name and address of operator (manager) or operators (managers) (if any); (b) type of fishing methods; (c) moulded depth; (d) beam; (e) gross register tonnage; and (f) power of main engine or engines.

Importantly, the Committee on Fisheries (COFI) identified two specific areas for action; namely (1) a global record of fishing vessels, which is to be further developed by an Expert Consultation, and (2) criteria for the assessing the performance of flag States, to be developed in an expert consultation, and possible actions against vessels using the flags of States not meeting such criteria.<sup>60</sup>

Under Article VI(3) of the FAO Compliance Agreement, States are obliged to notify the FAO promptly about any modifications to the information listed in paragraphs 1 and 2. Further, Article VI(5) requires States to inform the FAO promptly about any additions to or any deletions from the record. The reasons for such additions or deletions may include non-renewal of the fishing authorization by the fishing vessel owner or operator, the withdrawal of the fishing authorization issued regarding the fishing vessel under paragraph 8 of Article III where the fishing vessel concerned is no longer flying the flag of a State, and the scrapping, decommissioning or loss of the fishing vessel concerned.

Article VI(7) provides that a flag State has a duty to inform the FAO if the State intends to exempt fishing vessels of less than 24 metres in length from complying with the FAO Compliance Agreement under Article II(2). In this case, the State is to provide relevant information on the number and type of fishing vessels covered by the exemption and the geographical areas in which these fishing vessels operate.

Of particular importance is Article VI(8)(a), which requires a flag State to report promptly to the FAO all relevant information of the activities of its vessels that undermine international conservation and management measures. The information is to include the identity of the fishing vessel or vessels involved and measures imposed by the flag State regarding these activities. Under Article VI(8), if a party to the Agreement has a

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<sup>59</sup> Edeson, *loc. cit.*, n. 8, at 15.

<sup>60</sup> “Main Decisions of the Twenty-Seventh Session of the Committee on Fisheries (COFI)”, Western Central Atlantic Fishery Commission (Thirteenth Session), Cartagena de Indias, Colombia, 21–24 October 2008, Rome: FAO, 2008, at 3.

strong belief that any of its vessels are engaged in activities that undermine international conservation and management measures, the party must draw this to the attention of both the flag State concerned and the FAO. To this end, the party must provide the flag State concerned with full supporting evidence and provide the FAO with summary information. The FAO need not disseminate this information until the flag State has had an opportunity to comment on the allegation and submitted evidence.

The obligations of the FAO under Article VI(8) noted above must be read in light of Articles VI(4) and 10, which impose a duty upon the FAO to disseminate the above information regarding fishing vessels to all the State Parties, and particularly to a State Party that requests such information. The FAO must also provide such information promptly on request to RFMOs. However, this provision of information is subject to any restrictions that may be imposed by the State Party concerned on the dissemination of information.

Article VI(11) provides that RFMOs are to play a significant role in the exchange of information relating to the implementation of the FAO Compliance Agreement. As Applebaum and Donohue note, Article VI(II) would suggest that RFMOs are required to take an active role in monitoring the implementation of the FAO Compliance Agreement against their members who are Parties to the FAO Compliance Agreement and other Parties whose vessels are undermining their conservation and management measures.<sup>61</sup>

It is important in this context to note the statement of the RFMO Secretariats Network (RSN). The RSN is an informal consortium of secretariats representing up to 46 RFMOs responsible for inland, coastal and oceanic fisheries. At the meeting of the RSN on 9–10 March 2009 at FAO Headquarters in Rome, Italy, one of the important agenda items was an exchange of ideas and experiences of network members in combating IUU fishing. The discussion identified important factors that should be considered in the design of strategies to combat IUU fishing, such as establishing fishing and fish transport vessel “black lists” and a global record of fishing vessels, among other things. Issues discussed during RSN biennial meetings include the role of RFMOs and global fisheries governance.<sup>62</sup> This governance of global fisheries includes the FAO Compliance Agreement, which sets out requirements for fishing vessels that can only be determined by an RFMO. The availability of the RFMO is therefore a very important step in successful implementation of the FAO Compliance Agreement to combat IUU fishing activities in areas covered by RFMOs.

### **International cooperation to combat IUU fishing by non-Parties**

This section examines the ways in which the FAO Compliance Agreement provides for international cooperation to combat IUU fishing on the high seas. The mandate of

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<sup>61</sup> Applebaum, Bob and Amos Donohue, “The role of regional fisheries management organizations”, in Hey (ed.), *op. cit.*, n. 32, at 240.

<sup>62</sup> Statement of the Regional Fishery Body Secretariats Network to the Informal Consultation of State Parties to UNSFA, Second Meeting of the Regional Fishery Body Secretariats Network, Rome, Italy, 9–10 March 2009, Rome: FAO, 2009, at 1–2.

international cooperation is to help a flag State identify any of its fishing vessels undertaking activities that undermine international conservation and management measures.<sup>63</sup> Article VI of the FAO Compliance Agreement requires all States Parties to assist the flag State in identifying vessels that undermine international conservation and management measures through active cooperation.

As previously indicated, unregulated fishing in areas covered by an RFMO is conducted by vessels flying the flag of non-members of RFMOs. One way to combat unregulated fishing on the high seas is to forbid access of non-members to the flag State's ports. IUU fishing is a huge and well-organized business, where the profits rely on the possibility of gaining access to legal markets through landing in ports. The failure of flag States to effectively control the fishing activities of their flagged vessels is the main problem. Therefore, enhanced port-State control is crucial for combating IUU fishing.<sup>64</sup>

Under Article V(2), a port State is required to promptly notify the flag State when a vessel is voluntarily in its port and there are reasonable grounds to believe that the vessel has undermined international conservation and management measures. The flag State and port State may make arrangements regarding the authority of the latter State to undertake investigation. Such investigative arrangements would require the States to enter into international agreements. This may be achieved through a mutual assistance agreement on a global, regional, sub-regional or bilateral basis.

Article VIII(1) pertains to the application of the FAO Compliance Agreement to vessels of non-State Parties. The nature of this provision is legally distinct from the nature of Article 34 of the 1969 Vienna Convention on the Law of Treaties, which provides that a treaty is not binding on third States without their consent.<sup>65</sup>

Specifically, States Parties are to encourage non-Parties to accept the FAO Compliance Agreement and adopt laws and regulations consistent with the agreement. All States Parties are also bound by paragraph 2 to cooperate in a manner consistent with the FAO Compliance Agreement and international law. These provisions are designed to ensure that vessels of non-party flag States do not engage in activities that undermine the effectiveness of international conservation and management measures.<sup>66</sup> Paragraph 3 further requires States Parties to exchange information with each other, either directly or through the FAO, regarding activities of vessels that undermine the effectiveness of international conservation and management measures. Non-Parties are also encouraged to adopt fisheries legislation to deal with IUU fishing on the high seas. It is important to strengthen the capacity of its individual members, both developing and developed countries, and to encourage non-members to join the FAO Compliance Agreement.

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<sup>63</sup> Joyner, *loc. cit.*, n. 2, at 284.

<sup>64</sup> "The UN Fish Stocks Agreement Review Conference considers duties of flag states in addressing IUU fishing and other issues discussed, including control exercised by port states, bordering of vessels for inspection", New York: UN Department of Public Information, News and Media Division, 24 May 2006, at 3.

<sup>65</sup> See Article 34 of the Vienna Convention on the Law of Treaties of 1969.

<sup>66</sup> Van Dyke, John M. "Sharing ocean resources in a time of scarcity and selfishness", in Scheiber, *op. cit.*, n. 45, at 15.

Article VIII(1) (2) and (3), however, does not provide for compulsory application by non-Parties. Arguably, the FAO Compliance Agreement is a particular form of global fisheries treaty whose fundamental objective of achieving sustainability of the high seas fisheries management would be frustrated if the reach of the treaty does not extend to non-members. An underlying purpose of the above provisions is to enable the non-members to accept the Compliance Agreement.

### **Gaps in the FAO Compliance Agreement**

Despite the seemingly comprehensive nature of the FAO Compliance Agreement, it has only answered one part of UNCED's call to address the problems of high seas fishing. As David Balton notes, the Agreement fails to resolve the need to establish better conservation rules. The Agreement also fails to ensure compatibility of measures on the high seas and in their EEZs.<sup>67</sup> Rather than regulating port-State measures, the Agreement focuses on actions taken by flag States.

Orrego Vicuna also notes a number of other shortcomings of the FAO Compliance Agreement. The first is the inadequate definition of fishing vessels. It is not clear whether Article I (a) of the FAO Compliance Agreement applies to factory ships or transportation vessels that are often used for fishing activities on the high seas. Further, it may be questioned whether the provisions of the FAO Compliance Agreement would apply to support and charter vessels undermining international conservation and management measures.<sup>68</sup>

One of the difficulties that may be faced by States in implementing Article I(a) of the FAO Compliance Agreement relates to fishing by transport and support vessels. This is a major problem because many fishing vessels need the assistance of transport and other support vessels when engaging in IUU fishing. Such action would be considered contrary to the objectives and purpose of the Agreement. Thus, transshipment at sea by support vessels is one of the commonest and most difficult unreported fishing activities to deal with.<sup>69</sup>

There is a clear need to develop a more comprehensive definition of fishing vessels in Article I(a) in order to provide an adequate framework for monitoring the activities undertaken by factory ships or transshipment vessels. The Compliance Agreement should impose an obligation on flag States to ensure that their fishing, transport and support vessels do not support or engage in IUU fishing.

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<sup>67</sup> Balton, David A., "Strengthening the law of the sea: The new Agreement on Straddling Fish Stocks and Highly Migratory Species", 27 *ODIL* 132 (1996).

<sup>68</sup> Orrego Vicuna, *op. cit.*, n. 30, at 133.

<sup>69</sup> FAO Technical Guidelines for Responsible Fisheries on Fishing Operations No. 9, Rome: FAO, 1996, at 29.

## THE UN FISH STOCKS AGREEMENT

Under Article 63(2) of the LOSC, the coastal States and States fishing for straddling stocks are under an obligation to seek agreement upon<sup>70</sup> the measures necessary for their conservation.<sup>71</sup> The agreement is to be arrived at either directly or through appropriate regional or sub-regional organizations. However, such obligations exist only if the measures have been agreed upon as a result of negotiations.<sup>72</sup> Similarly, Article 64(1) of the LOSC requires the coastal States and States fishing for highly migratory stocks to cooperate with a view to ensuring long-term conservation and management of such stocks. Cooperation is to be achieved directly or through appropriate international organizations to promote the optimum utilization of such species through the region, both within and outside the EEZ. In regions where there are no appropriate international organizations, these States are obliged to cooperate in establishing such organizations and participating in its work.

Furthermore, Article 118 obliges States to cooperate with each other in the conservation and management of living resources in the areas of the high seas, and States whose nationals exploit identical living resources, or different living resources in the same area, are to enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. To this end, they are required to cooperate to establish sub-regional or regional fisheries organizations. The LOSC, however, does not provide any specific directive as to how these obligations are to be fulfilled.<sup>73</sup>

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 (UN Fish Stocks Agreement) was concluded in 1995 in response to global concerns about the conservation and sustainable use of straddling fish stocks and highly migratory fish stocks. The objective of the UN Fish Stocks Agreement is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks in their entirety, through effective implementation of the relevant provisions of the LOSC.<sup>74</sup>

An implementation of this provision is found in Article 2 of the Western and Central Pacific Fisheries (WCPF) Commission. According to this provision, the primary purpose of the WCPF Commission is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks in the western and central Pacific

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<sup>70</sup> Burke, William T., "The law of the sea concerning coastal state authority over driftnets on the high seas", in Hey, Ellen, William T. Burke, Doris Ponzoni and Kazuo Sumi (eds.), *The Regulation of Driftnet Fishing on the High Seas: Legal Issues* (FAO Legislative Study 47), Rome: FAO, 1991, at 25.

<sup>71</sup> Hayashi, Moritaka, "The 1995 UN Fish Stocks Agreement and the law of the sea", in Vidas, Davor and Willy Østreng (eds.), *Order for the Turn of the Century*, The Hague/London/Boston: Kluwer Law International, 1999, at 37.

<sup>72</sup> Brown, *op. cit.*, n. 20, at 228.

<sup>73</sup> *Ibid.*, at 570–571.

<sup>74</sup> UN Fish Stocks Agreement, Art. 2.

Ocean through their effective management in a way that is consistent with the UN Fish Stocks Agreement.<sup>75</sup>

Although the UN Fish Stocks Agreement applies principally to the conservation and management of straddling fish stocks and highly migratory fish stocks beyond areas under national jurisdiction (i.e. on the high seas),<sup>76</sup> key conservation obligations under the Agreement also apply in the EEZ of Parties to ensure that there is compatibility between high seas and in-zone conservation and management measures.<sup>77</sup>

Article 5 of the Agreement imposes a number of conservation obligations on States with regard to straddling fish stocks and highly migratory species. Of particular relevance are the obligations to adopt measures to support long-term sustainability of straddling fish stocks and highly migratory species, and to promote optimum utilization. Measures to be adopted should be those based on the best scientific evidence available and those that will help maintain or restore stocks at levels capable of producing maximum sustainable yield as qualified by relevant listed factors. These measures are to effectively assess the impacts of fishing, other human activities and environmental factors on target species, and the rest of the ecosystem. Conservation and management measures are to be applied to an entire ecosystem so as to protect both target species and non-target species and minimize pollution, discards, waste and abandoned or lost gear. These measures should also include the development and use of selective fishing gear and techniques, the protection of marine biodiversity, and the prevention or elimination of overfishing and excess fishing capacity.

The above provisions were drafted to fill gaps in the provisions of Articles 63, 64 and 118 of the LOSC, as already discussed. To this extent, the UN Fish Stocks Agreement represents a significant step forward in detailing the manner in which fishing States and coastal States are to give effect to their duty to cooperate in conservation and management of straddling and highly migratory fish stocks under the LOSC. The key requirement to achieve the objectives of the UN Fish Stocks Agreement is cooperation at the bilateral, multilateral or global levels.<sup>78</sup>

Additionally, Article 6(1) of the UN Fish Stocks Agreement obliges States to apply the precautionary approach widely to conservation and management, and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living resources and preserve the marine environment. Under paragraph 2 of this Article, States are to be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information cannot be used as a reason for postponing or failing to take conservation and management measures.

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<sup>75</sup> Tsamenyi, Martin, "The legal substance and status of fishing entities in international law: A note", 37 *ODIL* 126 (2006).

<sup>76</sup> UN Fish Stocks Agreement, Art. 3(1).

<sup>77</sup> UN Fish Stocks Agreement, Arts. 5, 6 and 7.

<sup>78</sup> Vidas, Davor, "Emerging law of the sea issues in the Antarctic maritime area: A heritage for the new century", 31 *ODIL* 202 (2000).

### Compatibility of conservation and management measures

As indicated earlier, unregulated fishing refers to fishing activities in areas where there are no management rules. Prior to the Law of the Sea Convention (LOSC), fisheries stocks within the EEZ were regulated by the high seas fisheries regime. Coastal State claims over the EEZ under the LOSC resulted in the transfer of the most important and lucrative fisheries resources to the coastal States.<sup>79</sup> Currently about 90 per cent of the world's fish stocks are located within the EEZs of coastal States.<sup>80</sup> One of the inevitable consequences of the establishment of the EEZ and the resulting expansion of coastal States' rights is that the fishing activities of distant-water fishing States have been significantly curtailed.<sup>81</sup>

Although high seas fishing activities take place just outside the EEZ, conservation and management of fisheries resources are not unified. As a result, over-exploitation of high seas fish stocks has become one of the most serious fisheries problems facing the international community. This is highlighted by increasing incidents of illegal and unregulated fishing in the EEZ and the fact that it is difficult for coastal States to monitor whether fleets are fishing at 195 miles or at 201 miles.<sup>82</sup> The real threat to the future of coastal State fisheries and neighbouring States comes from unregulated fishing activities. From this perspective, the unregulated fishing activities have an international dimension as these IUU activities are characterized as threats to sustainable fisheries development both within and beyond limits of national jurisdiction.

Illegal, unreported and unregulated (IUU) fishing is a major obstacle to the management of sustainable fisheries. Effective fisheries management relies on accurate data collection, particularly regarding fish catches and setting catch quotas at sustainable levels. Lack of these forms of controls leads to overfishing, the continuation of which will cause the collapse of fisheries.<sup>83</sup>

A key aspect of the UN Fish Stocks Agreement achieving international cooperation is the requirement for compatibility between management measures in the EEZ and on

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<sup>79</sup> Tsamenyi, Martin, "Offshore resources development", in Tsamenyi, Martin, Sam Batemen and John Delaney (eds.), *The United Nations Convention on the Law of the Sea: What It Means to Australia and Australia's Marine Industries (Wollongong Paper on Maritime Policy No. 9)*, New South Wales, Australia: Centre for Maritime Policy, University of Wollongong, 1996, at 144.

<sup>80</sup> Joyner, Christopher C., Alejandro Alvarest von Gurdsted and Ferdinand J. Gallo, "The Turbot War of 1995: Lessons for the law of the sea", 11 *IJMCL* 430 (1996).

<sup>81</sup> Rich, Roland, "Recent developments in international law with implications for Australian practitioners: Law, politics and politics disguised law", in Sharer, Ivan (ed.), *International Law and The Australian Practitioner (Martin Place Papers No. 3)*, International Law Association (Australian Branch), 2001, at 38.

<sup>82</sup> Pfirter, Frida Maria Armas, "Straddling stocks and highly migratory stocks in Latin American practice and legislation: New perspectives in light of current international negotiations", 26 *ODIL* 133 (1995).

<sup>83</sup> Australian Centre for International Agricultural Research, Australian Government, *ACIAR Activities in Fisheries and Aquaculture in Indonesia 2005–2006*, 2005, at 5.



the high seas.<sup>84</sup> This is in recognition of the inappropriate artificial boundaries under the LOSC. The compatibility of conservation and management measures is contained in Article 7(1), which states that:

- (a) with respect to straddling fish stocks, the relevant coastal States and the States whose nationals fish for such stocks in the adjacent high seas area shall seek, either directly or through the appropriate mechanisms for cooperation provided in Part III, to agree upon the measures necessary for the conservation of these stocks in the adjacent high seas area;
- (b) with respect to highly migratory species, the relevant coastal States and other States whose nationals fish for such stocks in the region shall cooperate, either directly or through the appropriate mechanisms for cooperation provided in Part III, with a view to ensuring conservation and promoting the objective of optimum utilization of such stocks throughout the region, both within and beyond the areas under national jurisdiction.

Article 7(1) of the UN Fish Stocks Agreement elucidates the rights and duties of States prescribed in Articles 63(2) and 64 of the LOSC.<sup>85</sup> As noted earlier, under Article 63(2), the coastal States and States fishing for straddling fish stocks are to cooperate directly or through international organizations. Under Article 64(1), the coastal States and States fishing for highly migratory stocks in a region are required to cooperate to ensure conservation throughout the region, including the high seas, either directly or through international organizations. However, the LOSC does not contain either any reference to the concept of compatibility or any guidance concerning the relationship between the conservation and management rules established for the EEZ and the high seas.<sup>86</sup>

In determining compatible conservation and management measures, Article 7(2) provides that States are required to take into account a wide variety of factors, including: (a) the management measures adopted by coastal States in their EEZs and in accordance with Article 61 of the LOSC;<sup>87</sup> (b) previously agreed measures for the high seas with respect to the same stocks that are in accordance with the LOSC or with sub-regional or regional fisheries management organizations or arrangements; (c) previously agreed measures established and applied for the high seas in accordance with the LOSC in respect of the same stocks by a sub-regional or regional fisheries management

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<sup>84</sup> Boyle, A. E., "Problems of compulsory jurisdiction and the settlement of disputes relating to straddling fish stocks", 14 *IJMCL* 20 (1999). See also Botet, Vilonda, "Filling in one of the last pieces of the ocean: Regulating tuna in the western and central Pacific Ocean", 41 *Va.JIL* 800 (2000–2001).

<sup>85</sup> Rowe, Peter and Michael A. Meyer, "The Straddling Stocks Agreement: An initial assessment", 45 *ICLQ* 468 (1996).

<sup>86</sup> Hayashi, Moritaka, "The 1995 Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks: Significance for the Law of the Sea Convention", 29 *Ocean and Coastal Management* 57–58 (1996).

<sup>87</sup> Van Dyke, John M., "The Straddling and Migratory Stocks Agreement and the Pacific", 11 *IJMCL* 407 (1996).

organization or arrangement; (d) the respective dependence of coastal and other States fishing on the high seas on stocks in question; and (e) the need to ensure that measures taken do not have a harmful impact on marine resources as a whole.<sup>88</sup> Under Article 7(7), coastal States must also regularly inform other States about such measures. Moreover, distant-water fishing States are obligated to regularly inform other States about the conservation and management measures adopted for the high seas. These obligations are intended to regulate the activities of fishing vessels on the high seas.<sup>89</sup>

The author supports Michael W. Lodge and Satya N. Nandan's opinion that the provisions of the UN Fish Stocks Agreement are adequate to provide a satisfactory solution to the problem of the compatibility between the conservation and management measures for the EEZ and the adjacent high seas areas.<sup>90</sup> The framework of the UN Fish Stocks Agreement provides a basic obligation for coastal States to cooperate with other States in handling unregulated fishing in shared waters and participate in RFMOs to combat IUU fishing. The cooperation between coastal and fishing States either directly or through appropriate sub-regional or regional arrangements is aimed at ensuring the conservation and management of highly migratory or straddling stocks and ensuring compatibility of management arrangements between different jurisdictions

### **Governance and management of deep-sea fisheries (DSFs) in the high seas**

Notably, a fishing problem that needs to be addressed by this Agreement is unregulated deep-sea fisheries. The UN Fish Stocks Agreement is not applicable to manage the high seas fish stocks.<sup>91</sup> Many DSFs have different characteristics from other fisheries in the light of heightening sustainability and biodiversity concerns. Because of their depth of operation, many of these fishing activities take place in areas where the existing international law of the sea does not give coastal States jurisdiction to regulate fisheries unilaterally.<sup>92</sup> In this respect, the deep-sea gillnet fisheries in the Northeast Atlantic are not well regulated and they seem to be mainly unregulated. Aside from that, there is little or no information on composition catch or discards, and a high degree of suspected misreporting.<sup>93</sup>

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<sup>88</sup> Juda, Lawrence, "The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A critique", 28 *ODIL* 155 (1997).

<sup>89</sup> Molenaar, Erik Jaap, "Addressing regulatory gaps in high seas fisheries", 20 *IJMCL* 565 (2005).

<sup>90</sup> Lodge, Michael W. and Satya N. Nandan, "Some suggestions towards better implementation of the United Nations", 20 *IJMCL* 350 (2005).

<sup>91</sup> Gjerde, Kristina M. and David Freestone, "Unfinished business: Deep sea fisheries and the conservation of marine biodiversity beyond national jurisdiction editors' jurisdiction", 19 *IJMCL* 209 (2004).

<sup>92</sup> Molenaar, Erik Jaap, "Unregulated deep sea fisheries: A need for a multi-level approach", 19 *IJMCL* 223 (2004).

<sup>93</sup> "Northeast Atlantic deep-sea gillnet fishery management", Recommendations for Deep-sea Gillnet Fisheries Management, Oceana, Protecting The World's Oceans, Washington DC, USA, 2006, at 2–3.

Consequently, some DSFs use bottom trawling to target vulnerable and discrete high seas fish stocks, which has a destructive impact on the broader marine ecosystems.<sup>94</sup> The gaps and inadequacies in the existing legal and institutional regimes constitute major obstacles in the management of DSFs in the high seas. These include ineffective systems of management of many DSFs and the lack of competent RFMOs. The issues described above make the need for vigilance greater than that needed for fisheries on the continental shelves and within national jurisdiction to ensure sustainable use of the marine-living resources, the prevention of significant adverse impacts on vulnerable marine ecosystem (VMEs) and the protection of marine biodiversity.<sup>95</sup>

It can be seen from the above that the international community moved into what can be described as a twin-track approach on the subject of unregulated DSFs: the 2006 UN Fish Stocks Agreement Review Conference dealt with the issue of unregulated DSFs.<sup>96</sup> The Review Conference was called for by Article 36 of the UN Fish Stocks Agreement and the UN General Assembly Resolution No. 59/25 of 17 November 2004. Under Article 36, the Conference has the mandate, four years after their entry into force, to review and assess the effectiveness of the Agreement's provisions in securing those goals.<sup>97</sup> Meanwhile, on the other track, the International Guidelines for the Management of Deep-Sea Fisheries (DSFs) in the High Seas were adopted by the Technical Consultation on 29 August 2008. These International Guidelines were developed at the request of the Food and Agriculture Organization of the United Nations (FAO) Committee on Fisheries (COFI) at its 27th session in March 2007 in order to assist States and regional fisheries management organizations and arrangements (RFMOs/RFMAs) in sustainable management of DSFs.<sup>98</sup>

These 2008 International Guidelines have been developed for fisheries exploiting deep-sea fish stocks, in a targeted or incidental manner, in areas beyond limits of national jurisdiction, including fisheries with the potential to have significant adverse impacts on VMEs.<sup>99</sup> The role of the Guidelines is to:

- (1) provide tools, including guidance on their application;
- (2) facilitate and encourage the efforts of States and RFMO/As in order to achieve sustainable use of marine living resources exploited by DSFs;

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<sup>94</sup> Molenaar, *loc. cit.*, n. 89, at 534.

<sup>95</sup> *International Guidelines for the Management of Deep-Sea Fisheries in the High Seas*, Rome: FAO, September 2008, at 2.

<sup>96</sup> "Press conference on Fish Stocks Agreement review", New York: Department of Public Information, News and Media Division, 26 May 2006, at 2.

<sup>97</sup> The International Institute for Sustainable Development, "Summary of the UN Fish Stocks Agreement Review Conference (22–26 May 2006)," 17 *Earth Negotiations Bulletin*, at 1, available at <http://www.iisd.ca/oceans/sfsrc> (accessed on 22 June 2008).

<sup>98</sup> *Technical Consultation on the International Guidelines for the Management of Deep-Sea Fisheries in the High Seas 4–8 February 2008*, FAO Headquarter Rome (Note prepared by the NEAFC Secretariat), at 2.

<sup>99</sup> *International Guidelines*, *op. cit.*, n. 95, para. 5.

- (3) prevent significant adverse impacts on deep-sea VMEs; and
- (4) protect the marine biodiversity that these ecosystems contain.<sup>100</sup>

The Guidelines are to be interpreted and applied consistent with the relevant rules of international law, as set out in the LOSC.<sup>101</sup> The main objectives of the management of DSFs are to promote responsible fisheries that provide economic opportunities to enable the conservation of living marine resources and the protection of marine biodiversity, by:

- 1. ensuring the long-term conservation and sustainable use of marine living resources in the deep seas; and
- 2. preventing significant adverse impacts on VMEs<sup>102</sup>

In accordance with paragraph 12 of the 2008 International Guidelines, States and RFMOs are asked to:

- I. adopt and implement measures
  - 1. consistent with the precautionary approach, as set out in Article 6 of the UN Fish Stocks Agreement;
  - 2. in line with an ecosystem approach to fisheries (EAF);
  - 3. in conformity with the relevant rules of international law, in particular as reflected in the LOSC; and
  - 4. in a manner consistent with other relevant international instruments
- II. identify areas where VMEs are known or likely to occur; and
- III. take action using the best information available to further achieve the objectives of the Guidelines.

In addition, paragraph 21 of the 2008 International Guidelines imposes a number of conservation obligations on States and RFMO/As with regard to conservation of DSFs. Of particular significance are the obligations to adopt measures to prevent significant adverse impacts on VMEs and to protect the marine biodiversity within these ecosystems. Measures to be adopted should include the development and use of selective fishing gear and techniques, and the implementation and enforcement of conservation and management measures through effective monitoring, control and surveillance (MCS). These measures should also include taking appropriate steps to address the problem of IUU fishing in DSFs.

Even though they are not binding, the 2008 International Guidelines raise a larger international legal and policy issue, with profound consequences for fighting IUU fishing in DSFs. The non-legally binding character of the Guidelines means that they offer more latitude regarding the principles on DSF management than those not regulated in the UN

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<sup>100</sup> *Ibid.*, para. 6.

<sup>101</sup> *Ibid.*, para. 7.

<sup>102</sup> *Ibid.*, para. 11.

Fish Stocks Agreement. Adopted by the Food and Agriculture Organization (FAO) Conference, the 2008 Guidelines could be considered as evidence of the development of new norms and principles in the area of fisheries law. These seek to bridge existing gaps in the 1995 UN Fish Stocks Agreement when dealing with the issue of IUU fishing in DSFs.

## International cooperation

### *International cooperation under the UN Fish Stocks Agreement*

An “arrangement” is defined as an international cooperative mechanism established in accordance with the LOSC and the UN Fish Stocks Agreement by two or more States. The purpose of this arrangement is to establish conservation and management measures in a sub-region or region of one or more straddling fish stocks or highly migratory fish stocks, among other things.<sup>103</sup> The UN Fish Stocks Agreement requires States to give effect to their duty to cooperate to conserve and manage highly migratory stocks and straddling stocks, as required by the LOSC, by adopting conservation and management measures, including implementing and enforcing conservation and management measures through effective monitoring, control and surveillance.<sup>104</sup> Cooperation is also required under Article 7 to ensure that measures adopted for the high seas are compatible with those adopted by States within the EEZ.<sup>105</sup>

The mechanisms for cooperation are set out in Article 8 of the UN Fish Stocks Agreement. Under this Article, States must cooperate – either directly or through regional or sub-regional fisheries management organizations or arrangements – to ensure the effective management of straddling and highly migratory fish stocks. States are to enter into consultations without delay to establish appropriate conservation and management measures for these stocks. If there is no existing regional or sub-regional management organization competent to establish appropriate measures, States are to form a new organization or to cooperate to establish arrangements.<sup>106</sup>

If a competent organization or arrangement already exists, then States are urged to become members or participants.<sup>107</sup> States are only entitled to have access to a fishery if they are members of or participants in the relevant organization or arrangement, or if they apply the conservation and management measures developed by the relevant organization or arrangement for that fishery.<sup>108</sup>

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<sup>103</sup> UN Fish Stocks Agreement, Art. 1(d).

<sup>104</sup> UN Fish Stocks Agreement, Art. 5(1).

<sup>105</sup> See discussion in Burke, *loc. cit.* n. 70, in Scheiber, *op. cit.*, n. 45, at 114–117.

<sup>106</sup> UN Fish Stocks Agreement, Art. 8(5).

<sup>107</sup> UN Fish Stocks Agreement, Art. 8(3).

<sup>108</sup> UN Fish Stocks Agreement, Art. 8(4). For discussion of such issue, see Churchill, Robin R., “The Barents Sea loophole agreement: A ‘coastal state’ solution to straddling stock agreement”, 14 *IJMCL* 475 (1999).

The main functions of RFMOs as stipulated in Article 10 are, *inter alia*, to (a) agree and comply with conservation and management measures to ensure the long-term sustainability of straddling fish stocks and highly migratory species; (b) agree on participatory rights such as allocations of allowable catch or levels of fishing effort; (c) adopt and apply any generally recommended international minimum standards for the responsible conduct of fishing operations; and (d) establish appropriate cooperative mechanisms for effective monitoring, control and surveillance and enforcement.

The implementation of Article 10 of the UN Fish Stocks Agreement is reflected in Article 10 of the Western and Central Pacific Fisheries Commission (WCPFC) Convention. Under this article, the functions of the WCPFC are to provide for: (a) the determination of total allowable catch; (b) collaboration on conservation and management measures for highly migratory fish stocks, and non-target and species-dependent or associated with target species; (c) the collection and exchange of fishery data and statistics; (d) the provision of scientific advice; (e) criteria for allocation; (f) responsible fisheries operations, monitoring, control and surveillance; and (g) the use of economic and other fisheries-related data, new entrants and administrative functions.<sup>109</sup>

Looking at the above description, it can be said that the UN Fish Stocks Agreement establishes a global framework within which detailed rules are to be elaborated in establishing regional agreed conservation and management measures for straddling and highly migratory fish stocks.<sup>110</sup> The UN Fish Stocks Agreement highlighted and further developed the concept and need for regionally based management arrangements established either on a bilateral or multilateral basis. RFMOs provide the framework to implement this where various States are involved as coastal, flag and port States. The continuing decline of the world fish stocks as a result of IUU fishing has indicated the need to commit all these States to ensuring the implementation of conservation and management measures.<sup>111</sup> The RFMOs are exercising the power to assess the status of the regulated fish stocks; set total allowable catch (TAC) quotas for fish stocks; set limits on the number of vessels permitted to fish; regulate the types of gear that can be used; and conduct inspections to ensure compliance. Therefore, RFMOs play a central role in combating IUU fishing.<sup>112</sup>

If a State Party to the UN Fish Stocks Agreement is not a member of an organization and does not participate in an arrangement, it is still required to cooperate in the

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<sup>109</sup> Western and Central Pacific Fisheries Commission, *Review Conference on 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, 22 to 26 May 2006, at 5.

<sup>110</sup> Swan, Judith, "Decision in regional fisheries bodies or arrangements: The evolving role of RFBS and international agreement on decision-making process", *FAO Fisheries Circular No. 995*, Rome: FAO, 2004, at 5.

<sup>111</sup> Meere, Frank and Mary Lack, "Assessment of the impacts of illegal, unreported and unregulated (IUU) fishing in the Asia-Pacific", Asia Pacific Economic Cooperation Fisheries Working Group, November 2008, Sustainable Fisheries Management, Australia, at 44.

<sup>112</sup> Song, Yann-huei, "The efforts of ICCAT to combat IUU fishing: The roles of Japan and Taiwan in conserving and managing tuna resources", 24 *IJMCL* 115 (2009).

conservation and management of straddling fish stocks and highly migratory fish stocks. Such a State cannot authorize vessels flying its flag to engage in fishing operations for the straddling fish stocks or highly migratory fish stocks,<sup>113</sup> which are subject to the conservation and management measures established by a relevant organization or arrangement.<sup>114</sup> States that are members or participants of the organization are to exchange information on, and take measures against, vessels engaged in fishing activities that undermine the conservation and management measures.<sup>115</sup>

Article 8(2) imposes an obligation on States with an interest in conservation and management measures to consult and cooperate towards a mutually satisfactory outcome for straddling and highly migratory fish stocks.<sup>116</sup> It is contemplated that such consultation and cooperation will be undertaken where there is evidence that straddling and highly migratory fish stocks may be under threat of over-exploitation or where a new fishery is being developed for such stocks.

Although Article 8(3) obligates an RFMO to allow a State with “a real interest in the fisheries concerned” to become a member of that RFMO,<sup>117</sup> neither the LOSC nor the UN Fish Stocks Agreement defines the concept of “real interest”.<sup>118</sup> Some commentators argue that a “real interest” is restricted to flag States whose vessels are engaged in fishing on the high seas. However, other commentators argue that there are clear provisions that coastal States are not allowed to discriminate against interested new entrants.<sup>119</sup>

Under Article 119(3) of the LOSC, States with an interest in high seas fisheries must ensure that the implementation of conservation measures do not discriminate in form or in fact against the fishermen of any State.<sup>120</sup> Nevertheless, it is unclear whether or not new entrants are considered as having a real interest. Essentially, States interested in engaging in such fishing activity or States interested in joining RFMOs to ensure sustainable management or to safeguard biodiversity may not be regarded as having a “real interest”

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<sup>113</sup> UN Fish Stocks Agreement, Art. 17. *See also* Van Dyke, John M., “Modifying the 1982 Law of the Sea Convention: New initiatives on governance of high seas fisheries resources: the straddling stocks negotiations”, 10 *IJMCL* 224 (1995).

<sup>114</sup> UN Fish Stocks Agreement, Art. 17.

<sup>115</sup> UN Fish Stocks Agreement, Art. 17(4).

<sup>116</sup> Green, Julia and David Agnew, “Catch document schemes to combat illegal, unreported and unregulated fishing: CCAMLR’s experience with southern ocean tooth-fish”, in Borgese, Elisabeth Mann, Aldo Chircop and Maria McConnel (eds.), *Ocean Yearbook 16*, Chicago and London: The University of Chicago Press, 2002, at 178.

<sup>117</sup> Molenaar, Erik Jaap, “The South Tasman Rise Agreement of 2000 and other initiatives on management and conservation of orange roughy”, 16 *IJMCL* 96 (2001).

<sup>118</sup> Rayfuse, Rosemary, “The interrelationship between the global instruments of international fisheries law”, in Hey (ed.), *op. cit.*, n. 32, at 138.

<sup>119</sup> Stokke, Olav Schram, “Managing straddling: The interplay of global and regional regimes”, 43 *Ocean and Coastal Management*, 166 (2000).

<sup>120</sup> Hewison, Grant James, “High seas driftnet fishing in the south Pacific and the law of the sea”, 5 *The Georgetown International Environmental Law Review* 370 (1992–1993).

in the fisheries concerned.<sup>121</sup> There are two key issues to be considered by RFMOs in the case of new entrants, especially in relation to fully exploited fisheries. These issues are resource allocation and freedom of fishing.

In relation to the first issue, the RFMO must determine how resources are to be allocated amongst the new entrants and existing members. The new entrants can increase pressure on a fishery and reduce catch allocation to the existing members. As a consequence of their entry into a fishery, the new entrant may undermine the effectiveness of existing management efforts.<sup>122</sup>

If the allocations provided to new entrants are perceived as unfair distributions, the new entrants may be tempted to operate outside RFMOs by maintaining or increasing their catch. From the perspective of the IPOA–IUU, such fishing activity will be considered as “unregulated fishing”.<sup>123</sup> There is also the possibility of vessels re-flagging in order to avoid agreed management measures by contracting parties concerned with quota allocations.<sup>124</sup>

The second issue to consider is the right of freedom to fish on the high seas under traditional international law. Article 11 of the UN Fish Stocks Agreement grants RFMOs the power to determine the “nature and extent of participatory rights” for new entrants in accordance with a variety of general criteria.<sup>125</sup> There is thus a clear conflict between

<sup>121</sup> Molenaar, Erik Jaap, “Regional fisheries management organizations: Issues of participation, allocation and unregulated fishing”, in Elferink, Alex G. Oude and Donald R. Rothwell (eds.), *Ocean Management in the 21st Century: Institutional Frameworks and Response*, The Hague: Martinus Nijhoff Publishers, 2004, at 73. For the importance of this subject, see Ple, Jean-Pierre, “Responding to non-member fishing in the Atlantic: The ICCAT and NAFO experiences”, in Scheiber (ed.), *op. cit.*, n. 45, at 206.

<sup>122</sup> Rayfuse, Rosemary, “Regional Allocation Issues or Zen and the Art of Pie Cutting”, A Paper Presented at the *Sharing the Fish Conference 06: Allocation Issues in Fisheries Management*, Perth, Western Australia, 26 February–2 March 2006, the Department of Fisheries of the Australian Government in Cooperation with the FAO, at 6.

<sup>123</sup> Molenaar, *loc. cit.*, n. 121, at 71.

<sup>124</sup> Opening Statement by the Representative of the Director-General of FAO, in Levy, Jean-Pierre and Gunnar G. Schram (eds.), *United Nations Conference on Straddling Fish Stocks and Highly Migratory Species*, The Hague/Boston/London: Martinus Nijhoff Publishers, 1996, at 356.

<sup>125</sup> McDorman, Ted L., “Implementing existing tools: Turning words into actions – decision-making processes of regional fisheries management organizations (RFMOs)”, 20 *IJMCL* 438 (2005). See also Article 11 of the 1995 UN Fish Stocks Agreement which states that:

In determining the nature and extent of participatory rights for new members of a sub-regional or regional fisheries management organization, or for new participants in a sub-regional or regional fisheries management, States shall take into account, *inter alia*:

- (a) the status of straddling fish stocks and highly migratory fish stocks and the existing level of fishing effort in the fishery;
- (b) the respective interests, fishing patterns and fishing practices of new and existing members or participants;
- (c) the respective contributions of new and existing members or participants to conservation and management of the stocks, to the collection and provision of accurate data and to the conduct of scientific research on the stocks;



traditional international law and the Agreement in relation to the extent to which an RFMO may restrict the activities of non-Parties to the UN Fish Stocks Agreement.<sup>126</sup> The issue raised is therefore a potential conflict between the RFMO and Flag of Convenience (FOC) countries. This may be justified where a number of FOC vessels have undertaken IUU fishing in areas covered by RFMOs.

The International Commission for the Conservation of Atlantic Tuna (ICCAT) has estimated that 10 per cent of all high-value tuna fishery is taken illegally by FOC vessels, and that this is unaccounted for in stock assessment. The depletion of Patagonian toothfish fishery in the Southern Ocean has also occurred due to IUU FOC vessels and it is now considered endangered.<sup>127</sup> While this may indicate “a weakness” on the part of the RFMO, it reflects the reality that the RFMO has to deal with the problem.

*The 2007 Regional Plan of Action to promote responsible fishing practices (including combating IUU fishing) in the region*

One of the reasons behind the adoption of the 2007 Regional Plan of Action to Promote Responsible Fishing Practices, including Combating IUU Fishing in the Region (the 2007 RPOA) was Indonesia’s responsibility to actively participate in combating IUU fishing at the national, regional and global levels.<sup>128</sup> Indonesian waters are bordered by 10 neighbouring countries, namely: Thailand, Malaysia, Singapore, Australia, Papua New Guinea, Timor-Leste, the Philippines, India, Palau and Vietnam. Of these bordering seas, there are five ‘hot spots’, namely South China, Sulu, Celebes, Arafura and the Timor Seas. These hot spots have been the fishing areas where a large number of IUU fishing problems have taken place.<sup>129</sup>

Indonesia and Australia have taken an initiative step in developing a regional cooperation with States bordering the above seas in an effort to implement responsible fishing

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- (d) the needs of coastal fishing communities which are dependent mainly on fishing for the stocks;
  - (e) the needs of coastal States whose economics are overwhelmingly dependent on the exploitation of living marine resources;
  - (f) the interests of developing States from the sub-region or region in whose areas of national jurisdiction the stocks also occur.

<sup>126</sup> Mack, Julie R., “International fisheries management: How the U.N. Conference on Straddling and Highly Migratory Fish Stocks changes the law of the sea fishing on the high seas”, 26 *California Western International Law Journal* 326 (1995–1996).

<sup>127</sup> Sumalia, U. R., J. Alder and H. Keith, “Global scope and economics of illegal fishing”, 30 *Marine Policy* 700 (2006).

<sup>128</sup> *Actual Information on IUU Fishing*, Jakarta: Department of Marine Affairs and Fisheries of the Republic of Indonesia, 16 March 2008, at 2.

<sup>129</sup> Siry, Hendra Yusran, “Comments on Indonesian fishing in Australian waters: Has the problem been solved?”, Regional Ministerial Meeting on Promoting Responsible Fishing Practices including Combating IUU Fishing in the Region, Bali, 4 May 2007, Department of Marine Affairs and Fisheries of the Republic of Indonesia, Jakarta, Indonesia, at 1.

practices and combat IUU fishing in the Region. These States are Malaysia, Thailand, the Philippines, Cambodia, Indonesia, Singapore, Papua New Guinea, Vietnam, Brunei Darussalam, Timor-Leste and Australia.<sup>130</sup> The Regional Plan of Action (RPOA) to Promote Responsible Fishing Practices, including Combating Illegal, Unreported and Unregulated (IUU) Fishing in the Region was approved by the Ministers of Indonesia, Australia, Brunei Darussalam, Cambodia, Malaysia, Papua New Guinea, the Philippines, Singapore, Thailand, Timor-Leste and Vietnam on 5 May 2007 in Bali, following three meetings of senior officials: in Jakarta on 29–30 November 2006; in Canberra, Australia on 22–23 March 2007; and in Bali, Indonesia on 2–3 May 2007.<sup>131</sup>

The 2007 RPOA begins with the objective and framework. It states that the basic objective of this RPOA is to enhance and strengthen the overall level of fisheries management in the region, in order to sustain fisheries resources and to optimize the benefit of adopting responsible fishing practices.<sup>132</sup> The actions adopted under the RPOA cover conservation of fisheries resources and their environment, managing fishing capacity and combating illegal, unreported and unregulated (IUU) fishing in three areas, namely the South China Sea, Sulu–Sulawesi Seas (Celebes Sea) and the Arafura–Timor Seas.<sup>133</sup>

The essential point is that the 2007 RPOA is a voluntary instrument in character, in the sense that it is not intended to give rise to binding legal obligations. The RPOA draws on core principles from already established international fisheries instruments for promoting long-term responsible fishing practices set out in Articles 64 and 116–119 of the LOSC, the FAO Compliance Agreement and the UN Fish Stocks Agreement. The RPOA is consistent with existing treaties, agreements and arrangements and all other plans and programmes relevant to the sustainable management of the region's living marine resources.<sup>134</sup>

Despite being a non-legal binding instrument, the 2007 RPOA provides the framework for countries to take individual or collective action to enhance conservation and sustainable use of fisheries resources and combat IUU fishing in the region. The RPOA identifies a number of specific measures to promote responsible fishing practices and to combat IUU fishing in the region. These measures include: understanding the current resource and management situation in the region; implementing international and regional instruments; working with regional and multilateral organizations; implementing coastal State measures; enforcing flag-State responsibilities; developing port-State measures;<sup>135</sup> regional capacity building;<sup>136</sup> strengthening monitoring, control and surveillance (MCS)

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<sup>130</sup> *Declares War against IUU Fishing: Indonesia Promoted States Cooperation*, Jakarta: Department of Marine Affairs and Fisheries of the Republic of Indonesia, 10 March 2008, at 1.

<sup>131</sup> Palma, Mary Ann and Tsamenyi, Martin "Case study on the impacts of illegal, unreported and unregulated (IUU) fishing in the Sulawesi Sea", APEC Fisheries Working Group, April 2008, Asia-Pacific Economic Cooperation, at 47.

<sup>132</sup> 2007 Regional Plan of Action (RPOA) to Promote Responsible Fishing Practices (including Combating IUU Fishing) in the Region, para. 1.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*, para. 4.

<sup>135</sup> Meere and Lack, *op. cit.*, n. 111, at 54–55.

<sup>136</sup> 2007 Regional Plan of Action (RPOA), *op. cit.*, n. 132, para. 10.

systems;<sup>137</sup> and controlling transshipment at sea.<sup>138</sup> There are five high-priority actions proposed for strengthening and implementation of further measures of the 2007 RPOA, namely: the current resource and management situation in the region; regional capacity building; coastal-State responsibilities; developing port-State measures; and strengthening MCS systems.<sup>139</sup>

The key common understanding of the Regional Ministerial Meeting is that the shared stocks in the region are a very important source of food for people in the region, and are also traded to countries outside the region. The Ministers also noted that over-fishing and IUU fishing activities are seriously depleting the fish stocks in the region. Hence, the Ministers agreed that regional cooperation amongst countries to promote responsible fishing practices and to combat IUU fishing is essential, particularly in order to sustain fisheries resources, ensure food security, alleviate poverty and to optimize the benefits to the people and economies of the region.<sup>140</sup>

The 2007 Regional Plan of Action (RPOA) reaffirms basic provisions of the LOSC, the FAO Compliance Agreement and the UN Fish Stocks Agreement for implementing responsible fishing practices. Relevant regional instruments that can be referred to are the WCPFC Convention and the Agreement Establishing the Indian Ocean Tuna Commission (IOTC). To support these measures, countries in the region are encouraged to:

- work toward ratification, and/or acceptance and full implementation, of the LOSC and the UN Fish Stocks Agreement;
- work towards ratification and/or acceptance of regional fisheries management instruments, where appropriate; and
- work towards acceptance and full implementation of relevant regional and multilateral arrangements, where appropriate.<sup>141</sup>

The Organizational Structure for the Implementation of the RPOA consists of Ministerial Meeting, Coordination Committee, Secretariat, an Advisory Group and Ad-hoc Technical Working Groups. The coordinators for the implementation of the RPOA in each sub-region are:

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<sup>137</sup> *Ibid.*, para. 11.

<sup>138</sup> *Ibid.*, para. 12.

<sup>139</sup> The First Meeting on Implementation of the RPOA in Kuala Lumpur, Malaysia, 13 August 2007, Regional Plan of Action to Promote Responsible Fishing Practices Including Combating IUU Fishing in the Region (RPOA), *An Initiative and a Regional Commitment of the Countries Bordering the South China Sea, the Sulu-Sulawesi Seas and Arafura-Timor Seas to Manage Fisheries Resources*, Jakarta: Department of Marine Affairs and Fisheries of the Republic of Indonesia, 2008, at 6.

<sup>140</sup> *Joint Ministerial Statement of Regional Ministerial Meeting on Promoting Responsible Fishing Practices Including Combating IUU Fishing in the Region, Bali, 4 May 2007*, Jakarta: Department of Marine Affairs and Fisheries of the Republic of Indonesia, at 1.

<sup>141</sup> 2007 Regional Plan of Action (RPOA), *op. cit.*, n. 132, para. 2.

1. Thailand for the Gulf of Thailand and Adjacent Waters;
2. Malaysia for the Southeast Area of South China Sea and the Sulu–Sulawesi Seas;
3. Australia for the Arafura–Timor Seas.<sup>142</sup>

Paragraphs 7, 8 and 11 are at the heart of the 2007 RPOA. These paragraphs deal with the implementation of measures to combat IUU fishing, which are covered under the major headings of flag-State responsibilities: strengthening MCS systems and port-State measures. These aspects are discussed later.

A problem with this “soft” law is that it requires political will to implement its non-legally binding instrument and constant attention to ensure it is being met. While developing an RPOA is an important step in addressing IUU fishing in the region, it is only effective if it is fully implemented and backed by an appropriate national legal framework.

### Deterring IUU fishing within the jurisdiction of RFMOs

Article 8(4) of the UN Fish Stocks Agreement is primarily designed to prohibit States from fishing within RFMO regulatory areas unless they become a member of the RFMO or arrangement.<sup>143</sup> Article 8(4) restricts access to certain fisheries resources to those States that are members of relevant RFMOs or participants in relevant arrangements, or that agree to apply the conservation and management measures established by such RFMOs or under such arrangements. This article is of particular importance for States fishing in areas where there are fish stocks that straddle one or more EEZs, or migrate in and out of EEZs to the high seas, or are highly migratory.<sup>144</sup> Rayfuse aptly notes that:

. . . membership – or at least agreeing to play by the rules – is the *sine qua non* of access to a fishery. Were this not the case, all the conservatory and managerial efforts of member and participating States would continue to be rendered nugatory by the unregulated fishing activities of non-members and non-participants and one of the major reasons for negotiating the FSA would be defeated.<sup>145</sup>

Article 17(1) of the UN Fish Stocks Agreement specifically deals with third parties who are non-members of RFMOs and non-participants in relevant arrangements. This article

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<sup>142</sup> The First RPOA Coordination Committee (CC) Meeting, Manila, 28–30 April 2008, Regional Plan of Action to Promote Responsible Fishing Practices Including Combating IUU Fishing in the Region (RPOA), *An Initiative and a Regional Commitment of the Countries Bordering the South China Sea, the Sulu–Sulawesi Seas and Arafura–Timor Seas to Manage Fisheries Resources*, Jakarta: Department of Marine Affairs and Fisheries of the Republic of Indonesia, 2008, at 11.

<sup>143</sup> Molenaar, *loc. cit.*, n. 92, at 226.

<sup>144</sup> Friedheim, Robert L. “A proper order for the oceans: An agenda for the new century”, in Vidas and Østreg (eds.), *op. cit.*, n. 71, at 44.

<sup>145</sup> Rayfuse, Rosemary Gail, *Non-Flag State Enforcement in High Seas Fisheries*, Leiden/Boston: Martinus Nijhoff Publishers, 2004, at 44.

provides that a non-party State of an RFMO that does not agree to apply the conservation and management measures provided for in the Agreement is not discharged from fulfilling its obligation to cooperate in accordance with the Law of the Sea Convention (LOSC) and the UN Fish Stocks Agreement, in the conservation and management of the relevant straddling fish stocks and highly migratory species. Accordingly, under paragraph 2 of the same provision, a non-party State cannot authorize a vessel flying its flag to engage in fishing operations for straddling fish stocks and highly migratory species within the area of competence of an RFMO.

Article 17 of the UN Fish Stocks Agreement essentially provides a legal basis for cooperation by non-member States of RFMOs and establishes the legal conditions for non-member States to fish in areas of the high seas.<sup>146</sup> This issue was not addressed by the LOSC.

There are two important points to note about third-party State obligations. First, the provisions in the Agreement transform already existing discretionary powers under general international law into a mandatory treaty obligation for States Parties to the Agreement. Second, Article 17(4) grants two types of powers to States Parties to the Agreement that are not regulated by general international law.<sup>147</sup> Thus, it is necessary to consider whether the provisions of the UN Fish Stocks Agreement violate the *pacta tertiis nec nocent nec prosunt* rule<sup>148</sup> of international law by seeking to bind non-members of RFMOs to rules established by RFMOs and to the Agreement itself.<sup>149</sup> A further issue in this regard is whether the RFMO conservation and management measures are applicable to fishing vessels of third-party States.

Although it is common to think of treaties in terms of Parties or non-Parties, the present issue is whether the provisions of the UN Fish Stocks Agreement are legally binding from the perspective of international law. The general rule, encapsulated in Article 34 of the 1969 Vienna Convention on the Law of Treaties, is that a treaty can only create rights and obligations for those Parties that have consented to be bound.<sup>150</sup> The exception to the general rule is to be found in Article 35 of the Vienna Convention on the Law of Treaties, which provides that an obligation arises for a third-party State from a provision of a treaty if the Parties to the treaty intend to confer obligations on a third-party State and the third-party State expressly accepts that obligation in writing. There is,

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<sup>146</sup> Hedley, Chris, "Entry into force of the United Nations Fish Stocks Agreement: An initial assessment", *Internet Guide to International Fisheries Law*, originally published as *International Fisheries Bulletin* No. 24 (2001), at 6. <http://www.intfish.net/ops/papers/7.htm> (accessed on May 17, 2006).

<sup>147</sup> Molenaar, *loc. cit.*, n. 121, at 73.

<sup>148</sup> This rule simply means that a treaty is not binding on third-party States without their express concern.

<sup>149</sup> Franckx, Erik, "Pacta tertiis and 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", *FAO Legal Papers Online* 8 (June 2000), at 20.

<sup>150</sup> Brownlie, Ian, *Principles of Public International Law*, Seventh Edition, Oxford: Oxford University Press, 2008, at 598.

however, an important exception to this principle in the case of dispositive treaties.<sup>151</sup> Dispositive treaties create law that is legally binding upon all States.<sup>152</sup>

In commenting on the substance of its Draft Article 63 regarding obligation, which became Article 35 of the 1969 Vienna Convention, the International Law Commission (ILC) recognized that the requirements are very strict. When they are met, in fact, there is a second collateral agreement between the member States of the treaty, on the one hand, and the third party on the other. The legal basis of the latter's obligation is not the treaty itself but the collateral agreement.<sup>153</sup> As to obligations, it has been confirmed by the Permanent Court of International Justice in the cases of the *Free Zones* and the *River Order* concerning treaty law. The rule acknowledges that there is no exception in matters of obligation, despite the fact that it is, of course, without prejudice to the principle that certain obligations stated in a treaty may become binding on non-States Parties as it has become international customary law.<sup>154</sup>

The juridical basis of this international customary law is to be found in Article 38, which provides that nothing in Articles 34 to 37 prevents a rule stipulated in a treaty from being binding upon a third-party State as a customary rule of international law. In the light of current State practice, it can be argued that certain provisions on the UN Fish Stocks Agreement, such as the conservation and management measures, cooperation duty in conservation and management measures of transboundary fish stocks and compliance and enforcement, are emerging as a rule of international customary law.

As the purpose of examining State practice is to determine the relevant norms of international law, it is important to take into account every activity of the organs and officials of States in connection with that purpose.<sup>155</sup> The principles and approaches set forth in the UN Fish Stocks Agreement have been adopted by a number of regional fisheries management organizations, which are beginning to take decisive action against IUU fishers. Up to now, two approaches have been adopted to counter fishing activities conducted by vessels flying the flag of a State not party to RFMOs.

The first approach was developed by ICCAT to tackle the growing incidence of fishing activities of vessels from several non-members of ICCAT that directly undermined its efforts to conserve bluefin tuna and swordfish. The second approach was

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<sup>151</sup> *Ibid.*, at 99. For more on this issue, see Molenaar, Erik Jaap, "Southern ocean fisheries and the CCAMLR regime", in Elferink, Alex G. Oude and Donald R. Rothwell (eds.), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction*, The Hague/New York/London: Martinus Nijhoff Publishers, 2001, at 309.

<sup>152</sup> Dixon, Martin, *Textbook on International Law*, Fifth Edition, Oxford: Oxford University Press, 2005, at 70.

<sup>153</sup> Harris, D. J., *Cases and Materials on International Law*, Sixth Edition, London: Sweet and Maxwell, 2004, at 631.

<sup>154</sup> Sinclair, I. M. (C.M.G.), *The Vienna Convention on the Law of Treaties*, Manchester: Manchester University Press, 1973, at 76–77.

<sup>155</sup> Greig, Donald W., "Sources of international law", in Blay, Sam, Ryszard Piotrowicz and Martin Tsamenyi (eds.), *Public International Law: An Australian Perspective*, 2nd edn., Oxford: Oxford University Press, 2005, at 56.

developed by the Northwest Atlantic Fisheries Commission (NAFO), which used restrictions on landing of fish caught by non-member vessels.<sup>156</sup> The second approach will also be discussed later.

Since many States' activities are conducted through the auspices of international organizations, there is no doubt that the cumulative conduct of an international organization may constitute evidence of State practice.<sup>157</sup> The consequence of this view is that a non-member is expected to become a party to a regional fisheries management organization (RFMO). The three most highly developed fisheries regimes are those established to complement and affirm the LOSC and Chapter 17 of Agenda 21. Applying these principles and rules to the IUU fishing case, the practice of States referred to in the above instruments may be taken as sufficient evidence of the existence of any necessary *opinio juris*. The UN Fish Stocks Agreement falls within this category. Essentially, this means that a flag State that has accepted the LOSC is bound by the provisions of the UN Fish Stocks Agreement.

### Duties of the flag State

#### *Duties of the flag State for the regulation of the high seas fisheries MCS systems*

As already pointed out, the fisheries provisions of the LOSC are not adequate to provide an effective regulation of the high seas fisheries' monitoring, control and surveillance (MCS) systems. Under Article 117 of the LOSC, all States whose vessels fish on the high seas are under the obligation to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas. One problem in implementing Article 117 involves the definition of the term "nationals". The question is whether this term covers activities undertaken by individuals and corporations engaged in IUU fishing, which undermines the effectiveness of conservation and management measures.<sup>158</sup>

The duties of flag States under the UN Fish Stocks Agreement are set out at Articles 18, 19 and 20 and 22. Article 18 covers general principles as well as specific measures to be undertaken by the flag State. Article 19 addresses compliance and enforcement responsibilities whilst Article 20 deals with international cooperation in enforcement. Article 22 regulates flag-State obligations when vessels flying their flag are subject to boarding and enforcement by other States.

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<sup>156</sup> Balton, David A., "Dealing with the bad actors of ocean fisheries", Paper Submitted to the IUU Workshop, 19–20 April 2004, Directorate for Food, Agriculture and Fisheries, Fisheries Committee of OECD, at 6–7.

<sup>157</sup> See also O'Brien, John, *International Law*, London, Sydney and Portland, Oregon: Cavendish Publishing Limited, 2001, at 72.

<sup>158</sup> Bialek, Dean, "Sink or swim: Measures under international law for the conservation of the Patagonian toothfish in the southern ocean", 34 *ODIL* 119–120 (2003).

Articles 18(1) and 18(2) establish the following general obligations for all flag States that are party to the Agreement:

- Flag States must ensure that vessels flying their flags comply with all applicable conservation and management measures for straddling stocks and highly migratory species at the regional and sub-regional levels;
- Flag States must ensure that vessels flying their flag do not engage in any activities which undermine the effectiveness of such measures;
- Flag States must ensure that vessels flying their flags are only authorized to fish when the flag State is certain that it is able to effectively exercise its responsibilities in respect of such vessels under the UN Fish Stocks Agreement and the LOSC.<sup>159</sup>

Each flag State also agrees to the following more specific obligations:

- to control its flagged vessels through licences or authorizations, the terms of which must reflect agreed global, regional or sub-regional measures;
- to promulgate regulations to enforce authorizations or permits on the high seas and in the EEZ of other States;
- to establish a national record or register of fishing vessels authorized to fish on the high seas;
- to establish arrangements for sharing national register information with directly affected States at their request, whilst respecting confidentiality requirements;
- to ensure that flagged vessels undertake the proper marking of fishing vessels and fishing gear;
- to ensure that flagged vessels undertake timely, accurate and effective reporting of vessel position, target and non-target catches, catch landed, catch trans-shipped, fishing effort and other relevant fisheries data;
- to ensure that catch is properly verified through “best practice” procedures like observer programmes, inspection schemes and cross-matching of different types of data;
- to regulate high seas transshipment so that effectiveness of conservation and management measures is not undermined; and
- to require the use of a Vessel Monitoring System (VMS) on flagged vessels whilst taking into account any sub-regional, regional and global VMS schemes amongst concerned States.

An important aspect of the flag-State responsibility requirements is the control of nationals fishing on the high seas and in waters under the jurisdiction of other States. The concept of “control of nationals” is a broad one and extends to regulating flagged vessels, citizens and business entities. In essence, the UN Fish Stocks Agreement contains the

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<sup>159</sup> Teece, David R., “Global fishing and the Spanish–Canadian turbot war: Can international law protect the high-seas environment”, 8 *Colorado Journal International Environmental Law and Policy* 120 (1997).



primary obligations of flag States to prevent and deter IUU fishing by their fishing vessels on the high seas. Consequently, the Agreement fills the gaps left by the provisions of the LOSC on flag-State control by setting out detailed and specific provisions regarding fishing licences, monitoring, control and surveillance and other important aspects.

The domestic legislation that implements Articles 18(1) and 18(2) of the UN Fish Stocks Agreement in Australia, New Zealand and United States of America provides prohibitions on fishing without authorization beyond their national waters. Australia is a key party of international and regional fisheries and fisheries-related forums. These include the Commission for the Conservation of Southern Bluefin Tuna (CCSBT), Indian Ocean Tuna Commission (IOTC), the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC), and the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR).<sup>160</sup>

The Australian Fisheries Management Act (FMA) 1991 contains permitting provisions for Australian-flagged fishing vessels engaging in fishing activities on the high seas.<sup>161</sup> Specifically, Australian-flagged fishing vessels engaging in high seas fishing in South Pacific waters are required to have a fishing licence issued by the Australian Fisheries Management Authority (AFMA).<sup>162</sup> Through their direct participation in fishing activities within the Australian Fishing Zone (AFZ) or in international fishing activities under the RFMO management, Australian nationals become more actively involved in fishing activities on the high seas or in foreign waters. The Australian Government has adopted regulations to control its nationals if they are engaged in fishing activities in specific areas outside the AFZ. This is to include the Antarctic waters within 200 nautical miles of the Australian Antarctic Territory baselines, specified areas of the high seas associated with fishing for southern or northern bluefin tuna, CCAMLR sub-area 58.5.2 and other specified CCAMLR waters, and the waters adjacent to the AFZ in the area off Tasmania, known as the South Tasman Sea.<sup>163</sup>

Consequently, it is an offence for an Australian-flagged fishing vessel to operate on the high seas or in foreign waters without the appropriate fishing permit. Importantly, operators using Australian-flagged fishing vessels on the high seas are also required to mark their vessels in accordance with the Food and Agriculture Organization (FAO) standard specifications, facilitate the carriage of observers, complete catch and effort logs, and operate a vessel monitoring system (VMS) that reports to the AFMA.

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<sup>160</sup> “Fisheries legislation amendment (New governance arrangements for the Australian Fisheries Management Authority and other matters) Bill 2008”, Department of Parliamentary Services, Parliament of Australia, 14 May 2008, at 7.

<sup>161</sup> See Sections 4, 4AA, 4AD of the Fisheries Management Act 1991.

<sup>162</sup> Sampaklis, A. J., A. K. Morison and P. I. Hobsbawn, “Australian fishing for non-highly migratory fish (1987–2006) in the area of the proposed South Pacific Regional Fisheries Management Organization”, Working Paper presented at the Data and Information Working Group Meeting, Chile April, 2007, Bureau of Rural Sciences, Australian Government, 2007, at 1.

<sup>163</sup> *Australian Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, Department of Agriculture, Fisheries and Forestry, July 2005, at 18–19.

Additionally, Australian-flagged vessels must operate in the way that is in line with Australia's obligations under international agreements and other arrangements to which Australia is a member.<sup>164</sup>

These fishing activities are authorized through the issue of permits and concessions that are subject to specific management rules designed to ensure the long-term sustainability of the fisheries resources. The Australian Government has taken greater responsibility in tackling IUU fishing due to serious concerns at the effect of increasing IUU fishing on the sustainability of fish stocks and the marine environment.<sup>165</sup>

New Zealand also appears to have regarded fishing by its nationals as well as vessels as being subject to its control. New Zealand is a party to the Commission for the Conservation of Southern Bluefin Tuna (CCSBT), the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), and the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC). New Zealand has enacted laws and regulations relating to the conservation and management rules established by the above regional fisheries management organizations (RFMOs). Section 113D of the Fisheries Act 1996 requires all New Zealand vessels fishing on the high seas to possess a high seas permit. The activities of New Zealand nationals fishing on the high seas are also controlled. This is done through prohibiting fishing by New Zealand nationals on foreign vessels flagged to States that have not agreed, through signing or ratification of international agreements, to control their vessels on the high seas.<sup>166</sup> Under Sections 252 and 255C of the same Act, penalties are imposed on fishing activities on the high seas without an appropriate licence, which can include a fine of up to NZ\$250,000 and forfeiture of the vessel, fish and fishing gear.

All New Zealand fishing vessels authorized to fish on the high seas must observe a number of requirements imposed on fishers through permit conditions. These include provisions of notification to Ministry of Fisheries, carriage of observers, VMSs, vessel and gear markings, landing and transshipment, catch and effort reporting, and conservation and management measures established by RFMOs of which New Zealand is a member.<sup>167</sup>

The United States Government has prescribed regulations in conformity with the UN Fish Stocks Agreement. On the high seas, no person or legal entity may use an American-flagged vessel to take fish, for the purpose of sale, unless under the authority of and in accordance with a high seas fishing licence.<sup>168</sup> The United States, which is a party to the UN Fish Stocks Agreement, actively participates in many RFMOs and continually seeks

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<sup>164</sup> *Steps Australia Has Taken to Address Illegal Fishing*, Canberra, Australia: Department of Agriculture, Fisheries and Forestry, 14 October 2008, at 1.

<sup>165</sup> *Country Note on Fisheries Management Systems – Australia*, Canberra, Australia: Department of Agriculture, Fisheries and Forestry, 2008, at 15.

<sup>166</sup> *New Zealand Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, Wellington: Ministry of Fisheries of the New Zealand Government, 2004, at 10.

<sup>167</sup> *Ibid.*, at 34–35.

<sup>168</sup> See Title 50 –Wildlife and Fisheries, Part 300.13 of Code of US Federal Regulations, United States Fish and Wildlife Service, Department of the Interior, 2000.

to promote MCS mechanisms and regimes that are in line with international and domestic laws.<sup>169</sup> The United States is a member of the Inter-American Tropical Tuna Commission, the International Commission for the Conservation of Atlantic Tuna, the Northwest Atlantic Fisheries Organization, the North Pacific Anadromous Fish Commission, the North Atlantic Salmon Conservation Organization and the Commission for the Conservation of Antarctic Marine Living Resources, among others.<sup>170</sup>

The MCS measures listed in Article 18(1) and (2) of the UN Fish Stocks Agreement have been implemented by CCAMLR. At the 25th Annual Meeting of the CCAMLR, held in October 2006, a resolution was adopted in which CCAMLR member States were asked to establish a high-tech Vessel Monitoring System (VMS). In addition, a resolution was adopted by the CCAMLR requiring member States to combat illegal, unreported and unregulated fishing in the Convention Area by the flag vessels of non-Contracting Parties.<sup>171</sup>

It has to be noted that the very important role of Australia, the United States and New Zealand should be acknowledged. These countries have contributed to the adoption of a centralized VMS (cVMS) for vessels operating within the CCAMLR area. The establishment of the cVMS agreed by CCAMLR in 2006 would ensure that vessel-location data of a consistent format and standard are forwarded in real time to the CCAMLR Secretariat.

The CCAMLR measures have also been adopted by the WCPFC in which its member States were asked to establish a VMS and an observer monitoring programme. Likewise, from June 2007 the International Commission for the Conservation of Atlantic Tuna (ICCAT) required fishing vessels of its member States operating in its convention area to carry observers.<sup>172</sup> The information derived from licensing, observer coverage and VMS is used to feed back into real-time fisheries' management decisions.

It is clear that, while the important role of RFMOs in forming a network of fisheries regulation has to be acknowledged, the UN Fish Stocks Agreement remains a global framework containing the principles and norms that underpin all RFMO activities. A problem can arise if regional fisheries management organization agreements can grow to realize fisheries regulation on a global scale. This raises the question of the significance and legal effect that the FAO Compliance Agreement and the UN Fish Stocks Agreement would have. The answer appears to be that the two Agreements continue to be regarded as global fisheries regimes for international cooperation in combating IUU fishing in the treaty-making process. The elaboration of these Agreements by RFMOs represents an attempt to establish true universality in the battle against IUU fishing.

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<sup>169</sup> *National Plan of Action of the United States of America to Prevent, Deter and Eliminate Illegal, Unregulated and Unreported Fishing*, The US Department of State and the National Oceanic and Atmospheric Administration, the National Marine Fisheries Service, the US Coast Guard, the Office of the US Trade Representative, the US Fish and Wildlife Service and the US Customs Service, 2004, at 12.

<sup>170</sup> *Ibid.*, at 5.

<sup>171</sup> "Current Developments in International Fisheries Laws and Policy", *op. cit.*, n. 21, at 8.

<sup>172</sup> *Sixth Round of Informal Consultation of States Parties to the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, New York, 23–24 April 2007, at 7.

*Duties of States and RFMO/As for the regulation of deep-sea fisheries, MCSs*

Under paragraph 54, monitoring, control and surveillance (MCS) frameworks are to be developed and implemented as vital components for regional and national conservation and management measures for deep-sea fisheries (DSFs). To that end, States both individually and cooperatively, through competent regional fisheries management organizations (RFMOs), must work to implement effective MCS frameworks. These frameworks are to ensure compliance with conservation and management rules for DSFs through effective MCS programmes. These include the establishment of onboard observers, and vessel monitoring systems (VMSs) that aim to:

- provide information on the location of fishing vessels engaged in DSFs;
- verify catch data;
- improve compliance with closed-area regulations;
- provide sufficient evidence to detect infractions; and
- ensure that all DSFs' fishing operations can be monitored effectively.

To this end, States are encouraged to participate in the voluntary International Monitoring, Control and Surveillance Network for Fisheries Related Activities. According to paragraph 55, national or international cooperative observer programmes are needed to be implemented for all DSFs. In this context, RFMO/As are given competence to determine observer coverage for established fisheries to ensure effective monitoring and assessment in combination with other MCS tools.

Further, according to paragraph 56, States are obliged to maintain and periodically update vessels' registers or records to document changes in fleet characteristics. In addition, this paragraph requires authorization to fish to contain details of the authorized vessels, information regarding the length tonnage and types of gear. The authorization should contain the relevant information on the areas, fisheries and species. Paragraph 56 further places an obligation upon flag States to ensure that vessels flying their flags have a permanent identification.

Although not legally binding, the Guidelines certainly encourage and even, as a political matter, create an expectation of how a flag State and RFMO/As should exercise their authority in the framework of regional cooperation. Therefore, the Guidelines have helped to fill a gap in the UN Fish Stocks Agreement with respect to MCS provisions in DSFs.

*Duties of the flag State and strengthening MCS systems under the 2007 Regional Plan of Action to Promote Responsible Fishing Practices (including Combating IUU Fishing) in the region*

Paragraph 7 of this 2007 Regional Plan of Action (RPOA) provides that coastal States, through their flag-State responsibilities in the region, are at the forefront in implementing sustainable fishing practices and combating illegal fishing. This paragraph further requires all coastal States, relevant flag States and fishing entities operating in the region to actively cooperate to ensure that their fishing vessels do not undermine the effectiveness of conservation and management measures.

For the purpose of ensuring compliance with international conservation and management measures of DSFs, member States of the 2007 RPOA are obliged to develop a national and regional MCS system for supporting and underpinning robust fisheries management. The strong enforcement network is designed to share data and information on enforcement strategies, and provide advice and build capacity. To better coordinate efforts against illegal fishing activity, paragraph 11 further requires the member States to establish suitable and relevant inter-agency arrangements to enable their networks to quickly share information. This includes locations, names of vessels, port used (home and/or unloading port) and species targeted, and other important information.

Some of the MCS and legislative measures adopted by these States to develop these capacities include:

1. entering into appropriate sub-regional MCS arrangements to promote the elimination of IUU fishing within the region;
2. development of a regional MCS network to promote the sharing of information and to coordinate regional activities to support the promotion of responsible fishing practices;
3. promotion of knowledge and understanding within their fishing industries about MCS activities to enhance sustainable fisheries management and to help combat IUU fishing;
4. development of observer programmes including the requirement for industry to adhere to inspection and carry observers on board when required.

States are also obliged under paragraph 12 to regulate transshipment outside the territorial sea in order to prevent illegal fishers from using it to launder their catches. Stronger monitoring, control and surveillance of both fishing and carrier vessels is a priority. To implement this, countries must:

1. monitor and control the transshipment of fisheries resources; and
2. establish control measures such as vessel registers, mandatory notification of the intention to tranship and the application of vessel monitoring systems (VMS).

The 2007 RPOA is not a “hard” law so there are no strict rules for the development of MCS systems. Despite its lack of obligations, some of the RPOA’s provisions reflect obligations that States must accept as binding, either through global instruments or through RFMOs.

### **Compliance and enforcement**

Under Articles 19 to 23 of the UN Fish Stocks Agreement, States are obliged to enforce conservation and management measures.<sup>173</sup> As far as enforcement is concerned, the

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<sup>173</sup> Tsamenyi and Woodhill, *op. cit.*, n. 19, at 21.

Agreement goes much further than the Law of the Sea Convention (LOSC) or customary international law. There are four different types of enforcement regimes under the Agreement: (a) enforcement by the flag State; (b) enforcement through international cooperation; (c) enforcement through regional agreement; and (d) enforcement by the port State.<sup>174</sup>

### *Enforcement by the flag State*

As a general principle of law, vessels on the high seas are subject to the exclusive jurisdiction and authority of their flag State. The rule of exclusive flag-State jurisdiction is based on the high seas freedom of fishing, which was codified in the 1958 High Seas Convention and re-codified in the LOSC.<sup>175</sup> Under the Article 92(1) of the LOSC, ships on the high seas are, in principle, subject to the exclusive jurisdiction of their flag State.<sup>176</sup> Article 19(1) requires a flag State to ensure that any vessel flying its flag and fishing on the high seas complies with the conservation and management measures established by RFMOs. The article also provides the obligation of a flag State to enforce measures irrespective of where violations occur and investigate any alleged violation immediately and fully.<sup>177</sup> In addition, a flag State has a duty to require their vessels to provide information to the investigating authority regarding vessel position, catches, fishing gear, fishing operations and related activities in the area of alleged violation. If there is sufficient evidence relating to the violation, the flag-State authorities must institute proceedings in accordance with their laws, and, where appropriate, detain the vessel concerned. If the vessel is proven to have committed a serious violation of RFMO conservation measures, the flag State must prevent the vessel from engaging in fishing operations on the high seas until all outstanding sanctions have been complied with.

Under Article 19(2) of the UN Fish Stocks Agreement, any investigations and judicial proceedings are to be conducted expeditiously. Sanctions are to be adequately severe so as to effectively secure compliance and discourage subsequent violations. Additionally, the sanctions are to be imposed so as to deprive offenders of the benefits accruing from their illegal fishing activities. Sanctions imposed upon masters and other officers of fishing vessels are to include provisions that may permit refusal or suspension of authorizations to serve as master or officer of these vessels.

The provisions of the UN Fish Stocks Agreement examined above thus far indicate that the flag State is regarded as the main enforcement authority in the implementation of conservation and management measures under the Agreement. However, history has shown that there are inherent difficulties in requiring flag States to ensure compliance

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<sup>174</sup> Moran, Patrick E. "High fisheries management agreement adopted by UN conference: the final session of the United Nations Conference on Straddling and Highly Migratory Fish Stocks", 27 *Ocean and Coastal Management*, 223 (1996).

<sup>175</sup> Warner-Kramer, Deidre M. and Krista Canty, *op. cit.*, n. 35, at 229.

<sup>176</sup> Opeskin, Brian and Martin Tsamenyi, "The law of the sea", in Blay, Piotrowicz and Tsamenyi (eds.), *op. cit.*, n. 155, at 324.

<sup>177</sup> Barston, Ronald, "The law of the sea and regional fisheries organizations", 14 *IJMC* 340 (1999).

with international agreements because of competing national interests. As a result, flag States will need to improve their compliance records to ensure that their fishing vessels are to comply with various conservation and management measures wherever the vessels carry out fishing activities.<sup>178</sup>

### *Enforcement through international cooperation*

In enforcing conservation and management measures adopted by RFMOs, Article 20(1) of the 1995 UN Fish Stocks Agreement requires States to cooperate with each other,<sup>179</sup> either directly or through sub-regional or regional fisheries' management organizations or arrangements. For the purpose of investigating an alleged violation of conservation and management measures, Article 20(2) provides that flag States are entitled to request any assistance from non-flag States. Once a request is made, the non-flag States are obligated to endeavour to meet reasonable requests of the flag States. Information on the progress and outcome of the investigations should be provided to all States having an interest in, or States affected by, the alleged violation.

Significantly, under Article 20(4) and (5), States are obliged to offer assistance to each other in identifying rogue fishing vessels and are required to provide evidence to prosecutors in other States by giving information about alleged violations by fishing vessels.<sup>180</sup> Under Article 20(6), at the request of coastal States, the flag States are also required to conduct an investigation into their fishing vessels on the high seas, if the vessels are believed to engage in illegal fishing in marine areas under national jurisdiction of a coastal State.

Apart from the power of investigation, flag States must cooperate with coastal States in taking appropriate law-enforcement action. Flag States may authorize coastal States to board and inspect their vessel on the high seas. More importantly, under Article 20(7) of the UN Fish Stocks Agreement, a non-flag State that is not a member of an RFMO could take action against vessels that undermine the effectiveness of the conservation and management measures established by that organization until the flag States take appropriate action.<sup>181</sup>

A number of comments can be made about the enforcement provisions of the UN Fish Stocks Agreement. First, in terms of inspection and detention, the Agreement significantly modifies the international law regime dealing with the traditional high seas compliance, which gives sole responsibility for enforcement to the flag States. Second, the Agreement imposes more onerous responsibilities on flag States to monitor and enforce conservation and management measures. Third, the Agreement provides

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<sup>178</sup> Hewison, Grant, "Balancing the freedom of fishing and coastal state jurisdiction", in Hey, *op. cit.*, n. 32, at 188.

<sup>179</sup> Juda, *loc. cit.*, n. 88, at 157.

<sup>180</sup> Hewison, *loc. cit.*, n. 178, at 189.

<sup>181</sup> Rayfuse, Rosemary, "Canada and regional fisheries organizations: Implementing the UN Fish Stocks Agreement", 34 *ODIL* 217 (2003).

procedures for involvement of non-flag States in fisheries law-enforcement activities.<sup>182</sup> This would seem to include coastal States, which may potentially be affected by the illegal fishing activities occurring in areas under their national jurisdiction.

A well-known case is the FV *Taruman* fishing vessel. On September 2005, the FV *Taruman* was the most recent vessel to be arrested for IUU fishing in the remote sub-Antarctic Australian exclusive economic zone (EEZ). The vessel travelled to the Southern Ocean and most of its crew consisted of fishermen from developing States. It began fishing for Patagonian Toothfish in the Australian EEZ of a sub-Antarctic region. The *Taruman* was detected and inspected while fishing in the Australian EEZ around Macquarie Island. It then went to port in New Zealand before returning to the high seas where it was finally boarded and searched with the permission of its flag State, namely Cambodia. It has to be noted that the *Taruman* was registered in that State, which has not signed the LOSC, the UN Fish Stocks Agreement or the Compliance Agreement. Accordingly, Cambodia is regarded as a Flag of Convenience (FOC) State.<sup>183</sup>

The question is whether Cambodia's action can be regarded as a cooperation or compliance with international fisheries laws. As a legal concept, compliance is defined as a State's implementation and enforcement of the specific norms, principles and rules as stipulated in the international treaty to which it is a party. In the meantime, cooperation with international norms, principles and rules is a broader, more political concept. Similar to compliance, cooperation implies the voluntary acceptance by the State of restrictions upon its freedom of action for the common good. However, whilst compliance may be viewed as obedience to a set law, cooperation in the sense described may be regarded as State action reflecting the spirit of developing international law. It is associated with situations for which States arguably have a moral obligation instead of legal one.<sup>184</sup>

The above case has demonstrated that, although Cambodia is not a member of the relevant RFMO, it has assisted Australia in taking action against its vessel that engaged in IUU fishing in the Australian EEZ. Cambodia's commitment to respect the provision of Article 20(7) of the UN Fish Stocks Agreement places it under an obligation to engage in cooperation with respect to enforcement through international cooperation.

### *Enforcement through the Regional Fisheries Management Organization (RFMO) Agreement*

As stated earlier, each State has the exclusive jurisdiction and control over vessels flying its flag. The UN Fish Stocks Agreement establishes a far-reaching new exception to the

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<sup>182</sup> Olav Schram Stokke, "Managing Fisheries in the Barents Sea Loophole: Interplay with the UN Fish Stocks Agreement", 32 *ODIL* 255 (2001).

<sup>183</sup> Griggs, L. and G. Lugten, "Veil over the nets (unraveling corporate liability for IUU fishing offences)", 31 *Marine Policy* 159–160 (2007).

<sup>184</sup> Kent, Ann, "Compliance v cooperation: China and international law", 13 *Australian International Law Journal* 20–21 (2006).



principle of the flag-State's exclusive jurisdiction.<sup>185</sup> The Agreement provides an elaborate system of regional cooperation for the enforcement of regionally agreed measures against vessels that are suspected of violating these measures.<sup>186</sup> According to Article 21(1) of the UN Fish Stocks Agreement, a State party to the Agreement that is also a member of an RFMO or a participant in any fisheries arrangement may board and inspect fishing vessels flying the flag of another State party to the Agreement, regardless of whether the flag State is a member or non-member of that regional organization or participant in the arrangement.<sup>187</sup> This power is to be used to ensure that vessels comply with conservation and management measures adopted by the relevant regional organization or arrangement.

Especially noteworthy is Hayashi's view that a State Party's RFMO official can take certain fisheries law-enforcement measures within the regulatory area covered by RFMOs against the vessels of either member or non-member States. He argues that these enforcement measures are allowed where a vessel is flying the flag of another State party to the UN Fish Stocks Agreement. Although the State is not a member of the relevant RFMO, it has to comply with the conservation and management measures of the RFMO as part of its commitment to applicable global international agreements, as contained in the UN Fish Stocks Agreement.<sup>188</sup>

In cases where such measures cannot be enforced against non-member States of an RFMO, the only way to bring these States into the RFMO regime would be to isolate and apply trade measures against them. Several RFMOs such as the International Commission for the Conservation of Atlantic Tuna (ICCAT), the Indian Ocean Tuna Commission (IOTC) and the Northwest Atlantic Fisheries Commission (NAFO), as well as the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), have actually adopted economic and trade measures against these FOC States.<sup>189</sup>

As indicated above, should the flag States fail to discharge enforcement responsibilities, they can still impose trade sanctions against non-member States of an RFMO. The economic and trade measures laid down by the above RFMOs have filled the void left by the enforcement of the UN Fish Stocks Agreement.

Further, the key provision in respect of the duties of member States of an RFMO is the obligation under Article 21(2) of the UN Fish Stocks Agreement to establish procedures for boarding and inspecting vessels.<sup>190</sup> Boarding and inspection must be done in

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<sup>185</sup> Yturriaga, Jose A. de, *The International Regime of Fisheries: From UNCLOS 1982 to the Presential Sea*, The Hague/Boston/London: Martinus Nijhoff Publishers, 1997, at 213.

<sup>186</sup> Hayashi, Moritaka, "Enforcement by non-flag states on the high seas under the 1995 Agreement on Straddling and Highly Migratory Fish Stocks", 9 *Georgetown International Environmental Law Review*, 27 (1996).

<sup>187</sup> Stokke, Olav Schram, "Managing straddling stocks: The interplay of global and regional regimes", 43 *Ocean and Coastal Management*, 204–234 (2000), at 220.

<sup>188</sup> Hayashi, Moritaka "The 1995 UN Fish Stocks Agreement and the law of the sea", in Vidas and Østreng (eds.), *op. cit.*, n. 71, at 43.

<sup>189</sup> Hayashi, Moritaka, "Global governance of deep-sea fisheries", 19 *IJMCL* 294–295 (2004).

<sup>190</sup> Rayfuse, Rosemary, "Enforcement of high seas fisheries agreements: Observations and inspection under the Convention on the Conservation of Antarctic Marine Living Resources", 13 *IJMCL* 580 (1998).

accordance with the procedures established in Article 22 and published by member States, which provides for non-discrimination against fishing vessels of an RFMO and non-member States of an RFMO.

Under Article 21(3) of the UN Fish Stocks Agreement, if within two years of the adoption of the Agreement any organization or arrangement has not established procedures for boarding and inspection, the basic procedures set out in Article 22 apply until such procedures have been established.<sup>191</sup> Of particular importance is the approach taken in Article 21(5), which authorizes the inspecting States to secure evidence and notify the flag States of the vessels allegedly engaging in IUU fishing. Such notification is allowed where, following a boarding and inspection, the State has clear grounds for believing that the vessel has engaged in IUU fishing contrary to regional conservation and management measures.<sup>192</sup>

Article 21(6) of the UN Fish Stocks Agreement requires the flag State to respond within three working days by either taking enforcement actions or authorizing the inspecting States to initiate an investigation into the matter. In the latter case, under Article 21(7), the inspecting States are required to communicate the results of the investigation to the flag State, which must then, if evidence so warrants, take enforcement action itself or authorize the inspecting States to take such enforcement action as the flag State may specify.<sup>193</sup>

To tackle serious violations of conservation and management measures, Article 21(8) of the UN Fish Stocks Agreement provides that inspectors may remain on board and secure evidence by requiring the master to bring the vessel to the nearest port.<sup>194</sup> This is allowed where the flag State has not responded or not taken any action to investigate the case. The inspecting States must notify the flag State immediately of the name of the port. The inspecting States, the flag State and the port State are to take all necessary steps to ensure the well-being of the vessels' crews, regardless of their nationality.

John Van Dyke has observed that the serious violations to which Article 21(8) applies are detailed in Article 21(11) and include fishing without a valid authorization from the flag State; failure to maintain accurate records of the catch and catch-related data as required by RFMOs; fishing in a closed area, fishing during a closed season or fishing without a quota established by RFMOs; fishing for a stock that is prohibited or subject to a moratorium; using prohibited fishing gear; falsification or concealment of markings, identity or registration of a fishing vessel; concealment, tampering or disposal of evidence relating to an investigation; multiple violations that together constitute a serious disregard

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<sup>191</sup> Rayfuse, Rosemary, "The United Nations Agreement on Straddling and Highly Migratory Fish Stocks as an objective regime: A case of wishful thinking?", 20 *Australian Year Book of International Law* 267 (1999).

<sup>192</sup> Kedziora, Derrick M., "Gunboat diplomacy in the northwest Atlantic: The Canada–EU fishing dispute and the United Nations Agreement on Straddling and High Migratory Fish Stocks", 17 *Northwestern Journal of International Law and Business*, 1154 (1996–1997).

<sup>193</sup> Hey, Ellen, "Global fisheries regulations in the first half of the 1990's", 11 *IJMCL* 479 (1996).

<sup>194</sup> Rieser, Alison, "International fisheries law, over-fishing and marine biodiversity", 9 *The Georgetown International Environmental Law Review* 271 (1996–1997).

of conservation and management measures; and other violations specified by the RFMOs.<sup>195</sup>

From the foregoing discussion, it can be seen that the UN Fish Stocks Agreement establishes a new precedent for fisheries law enforcement on the high seas. This new precedent is evidenced by Article 21(8), which allows non-flag States to board and inspect fishing vessels on the high seas regardless of whether these vessels belong to member States of RFMOs. This is to ensure compliance with conservation and management measures established by the particular organization.<sup>196</sup>

A practical problem facing many countries, particularly developing countries, is the prohibitive cost of enforcing their jurisdiction in their EEZs and RFMO convention area. As the High Seas Task Force correctly notes:

Governments invest huge sums of money in physical surveillance of EEZs using conventional platforms such as patrol vessels and aircraft. Australia, for example, which has the third largest exclusive economic zone in the world, recently allocated US\$163 million over five years for a full-time armed patrol boat presence – the *Oceanic Viking* – which is used, amongst other things, to patrol the waters around the remote Sub-Antarctic possessions of Heard Island and McDonald Island. It is estimated that it costs Canada approximately US\$26 million annually to deliver the operational monitoring, control and surveillance programmes associated with the NAFO Regulatory Area. The overall cost of monitoring fishing activities in the EU and its member States amounts to some US\$362 million, which is about 5 per cent of total landings. The cost of monitoring EU vessels in the NAFO Regulatory Area alone amounts to some US\$4.8 million, or 7 per cent of total landings.<sup>197</sup>

Such huge amounts of money spent on infrastructure to monitor the fishing activities within areas of national jurisdiction are most often not available to developing countries.

The final report of the High Seas Task Force identifies a number of key measures to expose and deter IUU fishing and improve the enforcement capabilities of developing countries. These measures include those designed to, first, commit resources to the International Monitoring Control and Surveillance Network in order to have analytical capacity and be able to provide training to developing countries; and second, address some of the needs of developing countries with the intent to improve their capability in monitoring, control and surveillance (MCS) as flag States.<sup>198</sup>

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<sup>195</sup> Van Dyke, John M., “Allocating fish across jurisdictions”, Paper Presented at *the Sharing the Fish Conference 06: Allocation Issues In Fisheries Management, Perth Western Australia, 26 February–2 March 2006*, the Department of Fisheries of the Australian Government in Cooperation with FAO, at 6.

<sup>196</sup> Warner-Kramer and Canty, *loc. cit.*, n. 35, at 234.

<sup>197</sup> IUU Fishing Coordination Unit, Department for Environment, Food and Rural Affairs, United Kingdom, *Closing the Net, Stopping Illegal Fishing on the High Seas, Final Report of the Ministerially-led Task Force on IUU Fishing on the High Seas*, 2006, at 25.

<sup>198</sup> High Seas Task Force on Illegal, Unreported and Unregulated Fishing Report, Fisheries and Oceans Canada (March 2006), 1 [http://www.dfo.gc.ca/media/backgrou/2006/hq-acO2a\\_e.htm](http://www.dfo.gc.ca/media/backgrou/2006/hq-acO2a_e.htm) (accessed on 12 December 2006), at 1.

The above discussion shows that the enforcement of fisheries law in the exclusive economic zones (EEZs) and RFMO regulatory areas require a huge budget in order to ensure the effective implementation of international obligations. This is realized through the implementation of MCS as a method of fisheries enforcement. Limited financial capacity and high cost of enforcing fisheries law in the EEZ have encouraged developed countries to ensure a priority focus on the needs of developing countries by providing assistance in the education and training associated with implementing MCS systems. This is due to a bigger problem posed by developing countries that do not have the financial and human resources to carry out enforcement tasks in the EEZ and the Convention Area of which they are a member. It would be helpful if the governments of developing countries could have a primary budget to finance main activities for combating IUU fishing within and beyond the limits of national jurisdiction.

### *Enforcement by port States*

Before discussing this matter, it is important to examine the port-State regime on marine environmental protection as set out in the Paris Memorandum of Understanding on Port State Control adopted in 1982 (the 1982 Paris MoU). Under the 1982 Paris MoU, each authority undertakes to maintain an effective regime of port-State control to ensure that vessels entering its ports comply with international law, especially the International Convention for the Prevention of Pollution from Ships 1973 (the MARPOL Convention, as revised in 1973).<sup>199</sup> The MARPOL 73/78 Convention confers upon port States a limited role in law enforcement. The port authorities are entitled to inspect a foreign vessel and, where the condition of the vessel warrants it, they can detain the vessel until it can proceed to sea without causing an unreasonable threat of harm to the marine environment. Furthermore, where the inspection indicates a violation of the MARPOL Convention, the authorities of the flag State must be reported and should take legal proceedings if there is sufficient evidence.<sup>200</sup>

In recent years, the international community has recognized the significant role of port States in combating IUU fishing and ensuring compliance with domestic and regional conservation and management measures. The increasing attention on port-State measures has grown in tandem with an increasing focus on ensuring flag-State responsibility and implementing market State measures.<sup>201</sup> The schemes of port States, closely modelled on the 1982 Paris MoU, have been adopted by the UN Fish Stocks Agreement.

Article 23(1) of the UN Fish Stocks Agreement gives a port State the right, and imposes a duty on it, to take measures, in accordance with international law, to promote the effectiveness of sub-regional, regional and global conservation and management measures. In doing so, the State cannot discriminate either in form or in fact against the

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<sup>199</sup> Churchill, R. R. and A. V. Lowe, *The Law of the Sea*, Third Edition, Manchester: Manchester University Press, 1999, at 274.

<sup>200</sup> *Ibid.*, at 345.

<sup>201</sup> Issue Note on Port State Measures Purpose: Information Submitted by Canada, Asia-Pacific Economic Cooperation, 19th Fisheries Working Group Meeting, Piura, Peru, 14–17 April 2008, at 1–2.

vessels of all States. Paragraph 2 of Article 23 further provides that when vessels are voluntarily within its ports, the port State may, *inter alia*, inspect documents, fishing gear and fish catches on board fishing vessels. Paragraph 3 of the same provision gives the power to port States to adopt regulations to prohibit landings and transshipments where it has been established that the catch has been taken in a manner that undermines the effectiveness of sub-regional, regional or global conservation and management measures.<sup>202</sup> The port-State reporting obligation on the prevention of IUU fishing to the authorities of the flag State is not specified in the UN Fish Stocks Agreement as it is under the MARPOL Convention.

The application of these provisions is dependent upon the ability of port States to undertake surveillance of vessels carrying out fishing for straddling and highly migratory species.<sup>203</sup> A difference between the power of port States under the FAO Compliance Agreement and the UN Fish Stocks Agreement is clearly evident. Under Article 23 of the UN Fish Stocks Agreement, the inclusion of the right of port States to take measures to prevent IUU fishing seems to be aimed at giving the enforcement power to a flag State. In contrast, the similar right under Article V(2) of the FAO Compliance Agreement requires an international arrangement.

The provisions for port-State measures have been regionally accepted by RFMOs. A Scheme to Promote Compliance by Non-Contracting Party Vessels with the Conservation and Enforcement Measures Established by the North Atlantic Fisheries Organization (NAFO) was adopted in 1997. The regime provides that non-member vessels sighted engaging in fishing in the NAFO Convention Area are presumed to be undermining this scheme. These vessels are not allowed to land or tranship any fish in a NAFO member port until it has been inspected. In cases where such inspection indicates fish species established by NAFO, landing and transhipment will be prohibited unless the vessel can prove that the taking of this fish has been consistent with NAFO measures. This was rapidly followed by CCAMLR.<sup>204</sup>

The CCAMLR Conservation Measures No. 118/XVI, introduced in 1997, provides for information to be transmitted to the Commission concerning sightings of vessels of non-member States engaged in fishing in the CCAMLR areas. These vessels are therefore presumed to be undermining the effectiveness of CCAMLR Conservation Rules. The Commission also permits the vessels of non-member States to be inspected when in the ports of member States, and for landings and transshipments to be prohibited where it cannot be proved that the vessel has caught the fish in accordance with CCAMLR.<sup>205</sup> In this respect, the New Zealand Government sighted the *Paloma V* vessel engaged in transhipment activity in the CCAMLR Southern Ocean Regulatory Area. In May 2008, the vessel intended to tranship toothfish in Auckland Port Landing. Further, following

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<sup>202</sup> La Fayette, Louise de, "Access to ports in international law", 11 *IJML* 5 (1998).

<sup>203</sup> Bialek, *loc. cit.*, n.158, at 121.

<sup>204</sup> Stokke, *loc. cit.*, n. 119, at 221.

<sup>205</sup> Ridings, Penelope, "Compliance, enforcement and the southern oceans: The need for a new approach", in Herr, R. A. (ed.), *Sovereignty at Sea: From Westphalia to Madrid* (Wollongong Papers on Maritime Policy No. 11), Centre for Maritime Policy, University of Wollongong, 2000, at 179.

boarding and inspection, it was confirmed by the New Zealand Fishery Officers that the vessel had engaged in IUU fishing. The vessel was on CCAMLR's draft IUU vessel list to be considered at the Commission's Annual Meeting in Hobart, Australia in October 2008.<sup>206</sup>

Some other RFMOs have also adopted port-State measures. These include the South East Atlantic Fisheries Organization (SEAFO), the Western and Central Pacific Fisheries Commission (WCPFC), the South Indian Ocean Fisheries Agreement (SIOFA), the Indian Ocean Tuna Commission (IOTC), the Commission for the Conservation of Southern Bluefin Tuna (CCSBT), the International Commission for the Conservation of Atlantic Tuna (ICCAT) and the North Pacific Anadromous Fish Commission (NPAFC).<sup>207</sup> The approaches to fisheries-related port-State control stipulated in Article V(2) of the Food and Agriculture Organization (FAO) Compliance Agreement and Article 23 of the UN Fish Stocks Agreement and several RFMO Agreements indicate that the regime of port-State control is highly relevant for fishery conservation and management measures.<sup>208</sup>

In reality, port-State measures did not become a key instrument until 2005, when the establishment of the FAO Model Scheme provided a legally sound basis for strengthened and coordinated approaches.<sup>209</sup> The 2005 FAO Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing (Model Scheme) was drafted to address all States, fishing entities and RFMOs.<sup>210</sup> Notably, the origin of this Model Scheme can be traced to the FAO Committee on Fisheries (COFI) meetings in 2005 in response to a lack of binding port-State measures; this lack created a loophole for IUU fishers. As a first step, COFI endorsed the Model Scheme. The Model Scheme was developed to elaborate the port-State provisions of the IPOA–IUU and as a means of strengthening other international recommendations, such as the United Nations General Assembly Resolutions,<sup>211</sup> and to give effect to port-State measures in the battle against IUU fishing. In a further development, the FAO's Committee on Fisheries (COFI) in 2007 recommended that the FAO take the initiative in promoting capacity-building in developing countries for implementing the Model Scheme and enhancing and strengthening the

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<sup>206</sup> "New Zealand acts to protect Antarctic waters from transnational crime", New Zealand Ministry of Foreign Affairs and Trade (17 July 2008), at 1, available at <http://www.mfat.govt.nz/Features/Illegal-Fishing-activities.php> (accessed on 8 August 2008).

<sup>207</sup> Swan, Judith, "Port state control: International developments", *FAO/FFA Regional Workshop to Promote the Full and Effective Implementation of Port State Measures to Combat IUU Fishing, 28 August–1 September 2006, Mocambo Hotel Nadi, Fiji*, Rome: FAO, at 5–6.

<sup>208</sup> Lobach, Terje, "Port state control of foreign fishing vessels", *FAO Fisheries Circular No. 987*, Rome: FAO, 2003, at 3.

<sup>209</sup> Swan, *loc. cit.*, n. 207, at 4.

<sup>210</sup> FAO Model Scheme on port state measures to combat Illegal, Unreported and Unregulated (IUU) Fishing, Global Partnership for Responsible Fisheries, FAO, Rome (2007), at 1.

<sup>211</sup> See UN General Assembly Resolution A/Res/60/31 (2005), available at United Nations General Assembly (60th Session Agenda item 75(b)), para. 42 (10 March 2006), at 10; and A/Res/61/105 (2006), available at United Nations General Assembly (61st Session Agenda item 71(b)), paras. 42–44 (6 March 2007), at 10.

implementation of port-State measures to combat IUU fishing. In September 2007, the FAO convened an Expert Consultation to Draft a Legally Binding Instrument on Port State Measures in Washington, DC, USA. The purpose of the Expert Consultation was to develop a draft text for a legally binding instrument on port-State measures, based on the IPOA–IUU and the Model Scheme. Based on the FAO’s first draft, the Expert Consultation developed a draft agreement for consideration at a technical consultation in FAO Headquarters in June 2008.<sup>212</sup>

The draft agreement is designed as a basis for the finalization of a legally binding instrument that was expected to be presented at the 28th Session of the COFI in Rome in 2009. Such a crucial framework has to be developed within the context of the campaign against IUU fishing incidences, which occur at the global and regional levels.<sup>213</sup>

In November 2009, a new treaty that aims to close fishing ports to ships engaged in IUU fishing was approved by FAO’s governing Conference.<sup>214</sup> Article 12(1) of the 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing places an obligation on States Parties to endeavour to inspect a number of vessels in their ports in order to reach an annual level of inspections necessary to achieve the objective of this Agreement.<sup>215</sup> In order to determine which vessels to inspect, pursuant to paragraph 3 of the same Article, a party is to give priority to (a) vessels that have been denied the use of a port in accordance with Articles 9<sup>216</sup> or 18<sup>217</sup> of this Agreement; and (b) requests from other relevant RFMOs that particular vessels be inspected. Furthermore, paragraph 2 of the same Article requires parties to agree, through RFMOs or otherwise, on minimum levels for inspections of vessels. This is with a view to reaching a coordinated level of inspections necessary to achieve the objective of this Agreement.

The adoption and application of this framework must be encouraged at regional level through the initiatives of the member States of the 2007 RPOA. It is specifically in paragraph 8 of the 2007 RPOA that the role of port States to combat illegal and unreported fishing in the region is referred to, given the need to land catch and support fishing activities. Countries and fishing entities are encouraged to develop port States’ measures to regulate fishing vessels. It can be said that the 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing has

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<sup>212</sup> *Trade-Related Measures for Sustainability: Progress on a Binding Instrument on Port State Measures*, Committee on Fisheries, Sub-Committee on Fish Trade, Eleventh Session, Bremen, Germany, 2–6 June 2008, at 2–3.

<sup>213</sup> Ferri, Nicola, “Current legal developments: General Fisheries Commission for the Mediterranean”, 24 *IJMCL* 164 (2009), at 164.

<sup>214</sup> Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 36th Session Conference, Rome: FAO, 18–23 November 2009, at 1–2.

<sup>215</sup> Article 2 provides that the objective of this Agreement is to prevent, deter and eliminate IUU fishing through the implementation of effective port State measures, and thereby to ensure the long-term conservation and sustainable use of living marine resources.

<sup>216</sup> See Article 9.

<sup>217</sup> See Article 17.

strengthened and complemented the provisions of Article V(2) of the Compliance Agreement and Article 23 of the UN Fish Stocks Agreement. Port-State jurisdiction with regard to marine-capture fisheries is gradually moving from a mandatory basis towards being comprehensively voluntary and mandatory through regional and global arrangements.

Overall, the official globally binding fisheries agreements and the other fisheries agreements discussed earlier place obligations on States and RFMOs to adopt international fisheries regulations to fight IUU fishing. These include flag-State measures; coastal-State measures; monitoring, control and surveillance (MCS) systems; fisheries law enforcement; economic and trade measures; and port-State measures.

## CONCLUSION

IUU fishing activities occur in all capture areas, especially in areas under the competence of regional fisheries management organizations (RFMOs), and on the high seas. The IUU fishing problems are mainly the practice of vessels re-flagging to escape flag-State controls, unregulated high seas fishing activities occurring outside the EEZ, insufficiently selective fishing gear, and lack of sufficient cooperation between States. The increasing problem of unregulated fishing on the high seas, including the practice of re-flagging vessels or registering in countries that operate open registers, are contributory factors in the depletion of marine resources.

It is evident from the discussion in this article that the FAO Compliance Agreement and the UN Fish Stocks Agreement have made significant contributions to promoting the implementation of fisheries-related provisions of the LOSC. The main contribution of the FAO Compliance Agreement is the strengthening of flag-State responsibilities to combat IUU fishing, particularly the re-flagging of fishing vessels to avoid compliance with conservation and management measures. The UN Fish Stocks Agreement has filled the gaps and dealt with the ambiguity evident in the LOSC in relation to conservation and management of straddling and highly migratory fish stocks and regional cooperation. The significant contribution lies in the development of law with respect to compatibility of conservation and management measures established in the EEZ and the adjacent high seas, and the role of RFMOs. These measures provide a basic obligation for coastal States to cooperate with other States in handling unregulated fishing activities in shared waters.

The Agreement has also made a significant contribution to supplementing the flag-State control provisions of the LOSC by elaborating on detailed and specific provisions regarding fishing licences, MCS and other important aspects. Another contribution of the Agreement is establishing a far-reaching new exception to the principle of the flag-State exclusive jurisdiction

The issues examined in this article demonstrate that the FAO Compliance Agreement and the UN Fish Stocks Agreement play a critical role in addressing the problems of IUU fishing. The key provisions of the Agreements, particularly the UN Fish Stocks Agreement, have been implemented in various regional fisheries agreements (RFMOs) and non-legally binding regional cooperation arrangements, namely the 2007 RPOA. In



particular, the 2007 RPOA has strengthened and complemented the LOSC, the FAO Compliance Agreement and the UN Fish Stocks Agreement.

The discussion in this chapter has also highlighted issues related to the implementation of these agreements. First, this article has argued that the substantive scope of Article 1(a) of the FAO Compliance Agreement on fishing vessels must be clarified so as to include transport and support vessels. Second, there is a need to reform the UN Fish Stocks Agreement's provisions dealing specifically with the conservation and management measures of deep-sea fisheries (DSFs). The recent adoption of the 2008 FAO International Guidelines for the Management of DSFs in the High Seas demonstrates the inadequacy of the Agreement to address unregulated DSF problems. Although not legally binding, the 2008 International Guidelines are a significant first step towards addressing unregulated DSF in the high seas. These Guidelines have filled the lacuna and strengthened the LOSC and the UN Fish Stocks Agreement in dealing with sustainable fisheries management in DSFs. The challenge for the international community today is to develop a DSF legally binding regime that would be effective in engaging normative condemnation of this unregulated fishing practice. The significance of such development is that unregulated fishing activities of States should in the end be a matter of regulation under the UN Fish Stocks Agreement.

Third, there is a need to clarify whether international fisheries instruments are binding upon the fishing vessels flying the flags of non-members of RFMOs. So far as the vessels of third-party States are concerned, it would appear that these States are bound to follow international agreements. Fourth, developed countries should provide assistance to developing countries in the education and training associated with MCS. Above all, the governments of developing countries should have a primary budget to finance the main activities for combating IUU fishing within and beyond the limits of national jurisdiction.

# AN EXAMINATION OF THE PLEA OF SELF-DEFENCE VIS À VIS NON-STATE ACTORS\*

Amin Ghanbari Amirhandeh<sup>†</sup>

## INTRODUCTION

An armed non-State actor resides in the territory of a failed State; it eventually gives up to the temptation of attacking another State from the territory of its host. In response, the victim State (acting STATE) reciprocates militarily.

A non-State actor (hereinafter NSA) is a group of uniformed and armed individuals under “organized command, which actually control and administer a sizeable portion of the territory”.<sup>1</sup> It is neither a classic insurgent<sup>2</sup> nor a national liberation movement that proclaims the right of people to self-determination,<sup>3</sup> with which it could legalize its presence, on the territory of other States, for the right of self-determination is a right *erga omnes*.<sup>4</sup>

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\* This article won the Sata International Law Prize for 2009.

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<sup>1</sup> Riedel, E. H., “Recognition of belligerency”, in Bernhardt, Rudolf (ed.), *Encyclopedia of Public International Law*, instalment 4, Max Planck Inst., 1981, at 167.

<sup>2</sup> See Cassese, Antonio, *International Law*, New York: Oxford University Press, 2001, at 124–131.

<sup>3</sup> For further reading on the right of people to self-determination See Cassese, Antonio, *Self-Determination of Peoples*, Cambridge: Cambridge University Press, 1995; Knop, K., *Diversity and Self-Determination in International Law*, Cambridge: Cambridge University Press, 2002; Umozurike, U. O., *Self-Determination in International Law*, Hamden, 1972; Rigo-Sureda, A., *The Evolution of the Right of Self-Determination*, Cambridge: Cambridge University Press, 2002; Shukri, M., *The Concept of Self-Determination in the United Nations*, Damascus: Al Jadidah Press, 1965; Pomerance, M., *Self-Determination in Law and Practice*, The Hague: Martinus Nijhoff Publishers, 1982; Shaw, Malcolm, *Title to Territory*, Dartmouth: Ashgate Publishing, 2005, at 59–144; Crawford, James, *The Creation of States in International Law*, Oxford: Oxford University Press, 2nd edition, 2006, and Crawford, *The General Assembly, the International Court and Self-Determination*, in Lowe, A. V. and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice*, New York: Cambridge University Press, 1996, at 585.

<sup>4</sup> For a brief reading on the use of force and self determination see Gray, Christine, *International Law and the Use of Force*, New York: Oxford University Press, 2000, at 59–65.

The failed State (host State), in the sense of this study, is a State unable to repress activities of such NSA on its territory, with its all due diligence; this makes it impossible to attribute the NSA's activities to the host State.<sup>5</sup>

The NSA's presence in the territory of the host State, concerning obligations of the host State, is illegal, as the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted unanimously by the General Assembly in 1970, plainly states that "every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands. . . for incursion into the territory of another State".<sup>6</sup> And in the words of the International Court of Justice (hereinafter ICJ) in the *Corfu Channel* case, every State is obliged "not to allow knowingly its territory to be used for acts contrary to the rights of other States".<sup>7</sup> Administration of the territory is accompanied with establishing military camps and bases.

The victim State, which we will refer to as the acting/invoking State, in the course of its military measures vis à vis the NSA, invokes its right of self-defence to preclude the wrongfulness of its incursion into the territory of the host for "there can be no self-defence against self-defence".<sup>8</sup>

This paper examines the validity of such justification under current international law of the use of force.

## SELF-DEFENCE AS A CIRCUMSTANCE PRECLUDING WRONGFULNESS

The United Nations International Law Commission (ILC), after a period of 52 years' work on the subject, eventually provided us with a set of draft articles on the responsibility of States, in which *inter alia* it designated "circumstances precluding wrongfulness" of a wrongdoing of a State, namely consent (article 20), self-defence (article 21), countermeasures (article 22), *force majeure* (article 23), distress (article 24) and necessity (article 25). Except for *force majeure*, all the other five circumstances may reasonably be invoked to preclude the wrongfulness of the conduct of the acting State in disrespect for the territorial integrity of the host State.<sup>9</sup> Article 21 of the draft articles stipulates:

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<sup>5</sup> For a brief reading on the phenomenon of "failed state" see Thürer, Daniel, "Failed state and international law", 836 *IRRC* 731–761 (1999).

<sup>6</sup> GA Resol. 2625 (XXV), 25 *Resolutions Adopted by the General Assembly* 121, 123 (1970).

<sup>7</sup> *Corfu Channel* case, Judgment of 9 April 1949, *ICJ Rep.* 1949, at 22.

<sup>8</sup> *USA v. Von Weizsaecker et al.* (the Ministries Case) Nuremberg 1949, *Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10* 314, at 329 (vols. XII, XIII and XIV).

<sup>9</sup> It seems reasonable to question if necessity, as a principle, applies to both cases of countermeasures and self-defence, then what can be the point for designating self-defence as a separate circumstance precluding wrongfulness of the use of armed force in response to an armed attack, since self-defence is nothing but a countermeasure necessarily and proportionately taken in military form. Whatever the answer to this question may be, the main issue in the present context that seems useful for the objective of the present work is that necessity, as a principle, is the bedrock principle that expands countermeasure into a form of military act, i.e. self-defence (*see infra* part II).

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.<sup>10</sup>

## Self-defence

The Charter of the United Nations contains a provision on the specific issue of self-defence. The reason for such articulation of self-defence in conventional form was that the drafters of the Charter, as is apparent in the order of the articles and, of course, in the preparatory work, presumed that initiation of violence would face immediate reaction from the Council (article 42); however, as a result of the understandable concerns of States, for cases of any dysfunction from the Council, it was decided to enshrine the very *inherent* right of self-defence in the form of article 51 to reserve the right for States to act individually or collectively to reciprocate militarily in cases of victimization through any kind of *armed attack*. Article 51 reads:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Of course, if the scope of article 51 allowed, one could use it to justify his or her act of self-defence against non-State actors; however, as the ICJ rendered in its advisory opinion on the *Construction of the Wall in the Palestinian Territory* in 2004, “article 51 of the Charter . . . recognizes the existence of an inherent right of self-defence in the case of armed attack by *one State against another State*”.<sup>11</sup>

The Court’s interpretation of the rule that vividly excludes NSAs from article 51 was opposed by some bench-holders at that time. Judge Rosalyn Higgins did not agree with “all that the Court has to say on the question of the law of self-defence”; she continued that “there is, with respect, nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State”.<sup>12</sup> Judge Buergenthal also agreed that the Court had gone far in this regard, and in his dissenting opinion

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<sup>10</sup> The wording of article 21 that limits its scope to “measure of self-defence taken in conformity with the Charter of the United Nations”, from the viewpoint of the writer, is a potential source of error, for self-defence, as will be discussed, also has its content in the form of customary international law.

<sup>11</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Rep. 2004*, at 194, para. 139 (emphasis added).

<sup>12</sup> *Wall* Advisory Opinion, n. 11, at 215.

asserted that “the United Nations Charter, in affirming the inherent right of self-defence, does not make its exercise dependent upon an armed attack by another State”.<sup>13</sup>

This view was held by Judge Kooijmans in his dissenting opinion in the case of *Armed Activities on the Territory of Congo*, with reference to his separate opinion on the issue of self-defence in paragraph 139 of the ICJ *Wall* advisory opinion,<sup>14</sup> reasserting that “this interpretation no longer seems to be shared by the Security Council, since in resolutions 1368 (2001) and 1373 (2001) it recognizes the inherent right of individual or collective self-defence without making any reference to an armed attack by a State”.<sup>15</sup>

After all, one can refer to two fundamental errors in the judgment: firstly, of the mere interpretation of article 51 in the above-mentioned manner, for all the reasons put forth by the dissenting judges,<sup>16</sup> and secondly, for the Court’s neglecting its own previous judgments.<sup>17</sup>

The Court repeated the same attitude in another case submitted to it by the Democratic Republic of Congo against Uganda, considering article 51 of the Charter in the same fashion as in the *Wall* Advisory Opinion and *Nicaragua* case, and omitted “to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against *large-scale attacks by irregular forces*”,<sup>18</sup> focusing instead on the attribution of acts of the non-State entities to one of the engaged parties to the dispute, where it concluded that “the attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC”,<sup>19</sup> hence “there was no armed attack in the sense employed by Article 51 against which the Respondent could have exercised the right of self-defence”.<sup>20</sup> This omission by the Court has been endorsed by some international lawyers in conformity with the Court’s *argumentative economy*, by which it does not have “to discuss law it does not absolutely have to discuss in order to render a judgment or give an opinion”.<sup>21</sup> However, it is still questionable why the Court, in the *Wall* Advisory Opinion, did not contribute to this matter. While it had no

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<sup>13</sup> *Ibid.*, at 241, para. 3.

<sup>14</sup> *Ibid.*, at 230, para. 35.

<sup>15</sup> *Armed Activities* case, Separate Opinion of Judge Kooijmans, para. 28; it has to be added that *judicis est jus dicere non dare*; article 59 of the Statute of the Court reads: “The decision of the Court has no binding force except between the parties and in respect of that particular case”; this view that does not exclude non-state entities from article 51 has been supported by profound international lawyers; see Franck, Thomas, *Recourse to Force*, Cambridge: Cambridge University Press, 2004, at 67.

<sup>16</sup> Although it has been difficult to consider Israel’s activities, in form of the construction of the Wall and its other illegal measures, as acts of self-defence in whatsoever meaning; for a defence of the Court’s opinion on this matter see Scobbie, Iain, “Words my mother never taught me – In defence of the International Court,” 99(1) *AJIL* 76–88 (2005); for an opposite and critical view see Sean, Murphy, “Self-defence and the Wall Advisory Opinion”, *ibid.* at 62–77.

<sup>17</sup> We will discuss the Court’s judgment in the *Diplomatic and Consular Staff in Tehran* case 1980.

<sup>18</sup> *Armed Activities* case, n. 15, para. 39.

<sup>19</sup> *Ibid.*, para. 147.

<sup>20</sup> Kammerhofer, Jorg, “The armed activities case and non-state actors in self-defence”, 20 *Leiden J. Int’l L.* 96 (2007).

<sup>21</sup> *Ibid.*, at 93.

such restrictions as *argumentative economy* on that occasion, and was not limited to evidences that the parties provided, yet it left the whole other side of the dispute (i.e. the threat due to activities of such entities) unsettled and unseen. In the words of Judge Rosalyn Higgins, “It is inherently awkward for a court of law to be asked to pronounce upon one element within a multifaceted dispute, the other elements being excluded from its view.”<sup>22</sup>

Context is usually important in legal determinations; however, if we accept the Court’s judgment as the only true and legitimate reflection and the sole valid interpretation of article 51 of the Charter, this question still stands before us: what can a lawyer or an interested State rely on to justify its defensive acts against an NSA?

### Self-defence under customary international law

Article 38 of the Statute of the ICJ determines sources, or in other words “forms” of legal provisions, which the Court shall apply in terms of deciding submitted disputes. Two main so-called sources of international law, which are generally regarded as enforceable both on States and on the Court simultaneously,<sup>23</sup> are *international conventions* and “*international custom, as evidence of a general practice accepted as law*” (emphasis added).

In the words of the Court, “It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.”<sup>24</sup> In line with its argument in the *Libya/Malta Continental shelf* case, the Court decided in *Nicaragua* that with respect to self-defence in international law, “even if the customary norm and the treaty norm were to have exactly the same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm.”<sup>25</sup> The Court added that “even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence”.<sup>26</sup> Thus, as our first premise, self-defence is subject to a customary form as well as its conventional form enshrined in the Charter.

Yet, before studying the customary body of the present rule of international law, one (at least theoretical) contradiction has to be settled, which is the situation we will

<sup>22</sup> *Wall Advisory Opinion*, n. 11, at 210, para. 14.

<sup>23</sup> Dinstein, Yoram, “The interactions between customary international law and treaties”, 322 *RCADI* 259 (2006).

<sup>24</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, *ICJ Rep. 1985*, at 29–30.

<sup>25</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Merits, Judgment, *ICJ Rep. 1986*, at 94–95, para. 177.

<sup>26</sup> *Ibid.*, at 94–95, para. 178.

face in any development of *jus ad bellum* beyond the Charter paradigm, with respect to prohibition of the use of force as a *jus cogens*.

### **Prohibition of the use of force, a norm with *jus cogens* character**

According to article 2(4), states “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. This is a peremptory norm of international law: it is to admit that the essential paradigm of the Charter in its process of formation was based on the conception of the international society as a State-centric society, so it is merely obsessed with State–State armed conflict, even in its very article 2(4).

As our first question, we have to see if customary forms of the right of self-defence can exceed the content of article 51 of the Charter as the main source of the conventional form of the rule. In other words, we have to examine whether we can assume that the present rule, as a general prohibition of the use of force, can or shall be shrunk down by expansion of a customary rule of self-defence, to a lesser domain.

To answer this, a series of facts about the so-called *right* of self-defence shall be considered. First and foremost, distinction shall be drawn between self-defence as an *inherent right*,<sup>27</sup> as article 51 of the Charter inducts from general international law, and other sorts of rights that, according to international law, States may possess. Self-defence is not a right that one could just waive; it is mostly a duty, as Vattel put it.<sup>28</sup> Some prominent international lawyers, according to positive law, conclude that self-defence cannot be a matter of duty, for “as a rule, international law does not lay down any obligation to exercise self-defence”;<sup>29</sup> however, as a defence for the *duty-based hypothesis*, I won’t suggest such conclusion merely on the grounds of defining self-defence anthropologically as a natural right, or on theological basis, but I will draw the readers’ attention to the basic principle already accepted in almost every domestic legal system that the function of the State in this regard is formed on the modern bureaucratic order that legally obliges governments to secure elements forming their personality (i.e. territory and citizens) for the benefit of their political society and structure; of course, the legal obligation on the State is still a legal obligation whether it is municipal or international.<sup>30</sup> In the words of

<sup>27</sup> “Droit Naturel” in the French text of the Charter.

<sup>28</sup> Vattel, E. de, *The Law of Nations or the Principles of Natural Law*, Book III, § III, 35 (3 Classics of International Law ed., C. G. Fenwick trans., 1916, at 246), from Dinstein, Yoram, *War, Aggression and Self Defence*, Cambridge: Cambridge University Press (Virtual Publishing), 2003, at 162.

<sup>29</sup> *Ibid.*, at 162.

<sup>30</sup> Recently a report was published by The International Commission on Intervention and State Sovereignty under the name: The Responsibility to Protect. Its central theme was “the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.” However, as the Commission itself

the Court in the same advisory opinion on *Wall*, “The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens.”<sup>31</sup>

Kelsen, on the other hand, believed that self-defence is a norm with peremptory character, of which no agreement among States could weaken its foundation.<sup>32</sup> In the end, what can hardly be denied about self-defence is the fact that it “connotes more like a *de facto* condition”<sup>33</sup> than just the operation of a right. In effect, one who is a victim of physical danger, harm or offence takes all possible and necessary actions and uses all sorts of means on a natural basis to repel the threat or actual offence.

However, as a norm, the right to self-defence stands with undeniable supremacy over other rules and norms. In line with this assumption, the ICJ held in its opinion on *The Legality of Use of Nuclear Weapons* that: “The issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict. The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment.”<sup>34</sup>

The second issue here is the very nature of *jus cogens*. *Jus cogens*, or a peremptory rule of international law, as article 53 of the Vienna Convention on the Law of Treaties provides, is “a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” *Jus cogens* are norms of custom *per se*.<sup>35</sup>

The use of the latter argument is that, in line with the first premise, we shall admit at the conclusion that both norms (i.e. prohibition of violence and self-defence) have shared the same bed in the process of their formation and the juxtaposition of the two has naturally taken place before any point in time when one could possibly expand one for the loss of the other. Hence, the existence of a rule of custom on the issue of self-defence and its modification and expansion in scope does not conflict with the peremptory norm of prohibition of the use of force, which the Charter itself has clarified by enshrining both in its provisions.<sup>36</sup>

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pronounces, “Our report has aimed at providing precise guidance for states faced with human protection claims in other states; it has not been framed to guide the policy of states when faced with attack on their own nationals, or the nationals of other states residing within their borders.” See International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, at VIII (2001), available at: <http://www.iciss.ca/menu-en.asp>; for a brief review see Carsten, Stahn, “Responsibility to protect: Political rhetoric or emerging legal norm?”, 101 *AJIL* 99–120 (2007).

<sup>31</sup> *Wall* Advisory Opinion, n. 11, para. 141.

<sup>32</sup> Kelsen, Hans, *The Law of the United Nations, a Critical Analysis of its Fundamental Problems*, London: Stevens and Sons Limited, 1951, at 791.

<sup>33</sup> See Ago, R., “Addendum to Eighth Report on State Responsibility”, [1980] II (1) *ILC Yb.*, at 13, 53.

<sup>34</sup> *Nuclear Weapons* Advisory Opinion, *ICJ Rep. 1996*, at 242, para. 30.

<sup>35</sup> Mendelson, Maurice H., “The formation of customary international law”, 272 *RCADI* 218 (1998).

<sup>36</sup> For modification of *jus cogens*, see Dinstein, n. 28, at 96–98.



According to Dinstein, “although the right of self-defence pursuant to the UN Charter has its origins in customary international law, there seems to be a material difference in the range of operation of the right arising from these two sources”;<sup>37</sup> this may contain the answer to our second question: can the customary form of self-defence exceed the conventional form of the rule in its scope and content? The answer is positive: firstly, because it is clear that article 51 does not contain all the consisting elements of self-defence because it lacks a definition of armed attack and, most importantly, neglects principles that the acting State shall comply with in the course of its acts of self-defence (i.e. necessity, proportionality and immediacy). Secondly, in case of a contradiction and conflict between a rule of custom and a treaty provision, “as a general rule, the later in time will have priority”.<sup>38</sup> This, of course, is because of the importance of the element of consent of the State in the process of rule-making in international law in general, and the *opinio juris* in custom-making specifically. That may be the reason why, while the Charter limits the exercise of self-defence to instances of an armed attack, the ICJ concluded that “[i]n view of the circumstances in which the dispute has arisen, reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised”.<sup>39</sup> This indicates that a State does not need to wait to become a victim of an armed attack before it can act in self-defence, but it may also act pre-emptively in response to an imminent armed attack.<sup>40</sup>

Now that it does not seem conflictory to expand the scope of self-defence in the form of customary law, one must examine it through the general practice of States. The very issue of the existence of customary rules and their scope and domain must be determined primarily through induction from State practice and, it must be said, only by a simple deduction from a more general rule, in this case prohibiting the use of force.<sup>41</sup>

## AN EXAMINATION OF EVIDENCES OF SELF-DEFENCE IN CUSTOMARY INTERNATIONAL LAW

For a more detailed examination of the customary international law in the realm of self-defence, it must be said that customary international law can hardly be deemed as the

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<sup>37</sup> *Ibid.*, at 165.

<sup>38</sup> Shaw, Malcolm, *International Law*, Cambridge: Cambridge University Press, 2003, at 116.

<sup>39</sup> *Nicaragua* case, n. 25, at 103, para 195; this view on possible permissibility of such a development in customary form of self-defence was announced afterwards; see *Case concerning the armed activities on the territory of the Congo (Congo v. Uganda)*, ICJ Rep. 2005, at 52, para. 143.

<sup>40</sup> *A more secure world: our shared responsibility*: Report of the Secretary-General’s High-Level Panel on threats, challenges and change, United Nations 2004. UN Doc A/59/565, at 63, para. 188; see also for different views: Arend, Anthony Clark & Robert J. Beck, *International Law and the Use of Force*, London: Routledge, 1993, at 71–79; Sean, Murphy D., *The Doctrine of Pre-emptive Self-Defense*, *Villanova Law Review* (Forthcoming); GWU Law School Public Law Research Paper No. 140, available at SSRN: <http://ssrn.com/abstract=707523>; Reisman, W. Michael and Andrea Armstrong, “The past and the future of the claim of pre-emptive self-defense” 100 *AJIL* 525–550 (2006).

<sup>41</sup> Dinstein, n. 23, at 256.

sole induction from State practice. As with any so-called scientific approach, legal examination consists of both induction and deduction, in our case, vis à vis reality of international relations.

By deduction, it means that we lawyers are bound to believe that the process of formation of a rule in international law, just like other legal systems, happens itself deterministically in accordance with another set of higher rules;<sup>42</sup> the first rule is that every rule is born from necessity and need; *cessante ratione legis, cessat ipsa lex*.

Foundation of a right on a principle had attracted the founders of the Charter, as is apparent from the words of Lord Halifax: “instead of trying to govern the actions of the members and the organs of the United Nations by precise and intricate codes of procedure, we have preferred to lay down purposes and principles under which they are to act . . . we do not want to lay down rules which may, in the future, be the signpost for the guilty and a trap for the innocent.”<sup>43</sup>

Having in mind the presumption that, at the time of its formation, the Charter was a reflection of the general international law, development of an existing customary rule inevitably takes place in accordance with the *objective* and the *necessity* to which the rule had been formed in response in the first place; this is exactly the situation that we face – expansion of a customary right (i.e. self-defence) to a wider extent.

To determine the exact status that gives rise to such necessity, as Roberto Ago in his report to the International Law Commission – referring to legal literature on the subject – shrewdly observed, self-defence, in comparison to other circumstances precluding the wrongfulness of an act of a State, “can be pleaded only in the case of a reaction to a special kind of wrongful act, namely the wrongful use of force”; according to Zourek, “only a wrongful armed attack can justify recourse to measures of self-defence”.<sup>44</sup> So, occurrence or imminence of an armed attack is the primary requirement for resorting to self-defence.

As the Court put it, “a definition of the *armed attack* which, if found to exist, authorizes the exercise of the *inherent right* of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which ‘subsumes and supervenes’ customary international law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed, customary international law continues to exist alongside treaty law”.<sup>45</sup>

Bearing in mind the opposing attitudes of some international lawyers concerning the legal possibility of occurrence of an armed attack from a non-State actor,<sup>46</sup> clarifying this

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<sup>42</sup> Mendelson, n. 35, at 181.

<sup>43</sup> Lord Halifax, *Verbatim Minutes of first meeting of commission I, June 14, 1945*, U.N. Doc. 1006 (June 15, 1945), in *United Nations Conference on International Organization: Selected documents* 529, 537 (1946), quoted from Stromseth, Jane E., “New paradigms for the *jus ad bellum*?”, 38 *GWILR* 563 (2006).

<sup>44</sup> Ago, n. 33, at 54.

<sup>45</sup> *Nicaragua case*, n. 25, at 94, para. 176.

<sup>46</sup> See for instance Delbrück, J., “The fight against global Terrorism: Self-defense or collective security as international police action? Some comments on the international legal implication of the ‘war against terrorism’”, 44 *GYIL* 15 (2001).

aspect of the law of self-defence, through studying customary international law, eventually results in greater clarification of the concept of armed attack itself.<sup>47</sup>

When examining the customary international law in a specific realm, through induction, it is a must to consider the existence of two elements that form international custom: State practice and *opinio juris*.

### State practice

While other subjects of international law may have an indirect effect on the formation and evolution of a rule of custom,<sup>48</sup> the practice of States is, basically, its material element. That is to say that normal practice of the organs of a State shall be deemed as the practice of that State in the process of forming a customary rule; yet, to form a rule of custom, consent from a certain level of hierarchy is essential for endorsing the practice by *opinio juris*.

In this regard, not all States have the same influence on the process of formation or evolution of a customary norm; the ICJ asserted in this regard that “an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States *whose interests are specially affected*, should have been both extensive and virtually uniform in the sense of the provision invoked”.<sup>49</sup> Uniformity is defined such that “each State whose conduct is under consideration must have behaved in the same way on virtually all of the occasions on which it engaged in the conduct in question”.<sup>50</sup>

In line with this, while article 38 of the Court’s statute defines custom “as evidence of a general practice accepted as law”, “the general practice does not mean that the practice has to be shared by all nations”, for “custom is not grounded on unanimity”.<sup>51</sup>

This seems to be tempting the assertion that the need for a change in the scope of a customary rule in practice in a number of States is contingent upon both the number of interested States and those whose interests are specifically affected simultaneously, while the latter has more effect on the general process of formation or change because, for the same reason as the “conduct priority over statements”,<sup>52</sup> those States that cannot participate practically in a certain matter are “not in a position to contribute to the formation of

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<sup>47</sup> The issue is one of a very tricky nature, for it is a vicious circle to assume that what pulls the trigger for self-defence is the notion of *armed attack*, yet the definition and determination of an act being armed is contingent on reliance on self-defence by subjects of international law. Unfortunately, definition of armed attack and its weight is far beyond what this article is intended to share; for further reading on the issue of armed attack see Dinstein, n. 28, at 165–183; Alexandrov, Stanimir A., *Self-defence against the Use of Force in International Law*, The Hague: Martinus Nijhoff Publishers, 1996, at 95–101; Gray, n. 4, at 128–148.

<sup>48</sup> Mendelson, n. 35, at 205.

<sup>49</sup> *North Sea Continental Shelf case (Federal Republic of Germany v. Netherlands)*, ICJ Rep. 1969, at 43.

<sup>50</sup> Mendelson, n. 35, at 212.

<sup>51</sup> Dinstein, n. 23, at 282.

<sup>52</sup> *Ibid.*, at 277.

any new relevant custom".<sup>53</sup> This is the main explanation for formation of those customary rules we refer to as particular customs; particularity is not a geographical issue,<sup>54</sup> but more the result of certain necessities shared by those States concerned.

A quick scan leads us to the fact that those States that have been victimized by acts of non-State armed entities show a largely uniform response in practice. We will consider the following examples: the United States against Al-Qaeda in Afghanistan and northern Pakistan in the 1990s and after 9/11; Iran against the insurgents' camps during and after the Eight Years War in northern Iraq; South Africa in the territory of Angola, Lesotho, Zambia and Swaziland in 1976–1985, attacking camps of the Southwest African People's Organization (SWAPO); Turkey's incursion into northern Iraq and its bombardments of those areas up until now; Israeli attacks against Palestinian camps in Lebanon during the period 1970–1983 and in Tunisia in 1985; Senegal's incursion into Guinea-Bissau; Thailand's crossing of the Myanmar (Burma) borders; Tajikistan against insurgents in Northern Afghanistan, all in the 1990s; and more recently, the Colombian incursion into Ecuador in 2008.<sup>55</sup>

Examination of all these cases in detail is almost impossible in the present context; however, a brief explanation of some of them is surely necessary. One classic example of such claim for permissibility of self-defence vis à vis non-State armed entities is the *Caroline* case.

In the *Caroline* incident in 1837, during the Mackenzie Rebellion against British rule in Upper Canada, five boats from the British Royal Navy, carrying a total of 45 men, attacked and sank the steamer, *Caroline*,<sup>56</sup> in a small landing point in New York State, less than 5 kilometres upstream from Niagara Falls; the steamer was suspected of providing arms and men to aid the Canadian rebellion across the river.

The British Government invoked self-defence in response to the protests of the United States; Daniel Webster, the US Secretary of State, wrote a formal letter of reply, setting out the British argument, which, years later in the Nuremberg tribunals, became known as a formula for legality of self-defence using the principles of necessity and proportionality.<sup>57</sup> In his letter of 27 July 1842, Daniel Webster did not give an opinion on the issue of legality or illegality of the use of the *Caroline* for the benefit of the insurgents in Canada; he only considered the British Government's actions in seizing the steamer, killing the crew and passengers and setting it alight, asserting that "that act is of itself a wrong, and an offense to the sovereignty and the dignity of the United States, being a violation of their soil and territory", which is vividly comparable to our scenario.

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<sup>53</sup> *Ibid.*, at 283.

<sup>54</sup> Mendelson, n. 35, at 194; Mendelson continues that "the point to note for the moment is that the general customary law has normally evolved from the particular".

<sup>55</sup> The Colombian side was supported by the Bush Administration (<http://www.antiwar.com/lobe/?articleid=12470>), and the OAS rejected it ([http://www.thaindian.com/newsportal/world-news/oas-rejects-colombian-military-incursion-in-ecuador\\_10028591.html](http://www.thaindian.com/newsportal/world-news/oas-rejects-colombian-military-incursion-in-ecuador_10028591.html)); FARC had not committed any armed attack against Colombia.

<sup>56</sup> House Document No. 302, 25th Congress, 2d session, serial 329, *passim*.

<sup>57</sup> International Military Tribunal (Nuremberg trial), Judgment (1946), 1 *I.M.T.* 171, 207. For British-American Diplomacy in the *Caroline* case, see [http://avalon.law.yale.edu/19th\\_century/br-1842d.asp](http://avalon.law.yale.edu/19th_century/br-1842d.asp).

Webster's letter, carrying US opinion on the matter, continued that "it does not think that that transaction can be justified by any reasonable application or construction of the right of self-defence under the laws of nations" for such act "when its alleged exercise has led to the commission of hostile acts, within the territory of a power at peace, nothing less than a clear and absolute necessity can afford ground of justification" (emphasis added). These lines from the Webster letter carry specific importance for certain reasons: firstly, they clearly reveal the functioning of the US Government and its endeavours to adopt active measures for enforcing neutrality in the region; *a contrario sensu*, one may reasonably infer that such act shall be deemed as justifiable in cases of the State being unable or unwilling to repress the insurgencies; secondly, it spells out the basic principle of *necessity* in a way that self-defence, as a result of its existence, can exceed its known and conventional borders. Another point in this matter is that the attribution of those acts of insurgency to the US Government was strongly denied.

In the presidential message of 11 August 1842, submitting the Webster–Ashburton Treaty to the Senate, mention was made that the note written by Lord Ashburton on 28 July had seemed "sufficient to warrant forbearance from any further remonstrance against what took place, as an aggression on the soil and territory of the country".

Departing from this historic point, our next stop before referring to State practice at the time of the Charter would be the 1930 Preparatory Committee of the Hague Conference questionnaire on the responsibility of States for "damage caused to the person or property of foreigners". On that occasion, the Committee provided States with a questionnaire that *inter alia* asked for their opinion on "Circumstances in which a State is entitled to disclaim responsibility"; States were asked: "What are the conditions which must be fulfilled in such cases: When the State claims to have acted in self-defence?" According to Roberto Ago, "It was, however, a potential source of error to ask the question about self-defence as a circumstance precluding the wrongfulness of State conduct in the context of a topic like that of responsibility, not for acts committed directly against a foreign State, but for actions harming foreign private persons."<sup>58</sup> Notwithstanding, replies given by some States attract the writer's attention even more than the main issue in question; as Ago continues, "referring to self-defence, Governments cited the case of measures taken by a State in defence against a threat emanating, not from another State but from private persons", but he reasonably continued that such duality "is in our opinion wholly outside the present context",<sup>59</sup> for the context he was presenting before the International Law Commission was supposedly the most loyal position that one could possibly expect from an international lawyer vis à vis the Charter provisions and the principle of prohibition of the use of force at its maximum.

In the Charter era, the Cold War provided the principle of prohibition of the use of force with just such a consolidation;<sup>60</sup> this, ironically, accompanied the dysfunctionality

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<sup>58</sup> Ago, n. 33, at 60.

<sup>59</sup> *Ibid.*

<sup>60</sup> Schrijver, Nico, "Challenges to the prohibition to use force: does the straitjacket of article 2(4) UN charter begin to gall too much?" in Blokker, Niels and Nico Schrijver (eds.), *The Security Council and the Use of Force*, Leiden/Boston: Martinus Nijhoff Publishers, 2007.

of the Security Council itself. Accordingly, in the realm of international law of the use of force, international lawyers are inertly inured, it seems, to a State-centric understanding that is basically formed around the main value of territory as an element forming the State. However, after the collapse of the Eastern bloc and the spread of far-reaching weapons on the one side, and the temptation of the United States as the only super-power to reduce the expenses of controlling every little portion of the earth's surface in the absence of fear from any rivals in other blocs on the other side, this understanding faced serious scepticism. Even before the 1990s, with no tendency to provide legal justification for such devaluations, a series of State practices to save nationals abroad, such as US military measures against Dominica (1965), Granada (1983), Egypt (1985–6), Libya (1986), Panama (1989), Israel in Uganda in 1976, and Belgium in Congo in the 1960s, are a few instances to mention.<sup>61</sup> These are examples that, whether justified by the *lex lata* at their time or not, are subject to our diagnosis today in the study of changes in the dynamics of international legal regimes.

Through the 1990s, a set of more significant State practices is traceable; Turkey's military incursion into northern Iraq is one of them. In 1995, Iraq's statement to the Security Council, asserting that its territory has been invaded by Turkish forces, described the invasion as a violation of its sovereignty,<sup>62</sup> while the latter, referring to the fact that Iraq was unable to curb these activities and that, at the time of Iraq's statement, its own forces had left the region, justified its acts as self-defence.<sup>63</sup> Iraq's subsequent calls to blame Turkey for serving the coalition and causing Iraq to lose strength for suppressing the Kurds<sup>64</sup> were not welcomed by the Council. The attacks by Turkey were again launched in 1996 on the grounds of pursuing the Kurdish terrorists, and in the latest of these events in 2007, one can refer to bombardment of Partiya Karkeran Kurdistan (PKK) camps by Turkish fighters and land incursion with over 10,000 forces on 21 and 22 February 2001 and in 2002.<sup>65</sup> The basis for the Turkish action is apparent in Erdogan's statement about the necessity of repression against PKK camps in Iraq by the Iraqi or US forces themselves: "If you're against it, make your attitude clear and do whatever is necessary . . . ; if you cannot do it, then let us do it." In response, the Kurdish local authorities asserted that Turks must respect the principles of proportionality and distinction, and avoid attacking civilians; otherwise, they would face counter-military measures by the largely autonomous northern Kurdistan region.<sup>66</sup>

On occasions, Turkey and also South Africa have relied on "hot pursuit"; this difference can be explained by reference to the ICJ judgment in the *Nicaragua* case when "the

<sup>61</sup> See Franck, n. 15, at 76–96.

<sup>62</sup> S/1995/272, 7 April 1995, 1995 UNYB 494.

<sup>63</sup> S/1995/605, 24 July 1995; S/1995/540, 9 May 1995, *ibid*.

<sup>64</sup> S/1996/401; S/1996/762; S/1996/860; S/1996/1018. See 1996 UNYB 236–37. For Turkey's response, see S/1995/605, 1996 UNYB 237.

<sup>65</sup> See <http://www.spiegel.de/international/world/0,1518,510821,00.html>; see also <http://www.cnn.com/2008/WORLD/meast/02/22/turkey.iraq/index.html>.

<sup>66</sup> See <http://www.reuters.com/article/newsOne/idUSL2313067720080224> (last visited: 27 Jan 2009).

Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule”.<sup>67</sup>

Following the attacks on the American embassies in Kenya and Tanzania in 1998, the Security Council immediately condemned terrorist attacks against embassies;<sup>68</sup> some lawyers reserved the right of self-defence for the US,<sup>69</sup> as the US itself acted alone against Al-Qaeda Camps in Afghanistan and Sudan by launching cruise missiles against Taliban camps and a pharmaceutical installation in Sudan.<sup>70</sup> However, the Security Council did not refer to the right as self-defence in its resolution following these incidents.<sup>71</sup> In Murphy’s words, “perhaps the US attacks were unlawful, but the global reaction to them suggests a measure of acceptance”.<sup>72</sup> The League of Arab States condemned the attacks on Sudan but was silent about those on Afghanistan.<sup>73</sup> Among Arab States, it was Libya and Iraq who condemned the attacks, while the US was supported by other States.<sup>74</sup> Russia announced that the attacks were “unacceptable” but added that “international acts of terrorism cannot go unpunished”.<sup>75</sup>

The events of 9/11 can be considered a dividing line in the history of *jus ad bellum*; no military forces were engaged, the attacks were carried out by a non-State actor (i.e. Al-Qaeda), and the targets were purely civilian. However, the United States and the Security Council, as will be discussed, and the international community in general, endorsed the validity of relying on self-defence as a response.

The attacks on 9/11 were described by the Organization of American States (OAS)<sup>76</sup> and NATO<sup>77</sup> as armed attacks subject to article 51 of the Charter. A NATO statement following 9/11 said that if the attack “was directed from abroad against the United States” then “it shall be regarded as an action covered by article 5 of the Washington Treaty, which states that an armed attack against one or more of the allies in Europe or North America shall be considered an attack against them all”.<sup>78</sup>

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<sup>67</sup> *Nicaragua* case, n. 25, at 98, para. 186.

<sup>68</sup> S/RES/1189 (1998), 13 August 1998.

<sup>69</sup> Wedgwood, R., “Responding to terrorism: The strikes against Bin Laden”, 24 *YJIL* 559, 564 (1999); Dinstein, n. 28, at 177.

<sup>70</sup> UN Doc. S/1998/780.

<sup>71</sup> S/RES/1189 (1998) of 13 August 1998.

<sup>72</sup> Murphy, n. 16, at 69; also *see* Franck, n. 15, at 94–96.

<sup>73</sup> UN Doc. S/1998/789.

<sup>74</sup> *New York Times*, 21 August, 1998, at A12.

<sup>75</sup> *New York Times*, 22 August, 1998, at A6.

<sup>76</sup> 24th Meeting of Consultation of Ministers of Foreign Affairs, OEA/Ser.F/II.24 RC.24/RES. 1/01, 21. September 2001, available at: [www.oas.org/consejo/MEETINGS%20OF%20CONSULTATION/minutes.asp](http://www.oas.org/consejo/MEETINGS%20OF%20CONSULTATION/minutes.asp).

<sup>77</sup> NATO Press Release (2001) 124, 12 September 2001, available at [www.nato.int/docu/pr/2001/p01-124e.htm](http://www.nato.int/docu/pr/2001/p01-124e.htm).

<sup>78</sup> Statement by the North Atlantic Council (12 September 2001), 40 *ILM* 1267 (2001); Article V of the Washington Treaty reads: “The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all.” 34 *UNTS* 243, 246.

## The Security Council

The legal weight of the Security Council's resolutions has been disputed by some international lawyers;<sup>79</sup> however, this writer finds it useful to emphasize such resolutions as being a supplementary source for examination of international law for two reasons; firstly, the presence of the permanent members of the Council and the importance of their legal opinions in cases referred to them; secondly, the position that international law has given to its decisions as stipulated in article 25 of the Charter: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

Of course, such obligations for the member States, even in the most directive sense of the resolutions, eventually lead to acceptance of a legal belief on which those directive resolutions are based. Suffice to say that in cases concerning international peace and security, the occurrence of an armed attack and the subsequent question of self-defence are vivid examples of this matter; the Council's opinion is inducible by its subsequent practice, forming further branches of the tree of the Charter.<sup>80</sup> This subsequent practice shall be taken into consideration when interpreting the constituent instruments of international organizations.<sup>81</sup>

In my favourite case, the Council, in describing the attacks by a group of armed men against the presidential palace in Benin, "strongly condemns the act of *armed aggression* perpetrated against the People's Republic of Benin".<sup>82</sup> The activities of the armed group were not attributed to any State; that is to say, for the first time it was apparently a non-State actor whose actions were described by the Council as "armed aggression".

After 9/11, the Council issued two crucial resolutions, both recognizing "the inherent right of individual or collective self-defence in accordance with the Charter",<sup>83</sup> it is obvious that the endorsement of the act of self-defence in these two resolutions "could only mean that it considered that the terrorist attacks constituted armed attacks for the purpose of article 51 of the Charter".<sup>84</sup> Although neither the resolution nor the statements of the mentioned States referred directly to article 51 of the Charter, they meaningfully emphasized self-defence in accordance with the Charter in general.<sup>85</sup>

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<sup>79</sup> For a brief review see Paul, Szasz C., "The Security Council starts legislating", 96 *AJIL* 901–905 (2002).

<sup>80</sup> See Franck, n. 15, at 6.

<sup>81</sup> Amerasinghe, Chittharanjan Félix, *Principles of the Institutional Law of International Organizations*, Cambridge: Cambridge University Press, 2005, at 41; Shaw, n. 38, pp. 227, 841; see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *ICJ Rep.* 1971, at 52; *Tadic* case, *ICTY* 105 *ILR* 419, 466.

<sup>82</sup> S.C. Res. 405 of 14 April 1977 (emphasis added).

<sup>83</sup> S.C. Res. 1368 of 12 September 2001 and S.C. Res. 1373 of 28 September 2001.

<sup>84</sup> Greenwood, C., "International law and the war against terrorism", 78 *International Affairs* 301, 308 (2002).

<sup>85</sup> For an opposite view see Murphy, Sean D., "Terrorism and the concept of armed attack", 43 *HLLR* 41–51 (2002).



### International judicial records

The ICJ, in the *Diplomatic and Consular Staff in Tehran* case, rendered its judgment on the taking over and seizure of the American embassy in 1979 by an organized group of revolutionists, and its legal consequences.

The Court asserted that it “finds itself obliged to stress the cumulative effect of Iran’s breaches of its obligations when taken together. A marked escalation of these breaches can be seen to have occurred in the transition from the failure on the part of the Iranian authorities to oppose the *armed attack by the militants* on 4 November 1979”;<sup>86</sup> the Court deliberately repeated its interpretation of the acts of a militant group as an armed attack against the embassy, a premise that the United States had pronounced before the Security Council for the sake of justification of its military operation of 24 April 1980.<sup>87</sup>

This position of the Court has to be regarded as significant if one comes to realize that use of the term “armed attack” was challenged by Judges Tarazi and Morozov. “One can only wonder, therefore, whether an armed attack attributable to the Iranian Government has been committed against the territory of the United States, apart from its Embassy and Consulates in Iran”;<sup>88</sup> asserted Judge Tarazi; and, as Judge Morozov put forth, “there is no evidence that any armed attack had occurred against the United States”.<sup>89</sup> These examples show that using the term “armed attack” had been an ongoing issue of discussion.

It must be added that there seems to be an unspoken rule for international tribunals to attribute acts of armed actors, as much as possible, to a specific State. This is because international law seems to be better able to put the weight of responsibility on States rather than non-State entities; *ergo*, the recent change in the dynamics of the role-playing of such entities has affected the judgments of international tribunals, as is the case with the notion of “control” involving the State’s responsibility for the acts performed by members of a military or paramilitary group, by considering their acts as “acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the

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<sup>86</sup> *United States Diplomatic and Consular Staff in Tehran* case, Judgment, *ICJ Rep.* 1980, at 42, para. 91 (emphasis added); see also paras. 57 and 64.

<sup>87</sup> *Ibid.*, paras. 93–94. Concerning the issue of the use of force against Iran, the Court concluded that it “must point out that neither the question of the legality of the operation of 24 April 1980, under the Charter of the United Nations and under general international law, nor any possible question of responsibility flowing from it, is before the Court” (para. 94); however, it must be added that as the Court put it, “the rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse” (para. 86). The Court asserted that diplomatic law “provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions” (para. 83), which implicitly describes the Court’s attitude towards a policy of force in cases of breach in such regimes, so it adds that “in the circumstances of the present proceedings, the Court cannot fail to express its concern in regard to the United States’ incursion into Iran” (para. 93).

<sup>88</sup> Dissenting opinion of Judge Tarazi, *ibid.*, at 65.

<sup>89</sup> Dissenting opinion of Judge Morozov, *ibid.*, at 57, para. 8.

commission of each of those acts”.<sup>90</sup> This has been noticed as a shift in the paradigm for attribution of their acts from “effective control”,<sup>91</sup> as was engaged before by the ICJ in 1986 in the *Nicaragua* case, to the wider notion of “overall control” in the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1999.

In addition, it seems interesting that the Court, in its *US Consular Staff in Tehran* judgment, described two events as armed attacks: one that was attributed to the Islamic Republic of Iran, and the other a failed attack that took place eight months before it, surely unattributable to the Iranian Government (i.e. an act of a non-State entity).<sup>92</sup>

### Question of the gravity of armed activities by the non-State actor

So far, we have seen that a State can assume that an armed attack may occur from a non-State actor, but shall we apply the same paradigm as we apply in State–State conflicts to our scenario? The mentioned paradigm implies that acts may occur in military and para-military forms, short of an armed attack subject to article 51. This is due to the tendency of international tribunals first to attribute the act to a certain State, and second to examine the gravity of the attack concerned for triggering the right of self-defence for the invoking party. The closest meaning of armed attack by an insurgent group, in our scenario, may be when one insurgent group is supported by another State to penetrate into the invoking State’s territory. In its *Nicaragua* judgment, the ICJ asserted: “In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also ‘the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to’ (*inter alia*) an actual armed attack conducted by regular forces, ‘or its substantial involvement therein’. This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law.”<sup>93</sup> However, the Court dismisses the US claim of self-defence, because those acts as “a form of conduct which is certainly wrongful, but is of *lesser gravity than an armed attack*”<sup>94</sup> may not trigger the right of self-defence against that State, for “it has primarily to consider whether a State has a right to respond to intervention with intervention going so far as to justify a use of force in reaction to measures which do not constitute an armed attack but may nevertheless involve a use of force”.<sup>95</sup>

This writer seriously doubts the possibility of applying such an interpretation in those cases relating to our scenario: firstly, because the host State in our case has no control

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<sup>90</sup> *Prosecutor v. Tadic*, Judgment, ICTY Case No. IT-94-1-A, Appeals Chamber, 1999, 38 *ILM* 1518, 1545 (1999).

<sup>91</sup> *Nicaragua* case, n. 25, para. 115.

<sup>92</sup> *Diplomatic* case, n. 86, para. 64.

<sup>93</sup> *Nicaragua* case, n. 25, para. 195 (emphasis added).

<sup>94</sup> *Ibid.*, para. 247 (emphasis added).

<sup>95</sup> *Ibid.*, para. 191.

over the areas under the non-State actor's (NSA's) control; secondly, and more importantly, if the method of insurgency or terrorism has any use for the non-State entity, it is primarily based on an *asymmetrical* logic of warfare,<sup>96</sup> which is "the application of tactics that are outside the norms of accepted rules of combat designed to weaken an enemy's resolve or ability to fight".<sup>97</sup> The very nature of NSAs makes it impossible to apply the criterion of the *gravity* of an armed attack, whether greater or lesser.

The claim that the use of such a criterion by the Court could serve international peace by preventing the acting States from reciprocal armed attacks, which could lead to large-scale war between them, would be a *reductio ad absurdum* in our scenario as such large-scale armed conflict can hardly take place in such cases.

Even if "the Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as *armed attacks* within the meaning of Article 51",<sup>98</sup> I would like to support the view that when use of military force against a State, whether by another State or an NSA, is subject to military response, then whatsoever the scale of the initial violence may be and whether the response is made under *self-defence* or on *state of necessity* – since that response shall remain in the borders of the principles applicable in the course of defensive measures (i.e. principles of proportionality and necessity) – the two above-mentioned circumstances mean the same in practice.

In line with this, in the words of the late Professor Thomas Frank, "there is discernible evolution, as well as occasional reaffirmation, in the way the international system has reacted to the various instances of the use of force against insurgents' and terrorists' safe havens. The incongruities only partly obscure a growing consistent pragmatism that is essentially fact-specific without being idiosyncratic. In each recent instance, UN organs seem to have eschewed narrowly dogmatic insistence on a traditional armed attack by a national army as the sole justification for an armed response in self-defence. Instead, they have focused on relevant evidence, weighing the seriousness of each claim of necessity and the proportionality of each aggrieved party's countermeasures".<sup>99</sup>

### **Principles of necessity and proportionality in the course of self-defence**

A countermeasure – whether military or non-military – that reaches the threshold of war or falls just short of it, shall be proportionate. As in criminal and civil law, where the fines, punishments and rewards cannot exceed a reasonable proportion, the same is applicable in international law, in which no wrongdoing is permitted as a response to a prior wrongdoing if it exceeds the proportionality that common sense perceives as appropriate.

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<sup>96</sup> Kay, Sean, *Global Security in the Twenty First Century*, Oxford: Rowman & Littlefield Publishers Inc, 2006, at 227–252.

<sup>97</sup> *Ibid.*, at 218.

<sup>98</sup> *Armed Activities* case, n. 15, Judge Simma's Separate Opinion, para. 11.

<sup>99</sup> Frank, n. 15, at 67.

The main result of applying the principles of necessity and proportionality is that the acting State shall not override the entire territory of the host State solely on the ground of self-defence against the residing NSA; this is based on the necessity for, in the case of civil war and internal belligerency, the control of insurgents over a certain portion of the territory of the engaged State. This geographical control may take place whether in the form of establishing military camps or publicly administering a *de facto* territory in the host land.

This would hopefully reduce the chance of the acting State interfering in domestic affairs of the host State, by illegalizing operations that are beyond military necessities. As was opposed by the international community against those “extra-territorial law enforcements” or saving nationals abroad, as in the *Entebbe* case,<sup>100</sup> a mobile threat does not allow the ubiquitous presence of powerful State military and anti-terrorist forces wherever they find it poses a risk to their security.

Of course, the principles of proportionality and necessity mostly benefit the host States, not the insurgent whose existence is deemed illicit; however, as the ICJ observed in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, proportionality and necessity are duly subject to general international humanitarian law. If the activities of the insurgents are considered an act of self-defence, they are surely entitled to the application of the principles regulating armed conflicts; that is (i) distinction between combatants and non-combatants, and (ii) the prohibition of causing unnecessary suffering to combatants.<sup>101</sup>

## CONCLUSION

If the Court insists on denying the possibility of justification of the acts of the victim State in our scenario on the grounds of article 51, and not even considering the subsequent practice of States, the Security Council and the Court’s jurisprudence, then in light of the customary international law on the use of force and by backing the Court’s previous decisions regarding State practice, this article sees no barrier for the plea of self-defence against non-State actors (NSAs).

It must be emphasized that there is a huge difference between armed attacks from NSAs and from terrorist activities. Nothing in international law gives the impression that all terrorist attacks shall end in the same way as armed attacks do; some terrorist attacks are, of course, not what we can legally deem an armed attack. Attacking a tourist bus full of civilians of the same or various nationalities is, of course, a terrorist act, but it can hardly amount to an armed attack against their respective State(s); alternatively, there are terrorist attacks specifically committed across borders, such as those of 9/11, which, in light of the scale of casualties, may be deemed as an armed attack. On the other hand, not every attack that an NSA commits is a terrorist attack, for in such confrontations conventional military instruments and weaponries are used mainly against the conventional military forces of the victim State.

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<sup>100</sup> See *ibid.*, at 82–85.

<sup>101</sup> *Nuclear Weapons* Advisory Opinion, n. 34, at 266, 257; see also Dinstein, n. 28, at 209–210.

Whatever the nature of an attack may be, there is no prohibition in current international law that can deprive the victim State of its right to respond proportionally. Whatever the relationship between the host State and the resident NSA, self-defence shall be carried out in accordance with other provisions of international law, *in bellum* and *post bellum*; so, the acting State, relying on the ground of self-defence, activates its obligations due to international humanitarian law. In cases where the ground that precludes wrongfulness of its acts for incursion into the host-State territory is exceeded, the acting State shall be deemed as the *aggressor*.

In the end, however, it must be observed that the “customary law process is a continuing one: it does not stop when a rule has emerged”.<sup>102</sup> No static statement can replace the need for perpetual observation of State practice.

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<sup>102</sup> Mendelson, n. 35, at 189.

# DESTRUCTION OF ENVIRONMENT DURING AN ARMED CONFLICT AND VIOLATION OF INTERNATIONAL LAW: A LEGAL ANALYSIS

Rishav Banerjee\*

## INTRODUCTION

Josephus said that if trees could speak, they would cry out that since they are not the cause of war it is wrong for them to bear its penalties.<sup>1</sup>

Scorched earths in Norway, defoliated jungles in Vietnam, ignited oil fields in Kuwait, emptied marshes in southern Iraq – the environment is often both a victim and a tool of armed conflict. Despite laws designed to prohibit or deter the environmental damages that result from belligerent conduct, they are, in reality, an inevitable consequence of war. Such damages have occasionally been the result of deliberate military strategy. The fact that wars are fought over natural resources only emphasizes Josephus' point that nature does not instigate battles and should therefore be protected from them. The Iran–Iraq war and the aftermath of Iraq's invasion of Kuwait (the “1991 Gulf War”) provide vivid evidence that conflicts arising at least in part from disputes over natural resources can wreak remarkable abuse on the environment, whether it is attacked directly or suffers collateral damage. International law seeks to limit environmental damage in times of armed conflict not only because it may harm human beings, but also because “dictates of public conscience” and principles of law increasingly recognize that the environment should be protected in its own right.<sup>2</sup>

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<sup>1</sup> Hugo Grotius, *De Jure Belli Ac Pacis Libra Tres* (1646), reprinted in *2 Classics of International Law* 747 (ed. by James Brown Scott, 1925).

<sup>2</sup> In drafting Protocol I, some delegates believed that wartime environmental protection was “an end in itself”. 15 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* 358 (1978). Others, however, thought that this protection was intended to ensure “the continued survival of the civilian population”.

The law of environmental damage during the conduct of war has a long history. War has been an unwelcome but constant factor in human history; and as long as there has been war, there has been environmental damage, both incidental and deliberate, resulting from it. More than 2,000 years ago the Romans sowed the soil of defeated Carthage with salt, but they were not the first to make use of environmental warfare. In modern times, regulation of instrumentalities of war with a potential impact on the environment dates from at least the 1868 Declaration of St Petersburg, which stated “the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy”. This, of course, leaves open the possibility of direct attacks on the environment, such as Iraq’s release of oil into the Persian Gulf during the first Gulf War or the United States’ use of Agent Orange to destroy forests during the Vietnam War, if the only purpose of the attacks is to weaken the military forces of the enemy, rather than to harm the civilian population. NATO’s air campaign in Kosovo raised a number of issues relative to the environmental consequences of warfare, *inter alia*, the protection of natural reserves and biological diversity; the targeting of industrial facilities, including oil refineries and petrochemical plants, posing pollution threats to the region, the River Danube and the Black Sea; and the use of weapons containing depleted uranium. It is significant that such issues were raised in a context involving the use of means and methods of warfare which, as a whole, were not exceptional. The use of weapons of mass destruction was not an issue, nor was the use of spectacular methods of warfare. The main focus was to regulate hostilities so as to protect combatants from unnecessary injury. Since World War II, the Declaration has turned to the protection of the civilian population and individual civilians. It does not follow that the environment did not receive any protection at all. In as much as international humanitarian law places constraints on the use of means and methods of warfare, the environment was indirectly protected. Thus, the provisions of the Hague or the Geneva Conventions, through the protection of civilian property and objects, offer indirect protection of the environment.<sup>3</sup>

Thus the importance of the environment is universally acknowledged. As the International Court of Justice (ICJ) proclaimed in 1996, in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*:

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.<sup>4</sup>

This Article examines, in light of the recent events (Case Studies) and commentary, current legal protections for the environment during an armed conflict such as Article 35(3) and Article 55 of the Additional Protocol I to the Geneva Conventions, 1977 or the Convention on the Prohibition of Environmental Modification (ENMOD) Techniques etc., which prohibits environmental destruction during war. After outlining existing rules and exploring some of the criticisms levelled against their effectiveness, this Article

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<sup>3</sup> Roberts, A., “The law of war and environmental damage”, in Austin, J. E. and C. E. Bruch, eds., *The Environmental Consequences of War*, Cambridge: Cambridge University Press, 2000, at 50.

<sup>4</sup> Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep. 1996, at 241.

considers potential consequences arising from possible violations of these provisions. Finally, it proposes how current rules can be modified and calls for a new law to provide more effective protection of the environment during times of armed conflict. Indeed, it concludes that the strongest protections are contained in the non-environment-specific provisions of the laws of armed conflict.

## THE INTERNATIONAL LEGAL TEXTS

There are two major treaties, and three supplementary texts, which are directly apposite to the protection of the environment in international armed conflict.

### **The ENMOD Convention**

Within the regime of International Environmental Law, the only instrument that directly addresses the problem of deliberate wartime environmental damage is the 1976 Geneva Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.<sup>5</sup> The Convention is currently binding on 55 States, including a substantial proportion of those technologically advanced countries whose cooperation would be necessary to effectuate the aims of the Convention.<sup>6</sup>

A number of States, including Iran, Iraq and Syria, have signed the convention but have not yet ratified it. Although these States are not bound by the terms of the treaty, they are probably bound by Article 18 of the Vienna Convention on the Law of Treaties,<sup>7</sup> which provides that: “a state is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty . . . subject to ratification”.<sup>8</sup> In

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<sup>5</sup> Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 18 May 1977, 31 *UST* 333, 1108 *UNTS* 152 (banning the use of techniques of environmental modification in war) [hereinafter ENMOD Convention]. The convention was adopted by GA Res. 321/72, by a vote of 90 to 8 with 30 abstentions. It came into effect on 5 October 1978.

<sup>6</sup> *Multilateral Treaties deposited with the Secretary-General: status as at 31 December 1989*, at 836, U.N. Doc. ST/LEG/SER. E/8 (1990) [hereinafter *Multilateral Treaties*]. Some of the countries are the United States, Soviet Union, United Kingdom, Japan, Germany, Canada, Cuba, Egypt, Yemen, India, Pakistan and others.

<sup>7</sup> Convention on the Law of Treaties, opened for signature 22 May 1969, UN Doc. A/CONF.39/27, reprinted in 63 *AJIL* 875 (1969), and in 8 *ILM* 686 [hereinafter *Vienna Convention*]. The convention is the principal authoritative source of the law of treaties. It is regarded as largely (but not entirely) declaratory of existing law, and on that basis it has been invoked and applied by tribunals and by states even prior to its entry into force and in regard to non-parties as well as parties.

<sup>8</sup> *Ibid.* State practice suggests that Article 18 is part of customary international law. For example, the United States and the Soviet Union have both accused each other of violating the unratified Strategic Arms Limitation Treaty (SALT II). Indeed, in 1986, the President ordered the elimination of two nuclear submarines in order to keep within the terms of the unratified treaty.



other words, they must not act inconsistently with the Convention's stated objective of prohibiting "military or any other hostile use of environmental modification techniques in order to eliminate the dangers to mankind from such use".<sup>9</sup> Of course, a violation of the Convention on the Law of Treaties is not the same as a violation of the Environmental Modification (ENMOD) Convention itself. The scope of State responsibility in this regard is likely to be in the nature of nominal damages only.

### *The central obligation*

Article 1 of the ENMOD Convention sets out the central obligation.<sup>10</sup> We shall examine the various elements of the Article in turn.

- (a) "Military or any other hostile use". It is significant that, in prohibiting "military or any other hostile use", the Convention does not distinguish between lawful and unlawful uses of force.<sup>11</sup> Presumably, the underlying policy is that hostile environmental modification poses such a threat to mankind that it must be prohibited even in the course of lawful self-defence or authorized collective security. This stands in contrast to the general principle in the *Trail Smelter* case and Stockholm Declaration, which is subject to exception in circumstances of "necessity" or "distress".
- (b) "Environmental modification techniques". This term is defined in Article 2 as: "any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space".<sup>12</sup> Although the definition is very broad and extends to every sector of the global environment, it seems to be primarily concerned with very large-scale environmental manipulation. This is reinforced by the Understanding reached by the Conference of the Committee for Disarmament and submitted to the General Assembly together with the convention.<sup>13</sup> The Understanding on Article 2 sets forth the following illustrations of phenomenon that might result from environmental modification:

earthquakes; tsunamis; an upset in the ecological balance of a region; changes in weather patterns (clouds precipitation, cyclones of various types and tornadic storms); changes in climate patterns, changes in the state of the ozone layer; and changes in the state of the ionosphere.<sup>14</sup>

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<sup>9</sup> ENMOD Convention, n. 5.

<sup>10</sup> *Ibid.* Art. 1: "Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party."

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.* Art. 2.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

- (c) “widespread, long-lasting or severe effects”. These terms describe the requisite quantum of damage. They are phrased in the alternative so that the existence of any one effect will invoke the prohibition. The problem with these expressions is that there is no indication of how widespread or how severe the damage must be. The Understanding accompanying Article 1 does define the terms as follows:
- (i) “widespread”: encompassing an area on the scale of several hundred square kilometres;
  - (ii) “long-lasting”: lasting for a period of months, or approximately a season;
  - (iii) “severe”: involving serious or significant disruption or harm to human life, natural and economic resources or other assets.<sup>15</sup>

However, this interpretation does not represent a consensus of opinion and is not part of customary international law. Some governments expressly rejected these interpretations and criticized the vague terminology of the Convention. The Turkish Government, for example, made the following Interpretive Statement when it signed the convention:

In the opinion of the Turkish Government the terms “widespread”, “long-lasting” and “severe effects” contained in the Convention need to be clearly defined. So long as this clarification is not made, the Government of Turkey will be compelled to interpret itself the terms in question and consequently it reserves the right to do so as and when required.<sup>16</sup>

Even if the Understanding on Article 1 was widely accepted, it would be open to criticism because the interpretation would subsume a large category of environmentally hazardous weapons that should arguably be permissible in certain circumstances during a war.<sup>17</sup> For present purposes, we may conclude that the vague terminology significantly undermines the practical value of the Convention.

- (d) “as the means of destruction, damage or injury”. This phrase raises the question of whether the offending State must have intended to cause the exact damage that occurred, or need only have intended to cause some damage. The former alternative would enable States to easily avoid the Convention by asserting that they did not intend to cause the amount or type of damage that in fact occurred. The latter alternative, however, would mean that States are responsible for excessive damage which they had no intention of causing and no means of anticipating. It is submitted that States should be responsible for any damage which they intended to cause and any excess damage which was reasonably foreseeable.

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<sup>15</sup> *Ibid.*

<sup>16</sup> *Multilateral Treaties, op. cit.*, n. 6, at 836.

<sup>17</sup> The terms are considered further in relation to 1977 Protocol (I) Additional to the Geneva Conventions of 1949 (n. 31 below), including a suggested interpretation representing the maximum consensus of all states.

In Conformity with the ENMOD Convention, not every use of an environmental modification technique is forbidden. The combined effect of Articles I and II is that several conditions have to be met:

- (i) Only “military or any other hostile” use of an environmental modification technique is forbidden. It does not matter whether resort to an environmental modification technique is made for offensive or defensive purposes.<sup>18</sup> But the proscribed use must be either military or hostile.<sup>19</sup> Article III(1) of the ENMOD Convention expressly States:

The provisions of this Convention shall not hinder the use of environmental modification techniques for peaceful purposes and shall be without prejudice to the generally recognized principles and applicable rules of international law concerning such use.<sup>20</sup>

It can be perceived that the activities excluded from the prohibition of the ENMOD Convention consist of either:

- (a) benign stimulation of desirable environmental conditions, such as relieving drought-ridden areas or preventing acid rains;<sup>21</sup> or (at the other end of the spectrum)
- (b) measures causing destruction, damage or injury to another State when the use of the environmental modification techniques is non-hostile and non-military.<sup>22</sup> As the last part of Article III(1) clarifies, the ENMOD Convention does not necessarily legitimize such activities (which may be illicit on other international legal grounds),<sup>23</sup> but they do not come within the framework of its prohibition.
- (ii) The proscribed action must consist of “manipulation of natural processes”. The natural process, then, is the instrument manipulated (as a weapon) for wreaking havoc.
- (iii) The prohibited conduct must be “deliberate”. Differently put, the manipulation of natural processes must be intentional, and mere collateral damage resulting from an attack against a military objective is not included.<sup>24</sup> Consequently, a

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<sup>18</sup> See Muntz, J., “Environmental modification”, 19 *HILJ* 388 (1978).

<sup>19</sup> “Military” and “hostile” do not necessarily overlap. On the difference between the two adjectives, see Wunsch, C. R., “The Environmental Modification Treaty”, 4 *ASIL International Law Journal* 126 (1980).

<sup>20</sup> ENMOD Convention, n. 5, at 16.

<sup>21</sup> Cf. Almond, H. H., “The use of the environment as an instrument of war”, 2 *YIEL* 462 (1991).

<sup>22</sup> See Caggiano, M. J. T., “The legitimacy of environmental destruction in modern warfare: customary substance over conventional form”, 20 *Boston College Environmental Affairs Law Review* 489 (1992–3).

<sup>23</sup> See Juda, L., “Negotiating a treaty on environmental modification warfare: the Convention on Environmental Warfare and Its Impact upon Arms Control Negotiations”, 32 *IO* 984 (1978).

<sup>24</sup> See Tarasofsky, R. G., “Legal protection of the environment during international armed conflict”, 24 *NYIL* 47 (1993).

bombing of a chemicals factory leading to toxic air pollution would not count under the ENMOD Convention.<sup>25</sup>

- (iv) The interdicted action must have “widespread, long-lasting or severe” effects (on the meaning of these crucial terms). Hence, if such effects are not produced, the use of an environmental modification technique (albeit technique) would be excluded from the scope of the prohibition.<sup>26</sup> By not forbidding a lower level manipulation of natural processes for hostile purposes, the ENMOD Convention appears to condone military preparations for such activities.<sup>27</sup>
- (v) The banned conduct must cause destruction, damage or injury.
- (vi) The destruction, damage or injury must be inflicted on another State Party to the ENMOD Convention.

### *Responsibility for violations*

Like all the other instruments of International Environmental Law, the ENMOD Convention only invokes the responsibility of States. Under Article 1, “each State Party” undertakes not to engage in hostile environmental modification against “other State Parties”.<sup>28</sup>

State responsibility under the Convention, however, does not include any obligation to make reparation or pay monetary compensation. Instead, Article 5(2) obligates the UN General-Secretary to convene a Consultative Committee of Experts at the unilateral request of any State.<sup>29</sup> The committee is required to assess the situation and present “a summary of its findings of fact”.<sup>30</sup> The underlying rationale is that the committee’s findings will have a political impact and result in some “horizontal enforcement” by encouraging the offending State to make reparation so as to re-establish its credibility in the international community. However, this is somewhat undermined by the fact that the committee is not authorized to draw legal conclusions, to vote on “matters of substance” or to impose liability. Indeed, in the context of war, international diplomacy has usually been exhausted already and States are unlikely to be overly concerned about a committee’s report.

### **Additional Protocol I of 1977**

Additional Protocol I of 1977 deals twice with the issue of the environment. Article 35(3) proclaims the basic rule:

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<sup>25</sup> See Rogers, A. P. V., *Law on the Battlefield*, Manchester: Manchester University Press, 1996, at 116.

<sup>26</sup> See Rodriguez, L. I. Sanchez, “1977 United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques”, in Ronzitti, N. (ed.), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries*, The Hague: Martinus Nijhoff Publishers, 1988, at 664.

<sup>27</sup> See Westing, A. H., “Environmental warfare”, 15 *Environmental Law Review* 663–4 (1984–5).

<sup>28</sup> ENMOD Convention, n. 5, Art. 1.

<sup>29</sup> *Ibid.* Art. 5(2).

<sup>30</sup> *Ibid.*

It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.<sup>31</sup>

Article 55(1) goes on to state:

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.<sup>32</sup>

These provisions establish an absolute prohibition not to cause “widespread, long-term and severe” damage to the natural environment. The infliction of such damage is prohibited, whether by direct attack (if a military objective is targeted) or as collateral damage, even if it would otherwise be justified by military necessity or by the application of the principle of proportionality.<sup>33</sup>

The terms “widespread”, “long-term” and “severe” have not been defined in the Protocol but it is generally agreed that they established a high threshold. The 1992 German Military Manual states, for instance, that “widespread, long-term and severe damage to the natural environment” is a “major interference with human life or natural resources which considerably exceeds the battlefield damage to be regularly expected in a war”.<sup>34</sup> It appears from a few indications in the *travaux préparatoires* that collateral damage resulting from conventional warfare such as artillery bombardment was not intended to be covered and that “long-term” should be understood in terms of decades.<sup>35</sup> Nonetheless, the threshold remains far from well established. It is not excluded that current environmental standards and knowledge should also be taken into account, which should lead to an evolving interpretation of the terms “widespread”, “severe” or “long-term”.<sup>36</sup> In that respect, the International Committee of the Red Cross (ICRC) emphasized the evolving expectations with regard to environmental protection:

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<sup>31</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977; Gary D. Solis, *Laws of Armed Conflicts*, Cambridge University Press, 2009 at 645.

<sup>32</sup> *Ibid*, 653.

<sup>33</sup> See Oeter, S., “Methods and means of combat”, in Fleck, D. (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford: Oxford University Press, 1995, at 117–118; Simonds, S. N., “Conventional warfare and environmental protection: a proposal for international legal reform”, 29 *SJIL* 173 (1992).

<sup>34</sup> Frederick William Charles Lieder and Ray Waldron Pettengil, *German Military Manual*, Kessinger Publishing, 1992, at 37, para. 403.

<sup>35</sup> Aldrich, G. H., “Prospects for United States ratification of Additional Protocol I to the 1949 Geneva Conventions”, 85 *AJIL* 13–14 (1991).

<sup>36</sup> Bothe, M., “The protection of the environment in times of armed conflict – legal rules, uncertainties, deficiencies and possible developments”, 34 *GYIL* 56–57 (1991).

The question as to what constitutes (prohibited) “widespread, long-term and severe” damage and what is acceptable damage to the environment is open to interpretation. Such interpretation has to take the whole context into account, and will vary with changes in expectations with regard to the general need to protect the environment. Of course, the “*travaux préparatoires*” have also to be taken into consideration where relevant.<sup>37</sup>

Now unlike many other clauses of the Protocol, Article 55(1) employs the expression “population” unaccompanied by the adjective “civilian”. This was a purposeful omission underscoring that the whole population, “without regard to combatant status”, is alluded to.<sup>38</sup> In any event, the replication of the same prohibition in Article 35(3) – forming part of a section of the Protocol related to methods and means of warfare – shows that civilians are not the sole beneficiaries of the protection of the natural environment. Moreover, in light of the condition that the environmental damage might be “long-term”, its effects are likely to outlast the war, and then any distinction between civilians and combatants becomes anachronistic.

Some commentators criticize the text of Article 55(1) for not elucidating whether the whole population of a country is referred to or only a segment thereof (for instance, those persons who are in the vicinity of a battlefield).<sup>39</sup> But this is not very persuasive. The Protocol’s interdiction is phrased in a manner featuring what is “intended” or “may be expected” to occur. The “may be expected” formula has also been disparaged.<sup>40</sup> Still, what the text does is accentuate prognostication (in the sense of both premeditation and foreseeability) rather than results. Hence: (i) On the one hand, “mere inadvertent collateral environment effect of an attack” does not come within the compass of the prohibition.<sup>41</sup> As long as the damage to the natural environment (and the consequential prejudice to the health and survival of the population) is neither intended nor expected, no breach of the Protocol occurs. (ii) On the other hand, where such an intention or expectation exists, it is immaterial that in fact only a portion of the population has been adversely affected. Indeed, if the intention or expectation can be established, it does not matter if ultimately there would be no victims at all (although, absent any change, there may be insuperable obstacles in providing the intention or the expectation). After all, the text posits “prejudice” to health or survival of the population, not actual injury.

Although Article 55(1) does not expressly designate the natural environment as a civilian object,<sup>42</sup> it is noteworthy that the clause features in a Chapter of the Protocol

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<sup>37</sup> ICRC, *Protection of the Natural Environment in Time of Armed Conflict, Contribution of the International Committee of the Red Cross to the Rio Conference*, Geneva: ICRC, 1992, at p. 4.

<sup>38</sup> Kalshoven, F., “Reaffirmation and development of international humanitarian law applicable in armed conflicts: the Diplomatic Conference, Geneva, 1974–1977, Part II”, 9 *NYIL* 130–131 (1978).

<sup>39</sup> See Roberts, G. B., “The new rules for waging war: the case against ratification of Additional Protocol I”, 26 *Va.JIL* 148, n. 213 (1985–6).

<sup>40</sup> See Wilcox, W. A., “Environmental protection in combat”, 17 *Southern Illinois University Law Journal* 299, 308, 313 (1992–3).

<sup>41</sup> Bothe, M., “War and environment”, 4 *Encyclopedia of Public International Law* 1344 (1982).

<sup>42</sup> See Baker, B., “Legal protections for the environment in times of armed conflict”, 33 *Va.JIL* 364 (1992–3).

entitled “Civilian Objects”.<sup>43</sup> The point is that, once classified as a civilian object, the natural environment must not be the object of attack.<sup>44</sup>

The Protocol does not define the phrase “natural environment”. The ICRC Commentary suggests that “it should be understood in the widest sense to cover the biological environment in which a population is living” (i.e. the fauna and flora) as well as “climate elements”.<sup>45</sup> It is sometimes alleged that the provisions have, in the meantime, been accepted as part and parcel of customary international law.<sup>46</sup> As late as 1996, the International Court of Justice – in the *Nuclear Weapons* Advisory Opinion – enunciated that the provisions of the Protocol “provide additional protection for the environment” and “these are powerful constraints for all the States having subscribed to these provisions”.<sup>47</sup>

Articles 35 and 55 have thus a very limited scope of application in limiting the environmental consequences of warfare. Only environmental damage of a catastrophic magnitude would come within their reach. However, placed in a binding treaty, those provisions at the very least reinforce the idea that the protection of the environment should be a concern in the application of the rules relative to the conduct of hostilities. As has been observed:

... it is not easy to know in advance exactly what the scope and duration of some environmentally damaging acts will be; and there is a need to limit as far as possible environmental damage even in cases where it is not certain to meet a strict interpretation of the criteria of ‘widespread, long-term, and severe’.<sup>48</sup>

### The dissimilarities between the ENMOD Convention and Protocol I

In its temporal sphere of application, Protocol I is narrower in scope than the ENMOD Convention. Although Protocol I draws no distinction between enemy territory and the territory of the belligerent causing the environmental damage,<sup>49</sup> the instrument applies only to international armed conflicts.<sup>50</sup> The counterpart instrument governing non-international armed conflicts – Protocol II<sup>51</sup> – does not incorporate a provision parallel to

<sup>43</sup> Protocol I, *op. cit.*, n. 31, at 652.

<sup>44</sup> See Article 52(1) of Protocol I, *ibid.*

<sup>45</sup> Pilloud C. and J. Pictet, *Commentary on the Additional Protocols*, Geneva: ICRC, 1987 at 662.

<sup>46</sup> See, e.g., Gupta, S., “Iraq’s environmental warfare in the Persian Gulf”, 6 *Georgetown International Environmental Law Review* 260 (1993–4).

<sup>47</sup> Advisory Opinion on *Nuclear Weapons*, 8 July 1996, *ICJ Rep. 1996*, at 242.

<sup>48</sup> *Report of the Secretary General on the protection of the environment in times of armed conflict*, UN Doc. A/48/269 (29 July 1993), at 7, para. 34.

<sup>49</sup> See Stannard, C., “Legal protection of the environment in wartime”, 14 *SLR* 375 (1992).

<sup>50</sup> See Article 1(3) of Protocol I, *op. cit.*, n. 31, at 628. But see also Article 1(4), *ibid.*

<sup>51</sup> 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, *op. cit.*, n. 31, at 689.

Articles 35(3) and 55(1).<sup>52</sup> For its part, the ENMOD Convention is germane to any situation in which an environmental modification technique is deliberately resorted to for military or hostile purposes and inflicts sufficient injury on another State Party. The phraseology would cover the case of a hostile use of an environmental modification technique in the course of a non-international armed conflict, where the weapon is widened intentionally against a domestic foe but causes cross-border environmental damage to another State Party.

Where weaponry is concerned, the Protocol has a wider scope than the ENMOD Convention. Whereas the ENMOD Convention is confined to one single type of weaponry (i.e. an environmental modification technique), the Protocol protects the natural environment (within prescribed circumstances) – and the population – against damage inflicted by any weapon whatsoever.<sup>53</sup> This can be looked at from an additional angle. In its thrust, the Protocol protects the environment (“the environment as victim”), whereas the ENMOD Convention protects from manipulation of the environment (“the environment as weapon”).

The Protocol goes much further than the ENMOD Convention in protecting the natural environment, not only against intentional (or “deliberate”) infliction of damage in the course of warfare, but also against “purely unintentional and incidental damage” which, however, can be “expected”.<sup>54</sup> The Protocol accordingly provides that the consequences for the natural environment are foreseeable.<sup>55</sup>

## Supplementary texts

### *The Rome Statute*

Article 8(2)(b)(iv) of the 1998 Rome Statute of the International Criminal Court stigmatizes as a war crime:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to concrete and direct overall military advantage anticipated.<sup>56</sup>

This text is based on the language of the Protocol, but there are two significant disparities with regard to the protection of the environment: (i) the Statute requires both intention

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<sup>52</sup> See Sassoli, M. and A. A. Bouvier, *How Does Law Protect in War? Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law*, Geneva: ICRC, 1999, at 437.

<sup>53</sup> De Preux, J., “Article 35”, in *Commentary, op. cit.*, n. 45, at 414–415.

<sup>54</sup> See Oeter, *loc. cit.*, n. 33, at 117.

<sup>55</sup> De Preux, *loc. cit.*, n. 53, at 419.

<sup>56</sup> Rome Statute of the International Criminal Court, 1998, 37 *ILM* 1006 (1998).



and knowledge of the outcome, rather than either intention or expectation as set forth in the Protocol; and (ii) for the war crime to crystallize, the damage to the natural environment must be clearly excessive in relation to the military advantage anticipated. The first disparity is warranted by the labelling of the act as a war crime, namely, the establishment of individual criminal responsibility and liability for punishment. Only an individual acting with both knowledge and intent would have the necessary *mens rea* exposing him to penal sanctions.<sup>57</sup> The second disparity is derived from the amalgamation in one paragraph of the *material* of the protection of civilians (or civilian objects) and that of the natural environment. This is true also of the natural environment as a civilian object (unless an element of the environment – like a forest – is deemed a military objective in the circumstances prevailing at the time<sup>58</sup>). But the special regime, set up for the protection of the natural environment in Articles 35(3) and 55(1) of the Protocol, brings in the three cumulative conditions of “widespread, long-term and severe damage” to the natural environment, irrespective of any other considerations.<sup>59</sup> Should the three cumulative criteria be satisfied, the action will be in breach of the Protocol even if it is “clearly proportional”.<sup>60</sup> This is not the case in the Rome Statute where damage to the environment (however “widespread, long-term and severe”) is explicitly added “as an element in the proportionality equation”.<sup>61</sup>

### *Protocol III, annexed to the Weapons Convention*

The Preamble of the 1980 Conventional Weapons Convention repeats verbatim (by “recalling”) the text of Article 35(3) of Protocol I (without citing the source).<sup>62</sup> Article 2(4) of Protocol III, annexed to the Convention, lays down the relevant provision.<sup>63</sup>

This provision is, of course, very limited in scope. It relates to only a small part of the natural environment: forests or other kinds of plant cover. In addition, it grants protection not against attacks in general, but only against attacks by specific (incendiary) weapons.

<sup>57</sup> See Drumbl, M. A., “Waging war against the world: the need to move from war crimes to environmental crimes”, 22 *FILJ* 126, 130–131 (1998–9).

<sup>58</sup> See Fleck, D., “Legal and policy perspectives”, in Fox, H. and M. A. Meyer (eds.), *Effecting Compliance*, London: British Institute of International and Comparative Law, 1993, at 146.

<sup>59</sup> See Richards, P. J. and M. N. Schmitt, “Mars meet mother nature: protecting the environment during armed conflict”, 28 *STL* 1061–1062 (1998–9).

<sup>60</sup> See Schmitt, M. N., “The environmental law of war: an invitation to critical reexamination”, 36 *Revue de Droit Militaire et de Droit de la Guerre* 35 (1997).

<sup>61</sup> Fenrick, W. J., “Article 8(2)(b)(iv)”, in Triffterer, O. (ed.), *Commentary on the Rome Statute of the International Court*, Baden-Baden: Nomos Verlagsgesellschaft, 1999, at 197.

<sup>62</sup> Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 1980, *Laws of Armed Conflicts*, *op. cit.*, n. 31, at 179.

<sup>63</sup> Protocol on Prohibition or Restrictions on the Use of Incendiary Weapons (Protocol III), 1980, at 190–191. Art 2(4): “It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.”

And the protection ceases when the enemy is using the forests for cover, concealment or camouflage; or when they constitute military objectives. In reality, “plant cover is most likely to be attacked precisely when it is being used as cover or camouflage”.<sup>64</sup> It has therefore been contended that the provision has little or no practical significance.<sup>65</sup> Protocol III is not accepted as customary international law.<sup>66</sup>

### *The Chemical Weapons Convention*

The use of herbicides (chemical defoliants) for military purposes – primarily, in order to deny the enemy sanctuary and freedom of movement in dense forests – caught wide attention during the Vietnam War, owing to the magnitude of American herbicide operations and the fact that they stretched over a long period of time.<sup>67</sup> The United States conceded that resorting to herbicides can come within the purview of the prohibition of the ENMOD Convention, but only if it upsets the ecological balance of a region.<sup>68</sup> Even this proposition has been challenged on the ground that resorting to herbicides, albeit destructive of an element of the environment, does not amount to a “manipulation of natural processes”.<sup>69</sup> However, the interpretation that the use of herbicides can under certain conditions “be equated with environmental modification techniques under Article II of the Convention” was authoritatively reaffirmed in a Review Conference in 1992.<sup>70</sup> Evidently, the conditions listed in Article I(1) of the ENMOD Convention must not be ignored. A sporadic spread of herbicides might not cause environmental damage that is “widespread, long-lasting or severe”, in which case it would not be in breach of the ENMOD Convention.

The allusion in the Preamble of the Chemical Weapons Convention to “the pertinent agreements” is somewhat vague, but it seems that the framers had in mind both the ENMOD Convention and Protocol I. Of greater weight is the reference to the “relevant principles of international law” and the use of the expression “recognizing”. The inescapable connotation is that the prohibition is now predicated on customary international law.

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<sup>64</sup> Goldblat, J., “Legal protection of the environment against the effects of military activities”, 22 *Bulletin of Peace Proposals* 403 (1991).

<sup>65</sup> See Kalshoven, F. and L. Zegveld, *Constraints on the Waging of War*, 3rd edn., Geneva: ICRC, 2001, at 164.

<sup>66</sup> Harlow, B. A. and M. E. McGregor, “International environmental law considerations during military operations other than war”, 69 *International Law Studies* 315, 318 (Grunawalt, R. J. et al. (eds.), *Protection of the Environment during Armed Conflict*, Naval War College, *International Law Studies*, 1996).

<sup>67</sup> See Westing, A. H., “Herbicides in war: past and present”, in Westing, A. H. (ed.), *Herbicides in War: The Long-Term Ecological and Human Consequences*, London: Taylor & Francis, 1984, at 5.

<sup>68</sup> See Goldblat, J., “The environmental Modification Convention: A Critical Review”, 6 *Humanitäres Völkerrecht* 81, 82 (1993).

<sup>69</sup> See J. G. Dalton, “The Environmental Modification Convention: an unassuming but focused and useful convention”, 6 *Humanitäres Völkerrecht* 142 (1993).

<sup>70</sup> Bouvier, A., “Recent studies on the protection of the environment in time of armed conflict”, 32 *IRRC* 563 (1992).

*Other general principles of the law of armed conflict*

In addition to specific environmental provisions, the application of general principles of the law of armed conflict can provide some protection to the environment. Although the law of armed conflict has focused, and still does, on the protection of persons and their property, the application of these principles can play a role with regard to the minimization of environmental harm, in as much as they are deemed to have incorporated environmental concerns.<sup>71</sup> This is in part because five long-standing precepts of armed conflict provide potentially far-reaching protection for the environment in times of armed conflict without specifically addressing environmental concerns: the limitation principle, military necessity, discrimination (i.e. between military and civilian objects), preventing unnecessary suffering, and proportionality.<sup>72</sup>

*Limitation*

The concept of limitation is a basic precept of the laws of war. In the laws of war, the concept of limitation reflects the idea that the right to injure one's enemy is not unlimited. Limitation is articulated in a significant number of international agreements, including both the Hague and Geneva Conventions.<sup>73</sup> Under the principle of limitation, not all acts of war that harm the environment are acceptable and any party claiming the right to damage the environment without regard to the consequences of that damage violates the first ground rule of the laws of war.

*Military necessity*

Military necessity is the limiting factor on a belligerent State's ability to choose the means and methods by which it will harm its opponents. This doctrine has evolved from authorizing any barbaric act of armed conflict to being the measure of whether a military action may be sanctioned as an unacceptable act of war.<sup>74</sup> Hence, whereas the concept of military necessity used to provide positive authorization for acts that would otherwise be disallowed under the rules of war, it now serves as a defence against excessive military force.

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<sup>71</sup> *Protection of the environment in times of armed conflict: Report of the Secretary-General*, UN Doc. A/47/328 (July 31, 1992), paras. 8–9; Simonds, *loc. cit.*, n. 33, at 169–170.

<sup>72</sup> Roberts, Adam & Richard Guelff, *Documents on the Laws of War*, 2d edn., Oxford University Press, 1989, at 1 (noting that “laws of war” is a well-recognized term of art, and not one of absolute precision”).

<sup>73</sup> Convention Respecting the Laws and Customs of War on Land, 18 Oct. 1907, Annex to the Convention, Art. 22, 36 Stat. 2301 [hereinafter Fourth Hague Convention]. The Fourth Hague Convention states in Article 22 that “[t]he right of belligerents to adopt means of injuring the enemy is not unlimited”. Protocol I to the Geneva Convention expands the limitation language slightly in an effort to address both means and methods. Specifically, Article 35(1) provides that “[i]n any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.” Protocol I, n. 31, Art. 35(1).

<sup>74</sup> Bothe, Michael et al., *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, The Hague/Boston/London: Martinus Nijhoff, 1982, at 196–197, Art. 35.2.3.3.

Both the Hague and Geneva Conventions contain provisions that demonstrate the limiting functions of military necessity. Article 23 of the Fourth Hague Convention prohibits a State from engaging in activity that would, *inter alia*, “destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war”.<sup>75</sup> The Fourth Geneva Convention, in Article 53, prohibits “any destruction by the Occupying Power of real or personal property, individual, collective, private or State, except where such destruction is rendered absolutely necessary by military operations”.<sup>76</sup>

Essentially, two criticisms may be levelled at these military necessity provisions by those attempting to show that they are insufficient to protect the environment. First, it has been pointed out that Article 53 of the Geneva Convention, which provides the broadest prohibition against destruction of property, applies only to occupied territories, presumably leaving open the possibility of destruction in territories that are not occupied, but are nonetheless the scene of hostilities. Second, it has been asserted that, as a practical matter, military necessity will always outweigh environmental interest, rendering purely illusory any alleged limiting protections. The Fourth Geneva Convention’s Article 53 applies only to occupied territory. Although they apply only in a limited geographic area, the provisions of Article 53 are the most comprehensive in terms of the types of property they protect, namely property in all forms of ownership (i.e. individual, collective, private or State). On the other hand, Article 23(g) of the older Fourth Hague Convention, which has a broader geographic application but refers simply to “enemy property”, presumably protects only State-owned property. Nonetheless, because Hague Article 23(g) and Geneva Article 53 both deal with “military necessity”, the increasing perception of that doctrine as a limiting factor on harm to property can help extend greater protections to occupied territories as well as to war zones. This can be done by reconsidering what military necessity means. Such reconsideration must concentrate in part on the closely related notion of proportionality, discussed below, to help develop a better understanding of what kind of damage to the environment is militarily necessary. In response to the second complaint, that military necessity always takes precedence over environmental concerns, it should be noted that developing practice indicates the military’s increasing awareness of the need to protect the environment from effects of war. An example of this is found in the recently drafted German military manual,<sup>77</sup> which refers specifically to environmental protection and to the environment-specific provisions of humanitarian law discussed later in this Article.<sup>78</sup> This manual thus contributes to the evolution of the doctrine of military

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<sup>75</sup> Fourth Hague Convention, n. 73, Art. 23, para. g.

<sup>76</sup> Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 6 *UST* 3516, 75 *UNTS* 287 [hereinafter Fourth Geneva Convention], Art. 53.

<sup>77</sup> The Federal Ministry of Defense of the Federal Republic of Germany, *Humanitarian Law in Armed Conflicts—Manual*, Bonn, 1992, draft translation of the German tri-service manual ZDv 15/2 *Humanitäres Völkerrecht in bewaffneten Konflikten-Handbuch* (1993) [hereinafter *German Manual*].

<sup>78</sup> *Ibid.*, paras. 401 (citing Articles 35(3) and 55(1) of Protocol I), 403 (discussing long-term, widespread and severe damage to the environment), 479 (forbidding reprisals against the natural environment), and 1020 (citing again Article 35(3)).

necessity by reducing its application to smaller fields of permissible operations, thereby opening the way for environmental concerns to take priority over military necessity in certain circumstances.

*Discrimination (civilian/military)*

Under traditional rules of war, a belligerent must distinguish between civilian and military objects and objectives. While certain objects and persons receive special protection under the Geneva Conventions,<sup>79</sup> Protocol I provides the first comprehensive detailed protections for civilians and civilian objects.<sup>80</sup> Article 52(1) of Protocol I, which prohibits attacks and reprisals against civilian objects generally, identifies four special categories of civilian objects: cultural objects and places of worship;<sup>81</sup> objects indispensable to the survival of the population;<sup>82</sup> the natural environment;<sup>83</sup> and works and installations containing dangerous forces.<sup>84</sup> The “natural environment” without further definition is at best an amorphous, far-reaching concept that does not fit well with the three other categories of more specific, tangible objects. Generally, the nebulous character of the “natural environment” makes it difficult to consider that environment as an object *per se* and, from a military perspective, to grant that environment blanket civilian status.<sup>85</sup>

One criticism of the Protocol is that although it includes protection of the “natural environment” (Article 55) under a chapter headed “civilian objects”, it does not explicitly specify that the environment has civilian status, and thus does not provide the environment with the same protections afforded to more traditional civilian objects such as places of worship. Indeed, some authors have suggested the need for a clear statement that the environment is not a military objective, and therefore is not subject to attack. These suggestions, however, are hard to implement because difficulties in defining “the environment” make it impractical to exclude that category entirely as a military objective under Article 52(2).<sup>86</sup>

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<sup>79</sup> The First Geneva Convention, for example, extends protection to medical units and establishments. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949, Art. 19, 6 *UST* 3128, 75 *UNTS* 44 [hereinafter First Geneva Convention]. In addition, the Fourth Geneva Convention protects hospitals and related personnel. Fourth Geneva Convention, n. 76, Arts. 18, 20.

<sup>80</sup> Article 48 provides that “[p]arties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”. Protocol I, n. 31, Art. 48. Article 51(6) prohibits attacks that are reprisals against civilians. *Ibid.*, Art. 51(6).

<sup>81</sup> *Ibid.*, Art. 53.

<sup>82</sup> *Ibid.*, Art. 54.

<sup>83</sup> *Ibid.*, Art. 55.

<sup>84</sup> *Ibid.*, Art. 56.

<sup>85</sup> For discussion of the inherent difficulties in determining which objects constitute legitimate military objectives, see Kalshoven, Frits, “Reaffirmation and development of international humanitarian law applicable in armed conflicts: the Diplomatic Conference, Geneva, 1974–1977”, 9 *NYIL* 110–12 (1978) [hereinafter Kalshoven, *Diplomatic Conference*].

<sup>86</sup> Protocol I, n. 31, Art. 52, para. 2.

Perhaps a more realistic and helpful endeavour would be to actively encourage scholarship and State practice to emphasize that damage to the environment – as a military objective or collaterally – can in fact be contrary to an effective military advantage. Under a revised understanding of what military advantage means, the act of inflicting environmental damage would be disadvantageous if it produces immediate military benefits but has long-term adverse effects on the State that perpetrates the damage.

Currently, for an object to be considered a military objective, its “total or partial destruction, capture or neutralization, in the circumstances ruling at the time, [must offer] a definite military advantage”<sup>87</sup> to the acting party. Any object against which action is taken that is not militarily advantageous (because of long-term environmental damage) should not be considered an appropriate military objective. Thus, under an expanded definition of military necessity, although the environment itself still would not be regarded as a civilian object, many instances of environmental damage would be viewed as militarily ineffective, because the costs to the civilian population are clearly disproportionate to any military goal. By reverse definition, harm to the environment can no longer be a military objective in many circumstances. For example, the widespread reaction that Iraq’s igniting of Kuwait’s oil fields was widely disproportionate to any conceivable military aim illustrates that some consensus can be reached on what actions are not permissible.

#### *Prevention of unnecessary suffering*

Unnecessary suffering can be said to have originally referred to the suffering of military personnel from battlefield injuries.<sup>88</sup> As the fields of combat and its consequences have expanded to affect non-military persons and objects,<sup>89</sup> however, diverse opinions have arisen as to the precise meaning of this doctrine. These opinions include observations that unnecessary suffering is related to the failure to discriminate between civilian and military personnel and objects, and that this concept is closely connected to proportionality and military necessity, regardless of whether the party harmed is military or civilian.

Protocol I strongly suggests that wartime environmental damage is as fundamentally contradictory to the laws of war as is the infliction of unnecessary suffering. Article 35’s inclusion of this third, environment-specific, basic rule, directed at an “evil . . . [that] has a greater impact on the population as a whole than it does on the armed forces”, reflects the further merging of civilian and military protection. This merging seems to contradict the long-standing rule of separating these two categories and requiring warring parties to

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<sup>87</sup> *Ibid.*

<sup>88</sup> For example, in discussing the Fourth Hague Convention and the St Petersburg Declaration of 1868, Fenrick refers to “the rules prohibiting the infliction of unnecessary suffering upon combatants”. Fenrick, W. J., “New developments in the law concerning the use of conventional weapons in armed conflict”, 19 *CYL* 232 (1981) (emphasis added).

<sup>89</sup> The Fourth Hague Convention, which deals with the protection of civilians, understood this wartime principle to specifically prohibit a belligerent’s ability “[t]o employ arms, projectiles, or material calculated to cause unnecessary suffering”. Fourth Hague Convention, n. 73, Art. 23, para. (e).

distinguish between military and civilian people and objects. This paradox is lessened, however, in recalling that the environment, like many other objects, may be considered at different times to have either military or civilian status. As discussed in the preceding section, non-environment-specific principles requiring distinctions between military and civilian targets may well provide a large measure of protection to the environment. To the extent that damage to the environment – as a military object or collaterally – causes unnecessary suffering, it violates yet another well-established principle of humanitarian law.

### *Proportionality*

In its most recent codification, the doctrine of proportionality is described in terms of excessive loss, in that it defines an indiscriminate (disproportionate) attack as: “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.<sup>90</sup>

Proportionality is closely related to the notion of military necessity. In what is known as the “precautionary provision”, Article 57(2)(a) of Protocol I also calls for minimizing incidental civilian losses. Proportionality is widely regarded to have customary law status, and its inclusion in Protocol I can be considered a codification of such pre-existing custom. Accordingly, proportionality restrictions are binding upon all States, including those not party to Protocol I.<sup>91</sup>

## THE APPLICATION OF (PEACETIME) ENVIRONMENTAL LAW IN TIMES OF ARMED CONFLICT

The application of peacetime environmental law during times of armed conflicts is not excluded *per se*. In its *Nuclear Weapons* advisory opinion, the International Court of Justice (ICJ) recalled its statement in the *Nuclear Tests* case (1995) that its conclusion was “without prejudice to the obligations of States to respect and protect the natural environment”.<sup>92</sup> It added that the statement also applied “to the actual use of nuclear weapons in armed conflict”.<sup>93</sup>

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<sup>90</sup> Protocol I, n. 31, Art. 51, para. 5(b).

<sup>91</sup> See Kalshoven, *Diplomatic Conference, loc. cit.*, n. 85, at 116–117. See also Greenwood, Christopher, “Customary law status of the 1977 Geneva Protocols”, in Delissen, Astrid J. M. and Gerard J. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead*, Dordrecht: Martinus Nijhoff Publishers, 1991, at 108–111, where the author states that Article 51(5)(b) “should be treated as an authoritative statement of the modern customary rule”.

<sup>92</sup> *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/ France)*, Order of 22 September 1995, *ICJ Rep. 1995*, at 306, para. 64.

<sup>93</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Rep. 1996*, para. 32.

### The duty to prevent environmental harm

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”<sup>94</sup> is a basic principle of customary environmental law.<sup>95</sup> It is based on the principle formulated in the *Trail Smelter* arbitration and the *Corfu Channel* case (i.e. the obligation of “every State [ . . . ] not to allow knowingly its territory to be used contrary to the rights of others”).<sup>96</sup> The threshold of prohibited damage as enunciated in the *Trail Smelter* case is relatively high. Only damages of “serious consequence” triggered State responsibility.<sup>97</sup> Furthermore, this threshold is not absolute. Its determination requires a balancing of the interests involved.

In the *Nuclear Weapons* advisory opinion, the ICJ did not exclude the application of the principle in times of armed conflict *per se* but simply observed that environmental obligations were not intended “to be obligations of total restraint during military conflict”.<sup>98</sup> *A priori*, the duty to prevent damage to the environment of other States remains applicable with regard to the territory of States not party to the conflict, since obligations between belligerents and neutrals are neither suspended nor terminated.<sup>99</sup> However, it must be kept in mind that the general obligation not to cause damage to the environment of other States or to areas beyond national jurisdiction is an obligation of “due diligence”. Damage that cannot reasonably be prevented is not covered. Peacetime environmental standards may be relevant to define the proportional or militarily necessary effects of war on the environment, but the determination of the applicable customary standard, in the absence of more precise codified standards, would hardly clarify the application of the principle of proportionality.

### State responsibility

The breach of an international legal obligation is an internationally wrongful act that gives rise to State responsibility.<sup>100</sup> The general principles of International Environmental Law made their first appearance in the 1941 *Trail Smelter* case<sup>101</sup> relating to injuries

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<sup>94</sup> *Ibid*, para. 29.

<sup>95</sup> Kiss, A. and D. Shelton, *International Environmental Law*, Ardley-on-Hudson, NY/London: Transnational Publishers/Graham & Trotman, 1991, at 121.

<sup>96</sup> *Trail Smelter* case (US/Canada), Award of 11 March 1941, 3 *RIAA* 1965; also *Corfu Channel* case (UK/Albania), Judgment of 9 April 1949, *ICJ Rep. 1949*, at 22. The principle has been reiterated in several sectoral international environmental conventions.

<sup>97</sup> 3 *RIAA* 1965.

<sup>98</sup> *Legality of the Threat or Use of Nuclear Weapons*, n. 93, para.30.

<sup>99</sup> Von Heinegg, W. Heintschel and M. Donner, “New developments in the protection of the natural environment in naval armed conflicts”, 37 *GYIL* 301 (1994).

<sup>100</sup> See, e.g., *Case Concerning United States Diplomatic and Consular Staff in Tehran (US v. Iran)*, 1980 *ICJ Rep. 1980*, at 41, 45.

<sup>101</sup> *Trail Smelter* case (United States v. Canada), 1938 & 1941, 3 *RIAA* 1905.



caused to the State of Washington by sulphur dioxide emissions from a smelter plant in British Columbia. In the absence of any international judicial decisions on the issue, the Special Arbitral Tribunal examined numerous decisions of the United States Supreme Court<sup>102</sup> and deduced the following principle:

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, when the case is of serious consequence and the injury is established by clear and convincing evidence.<sup>103</sup>

Applying this principle, the Tribunal held that Canada was responsible in international law for the conduct of the Trail smelter and had “the duty . . . to see to it that this conduct should be in conformity with the obligation of the Dominion under international law”.<sup>104</sup>

For the next 30 years, the *Trail Smelter* case was consistently cited as laying down a general principle of State responsibility for environmental damage.<sup>105</sup> Any remaining doubt as to whether the principle was a norm of customary international law was conclusively removed by Principle 21 of the 1972 Stockholm Declaration of the United Nations on the Human Environment:<sup>106</sup> “States have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”<sup>107</sup> The Declaration is not itself legally binding. However, Principle 21 was the culmination of 30 years of international judicial development and is universally recognized as a statement of customary international law.<sup>108</sup> Further development of the general principle of responsibility for environmental damage is being carried out by the International Law Commission (the “ILC”) in its draft Articles on “International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law”.<sup>109</sup> The 33 Articles adopted to date are the subject of much debate and, as acknowledged by the ILC itself, cannot be said to represent customary international law.<sup>110</sup> The principles established in the *Trail Smelter* case and the Stockholm Declaration have their roots in the traditional regime of “State responsibility”. The general principle is specifically intended to protect States, can only

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<sup>102</sup> E.g., *Missouri v. Illinois*, 200 U.S. 496 (1906) (water pollution), and *Georgia v. Tennessee Copper Company*, 206 U.S. 230 (1907) (air pollution).

<sup>103</sup> *Trail Smelter* case, 3 *RIAA* 1965.

<sup>104</sup> *Ibid.*, at 1966.

<sup>105</sup> See, e.g., Canada–United States Agreement on Air Quality, 13 March 1991, 30 *ILM* 676, 678.

<sup>106</sup> Stockholm Declaration on the Human Environment, adopted by the UN Conference on the Human Environment at Stockholm, 16 June 1972, section I of the Report of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14 and Corr. 1 (1972) (adopted with no roll-call vote recorded), reprinted in 11 *International Legal Materials* 1420 [hereinafter *Stockholm Declaration*].

<sup>107</sup> *Ibid.*

<sup>108</sup> See 19 *ILC Yb.* 175.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*, at 175.

be violated by States and, by implication, cannot give rise to any individual responsibility or punishment.

What, then, is the nature of a State's responsibility? Under customary international law, a State that commits an "internationally wrongful act" incurs "State responsibility", which can only be discharged by making "reparation". The Permanent Court of International Justice has explained that:

reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish 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.<sup>111</sup>

This view is reinforced by the ILC's Draft Convention on State Responsibility, which introduces in Article 19 the notion of an "international crime".<sup>112</sup> Significantly, Article 19(3) also expressly stipulates the same.<sup>113</sup>

However, the principles only demonstrate that a rule designed to protect the environment is capable of amounting to an "international crime" or *erga omnes*. It is extremely difficult to construe the particular principle established in the *Trail Smelter* case and that codified in the Stockholm Declaration as one of "essential importance for the safeguarding and preservation of the human environment".<sup>114</sup> The principle is specifically designed to resolve inter-State disputes. The focus of concern is the injury inflicted upon a State's interest, not the impact upon the interests of the international community at large. Even the ILC's draft Articles only require the State of origin to "negotiate with the affected State" to determine the legal consequences of the harm.<sup>115</sup> In the final analysis, it must be concluded that the principle developed in the *Trail Smelter* case and the Stockholm Declaration is not intended to protect global interests, only State interests.

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<sup>111</sup> *The Factory at Chorzow (Ger. v. Pol.)*, 1928 PCIJ, Ser. A, No. 17, at 47 (13 Sept. 1928).

<sup>112</sup> Draft Article 19(2), 1976 ILC Yb. 175. Some Western states (including the United States) rejected the Article as an unwise application of the notion of criminal responsibility, A/C 6/31/17 (1976). But it was generally agreed that "in the case of rules which protect the common and fundamental interests of all states . . . it is necessary to confer a right on any state individually to prosecute a claim". Judge Arechaga, 159 *Recueil des Cours de l'Académie de Droit International* 275 (1978-I). Art. 19 states: "An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime."

<sup>113</sup> *Ibid.* Art. 19(3) states that "an international crime may result, inter alia, from . . . a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas . . ."

<sup>114</sup> Stockholm Declaration, n. 106.

<sup>115</sup> ILC, *op. cit.*, n. 108, draft Article 21.

Hence, only those States that suffer environmental damage will be able to invoke the responsibility of the offending State to make reparation.

*Applicability of the general principle in wartime*

The *Trail Smelter* case and the Stockholm Declaration which, together, introduced the principle into customary international law, express the prohibition in broad terms and do not in any way preclude its application in the context of hostilities. This is reinforced by paragraph 5 of the World Charter for Nature in which the United Nations General Assembly (UNGA) overwhelmingly resolved that “nature shall be secured against degradation caused by warfare or other hostile activities”.<sup>116</sup> As part of an UNGA resolution, this provision is not inherently binding. It does, however, constitute further evidence supporting the applicability of the general principle in wartime.

On the other hand, Article 26 of the ILC’s draft Articles on “International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law” provides that “there shall be no liability . . . if the harm was directly due to an act of war [or] hostilities”.<sup>117</sup> However, this provision has no basis in customary international law and certainly does not prejudice the wartime application of the principle established in the *Trail Smelter* case and Stockholm Declaration. Indeed, Article 5 of the draft Articles expressly provides that “the present articles are without prejudice to the operation of any other rule of international law”.<sup>118</sup>

The author therefore concludes that the general principle of State responsibility for environmental damage is applicable in wartime.

*Circumstances precluding wrongfulness*

Even in the context of war, a State may be able to demonstrate the existence of certain circumstances that preclude the wrongfulness of acts which would otherwise be violations of the general principle. The “special circumstances” most likely to be invoked by a State causing wartime environmental damage are distress and necessity. It is important to appreciate that self-defence is not a defence to a violation of the general principle prohibiting environmental damage. It is only a defence to the use of force.<sup>119</sup> However, as will shortly be demonstrated, a State committing wartime environmental damage must be doing so in the course of lawful self-defence in order to assert a circumstance of distress or necessity.

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<sup>116</sup> The resolution was supported by over 100 states. The sole dissenting vote was cast by the United States. GA Res. 37/7, 37 UN GAOR Supp. (No. 51), UN Doc. A/RES/37/7 (1982), reprinted in 22 *ILM* 456 (1983).

<sup>117</sup> ILC, *op. cit.*, n. 108, at 171.

<sup>118</sup> *Ibid.*, Art 5.

<sup>119</sup> The “use of force” is prohibited by Article 2(4) of the UN Charter, subject to exceptions for self-defence (Article 51) and collective security authorized by the Security Council (Articles 39 and 42). Charter of the United Nations, 59 Stat. 1031, TS No. 993. This is discussed in detail in Section III.

- (a) Distress. The nature of “distress” in customary international law is codified in Article 32 of the ILC’s Draft Convention on State Responsibility.<sup>120</sup> Under the Article, distress may only be invoked if the State had no other means of saving the lives of persons entrusted to its care.<sup>121</sup> Furthermore, distress may not be invoked if the State in question has contributed to the occurrence of the situation of extreme distress, or if the conduct in question was likely to create a comparable or greater peril.<sup>122</sup> In the context of war, this means that a State must at least be acting in lawful self-defence and must satisfy the requirement of proportionality.
- (b) Necessity. The elements of “necessity” in customary international law are codified in Article 33 of the ILC’s Draft Convention.<sup>123</sup> As in the case of “distress”, a State must be acting in lawful self-defence because necessity may not be invoked if the State has contributed to the situation of necessity.<sup>124</sup> Unlike the case of “distress”, however, the state need not be acting to save lives. It need only be safeguarding “an essential interest of the State against a grave and imminent peril”.<sup>125</sup> At the same time, Article 33 imposes an upper limit on the amount of damage that may be inflicted by stipulating that the act of necessity must not “seriously impair an essential interest” of the victim State.<sup>126</sup>

The special circumstances precluding wrongfulness could rarely be invoked because an offending State would be required to demonstrate that:

- (1) it caused the environmental damage in the course of lawful self-defence; and
- (2) environmental destruction was either:
  - (a) the only means of saving lives; or [distress]
  - (b) the only means of safeguarding an essential State interest, in which case it must not seriously impair an essential interest of the victim State. [necessity]

However, the reality of modern armed conflict is such that the threat of post-war financial obligations is not likely to deter States or their individual representatives from engaging in environmental destruction during a war. After all, the issues over which wars are fought, (particularly when each State expects to be victorious) will invariably override any financial considerations! The inevitable conclusion is that while the general principle of State responsibility established in the *Trail Smelter* case and codified in the Stockholm Declaration is fully applicable to wartime environmental damage, its primary role will be in the context of post-war reparations rather than as a deterrent to the infliction of such damage during the course of war.

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<sup>120</sup> 1979 *ILC Yb.* 329.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> 1980 *ILC Yb.* 69.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

## ENVIRONMENTAL DAMAGE AND THE INTERNATIONAL LAW OF FORCE

In this section, the author shall examine the laws regulating the use of force *per se* (the *jus ad bellum*) with a view to their capacity to restrain environmental victimization. There are essentially three aspects within this regime that require investigation. They are:

- (a) Environmental Damage as a “Use of Force”.
- (b) Environmental Damage as a “Threat to the Peace” or “Breach of the Peace”.
- (c) Environmental Damage as Aggression.

Let us analyse the above aspects now.

**Environmental damage as a “use of force”**

The term “use of force” is not expressly defined in any international legal instruments. Brierly asserts that Article 2(4) only prohibits the use of “armed force” because this expression is used in the preamble of the Charter.<sup>127</sup> But this assertion appears to be unfounded. Brownlie comments that “the *travaux préparatoires* do not indicate that the phrase applied only to armed force” and “there is no evidence either in the discussions at San Francisco or in State or United Nations practice” suggesting such a limited construction.<sup>128</sup>

Given, then, that the “use of force” concept is wider than “armed force”, does it extend to the infliction of environmental damage? Brownlie stated in 1963 that “deliberate employment of natural forces by a State . . . can probably be regarded as a use of force”.<sup>129</sup> He suggests the “release of large quantities of water down a valley” and “the spreading of fire through a built up area or woodland across a frontier” as possible (albeit difficult) examples.<sup>130</sup>

More compelling is the growing support for the recognition of “coercive economic measures” as a “use of force”. The Charter of the Organization of American States, for example, provides in Article 16 that “no State may use . . . coercive measures of an economic or political character in order to force the sovereign will of another State”.<sup>131</sup>

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<sup>127</sup> Brierly, J. L., *The Law of Nations*, 6th edn. by Sir Humphrey Waldock, Oxford: Clarendon Press, 1963, at 415.

<sup>128</sup> Brownlie, Ian, *International Law and the Use of Force by States*, Oxford: Clarendon Press, 1963, at 266–267.

<sup>129</sup> *Ibid.*, at 376.

<sup>130</sup> *Ibid.*, at 362–363.

<sup>131</sup> 2 UST 2394, 119 United Nations Treaty Series 3. For similar resolutions, see Article 32 of the Charter of Economic Rights and Duties of States, GA. Res. 3281, 29 UN GAOR Supp. (No. 31), UN Doc. A/9631 (1974); Declaration of the Principles of International Law concerning Friendly Co-operation among States, GA. Res. 2625 (XXV), 25 UN GAOR Supp. (No. 28), UN Doc. A/8028 (1970); Declaration on the Inadmissibility of Intervention in Domestic Affairs of State and the Protection of their Independence and Sovereignty, GA Res. 2131, 20 UN GAOR Supp. (No. 14), UN Doc A/6014 (1965).

Of course, customary international law does not, at present, recognize economic coercion as a use of force<sup>132</sup> – such a claim by Iraq during the recent Persian Gulf conflict was firmly and universally rejected by the international community. Nevertheless, if international law is moving in the direction of recognizing economic coercion as “force”, *a fortiori* the infliction of deliberate environmental damage is likely to constitute a “use of force”.

Further evidence in support of the characterization of environmental damage as a “use of force” lies in Resolution 687 of the UN Security Council (the “cease-fire” resolution in the Persian Gulf conflict).<sup>133</sup> Paragraph 16 of the resolution expressly “reaffirms that Iraq is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources . . . as a result of Iraq’s unlawful invasion and occupation of Kuwait”.<sup>134</sup> Thus the reference to “Iraq’s unlawful invasion” could only relate to the prohibition on the use of force which, under the terms of paragraph 16, includes “environmental damage”.

In the author’s view the prohibition in Article 2(4) deliberately employs the broad term “force” in order to encompass any agency – including environmental manipulation – which has an adverse physical impact upon another State. It is the adverse physical impact, rather than the particular agency employed, which invites a conclusion that force has been used. Environmental damage, however, whether caused by the ignition of oil-well fires or by the pumping of oil into the sea, in itself constitutes an extremely adverse physical impact – worthy of full recognition as a use of force. This approach is consistent with the Oxford Dictionary’s definition of “force” as a “measurable and determinable influence, tending to cause motion of a body”.<sup>135</sup> The core of this definition is an “influence tending to cause motion”<sup>136</sup> – in other words, a “physical impact”. The qualifying criteria are that the influence or impact must be “measurable and determinable”<sup>137</sup> – in other words, “objectively assessable”.

Of course, not all environmental damage will amount to a use of force. Just as “a few stray bullets across a boundary”<sup>138</sup> would not be regarded as a violation of Article 2(4), small-scale environmental damage such as a small transboundary bushfire would also escape the prohibition. The question of the requisite quantum of damage is no clearer here than it is in relation to the International Environmental Law regime. The “agency” theory that we developed above suggests that the damage must at least be “measurable” or “objectively determinable”. However, it is certainly clear from Resolution 687 that

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<sup>132</sup> The concept of economic aggression was widely criticized as “liable to extend the concept of aggression indefinitely.” 7 UN GAOR Supp., No. 20, UN Doc. A/2211, at 58 (1952). Economic coercion was excluded from the 1974 consensus Definition of Aggression, GA Res. 3314, 29 UN GAOR 29th Sess., Supp., No. 31, UN Doc. A/9631 (1974).

<sup>133</sup> SC Res. 687, UN Doc. S/22430 (1991).

<sup>134</sup> *Ibid.*

<sup>135</sup> *The Concise Oxford Dictionary*, 7th edn., Oxford: Clarendon Press, 1982, at 382.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> Broms, Bengt, “The definition of aggression”, 154 *RCADI* 346 (1977).

severe damage, such as that inflicted on the environment during the Persian Gulf conflict, violates Article 2(4).

### **Environmental damage as a “threat to the peace” or “breach of the peace”**

Having established that environmental damage may constitute a “use of force”, it is appropriate to begin our investigation here by observing that most authorities regard the term “threat to the peace” as even wider in scope than “threat or use of force”. Róling explains that whereas “threat of force is illegal”, a “threat to the peace may be the consequence of legitimate activities”.<sup>139</sup> Kelsen, in fact, provides a long list of “threats to the peace” which would not amount to “threats or uses of force”.<sup>140</sup> Hence, we may confidently extend our previous finding that environmental damage may amount to a “use of force” to a conclusion that environmental damage may amount to a “threat to the peace” or “breach of the peace”.

Alternatively, the characterization of environmental damage as a “threat to the peace” or “breach of the peace” may be inferred even without resorting to indirect argumentation about the scope of the “use of force” concept. Dinstein states that Article 39 of the UN Charter gives the Security Council “a *carte blanche* in evaluating any given situation . . . Nowhere is the Council under less strictures than in its determination that a threat to the peace exists”.<sup>141</sup> Kelsen takes this view one step further, stating:

Since the Security Council is completely free in its determination of what is a threat to the peace or breach of the peace, it may determine as such any conduct of a State without regard to whether this conduct constitutes the violation of an obligation stipulated by pre-existing law. By declaring the conduct of a State to be a threat to, or breach of, the peace, the Security Council may create new law.<sup>142</sup>

Clearly, there is no legal impediment to a determination by the Security Council that acts of environmental damage constitute a “threat to the peace” or a “breach of the peace”. In the end, it is a question of political will, which in turn depends largely on the gravity of the damage and the perceived threat to international peace and security. It is significant that, in the context of the Persian Gulf conflict, the commencement of the allied “ground war” was reportedly triggered in part by growing evidence of Iraqi troops sabotaging Kuwaiti oil wells and inflicting environmental damage of potentially global proportions.

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<sup>139</sup> Róling, B. V. A., “On aggression, on international criminal law, on international criminal jurisdiction”, 2 *Nederlands Tijdschrift voor Internationaal Recht* 173–174 (1955).

<sup>140</sup> E.g. “If a state refuses to execute the decision of the International Court of Justice”, Kelsen, Hans, *The Law of the United Nations*, London: Stevens & Sons, 1950, at 727–728.

<sup>141</sup> Dinstein, Yoram, *War, Aggression and Self-Defence*, Cambridge: Cambridge University Press, 1988, at 86.

<sup>142</sup> Kelsen, *op. cit.*, n. 140, at 736.

### Environmental damage as “aggression”

The term “aggression” has a long legal history dating back to the early days of Greece. However, it was not until 1974, after 20 years of negotiations and submissions from representatives from 138 nations, that the UN General Assembly was able to reach a consensus with the adoption of Resolution 3314.<sup>143</sup> The overwhelming majority of nations have accepted the General Assembly’s Definition<sup>144</sup> and at least one paragraph, namely Article 3(g)<sup>145</sup> has been held by the International Court of Justice in the 1986 *Nicaragua* case to mirror customary international law.<sup>146</sup> At the outset, therefore, “the essence of crimes against peace has to be extracted from the General Assembly’s formulation”.<sup>147</sup>

The General Assembly’s Definition contains both general and enumerative elements. The general part is embodied in Article 1.<sup>148</sup> This is a repetition of the core wording of Article 2(4) of the UN Charter prohibiting the use of force, subject to several variations. The most significant variation for present purposes is that the Definition refers to the use of “armed force”<sup>149</sup> whereas the UN Charter simply prohibits the use of “force”.<sup>150</sup> Having demonstrated that acts of environmental damage may constitute a use of “force”, may they also constitute a use of “armed force”?

The natural starting point in answering this question is the enumeration of specific acts of aggression in Article 3 of the Definition. Sub-paragraph (b), the second of the seven illustrations, includes “the use of any weapon by a State against the territory of another State” as an act of aggression.<sup>151</sup> Can environmental manipulation be regarded as a “weapon”? As an initial observation, it is worth recalling the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.<sup>152</sup> Irrespective of the substance of the convention, its mere existence suggests that environmental modification was widely perceived as a potential weapon of war. This argument is reinforced by the Explanatory Note to Article 3(b), recording the unanimous agreement of the Special Committee that the expression “any weapon” is intended to include “conventional weapons”, weapons of mass destruction and, significantly, “any

<sup>143</sup> Definition of Aggression, GA Res. 3314, 29 UN GAOR 29th Sess., Supp., No. 31, UN Doc. A/9631 (1974).

<sup>144</sup> *Ibid.*, at 362–363.

<sup>145</sup> Article 3(g) of the definition provides that the “sending . . . of armed bands . . . which carry out acts of force against another state [may] qualify as an act of aggression”.

<sup>146</sup> *ICJ Reports. 1986*, 103. Since Article 3(g) was the most indirect form of aggression in the enumeration, it may be inferred by interpolation that “other portions of Article 3 may equally be subsumed under the heading of true codification.” Dinstein, *op. cit.*, n. 141, at 124.

<sup>147</sup> *Ibid.*, at 121.

<sup>148</sup> Definition of Aggression, Art. 1 states that: “Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.”

<sup>149</sup> Charter of the United Nations, 59 Stat. 1031, TS No. 993, Art. 2(4).

<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid.*, Art. 3(b).

<sup>152</sup> ENMOD Convention, n. 5, at 333.



other kind of weapon.”<sup>153</sup> Since environmental manipulation is capable of causing at least as much damage as conventional weapons, and potentially as much damage as weapons of mass destruction, it is submitted that environmental warfare is exactly the type of new weapon that the framers of the Definition of Aggression would have intended to be included in Article 3(b).

Nevertheless, if environmental manipulation cannot be regarded as a “weapon”, under Article 3(b) of the Definition, further investigation is still merited because Article 4 states that “the acts enumerated [in Article 3] are not exhaustive”.<sup>154</sup> To determine whether environmental manipulation might fall within the general definition of aggression as a “use of armed force”, it is necessary to consider the underlying interest at the heart of the concept of aggression, which was to be protected by the criminalization of “aggressive war”. The first clue as to the nature of this interest is found in the fifth preambular paragraph of the Definition: “Aggression is the most serious and dangerous form of the illegal use of force, being fraught in the conditions created by the existence of all types of weapons . . . with the possible threat of a world conflict and all its catastrophic consequences.”<sup>155</sup> Further insight is provided by an observation of George Finch in relation to the Nuremberg Trials in 1947. Finch canvasses the various contemporary views on the definition of aggression and comments that a good definition would apply to weapons and other scientific instruments “the outlawry of which is vitally necessary to safeguard not merely the future peace but civilization itself”.<sup>156</sup> Finally, the following statement by Judge Biddle (the American judge on the Nuremberg Tribunal) in his report of the trial to President Truman is of supreme intuitive value: “Aggressive war was once romantic; now it is criminal. For nations have come to realise that it means the death not only of individual human beings, but of whole nations, not only with defeat, but in the slow degradation and decay of civilised life that follows that defeat.”<sup>157</sup>

The common thread running through all these sources is that the criminalization of aggressive war was fundamentally designed to protect the welfare of future generations. It was not intended to be limited to military invasions and missile attacks. Rather, it extends to any conduct threatening future civilization. It is indisputable in this context that environmental damage is capable of threatening not only the welfare, but also the very survival of future generations of mankind. This reality was most clearly stated in the Commentary to the ILC’s draft Articles on State Responsibility.<sup>158</sup>

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<sup>153</sup> See paragraph 20 of the Report of the Special Committee on the Question of Defining Aggression, UN GAOR, 29th Sess., Supp. No. 19, at 9, UN Doc A/9619.

<sup>154</sup> Definition of Aggression, Art. 4.

<sup>155</sup> *Ibid.*

<sup>156</sup> Finch, George A., “The Nuremberg Trial and international law”, 41 *AJIL* 36 (1947).

<sup>157</sup> Report of Judge Francis Biddle to President Truman, 24 Nov. 1946, 15 *Dep’t of State Bulletin* 956 (1946).

<sup>158</sup> 2 *ILC Yb.* 95, 108 (emphasis added). “The astounding progress of modern science, although it has produced and continues to produce marvellous achievements of great benefit to mankind, nevertheless imparts a capacity to inflict kinds of damage which would be fearfully destructive not only of man’s potential for economic and social development but also of his health and of the very possibility of survival for the present and future generations.”

Thus, in this section we have demonstrated that deliberate wartime environmental damage may constitute: (1) an illegal use of force, giving rise to State responsibility to make reparation; (2) a threat to the peace, breach of the peace or act of aggression, for which the Security Council may authorize a collective military response, and; (3) aggressive conduct sufficient to render the war “aggressive”, thus giving rise to individual criminal responsibility for a “crime against peace”.

These conclusions, however, are subject to two very important qualifications. First, there remains considerable uncertainty as to the minimum quantum of environmental damage necessary in order to invoke each of the three consequences outlined above. We have suggested that the damage should be measurable and objectively determinable. Second, none of the principles in the *jus ad bellum* regime apply if the environmental damage is perpetrated in the context of lawful self-defence or authorized collective security.

## CASE STUDIES

### **The Persian Gulf conflict**

The period from 17 January to 28 February 1991 entranced the international community in a manner unprecedented in history. The realities of warfare in the 1990s were continuously and instantaneously relayed from a tiny war zone in the Persian Gulf to millions of homes in every country across the globe. As authorities feverishly recorded and reported casualties, property damage, fluctuations in world economies and shifts in political alliances, a more sinister threat began to emerge in the waters of the Gulf and in the skies above Kuwait. Graphic images of massive environmental destruction were almost biblical in their proportions. An ominous new dimension to the Gulf War was beginning to unfold. The United Nations Environment Program (UNEP) issued the following caution: “What is being destroyed today – and the damage which has been and could be caused could stay with us – all of us – for a very long time. It will affect generations to come which have had no say in the matter.”<sup>159</sup>

Until the Persian Gulf conflict, war and environmental damage arose independently, from time to time, as threats to our survival. To the horror of the international community, the Persian Gulf conflict brought about the “marriage” of war and environmental damage and the “birth” of a new menace – deliberate wartime destruction of the environment. As one observer commented:

The gulf war was the first conflict in which ecoterrorism played a major role in a combatant’s battle plan, and even though the fighting lasted only 42 days, it may turn out to be the most ecologically destructive conflict in the history of warfare. Experts are still sorting out the effects on the air, land and sea, some of which may persist for generations to come.<sup>160</sup>

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<sup>159</sup> United Nations Environment Program, “Gulf war oil spill: UNEP appeals for international action”, *News Release*, 1991 No. 2.

<sup>160</sup> Elmer-Dewitt, Phillip, “A man-made hell on earth,” *TIME* magazine, 18 March 1991, at 36.

Despite the outrage and demands for justice that echoed throughout the world community as it witnessed the environmental holocaust of the Gulf War, the international legal system was taken by surprise. The deliberate, massive environmental damage in the Persian Gulf conflict provides an immediate practical context within which we may observe the strengths and weaknesses of existing international law on deliberate wartime environmental damage. Although it is beyond the scope of this article to engage in a detailed assessment of the environmental damage inflicted during the conflict, we shall briefly outline the known circumstances and consequences of the oil spill and oil-well fires, so as to provide a factual basis for our legal analysis.

- (a) The Oil Spill: On 19 January 1991, two days after the commencement of hostilities, a giant oil slick began to form in the Persian Gulf off the Kuwaiti coast. By 15 April the slick was estimated to be “in the order of six million barrels”,<sup>161</sup> as compared to the release of only 250,000 barrels in the 1989 Exxon Valdez disaster.<sup>162</sup> Australian Foreign Minister, Senator Gareth Evans reported the existence of “credible evidence that the spill was deliberately engineered by the Iraqis . . . These particular environmental consequences are not to be attributed . . . to the inadvertent effect of artillery action or things of this kind”.<sup>163</sup> As to Iraqi motives, American officials were only able to speculate that Iraq was “attempting to disrupt allied military manoeuvres, or befool desalting plants, or produce a kind of ecological terrorism in retribution for the bombing”.<sup>164</sup>

Pictured on television screens across the globe, the first tragic victims of the spill were the numerous species of marine life that make up the rich and diverse ecology of the Persian Gulf:

The slick has killed an estimated twenty to thirty thousand sea birds . . . Small numbers of turtles and sea snakes seem to have died by being smothered from the oil. Fish mortalities have been fairly localised to shrimps and crabs which have died in very large numbers . . . Within the impacted area, most of the salt marshes and all of the mangroves have been oiled. It is likely then that all of the mangroves and virtually all of the salt marshes will die.<sup>165</sup>

- (b) The Oil-Well Fires: On 22 January 1991, US reconnaissance satellites detected plumes of dark smoke erupting from oil refineries and oil installations in

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<sup>161</sup> Kelly, Ros, Question Times, House of Representatives, 15 April 1991 (televised on Channel 2, 15 April 1991, 11:30 pm). The Minister explained that her report was based on information supplied by two Australian oil-spill experts in the Gulf: “The reality of it is you can’t read this sort of thing in the newspaper. This comes from advisors that this Government has taken the trouble to send to the area.”

<sup>162</sup> Saudi Arabian National Commission for Wildlife Conservation and Development (NCWCD), “Ecological consequences of the Arabian Gulf oil spill”, Fact File dated 25 February 1991

<sup>163</sup> News Conference, Parliament House, 26 January 1991, Transcript, at 23.

<sup>164</sup> McFadden, Robert, “Oil threatens fishing and water supply”, *New York Times*, 26 January 1991, at 4.

<sup>165</sup> Kelly, n. 161.

Iraqi-occupied Kuwait.<sup>166</sup> During mid-February, more fields were set ablaze in western Kuwait. In the final two weeks of the war, Iraq embarked upon large-scale sabotage of oil wells, especially in the Burgan field.<sup>167</sup> By 2 April 1991, 517 of Kuwait's 1,080 wells were ablaze, burning 3–4 million barrels of oil per day.<sup>168</sup> The general perception was that the sabotage was part of a vindictive "scorched earth" policy, although one Pentagon spokesman speculated that "there is an advantage from their point of view of starting a fire. It creates smoke, some would obscure the ground, make it difficult for us to find targets."<sup>169</sup> The fire blackened the skies, turning day into night in areas as far away as Turkey and Qatar. Sooty acid rain fell in Saudi Arabia and Iran and "reports of black snow in the Himalayas came from Swiss skiers".<sup>170</sup> The increase in soil acidity causes metal contamination, pollution of water supplies, reduction in farming yields and destruction of up to 60 per cent of the forests in the impacted area.<sup>171</sup>

Kuwaiti environmental experts have said that "spending one day in Kuwait City could be the equivalent of smoking 250 cigarettes".<sup>172</sup> Dr Sefein, a surgeon at Ahmadi Hospital in Kuwait, said he was dealing with "20 to 30 new cases every day involving breathing problems, urticaria, running noses, boils and sore throats".<sup>173</sup> Dr El Yacoub of the Kuwaiti Institute for Scientific Research reported that examination of several recently slaughtered sheep had revealed severe irritation of the lungs: "It means the hydrocarbons are taken to the smallest cell of the body, which means in the long term, the chances of cancer increase."<sup>174</sup>

#### *Application of the relevant law*

- (a) *Principle 1: Inter-State Environmental Damage.* Both the pumping of oil into the Persian Gulf and the ignition of oil wells took place in an area within the control of Iraq, namely Kuwaiti Territory. These activities caused environmental damage in Kuwait, Saudi Arabia, Iran and many other States, all of which were beyond the national jurisdiction of Iraq. Hence, provided this damage can be regarded as "significant", Iraq has violated Principle 1, as derived from the *Trail Smelter* case<sup>175</sup> and the 1972 Stockholm Declaration.<sup>176</sup> Note that the exceptions to Principle 1 do not apply

<sup>166</sup> Shenon, Philip, "Iraq sets oil refineries afire", *New York Times*, 23 January 1991, at A1, A6.

<sup>167</sup> Information Update, Kuwait's Oil Fires, Department of Foreign Affairs and Trade, 2 April 1991.

<sup>168</sup> *Ibid.*

<sup>169</sup> Fiedler, Tom, "Oil fires blanket Kuwait in smoke", *Age*, 14 February 1991, at 1.

<sup>170</sup> "Black snow", *AGE*, 1 April 1991, at 11.

<sup>171</sup> "Information update, Kuwait's oil fires", Department of Foreign Affairs and Trade, 2 April 1991.

<sup>172</sup> "Oil fire pollution drives away 150,000 Kuwaitis", *Sydney Morning Herald*, 27 March 1991, at 11.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

<sup>175</sup> *Trail Smelter* case, 3 *RIAA* 1905 (1938 & 1941).

<sup>176</sup> Stockholm Declaration, n. 106, at 1416.

because Iraq was engaged in an unlawful use of force in violation of Article 2(4) of the UN Charter.<sup>177</sup>

- (b) *Principle 2: Environmental Damage as a Use of Force.* To the extent that the pumping of oil into the Gulf and the ignition of oil-well fires constitutes a “use of force”, Iraq has violated Principle 2, as derived from the UN Charter.<sup>178</sup> Note that the exceptions to this Principle do not apply because Iraq was not engaged in authorized collective security, nor was it acting lawfully in self-defence.<sup>179</sup>

Applying the conception of force that we developed in the previous section, it is evident that Iraq’s acts of environmental victimization had an adverse physical impact upon other States. The question remains, however, whether the damage was sufficient in degree to amount to a “use of force”. This question is answered by paragraph 16 of UN Security Council Resolution 687, which expressly “re-affirms that Iraq . . . is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources . . . as a result of Iraq’s unlawful invasion and occupation of Kuwait”.<sup>180</sup> This resolution imposes liability for an unlawful use of force, acknowledging expressly that the unlawful use of force included environmental damage.

- (c) *Principle 3: The Marine Environment.* Iraq’s deliberate pumping of oil into the Gulf certainly amounts to the release of a harmful substance from a land-based source. It would also constitute pollution from an installation operating in the marine environment. All evidence indicates that the spill was the result of deliberate sabotage by Iraq, so as to preclude any suggestion that Iraq sought to minimize the damage. On this basis, it may be concluded that Iraq has violated the above Principle, as derived from customary international law (as reflected in the 1982 LOS Convention).<sup>181</sup>
- (d) *Principle 4: Property.* Much of the environmental damage inflicted by Iraq can be characterized as “destruction of property”. The despoiling of crops and farmland by acid rain, the poisoning of livestock by polluted air and the devastation of hundreds of oil installations by fire are but a few examples. All this damage caused by Iraq *prima facie* amounts to a violation of the above Principle, as derived from the 1907 Hague Regulations and the 1949 Geneva Conventions. But we must consider the application of the exception to the above Principle for destruction rendered absolutely necessary by military operations. Iraq would certainly argue that the oil spill was militarily necessary in order to deter an amphibious attack, and that the oil fires were militarily necessary in order to obscure the vision of allied pilots engaged in aerial attacks. Applying the “general theory of military necessity”, which we developed in the previous section, the following observations may be made:

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<sup>177</sup> UN Charter, n. 149, Art. 2(4).

<sup>178</sup> UN Charter, n. 149.

<sup>179</sup> *Ibid.*, Art. 51.

<sup>180</sup> UN Doc. S/22430 91–10541 32902(E).

<sup>181</sup> UN Doc. A/Conf. 62/122 (1982).

- (1) There was arguably some military benefit (albeit small) in polluting the Gulf and blackening the skies;
- (2) The magnitude of the damage to persons and objects unconnected to the military targets was indisputably far greater than the magnitude of the military advantage;
- (3) This disparity is evident from the vast amount of superfluous injury (which had no connection to the prevention of allied amphibious landings or to obscuring the vision of allied pilots) and from the substantial (as opposed to incidental) devastation of civilian objects;
- (4) The disparity could reasonably have been anticipated by Iraq, as evidenced by the numerous predictions and warnings by environmentalists, scientists and other experts, even in advance of the military confrontation, of severe environmental devastation;
- (5) Therefore, Iraq cannot invoke the doctrine of “military necessity” as a defence.

Even independently of this process of analysis, it may be argued that the majority of the oil-well fires, having been triggered by Iraq in the course of its retreat in the final hours of battle, could not reasonably have been regarded as militarily advantageous by any standards. Hence, on any interpretation of the “military necessity” exception, the ignition of the oil fires cannot escape illegality.

- (e) *Principle 5: Constraints on Military Strategy.* Principle 5 requires us to consider whether the oil spill and fires were militarily necessary, were proportionate to the expected military gain, avoided superfluous injury and impacted specifically on military targets.

Considering each of the four criteria individually, we immediately encounter the recurrent problem of ascertaining exactly what is meant by the terms “military necessity”, “proportionality”, “superfluous” and “civilian object”. We have already demonstrated how easy it would be for opposing States, taking different views of the scope of “military necessity”, to invoke a variety of competing arguments in their respective favours. Our “general theory of military necessity”, encompassing all four constraints, was applied in relation to Principle 4 (destruction of property not justified by military necessity) and will not be repeated here. In summary, however, it might be said that the damage inflicted was grossly excessive in relation to the meagre potential for military gain.

### *Responsibility for violations*

All violations of the relevant laws give rise to State responsibility to make reparation. Iraq’s obligation to provide monetary compensation for all the environmental damage has, in fact, been incorporated into paragraph 16 of Security Council Resolution 687 (the “cease-fire resolution”).<sup>182</sup>

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<sup>182</sup> SC Res. 687, UN Doc. S/22430 (1991).

Furthermore, violations of Principle 4 (destruction of property) and Principle 5 (constraints on military strategy) amount to “war crimes”. Any State that is able to secure custody of those persons who committed or ordered the destruction of property or the violation of the general constraints on military strategy, is entitled to prosecute those persons in its domestic courts and to impose criminal punishment including, where appropriate, the death penalty. Indeed, those who planned, prepared and organized the environmental victimization can be regarded as having planned, prepared and organized a “war of aggression” – a “crime against peace” for which there is also individual criminal responsibility.

### **NATO bombing campaign and the Kosovo crisis**

During the war between Serbia and Montenegro (then generally known as the Federal Republic of Yugoslavia) and the North Atlantic Treaty Organization (NATO), US bombers under NATO command repeatedly attacked a petrochemical and fertilizer factory complex at Pančevo, in Serbia. The Pančevo complex was selected as a target because it was believed by NATO to produce military chemicals as well as civilian ones. Pančevo’s mayor reported that the complex was struck by at least 56 aircraft-launched missiles on 23 days between 24 March and 8 June 1999. The complex’s chemical storage tanks, along with production facilities, were destroyed; thousands of tons of toxic chemicals were released into the River Danube. In addition to the damage to the Danube, the air in Pančevo was filled with fumes for several days, causing respiratory and stomach ailments. Leaves turned yellow or black; fish caught in the Danube looked sickly and local government officials temporarily banned fishing.

As a peacetime incident, the pollution from Pančevo might have been viewed as catastrophic; in the larger context of the war, it attracted less attention. Nonetheless, in the new climate of environmental awareness, the United Nations Environment Program (UNEP) dispatched a fact-finding team to Yugoslavia. The team, led by Pekka Haavisto, found no evidence of an environmental “disaster”, but concluded that measurable damage had occurred. (Environmental management in Serbia was generally poor; the UNEP report noted that some, or even most, of the environmental damage it found might have predated NATO’s attacks.) Pekka Haavisto reported that there was no “major ecocide or countrywide catastrophe”, but rather a few “chosen hot spots where immediate action has to take place”. Of these hot spots, the hottest was Pančevo.<sup>183</sup>

UNEP’s investigation was one of the three mechanisms employed to resolve the environmental dispute between Serbia–Montenegro and the NATO nations resulting from the destruction of Pančevo. The UNEP fact-finding mission looked at the environmental aspects of the problem alone and was concerned with questions of fact rather than questions of law. The other mechanisms considered the environmental damage at Pančevo as a relatively small event in the context of the larger war.

While the war was still going on, the Federal Republic of Yugoslavia brought an action before the International Court of Justice (ICJ) against 10 NATO nations involved

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<sup>183</sup> *UNEP Report*, 1999.

in the war: Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom and the United States. Cases against two parties (Spain and the United States) were quickly dismissed on jurisdictional grounds; the ICJ declined to order a halt to the conflict, but the other eight cases remained before the court until 2004, when they too were dismissed for lack of jurisdiction. Among the illegal harms alleged in the lawsuits was the environmental damage from the destruction of the complex at Pančevo.

Also while the war was still in progress, the Office of the Prosecutor (OTP) of the International Criminal Tribunal for the former Yugoslavia established a committee to report on war crimes allegedly committed by NATO during the conduct of the war, including the destruction of the chemical complex at Pančevo. A year later, the OTP's Final Report, issued on 13 June 2000, stated that none of NATO's actions merited further investigation or prosecution before the International Criminal Tribunal for the former Yugoslavia (ICTY).

In reaching its own conclusion, the OTP made some surprising observations about the law of war and the environment. The fundamental rule in cases such as these, according to the OTP, was set forth in Article 55 of Protocol I to the Geneva Conventions.<sup>184</sup>

Although the idea that Article 55 might state a rule of customary international law is encouraging from an environmental perspective, the OTP's extremely high standard set by the rule is less so: "Widespread, long-term, and severe . . . is a triple, cumulative standard" that is not met by "ordinary battlefield damage of the kind caused to France in World War I". Rather, the harm must "be measured in years rather than months". The use of the World War I example is especially disheartening; both humanity's understanding of the environment and the destructive potential of war have increased enormously since then, and there has been a fundamental shift in environmental values.

The OTP theorized that even the damage caused by oil spills and fires in the first Gulf War might not meet the Protocol I standard, although the harm was far greater than that at Pančevo and the military necessity probably non-existent. The OTP could easily have found that the Pančevo bombing was not a prosecutable environmental war crime under a post-Gulf War standard. (The evidentiary problem alone – the difficulty or impossibility of distinguishing environmental damage caused by NATO's actions from pre-existing damage caused by careless management – would have sufficed.) Instead, its report leaves the reader wondering what actions in twentieth- or twenty-first-century warfare, if any, might constitute environmental war crimes.

The NATO bombing campaign did cause some damage to the environment. For instance, attacks on industrial facilities such as chemical plants and oil installations were reported to have caused the release of the pollutants, although the exact extent of this is presently unknown. The basic legal provisions applicable to protection of the environment in armed conflict are Article 35(3) of Additional Protocol I and Article 55 as discussed above.<sup>185</sup>

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<sup>184</sup> N. 31.

<sup>185</sup> Schwabach, Aaron, *International Environmental Disputes – A Reference Handbook*, ABC Clio, Santa Barbara, California 2006, at 14.



Neither the USA nor France has ratified Additional Protocol I. Article 55 may nevertheless reflect current customary international law.<sup>186</sup> In any case, Articles 35(3) and 55 have a very high threshold of application. Their conditions for application are extremely stringent and their scope and contents imprecise. For instance, it is generally assumed that Articles 35(3) and 55 only cover very significant damage. For instance, it is thought that the notion of “long-term” damage in Additional Protocol I would need to be measured in years rather than months, and that, as such, ordinary battlefield damage of the kind caused to France in World War I would not be covered. The great difficulty of assessing whether environmental damage exceeded the threshold of Additional Protocol I has also led to criticism by ecologists. It is the committee’s view that similar difficulties would exist in applying Additional Protocol I to the present facts, even if reliable environmental assessments were to give rise to legitimate concern regarding the impact of the NATO bombing campaign. Accordingly, these effects are best considered from the underlying principles of the law of armed conflict, such as necessity and proportionality.

The alleged environmental effects of the NATO bombing campaign flow in many cases from NATO’s striking of legitimate military targets compatible with Article 52 of Additional Protocol I such as stores of fuel, industries of fundamental importance for the conduct of war and for the manufacture of supplies and material of a military character, factories or plant and manufacturing centre of fundamental importance for the conduct of war. Even when targeting admittedly legitimate military objectives, there is a need to avoid excessive long-term damage to the economic infrastructure and natural environment with a consequential adverse effect on the civilian population. Indeed, military objectives should not be targeted if the attack is likely to cause collateral environmental damage that would be excessive in relation to the direct military advantage which the attack is expected to produce.<sup>187</sup>

### Use of depleted uranium

During the Kosovo war, and more recently during the Iraq war, the United States has been criticized for its use of munitions made from depleted uranium. These criticisms are based on a fundamentally incorrect understanding of the facts; as with biopiracy and foreign trade, activists have once again picked the wrong battle. This is symptomatic of a problem that affects both international environmental law and international environmental activism and is particularly evident in attempts to bring about environmentally sound rules in two areas: the law of international trade and the law of war. Opponents of “globalization” lack a clear focus, but opponents of war do not.

The phrase “depleted uranium” is misleading and probably the primary cause of the popular misconceptions surrounding the substance. The name conjures up images of

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<sup>186</sup> See, however, the 1996 Advisory Opinion in the *Legality of Nuclear Weapons* case, where the International Court of Justice appeared to suggest that it does not. *ICJ Rep. 1996*, at 242, para.31.

<sup>187</sup> Rogers, A. P. V., “Zero casualty warfare”, 82 *IRRC* 177–178 (2000).

nuclear waste left over from power plants being fired from anti-tank weapons and scattered across the landscape of Kosovo, Iraq, or any place where the US military is active. Depleted uranium is not material that has been used in nuclear power plants; it is uranium from which the radioactive isotopes have been extracted, leaving an inert metal heavier than lead. Uranium is chemically poisonous, of course, like many metals; ingesting or inhaling it can be harmful, just as ingesting or inhaling lead might be.<sup>188</sup> Its use may have military advantages, but those may be outweighed by the public relations problems that are attached to it.

There is no evidence of use of depleted uranium (DU) projectiles by NATO aircraft during the bombing campaign. There is no specific treaty ban on the use of DU projectiles. There is a developing scientific debate and concern expressed regarding the impact of the use of such projectiles and it is possible that, in future, there will be a consensus view in international legal circles that use of such projectiles violates general principles of the law applicable to the use of weapons in armed conflict. No such consensus exists at present. Indeed, even in the case of nuclear warheads and other weapons of mass destruction – those which are universally acknowledged to have the most deleterious environmental consequences – it is difficult to argue that the prohibition of their use is in all cases absolute.<sup>189</sup> In view of the uncertain state of development of the legal standards governing this area, it should be emphasized that the use of depleted uranium or other potentially hazardous substance by any adversary to conflicts within the former Yugoslavia since 1991 has not formed the basis of any charge laid by the Prosecutor. It is acknowledged that the underlying principles of the law of armed conflict, such as proportionality, are also applicable in this context.

#### PREVENTION OF FUTURE ENVIRONMENTAL DAMAGE – REITERATION AND CONDEMNATION

Although existing legal mechanisms may provide sufficient prohibitions against wartime environmental damage, they cannot actually prevent environmental destruction. The international community, however, can take several actions to deter warring States from abusing the environment in the future. Firm reiteration and broad publication of existing prohibitions is one step toward prevention. Another is swift action to condemn individual State breaches, if not to address them further.

The threshold inquiry in determining whether a party may be punished for wartime environmental damage is to identify the rules and laws of war binding on the parties in question. A much generalized summary of the many comments addressing this question concludes that the rules contained in the Fourth Geneva Convention are binding not only on its practically universal body of signatories, but also on the few non-signatory

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<sup>188</sup> *Royal Society Report*, 2002, at 63.

<sup>189</sup> *Legality of Nuclear Weapons*, ICJ Rep. 1996, at 242.

nations.<sup>190</sup> This binding effect is based on customary and conventional grounds that are not easily distinguishable. Protocol I of the Fourth Geneva Convention, on the other hand, is less widely ratified, so its environment-specific provisions are not likely to be considered universally binding.<sup>191</sup>

Examination of the relationship between Article 147 of the Fourth Geneva Convention and Article 85 of Protocol I provides yet another example of how established principles of the laws of war offer more certain protection of the environment than the environment-specific provisions.<sup>192</sup> These two articles specify the actions that give rise to a grave breach under their respective documents.

Article 85 has been criticized for its failure to enumerate the violation of the environment-specific provisions in Protocol I as a grave breach. Of the four categories of civilian objects receiving special protection under Protocol I – cultural objects and places of worship under Article 53, indispensable objects under Article 54, the natural environment under Article 55, and dangerous works and installations under Article 56 – neither Article 54 nor Article 55 is expressly incorporated in the Article 85 provisions on grave breaches of Protocol I. In light of the specific inclusion of two other categories of civilian objects in Article 85(3), it would appear at first that the drafters did not intend a violation of Article 55, which protects the natural environment, to constitute a grave breach. This is not the case, however, as a closer examination of Article 85 reveals.

Under Article 85(4), which expressly refers to Article 53, it is a grave breach to make the object of attack historic monuments, art works or places of worship.<sup>193</sup> This reference to Article 53, however, does not mean that violations of other Protocol I provisions not explicitly discussed in Article 85 do not constitute grave breaches. This is because the objects encompassed by Article 53 are also the subject of a separate 1954 convention that itself does not provide for grave breaches. Thus, had Article 53 objects not been specifically included in the grave breaches section of Protocol I, some doubt might have existed as to whether those objects were meant to be protected exclusively under the 1954 convention, and thereby excluded from Protocol I's grave breach protection.

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<sup>190</sup> Several authors have produced works specific to humanitarian and armed conflict law which are useful in understanding the complicated problem of separating customary from conventional norms. See, e.g. Abi-Saab, Georges, "The 1977 Additional Protocols and general international law: some preliminary reflexions", in Delissen, Astrid J. M. and Gerard J. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead*, The Hague: Martinus Nijhoff Publishers, 1991 at 115; Aldrich, George H., "New life for the laws of war", 75 *AJIL* 764 (1981); Meron, Theodor, "The Geneva Conventions as customary law", 81 *AJIL* 348 (1987) at 419.

<sup>191</sup> For example, of states engaged in the 1991 Gulf War, Iraq, the United Kingdom, and the United States have not yet ratified Protocol I. For a discussion of possible US ratification of Protocol I, see generally Aldrich, George H., "Prospects for United States ratification of Additional Protocol I to the 1949 Geneva Conventions", 84 *AJIL* 1 (1991). Now that over one hundred states have accepted Protocol I, however, concerns are diminishing that it will not achieve the same kind of broad acceptance as the 1949 Fourth Geneva Convention, which has over 165 parties.

<sup>192</sup> See Protocol I, n. 31, Art. 85

<sup>193</sup> Protocol I, n. 31, Art. 85, para. (4).

More problematic is Article 85(3)(c)'s explicit inclusion of an attack on works and installations containing dangerous forces as a grave breach. These are protected as civilian objects under Article 56, although the article number itself does not appear in Article 85. When compared to the natural environment provision of Article 55, works containing dangerous forces are as a rule much more tangible specific objects. This is one possible reason why the grave breach provisions in Article 85 explicitly name such objects but say nothing about the natural environment *per se*. Attempts at Protocol I's Drafting Conference to include Article 55 offences as grave breaches highlighted the difficulty of placing the natural environment in a section on civilian objects if it is not, in fact, the same kind of tangible, specific object as items covered by other civilian object provisions (such as dams and places of worship).<sup>194</sup>

In light of the foregoing discussion, a thorough reading of Protocol I reveals that Article 85's failure to expressly list an Article 55 violation as a grave breach does not mean that such action escapes grave breach status. Article 85(3)(b) specifically identifies as grave breaches "launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii)."<sup>195</sup> Importantly, Article 57(2)(a)(iii) is a general provision requiring precautions to be taken with respect to all civilians and civilian objects. Its invocation in Article 85(3), therefore, extends Article 85's coverage to all four categories of civilian objects, including the natural environment as specified in Article 55. Article 55 can be said to have been implicitly written into Article 85 due to the overall structure of the Protocol I, and thus a violation of Article 55 constitutes a grave breach.

Article 85(5) of Protocol I adds that "without prejudice to the application of the [four Geneva] Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes."<sup>196</sup> This provision adds another level of severity to the condemnation of acts constituting grave breaches and indicates the seriousness with which the Protocol signatories view such violations. Thus, Article 85(5) also allows punishment of harms to the environment not within the scope of Protocol I's environment-specific provisions, but that violate provisions of one of the four Geneva Conventions, such as

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<sup>194</sup> For the International Committee of the Red Cross' query as to whether the environment is or is not an object, see 14 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* 171–179 (1978). For Sweden's attempts to include objects indispensable to the survival of the civilian population, see 10 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* 173 (1978). For Norway's effort to incorporate indispensable objects, see 9 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* 320 (1978).

<sup>195</sup> Protocol I, n. 31, Art. 85, para. 3(b). Article 57(2)(a)(iii) calls for precautions to be taken in launching attacks which would cause incidental civilian losses, injury or damage "which would be excessive in relation to the concrete and direct military advantage anticipated."

<sup>196</sup> Protocol I, n. 31, Art. 85, para. 5.

damage that is wanton but does not meet the threshold requirements of being widespread, long-term and severe.

## IMPLEMENTING EXISTING PROTECTIONS

Existing mechanisms to implement, enforce and improve the foregoing environmental protections preclude the need to create a new convention devoted to protecting the environment in wartime. Efforts towards creating such a document would divert too much expertise, funding and time<sup>197</sup> from the more important tasks of educating the relevant populations (public, military, diplomatic and political) about applicable rules, and implementing, enforcing and improving those rules.<sup>198</sup>

The 1991 Gulf War and ensuing developments provide a prime opportunity for demonstrating the pertinence of the laws of war to environmental protection by using existing “enforcement” mechanisms. For example, the International Fact-Finding Commission established under Article 90 of Protocol I<sup>199</sup> is competent to inquire into alleged grave breaches without prejudicing requests for similar investigations under Article 149 of the Fourth Geneva Convention. More should be done to publicize that commission’s work in governmental and public circles and to actively promote investigation of environmental damage. Broader dissemination of the commission’s work could be accomplished through sharing information with non-governmental organizations, particularly environmental groups, and with professional and academic communities interested in dispute resolution.

In addition, the commission to administer the UN compensation fund authorized under Security Council Resolution 687<sup>200</sup> can help publicize the possibility of compensation for war-related damage to the environment. The compensation commission’s governing council guidelines are to serve for presenting and evaluating claims arising out of “direct losses, damage, including environmental damage . . . as a result of Iraq’s unlawful invasion and occupation of Kuwait”.<sup>201</sup> This language leaves several avenues open for pursuit of environmental claims.

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<sup>197</sup> Green, L. C., “The environment and the law of conventional warfare”, 29 *CYIL* 235 (1991).

<sup>198</sup> Energies might be better spent reformulating the law of naval warfare, which is in a much more chaotic state of uncertainty as to which laws actually govern naval warfare. See Ronzitti, Natalino, “The crises of the traditional law regulating international armed conflicts at sea and the need for its revision”, in *id.* (ed.), *The Law of Naval Warfare*, The Hague: Martinus Nijhoff Publishers, 1988, at 50–51.

<sup>199</sup> Protocol I, n. 31, Art. 90.

<sup>200</sup> UN SC Resol. 687, reprinted in *U.S. Department of State Dispatch*, Vol. 2, No. 14 (1991) [hereinafter Resol. 687].

<sup>201</sup> Compensation Fund, *U.N. Chronicle*, Dec. 1991, at 19. This language parallels that of SC Res. 687 holding Iraq responsible for such damage. See Resol. 687, n. 200.

As for improving existing law, amendment of Protocol I is possible under Article 97.<sup>202</sup> Amendments might be proposed lowering Protocol I's damage threshold, or identifying the environment as a non-military objective.

A longer-term and more problematic project, less related to environment-specific provisions than to efforts by some international bodies to expand acceptance of Protocol I, is the attempt to amend those provisions that are preventing ratification by the United States. There is some indication that the United States has only limited objections to the environment-specific provisions.

Finally, intergovernmental consultation might be made more fruitful by focusing on how to incorporate into State practice those parts of Protocol I that protect the environment, and that "reflect customary international law or are positive new developments, which should in time become part of that law". Governments could revise their military manuals to reflect the importance of environmental protection. Germany's revised manual offers one such helpful model. The United States could undertake similar efforts to show its willingness to accept in principle certain provisions of environmental protection in wartime.

#### THE CALL FOR NEW LAW

As a result of the tremendous environmental devastation during the Persian Gulf War, there is a heightened interest within the world community about the sufficiency of international law to protect the environment in combat. International law already in effect provides sufficient means to discourage needless environmental destruction during wartime, if the law is enforced. Critics of existing law, however, refer to the environmental protections in the laws of war as "indirect".<sup>203</sup> They argue that the laws of war do not sufficiently discourage environmental destruction.

Greenpeace has argued, for instance, that the laws of war are fundamentally flawed. Greenpeace seems to argue that since commanders in proper circumstances can subordinate environmental concerns to military necessity, there is little restriction on damage. While Greenpeace did not specifically recommend any action in its 1991 report on the Persian Gulf War, its conclusion appeared to be that the international community should opt to specifically prohibit more war fighting practices.

Greenpeace and others have also urged the formal adoption of the 1977 Geneva Protocol I as a means for providing enhanced protection of the environment during

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<sup>202</sup> The relevant text of Article 97 states: "Any High Contracting Party may propose amendments to this Protocol. The text of any proposed amendment shall be communicated to the depository, which shall decide, after consultation with all the High Contracting Parties and the International Committee of the Red Cross, whether a conference should be convened to consider the proposed amendment." Protocol I, n. 31, Art. 97, para. 1.

<sup>203</sup> See Diederich, Michael D., "'Law of war' and ecology – a proposal for a workable approach to protecting the environment through the law of war", 136 *Military Law Review* 137 (1992).

wartime, despite its vagueness.<sup>204</sup> Greenpeace, for instance, described the 1977 protocols as “the most important instruments relating to the conduct of warfare and the natural environment”.<sup>205</sup> However, the fact remains that the environmental articles of 1977 Geneva Protocol I are vaguely worded. New environmental protections in international law may be inevitable, but the United States must ensure that it can comply with even the most far-fetched interpretations of their language. If terms such as “long-term” or “widespread” are used to describe prohibited environmental damage, then those terms must be defined in the instruments themselves.

In addition, the United States’ ability to respond militarily to a threat should not be compromised. As Colonel Terry explained, “only through a military capability such as reflected in the coalition reaction to Iraqi aggression can the environment, in the long term, best be preserved”. In other words, international law should not constrict “the prudent use of modern weapon systems” to respond to violent aggression. The United States and its coalition allies were able to suppress aggression in the Gulf with astoundingly low casualties. Had commanders been prohibited from using certain weapon systems, the war may have been more costly in allied lives.

Further, laws of war that are too restrictive of legitimate use of force may tend to penalize nations that follow the law. Nations that follow the law will likely come to depend on enemy nations’ compliance. For instance, weapon systems that are perceived as illegal may be discarded as obsolete, leaving no means to respond to the hostile use of similar weapons. Historically, nations have violated accepted international treaties when they saw a distinct military advantage for themselves. During World War II, for instance, Germany routinely violated the London Convention on Submarine Warfare of 1936 by sinking surface vessels without giving advance warning.<sup>206</sup> Since the allies had no ready means for combating Germany’s strategy, it was effective.<sup>207</sup>

If the United States were to formally adopt language similar to that set forth at Geneva Protocol I, it should not be speculative or vague, as is the present language. For example, the articles might arguably be more acceptable if the “or may be expected” language was eliminated from Articles 35(3) and 55. Thus, actions such as Iraq’s environmental terrorism would be explicitly barred, but legitimate conventional warfare with unintended environmental damages would not. In addition, the terms “widespread”, “long-term” and “severe” should each be separately defined.

Another approach that has been proposed is to strengthen the enforceability of the laws of armed conflict so that sanctions present a real deterrent to environmental terrorism. This approach is driven by the assumption that a nation will not comply with a law it does not respect and it will not respect a law unless there is a reasonable expectation that someone will attempt to enforce it. This approach would make war crimes prosecutions

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<sup>204</sup> Aldrich, George H., “Progressive development of the laws of war: a reply to criticisms of the 1977 Geneva Protocol I”, 26 *Va.JIL* 711 (1986).

<sup>205</sup> *Ibid.*, at 711.

<sup>206</sup> Ziegler, David, *War, Peace, and International Politics*, New York: Longman, 1977, at 154–155.

<sup>207</sup> *Ibid.*

more frequent, but such a court would still be forced to rely on the initiative of nations to enforce its decisions. However, as a first step in establishing a more institutional view of international law, a permanent court would be worthy of careful consideration.

### **Is a fifth Geneva Convention needed?**

Some non-governmental organizations (NGOs), including Greenpeace, have expressed the belief that the existing law relating to the conduct of war is inadequate to protect the environment during armed conflicts and have called for a fifth Geneva Convention. The Legal Committee of the United Nations General Assembly has discussed a convention aimed specifically at the protection of the environment during war; the United States opposes the idea on the grounds that existing international law, if complied with, already provides adequate protection.

### A PROPOSED ENVIRONMENTAL ARTICLE

The concerns of international environmentalists that the environment is not prominently considered in the laws of war are understandable. While protections for the environment do exist in the laws of war, a tribunal would likely be required to “back door” the environmental charges by charging other crimes. Still, the United States must be cautious not to adopt an unacceptable environmental article. For explicit environmental protection acceptable to US interests, in the opinion of the author, a satisfactory compromise article could state: “It is prohibited to employ methods or means of warfare that are intended to cause widespread, long-term and severe damage to the natural environment.” In addition, “widespread” could be defined as, for example, 1,500 square miles. “Long-term” could be defined as 25 years, and “severe” could be defined as any pollution that poses a substantial threat to public health or welfare, or the environment.

### CONCLUSION

The development of an environment framework regulating military operations is still in its infancy. In practice, apart from the indirect protection resulting from the constraints that aim to protect civilian objects, only the prohibition against causing unnecessary damage and the principle of proportionality address the environmental consequences of the use of conventional means and method of warfare. Without more precise standards, it is nearly impossible for military decision makers to ascertain what acceptable and lawful environmental damage is. As has been felt necessary for peacetime environmental law, there is a need for more meaningful and precise measures, standards or mechanisms. In concluding, it must be emphasized that the existence of applicable laws is no guarantee of their implementation, and the availability of avenues of reform does not mean they will eventuate. Until recently, there was every reason to be skeptical. After all, the environment had suffered war wounds before without any legal repercussions. In seeking to



protect the environment in its own right, the temptation is strong to identify new or specialized protections, but the wiser course is to pursue broader acceptance and more vigorous enforcement of existing rules. The task of those interested in preventing war's devastation of the environment is to ensure that such protections do not stray too far from foundational principles of international humanitarian law which, over the years, have extended to more and more people, places and things effective protection from the ravages of war. However, if we are to seriously address environmental protection, it must come from a genuine desire within each individual State to actively ensure compliance with the rules of war as they relate to safeguarding the planet.

## EDITORIAL NOTE



THE *NORTH SEA CONTINENTAL SHELF* CASES REVISITED:  
IMPLICATIONS FOR THE BOUNDARIES IN THE NORTHEAST  
ASIAN SEAS\*

Miyoshi Masahiro<sup>†</sup>

INTRODUCTION

The *North Sea Continental Shelf* cases of 1969, the first of their kind in the history of continental-shelf boundary delimitations, have had great influence on the development of the law of maritime boundary delimitation over the past 40 years, during which some 20 maritime boundary delimitation cases have been decided by international arbitral and judicial tribunals. It was quoted even in the most recent maritime delimitation case between Romania and Ukraine in the Black Sea of 3 February 2009 before the International Court of Justice (hereinafter the “ICJ”).<sup>1</sup>

Being the first-ever case of continental-shelf boundary delimitation, the *North Sea* cases had to address a number of basic issues related to the regime of the continental shelf: the very basis for title to the continental shelf; whether the regime is a customary rule of international law; whether the delimitation rule under the 1958 Convention on the

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\* This paper was originally prepared for presentation at the Japanese–Korean conference sponsored by the Korean Society of International Law and held at Kyushu University Faculty of Law, Fukuoka, Japan on 21 August 2009: *The 40th Anniversary of the ICJ Judgment on the North Sea Continental Shelf Cases – Reflections and Prospects*. The author gratefully acknowledges the permission of the conference organisers for the publication of this paper elsewhere for a wider readership besides in the conference file. Incidentally, the Korean Society sponsored another conference in commemoration of the 40th anniversary of the adoption of the 1969 Vienna Convention on the Law of Treaties in Seoul on 19 November 2009. See the conference file: *Four Decades of the Vienna Convention on the Law of Treaties: Reflections and Prospects*.

<sup>†</sup> Of the Editorial Board of this *Yearbook*.

<sup>1</sup> The *Romania/Ukraine Maritime Delimitation in the Black Sea* case quotes the *North Sea* cases, for example, in respect of the basis of the coastal State for title to the continental shelf and the exclusive economic zone:

As the Court stated in the *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* cases, “the land is the legal source of the power which a State may exercise over territorial extensions to seaward” (*Judgment, I.C.J. Reports 1969*, p. 51, para. 96).

*ICJ Rep. 2009*, at 26, para. 77.

Continental Shelf is a customary rule of international law; how a customary rule of international law is formed; how the conduct of a State has an impact on the formation of a customary rule of international law; reservations to a multilateral convention etc., to mention just a few of them. As, however, this conference is intended to address the impact of the *North Sea* cases on the contemporary problems and issues of maritime boundary delimitation in the Northeast Asian seas, it is proposed in this paper to take up just a few issues: (1) the “natural prolongation” doctrine as enunciated in the *North Sea* cases, (2) the “equidistance principle” as provided for in Article 6(2) of the 1958 Geneva Convention on the Continental Shelf, (3) “equitable principles” as proposed for application in the *North Sea* cases, and (4) taking into account “relevant circumstances” in the application of equitable principles. An attempt will be made to analyse how the *North Sea* cases did or did not influence the subsequent arbitral or judicial cases.

Before proceeding to the main part of my discussions, I would like to point out, as does Prosper Weil,<sup>2</sup> that the law of maritime boundary delimitation has evolved mainly through the cases before the arbitral and judicial tribunals. This is not to say, of course, that numerous international agreements on maritime boundary delimitation have not played a major role in developing the law. However, the trouble with this source of law is that, generally, little or no information is available in the records of negotiations that led to the agreements. By contrast, arbitral and judicial tribunals, especially the latter, have published materials to which access is open to make research in the case law comparatively easy. What follows, therefore, is mainly based on the jurisprudence with some additional inputs, as appropriate, from State practice as manifested in the relevant international agreements.

## THE BASIS OF TITLE TO THE CONTINENTAL SHELF

### **Finding of the *North Sea Continental Shelf* cases**

While it was requested to indicate the “principles and rules of international law . . . applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them”, rather than deciding on the delimitation lines as such, the ICJ found it necessary at first to address the very concept of the continental

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<sup>2</sup> Weil, Prosper, *Perspectives du Droit de la Délimitation maritime*, Paris: Editions A. Pedone, 1988, at 13, where he says based on his abundant experience of acting as counsel for parties to maritime boundary delimitation cases before the ICJ and arbitral tribunals:

La conquête de la délimitation maritime par le droit n'est en fin de compte l'oeuvre ni de la convention ni de la coutume, mais celle de la jurisprudence qui, loin d'apparaître comme une source subsidiaire du droit international, remplit ici la mission d'une source primaire et directe de droit, même si elle a choisi modestement d'en porter le crédit au compte du droit coutumier (emphasis added).

shelf before proceeding to its main job,<sup>3</sup> because this was the first-ever case of the continental shelf brought before an international tribunal. The Court defined the continental shelf as the land territory's offshore extension over which the coastal State has sovereign rights:

the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources.<sup>4</sup>

Such rights, the Court says, are “the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, *though quite independent of it*”.<sup>5</sup> Here, by adding “though quite independent of it”, the Court already implies its recognition of the coastal State's rights as an established customary rule of international law.

Thus, the continental shelf is the natural prolongation of the land territory into and under the high seas via and beyond the bed of the territorial sea. But that being so, it gave rise to the question of whether the coastal State can have such rights over the seabed under the high seas in international law. In other words, the question arose as to whether a claim to the seabed beyond the territorial sea could not be an encroachment on the freedom of the high seas. Indeed, this would have been another reason why the Court thought itself bound to address the basic concept of the

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<sup>3</sup> In the words of Judge Fouad Ammoun in his separate opinion:

La cour étant appelée, en vertu des compromis par la notification desquelles elle a été saisie, à énoncer les principes et les règles applicables aux différends qui opposent la République fédérale d'Allemagne aux Royaumes du Danemark et des Pays-Bas sur la délimitation des zones revenant à chacun de ces pays du plateau continental que constitue l'ensemble de la mer du Nord, *avait à déterminer au préalable le concept même du plateau continental dont la délimitation étant l'objet du litige* (emphasis added).

*ICJ Rep. 1969*, at 100, para. 1.

<sup>4</sup> *Ibid.*, at 22, para. 19. This definition is repeated and confirmed later on when the Court says:

[T]he right of the coastal State to its continental shelf areas is based on its sovereignty over the land domain, of which the shelf area is the natural prolongation into and under the sea.

*Ibid.*, at 29, para. 39. This is further elaborated on in these words:

the principle – constantly relied upon by all the Parties – of the natural prolongation or continuation of the land territory or domain, or land sovereignty of the coastal State, into and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that State.

*Ibid.*, at 31, para. 43.

<sup>5</sup> *Ibid.*, at 22, para. 19 (emphasis added).

continental shelf before proceeding to the main question it was requested by the Parties to address.<sup>6</sup>

After careful consideration, the Court found that the regime of the continental shelf had been established as a customary rule of international law,<sup>7</sup> and then went on to its main job of finding the applicable principles and rules of international law as between the Parties. In doing so, however, the Court repeatedly reverted to the basic concept of the continental shelf because the question at issue was the “delimitation” of the areas thus defined to appertain to the coastal States, instead of “apportioning” *de novo* such an area of the continental shelf. As it had to make clear distinction between “delimitation” on the one hand, and “apportionment” as advocated by the Federal Republic of Germany on the other, it stressed that its job was “delimitation”, which presupposed that the continental-shelf area was the extension of the coastal land territory beyond the bed of the territorial sea. This presupposition is even repeated in the operative part of the judgment.<sup>8</sup>

It would seem that the Court’s elaborate repetition of the basic definition of the continental shelf, even in the exposition of the applicable principles and rules of delimitation,

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<sup>6</sup> Judge Ammoun pointed out in his separate opinion:

On doit aujourd’hui reconnaître que *ces empiètements sur la haute mer, ces atteints à la liberté de celle-ci*, à commencer par la proclamation Truman du 28 septembre 1945, traduisaient des besoins nouveaux de l’humanité (emphasis added).

*Ibid.*, at 105, para. 6. Indeed, the Court itself admitted the encroachment by the new concept of the continental shelf on the established regime of the high seas:

The doctrine of the continental shelf is a recent instance of encroachment on maritime expanses which, during the greater part of the history, appertained to no-one.

*Ibid.*, at 51, para. 96.

<sup>7</sup> On the basis of this finding that the continental shelf is a legal regime under customary international law, the Japanese Government did not think it necessary to enact new legislation on the continental shelf on the ground that it could rely on the customary law concept of the continental shelf should there arise the need to address continental shelf issues. Indeed, the Tokyo District Court and the Tokyo High Court both dealt with the tax revenue issues that arose from the exploitation of oil and gas on the continental shelf off the Ibaraki Prefecture coasts in the *ODECO Nihon SA v. Shiba Taxation Office Superintendent* case of 1982 and that of 1984, on the assumption that the resources belong to the State of Japan because they lie on the continental shelf under customary international law. When it enacted a new Act on the Exclusive Economic Zone and the Continental Shelf in 1996 in preparation for the ratification of the UN Convention, it refrained from drafting detailed provisions for these regimes, on the assumption that it can rely on the relevant provisions of the UN Convention and customary international law as indeed it did in the *ODECO* cases.

<sup>8</sup> The judgment says:

[D]elimitation is to be effected by agreement in accordance with equitable principles, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a *natural prolongation of its land territory into and under the sea*, without encroachment on the *natural prolongation of the land territory* of the other (emphasis added).

*ICJ Rep. 1969*, at 53, para. 101(C) (1).

gave the wrong impression that “natural prolongation” is part of those principles and rules of delimitation. Or, most readers of the judgment seem to have misunderstood the true intent of the Court, for the judgement says elsewhere:

*The appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights.*<sup>9</sup>

At the risk of redundancy, it may be asserted that the Court meant to say that just as uncertainty as to where its boundary lines are located does not give rise to any uncertainty as to the basic status of a certain undersea area appertaining to the coastal State, so conversely that basic status of the area in question does not in itself mean the delimitation of its boundaries. In short, the Court would have meant to say that the basic status of a seabed area is one thing and its boundary delimitation quite another. While most international lawyers of the day seemed to misinterpret this reasoning of the Court, one young scholar made a discerning comment on it:

[W]hen read in the context of the complete opinion, it becomes manifest that the passages which contain the “natural prolongation” principle consistently deal not with the North Sea controversy but with the Court’s elucidation of the theoretical understructure of continental shelf doctrine in general . . . Such passages bear little relevance to the precise issue before the Court, but are merely preliminary steps in the Court’s deductive process, establishing such fundamental notions as that of the coastal State’s intrinsic right to sovereignty over the shelf *per se*. At no point in the opinion is it even hinted that the “natural prolongation” principle supplies a means or method for determining what portion of, or even whether, the particular continental shelf at issue may be subject to a particular coastal State’s jurisdiction.<sup>10</sup>

However that may be, the *North Sea* judgment unfortunately afforded practical implications for some parts of the world’s seas, and indeed provided a good basis of argument for both Korea and China as against Japan. Thus, both Korea and China argued just after the *North Sea* cases, and have been arguing since, that “natural prolongation” should be the basis of boundary delimitation between their respective continental-shelf areas and the Japanese continental-shelf areas. Unfortunately, most Japanese international lawyers, including the influential senior ones, shared, if reluctantly, such interpretation of the *North Sea* cases in the context of the Japanese–Korean negotiations for continental-shelf boundary delimitations, at least in the southern part of the sea areas between the two countries in the early 1970s. The negotiations resulted in the two agreements of 1974: one

<sup>9</sup> *Ibid.*, at 32, para. 46 (emphasis added).

<sup>10</sup> Terr, L. B., “The ‘Distance Plus Joint Development Zone’ Formula: A Proposal for a Speedy and Practical Resolution of the East China and Yellow Seas Continental Shelf Oil Controversy”, 7 *Cornell International Law Journal* 49, at 56–57 (1973).



for the northern part in the Sea of Japan and the other for the southern part in the East China Sea. Whereas a median line was agreed upon as the boundary line in the northern part where the two countries' coasts faced each other,<sup>11</sup> no such agreement was possible in the southern part, where a joint development zone was devised instead, covering a large sea area, the northwestern edge of which coincided with the Japanese-claimed median line, and the southeastern edge of which extended to the Okinawa Trough as claimed by Korea, based on the "natural prolongation" doctrine. Put simply, this joint development zone was so constituted that it lies in its entirety on the Japanese side of the median line.

If this outcome of the negotiations was an application of the "natural prolongation" doctrine in favour of the Korean claim, as indeed the Koreans would say it was, it is submitted that it was a misapplication of the doctrine based on a misunderstanding of its meaning. The "natural prolongation" doctrine is not absolute. As the Court said in the *North Sea* judgment:

whenever a given submarine area does not constitute a natural – or the most natural – extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State; – or at least it cannot be so regarded *in the face of a competing claim by a State of whose land territory the submarine area concerned is to be regarded as a natural prolongation*, even if it is less close to it.<sup>12</sup>

The Court further clarifies this point in these words:

for the reasons given in paragraphs 43 and 44, *the continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another state*.<sup>13</sup>

Here the Court clearly says that the natural prolongation of a State must not encroach upon that of another State. One would do well to see this repeated finally in the operative part of the judgment:

[D]elimitation is to be effected . . . in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory . . . *without encroachment on the natural prolongation of the land territory of the other*.<sup>14</sup>

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<sup>11</sup> In the negotiations for the continental shelf boundary delimitation in the northern part, the controversial issue of sovereignty over small islets called Takeshima (or Dokto in Korean) in the Sea of Japan was set aside by agreement for its extreme political sensitivity.

<sup>12</sup> *ICJ Rep. 1969*, at 31, para. 43 (emphasis added).

<sup>13</sup> *Ibid.*, at 47, para. 85 (emphasis added).

<sup>14</sup> *Ibid.*, at 53, para. 101(C)(1) (emphasis added).

Nothing is clearer than this statement that no State is entitled to claim its “natural prolongation” without paying attention to that of the other State or States in the same sea area.

In view of this finding by the ICJ in the *North Sea* cases, both Korea and China would seem to be oblivious to their obligation to pay heed to the natural prolongation of Japan’s land territory into and under the sea in the sea areas where Japan and its coasts are opposite to each other. If they assert that the seabed in these sea areas trends down in the southeast direction towards the Japanese coasts, and therefore they could claim their natural prolongations in their favour as against Japan, it is submitted that they are again oblivious of the basic legal entitlement of islands to the continental shelf, as provided for in Article 1(b) of the 1958 Geneva Convention on the Continental Shelf. Article 1 of the Convention provides:

For the purpose of these Articles, the term “continental shelf” is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admit of exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

Thus, islands are equally entitled to the continental shelf and, since there is no provision against them having the continental shelf extending on an upward slope of the seabed, the Japanese islands are entitled to such continental-shelf areas in the direction towards the Eurasian continent. And, as all international lawyers know well, this definition of the continental shelf was found to be a codification of the customary rule definition in the *North Sea* cases.<sup>15</sup> It is, therefore, not only a conventional rule but also a customary rule, binding upon all the States of the world.

### The “distance criterion” as developed in the subsequent cases

The “natural prolongation” doctrine, as propounded in the *North Sea* cases, gave the impression that it was something like an absolute basis of title to the continental shelf, but it was to be revised, at first in a very subtle way, in the subsequent cases of maritime boundary delimitation. In the *Anglo-French Continental Shelf Arbitration* of 1977, the

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<sup>15</sup> *Ibid.*, at 3, para. 63, where the Court states:

[Articles 1 to 3] being the ones which, it is clear, were then regarded as reflecting, or as crystallizing, received or at least emerging rules of customary international law relative to the continental shelf, amongst them the question of the seaward extent of the shelf; the juridical character of the coastal State’s entitlement; the nature of the rights exercisable; the kind of natural resources to which these relate; and the preservation intact of the legal status as high seas of the waters over the shelf, and the legal status of the superjacent air-space (emphasis added).

first case to come after the *North Sea* cases, the “natural prolongation” doctrine was relativised, as it were, in these words:

it is clear from the insertion of the “special circumstances” provision in Article 6 [of the 1958 Convention on the Continental Shelf] and from the emphasis on “equitable principles” in customary law that the force of the cardinal *principle of “natural prolongation of territory” is not absolute*, but may be subject to qualification in particular situations.<sup>16</sup>

Again, in the international conciliation in the continental-shelf boundary delimitation in the Jan Mayen ridge area between Iceland and Norway, the Conciliation Commission expressed in its report of 1981 that the concept of “natural prolongation” was not the proper basis for a solution of the matter submitted to it, showing its negative appraisal of the concept.<sup>17</sup>

Likewise in the *Tunisia/Libya Continental Shelf* case of 1982, the *Gulf of Maine* case of 1984 and the *Guinea/Guinea-Bissau Continental Shelf Arbitration* of 1985, it was similarly found that little could be gained from reliance on “natural prolongation”.<sup>18</sup> Thus, in the *Libya/Malta Continental Shelf* case of 1985, the Court found that in a situation of opposite coasts less than 400 miles apart, title to the continental shelf “depends solely on the distance from the coasts of the claimant States”, reasoning that “the geological or geomorphological characteristics” of “any areas of seabed claimed by way of continental shelf” were “completely immaterial”.<sup>19</sup> In the light of these developments in the jurisprudence, together with the advent of the 200-mile exclusive economic zone (hereinafter the “EEZ”) and its influence on the continental shelf, it may be concluded that the “distance criterion” has been established, along with the “natural prolongation” doctrine, as the basis for title to the continental shelf. This criterion is now incorporated on an equal footing to the natural prolongation criterion in the definition of the continental shelf under Article 76(1) of the UN Convention.<sup>20</sup>

<sup>16</sup> Decision, para. 191, 18 *RIAA* 91 (emphasis added).

<sup>17</sup> “Report and Recommendations to the Governments of Iceland and Norway of the Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen”, 20 *ILM* 822 (1981).

<sup>18</sup> *ICJ Rep. 1982*, at 58, para. 67; *ICJ Rep. 1984*, at 277, para. 56; Award, para. 117, 86 *RGDIP* 531 (1985), where the arbitral tribunal has this to say:

Mais, si par hypothèse le plateau continental est unique, aucune caractéristique en l'état actuel du droit international ne saurait valablement être invoquée à l'appui d'un raisonnement fondé sur la règle du prolongement naturel et ayant pour objectif de justifier une délimitation consacrant une séparation naturelle.

<sup>19</sup> *ICJ Rep. 1985*, at 35, para. 39.

<sup>20</sup> For more detailed discussion on these points, see Miyoshi, Masahiro, “Some Thoughts on Maritime Boundary Delimitation”, in Hong, Seoung-ong and Jon M. Van Dyke (eds.), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea*, Leiden/Boston: Martinus Nijhoff Publishers, 2009, at 108–112.

**The definition of continental shelf under the UN Convention on the Law of the Sea**

The continental shelf is defined under Article 76(1) of the United Nations Convention on the Law of the Sea (hereinafter “UN Convention”):

The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

This definition covers the natural prolongation of the land territory even “to the outer edge of the continental margin”, but can be said to have rightly incorporated in it the customary rule definition of the continental shelf as evolved since the 1958 Geneva Convention on the Continental Shelf, for the “exploitability test” under this Convention, which was also judged a customary rule in the *North Sea* cases, thereafter allowed the outer edge of the continental shelf to extend as far as technology could allow seabed exploitation. In view of possible unlimited extension of the outer edge of the continental shelf, the Third United Nations Conference on the Law of the Sea (hereinafter “UNCLOS”) devised a new regime of the “deep seabed” to prevent such a possibility, and set the limit of the continental shelf at the continental margin beyond which the seabed is defined as the deep seabed.

A new, additional or alternative definition of the continental shelf has come into being in the UN Convention: “the seabed and subsoil of the submarine areas . . . to a distance of 200 nautical miles from the baselines . . . where the outer edge of the continental margin does not extend up to that distance” (emphasis added). This would be, if anything, a definition of the nature of “progressive development”, rather than a codified definition. Since the early 1970s, a new regime of the EEZ had been claimed by a good number of coastal States as a sea area with a width of 200 nautical miles over which the coastal State has exclusive jurisdiction in respect of some specified matters, and this area covered both the water column and the seabed. Inasmuch as it includes the seabed up to a distance of 200 miles, the coastal State can have a 200-mile seabed area by merely declaring an EEZ. The many coastal States with seabed areas extending to a distance of less than 200 miles were not happy with the first definition based on natural prolongation, and could have easily declared an EEZ to have 200-mile-wide seabed areas. Such developments could have made the first definition practically meaningless. These considerations would have contributed to adding the second definition based on distance in Article 76(1).

This conventional rule helped States to consider that the continental shelf is the seabed up to a distance of at least 200 miles. This definition was further reinforced by a finding in the *Libya/Malta Continental Shelf* case of 1985 to the effect that title to the continental shelf depends solely on the distance from the coast,<sup>21</sup> which ensured for the

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<sup>21</sup> *ICJ Rep. 1985*, at 35, para. 39.

coastal State a universal distance of 200 miles from the baselines, regardless of geomorphological irregularities of the seabed.<sup>22</sup> Although it was not adopted as a codified definition in the UN Convention, this second definition, together with the first, in Article 76(1), now seems established, or at least well received, or emerging as a customary rule of international law.

#### THE EQUIDISTANCE PRINCIPLE

The *North Sea* judgment stressed the inapplicability of the equidistance principle as provided for in Article 6(2) of the 1958 Geneva Convention on the Continental Shelf to the cases before the Court. It did so primarily because one of the Parties, the Federal Republic of Germany, was not party to the convention. But this was not the end of the matter. Denmark and the Netherlands extensively argued for the *North Sea* judgment's applicability on the ground that the Federal Republic virtually became bound by this principle through its conduct towards the Convention, which it signed but did not ratify, and the Court had to deal with this issue accordingly.

The Federal Republic in fact acceded to this principle in the partial boundary delimitations in its agreements of 1 December 1964 and 9 June 1965 with the Netherlands and Denmark respectively.<sup>23</sup> This partial acceptance of the equidistance principle and the other acts allegedly acquiescing in the principle were extensively discussed by Denmark and the Netherlands and the ICJ, but in the end were not found to evidence the Federal Republic's acceptance of the principle as obligatory.<sup>24</sup> The Court, as well as the Federal Republic, basically admitted the correctness of the principle, but denied its applicability in the pending cases on the ground that its application would give rise to an inequitable result because of the special coastal configurations between the three Parties.

As the conventional "equidistance principle" was not applicable as between the Parties, there was no other way but to have recourse to customary rules of international law as applicable to the pending cases. Thus "equitable principles", as propounded in the Truman Proclamation of 1945, were found applicable because, in the words of the Court, "[t]hese two concepts, of delimitation by mutual agreement and delimitation in

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<sup>22</sup> In the words of the Court, "the geological and geomorphological characteristics of those areas [=any areas of sea-bed claimed by way of continental shelf] are completely immaterial." *Ibid.*

<sup>23</sup> Needless to say, however, the Federal Republic of Germany was not satisfied with any extension further seaward of these partial delimitations and went to The Hague for more satisfactory solutions.

<sup>24</sup> *ICJ Rep. 1969*, at 25–27, paras. 27–33. Judges Manfred Lachs and Max Sørensen, in their respective dissenting opinions, extensively discussed whether the Federal Republic was estopped in the light of its conduct from claiming that the equidistance principle was inapplicable to it. *Ibid.*, at 232–238, 247–248, 253. Judge Kotaro, Tanaka, however, seems to have placed more emphasis on the rationality of the principle as an inherent part of the "fundamental concept of the continental shelf" in his dissent. *See ibid.*, at 179–184.

accordance with equitable principles, have underlain all the subsequent history of the subject".<sup>25</sup>

This, however, seems to have led on to another unfortunate interpretation of the judgment in favour of "equitable principles" to the exclusion of the equidistance principle in a general way. As may be recalled, one of the "hard-core issues" in the UNCLOS sessions was the irreconcilable conflict concerning the boundary delimitation principle between the States in favour of the "equidistance principle" and those in favour of "equitable principles". The States in the latter group, mainly because of their peculiar coastal configurations, are strongly opposed to the application of the equidistance principle.<sup>26</sup>

## EQUITABLE PRINCIPLES

As the "equidistance principle" was held inapplicable as between the Parties, some other applicable law had to be sought elsewhere. Thus the Court found that the Truman Proclamation's "equitable principles", along with "mutual agreement", had "underlain all the subsequent history of the subject",<sup>27</sup> implying that they were customary rules of continental-shelf boundary delimitation.

The Court, however, did not specify what kind of principles were "equitable principles". All the Court did was to discuss some incidental factors to be taken into account in the application of "equitable principles": there is no question of completely refashioning nature;<sup>28</sup> there is no legal limit to the considerations to be taken into account in the application of equitable principles;<sup>29</sup> geological and geographical aspects of the situation, as well as the unity of any deposits, can provide adequate bases for decision adapted to the factual situation;<sup>30</sup> and there needs to be a reasonable degree of proportionality between the extent of the continental shelf and the lengths of the coastlines.<sup>31</sup> These are the "relevant circumstances" to be taken into consideration in the application of "equitable principles", as formulated in the operative part of the judgment.<sup>32</sup>

This again had much influence on the subsequent cases of maritime boundary delimitation. In the *Tunisia/Libya Continental Shelf* case of 1982, the Parties presented all the conceivable "relevant circumstances" in their pleadings, and the Court even went as far as discussing plate tectonics to cope with those pleadings before concluding that it is international law, rather than science, that decides the matter. Then, in the next *Libya/*

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<sup>25</sup> *Ibid.*, at 33, para. 47.

<sup>26</sup> Turkey, for example, is a good case in point.

<sup>27</sup> *See* n. 25.

<sup>28</sup> *ICJ Rep. 1969*, at 49, para. 91.

<sup>29</sup> *Ibid.*, at 50, para. 93.

<sup>30</sup> *Ibid.*, at 50–51, para. 94.

<sup>31</sup> *Ibid.*, at 52, para. 98.

<sup>32</sup> *Ibid.*, at 54, para. 101.

*Malta Continental Shelf* case of 1985, the Court made a reasonable finding that the “relevant circumstances” are limited to those relative to the continental shelf.<sup>33</sup>

It is worthy of note in this connection that an attempt was made during the oral proceedings to define “equitable principles”, which had never been specified in substance in the earlier cases. Professor Elihu Lauterpacht, counsel for Malta, raised the question of “equitable principles” in discussing the economic aspects of the dispute, and wondered why, although it referred to such principles for the first time in the *North Sea* cases, the Court failed to quote any particular authority on the origin of this important concept.<sup>34</sup> At another session some days later, counsel for Libya, Sir Francis Vallat, stated that equitable principles meant taking account of all relevant circumstances.<sup>35</sup> This exchange of ideas about equitable principles might possibly have urged the Court to elaborate in some measure on the substance of such principles. Thus the Court came up with a set of five principles as “well-known examples”, deduced from the previous cases.<sup>36</sup> Yet, in so far as they are put forward as “well-known examples” only, they are not a definitive list of “equitable principles”.

However that may be, it is important to note that the Court did not exclude the “equidistance principle” from “equitable principles”, for it stated:

*the parties are under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied – for this purpose the equidistance method can be used, but other methods exist and may be employed, alone or in combination, according to the areas involved . . .*<sup>37</sup>

Indeed, there is no doubt that in a situation of opposite coasts, the “equidistance principle or method” produces an equitable boundary line, which means that an application of “equitable principles” is nothing other than the application of the “equidistance principle” in this case. This reasonable, or natural, reasoning was later to prevail in the jurisprudence that followed in the subsequent years.

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<sup>33</sup> *ICJ Rep. 1985*, at 40, para. 48.

<sup>34</sup> Public Sitting on 27 November 1984, *CR 84/23*, at 36.

<sup>35</sup> Public Sitting on 20 February 1985, *CR 85/9*, at 21–22.

<sup>36</sup> *ICJ Rep. 1985*, at 39–40, para. 46, where the Court states that those five principles are:

the principle that there is to be no question of refashioning geography, or compensating for the inequalities of nature; the related principle of non-encroachment by one party on the natural prolongation of the other, which is no more than the negative expression of the positive rule that the coastal State enjoys sovereign rights over the continental shelf off its coasts to the full extent authorised by international law in the relevant circumstances; the principle of respect due to all such relevant circumstances; the principle that although all States are equal before the law and entitled to equal treatment, “equity does not necessarily imply equality” (*ICJ Reports 1969*, p. 49, para. 91), nor does it seek to make equal what nature has made unequal; and the principle that there can be no question of distributive justice.

<sup>37</sup> *ICJ Rep. 1969*, at 47, para. 85 (emphasis added).

## RELEVANT CIRCUMSTANCES

When it said that “equitable principles” were to be applied in the *North Sea* cases, the ICJ also indicated that “all the relevant circumstances” be taken into account in their application. In other words, “relevant circumstances” are to be taken into consideration in combination with “equitable principles”.

Article 6(2) of the 1958 Convention on the Continental Shelf provides for the application of the “equidistance principle” in the absence of “special circumstances”, and the Court combines these two into an “equidistance–special circumstances” rule.<sup>38</sup> As, however, this conventional rule was found inapplicable to the cases before the Court, and “equitable principles” found applicable as a customary rule of law instead, a combined “equitable principles–relevant circumstances” rule was recommended to the parties for application in their negotiations.

This categorisation was later to be confirmed in the *Greenland/Jan Mayen Maritime Delimitation* case of 1993:

[T]he 1958 Convention requires the investigation of any “special circumstances”; the customary law based upon equitable principles on the other hand requires the investigation of “relevant circumstances”.<sup>39</sup>

It is thus apparent that special circumstances are those circumstances which must modify the result produced by an unqualified application of the equidistance principle. General international law, as it has developed through the case law of the Court and arbitral jurisprudence, and through the work of the Third United Nations Conference on the Law of the Sea, has employed the concept of “relevant circumstances”.<sup>40</sup>

Despite their different wordings, the two expressions have the same or equivalent functions: to bring about an equitable result by taking into account special or relevant circumstances in the application of the equidistance principle or equitable principles.

To turn back to the *North Sea* cases, the Court instructed the parties to take into account in their negotiations for boundary delimitation three main factors:

- (1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;
- (2) so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;
- (3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose

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<sup>38</sup> See, for example, *ibid.*, at 28, para. 37.

<sup>39</sup> *ICJ Rep. 1993*, at 62, para. 54.

<sup>40</sup> *Ibid.*, at 62, para. 55.



of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region.<sup>41</sup>

While specifying these relevant factors, the Court left the substance of “equitable principles” unspecified. As was briefly discussed earlier, this seems to have driven counsel for Malta to enquire about the content of “equitable principles” in the *Libya/Malta* case of 1985. To be more precise, the *Tunisia/Libya* case of 1982 discussed the nature of “equitable principles”, and made clear that they are such principles as would bring about an equitable solution.<sup>42</sup>

The *Libya/Malta* judgment, while excluding the circumstances or factors unrelated to the continental shelf in view of the past abuses of “all the relevant circumstances”,<sup>43</sup> mentioned five “well-known examples” of “equitable principles”, among which is the “principle of respect due to all such relevant circumstances”.<sup>44</sup> This seems very helpful in characterising the “equitable principles” in a given case and bringing about an equitable solution.

## IMPLICATIONS OF THE *NORTH SEA CONTINENTAL SHELF* CASES FOR THE EAST ASIAN SEAS

### The Japan–Korea Joint Development Agreement of 1974

Five years after the *North Sea* cases, the Japanese and Korean Governments concluded their negotiations for continental-shelf delimitations in a pair of agreements on 30 January 1974: one for the northern part with a median line boundary between the two States and the other for the southern part with a joint development zone in the East China Sea. When the ICJ judgment in the *North Sea* cases was rendered in February 1969, it had great impact on the ongoing negotiations because of its emphatic pronouncement of the “natural prolongation” doctrine.

The judgment’s “natural prolongation” doctrine seems to have spurred the Korean Government to push forward its claim to continental-shelf areas, and with the enactment of “The Law for Development of Submarine Mineral Resources” of 1 January 1970,<sup>45</sup> the Korean Government moved to lease certain seabed areas in the East China Sea to some international oil majors. The leased areas, however, overlapped some parts of the seabed

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<sup>41</sup> *ICJ Rep. 1969*, at 54, para. 101(D).

<sup>42</sup> *ICJ Rep. 1982*, at 59, para. 70.

<sup>43</sup> *ICJ Rep. 1985*, at 40, para. 48. It is well to note, however, that such abuses were based on the *North Sea* judgment that “there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures”. *ICJ Rep. 1969*, at 50, para. 93.

<sup>44</sup> See n. 36.

<sup>45</sup> This Law was supplemented by the “Enforcement Regulations of the Submarine Mineral Resources Development Law” of 6 May 1971.

areas that had been leased to a couple of Japanese oil exploration companies some years before. Thus, a dispute started between the two States.<sup>46</sup>

Whereas Japan based its position on the “median line” principle for boundary delimitation, Korea agreed to the application of this principle in the Sea of Japan areas in the North but persisted in the “natural prolongation” doctrine in the East China Sea to the South, not only as the basis of its title to the continental shelf but also as the basis of its delimitations. As was seen earlier in this paper, there was generally an unfortunate misunderstanding of this doctrine among the Japanese international lawyers of the day, and a compromise agreement was struck in the end on a joint development zone lying entirely on the Japanese side of the Japan-proposed “median line”.<sup>47</sup>

In so far as an international agreement is a *political compromise*, the 1974 Japan–Korea Joint Development Agreement is a *fait accompli* that cannot be undone by any means unless the parties come to agree to annul or abolish it. But it is submitted that this agreement was based on a misunderstanding of the “natural prolongation” doctrine as propounded in the *North Sea* judgment. Consequently, the same mistake should not be repeated in the future in view of the subsequent evolution of the relevant law in respect of the basis of title to the continental shelf as well as its boundary delimitation.<sup>48</sup>

### Future maritime boundary delimitations in the East Asian seas

While the seabed areas between Japan and Korea have been delimited or placed under a joint development system, those between Japan and China have remained undelimited over the past decades, giving rise to a serious dispute between them. This is basically due to the diametrically opposing positions of the two States as to the basis of title to the continental shelf: Japan rests its claim to the continental shelf on the “distance criterion”, whereas China’s is still based on the “natural prolongation” doctrine to claim that its continental shelf extends as far as the Okinawa Trough.<sup>49</sup>

As has been seen above, both bases of title to the continental shelf are clearly incorporated as parallel definitions in the UN Convention of 1982. The two parallel definitions

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<sup>46</sup> For a detailed account of negotiations leading to the agreements of 1974, see Takeyama, Masayuki, “Japan’s Foreign Negotiations over Offshore Petroleum Development: An Analysis of Decision-Making in the Japan–Korea Continental Shelf Joint Development Program”, in Friedheim, Robert L. et al., *Japan and the New Ocean Regime*, Boulder, Colorado: Westview Press, 1984, at 276–313.

<sup>47</sup> The “compromise” was attested to by the Director-General of the Asian Affairs Bureau, the Japanese Ministry of Foreign Affairs at a meeting of the House of Representatives Standing Committee on Foreign Affairs on 22 April 1977. *Official Records of the House of Representatives Standing Committee on Foreign Affairs, meeting of 22 April 1977* (in Japanese), at 23.

<sup>48</sup> For a brief analysis of the case law of the ICJ and the jurisprudence of arbitral tribunals in the matter of maritime boundary delimitation, see, Miyoshi, *loc. cit.*, n. 20, at 107–118.

<sup>49</sup> See, for example, Gao, Zhiguo and Jilu, Wu, “Key Issues in the East China Sea: A Status Report and Recommended Approaches”, in Harrison, Selig S. (ed.), *Seabed Petroleum in Northeast Asia: Conflict or Cooperation?*, Washington, DC: Woodrow Wilson International Center for Scholars, 2005, at 33.

are on an equal footing, rather than one being the norm and the other the exception, as their legislative and evolutionary history shows. At the risk of repetition, it is submitted that if a coastal State with a narrow shelf declares an EEZ to 200 miles from its baselines, it can acquire a seabed area extending up to 200 miles even though the seabed may not meet the requirements of the definition of the continental shelf. In other words, the EEZ is now established as a legal regime under general international law, although it requires an express declaration unlike the continental shelf which requires no such procedure. The advent of the EEZ is known to have induced the thought that the physical seabed up to 200 miles from the baselines remains the same under either the continental shelf or the EEZ regime. It is true that a “natural prolongation” can extend beyond 200 miles up to the outer edge of the continental margin, which can be either 350 miles from the baselines or 100 miles from the 2,500-metre isobath.<sup>50</sup> But at a distance of less than 200 miles, which is precisely the case of the Japan-claimed median line between Japan and China in the East China Sea,<sup>51</sup> in the words of the ICJ:

*title depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial.*<sup>52</sup>

This finding of the Court holds true in itself but its implications, supported by another finding that the “distance criterion” is now a customary rule of international law, further strengthen the Japanese position, because the “*natural prolongation*” of the Chinese land territory, to which China is fully entitled, *must, however, not encroach upon that of the Japanese land territory* that extends in the direction towards China.<sup>53</sup>

It is a truism to say that maritime boundary delimitation should be made in accordance with the law applicable at the time of delimitation, whether by agreement between the parties or by means of a third-party settlement. The continental shelf boundaries have been in dispute between Japan and China since the late 1960s, or more specifically since

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<sup>50</sup> UN Convention, Article 76(5).

<sup>51</sup> It is well to note in this connection that the outstanding dispute between Japan and China over sovereignty over Senkaku (or Diaoyu in Chinese) Islets in the East China Sea is left out of the immediate discussion of boundary delimitation here; it requires a separate paper with full-scale legal and historical analyses and discussions, which are beyond the scope of this paper. For such analyses, the reader is referred to Ozaki, Shigeyoshi, “Territorial Issues on the East China Sea: A Japanese Position”, 3 *Journal of East Asia and International Law* 151–174 (2010), a compact but comprehensive and well-researched paper on that subject matter. This paper’s title, originally “The Status of Senkaku (Diaoyu Tai) Islands in International Law: A Japanese Position”, was changed by the editor to conform to the common title of the “Regional Focus and Controversies” section of the *Journal*. Cf. Hui, Wu and Dan, Zhang, “Territorial Issues on the East China Sea: A Chinese Position”, *ibid.*, at 137–149.

<sup>52</sup> *ICJ Rep. 1985*, at 35, para. 39 (emphasis added).

<sup>53</sup> See ns. 13 and 14, and the accompanying text.

China made its first official protest in December, 1970<sup>54</sup> against the ongoing tripartite Japan–Korea–Taiwan negotiations for a joint development of potential oil and gas in the East China Sea, following the Coordinating Committee for Geoscience Programmes (CCOP) in East and Southeast Asia’s report on its seismic surveys there in 1968.<sup>55</sup> It was just 22 months after the *North Sea* cases propounded the “natural prolongation” doctrine. If it based its claim to the continental shelf in the East China Sea on this doctrine allegedly extending to the Okinawa Trough, China would have been oblivious to the other concomitant aspect of this doctrine: it must not encroach upon the “natural prolongation” of the other coastal State or States in the same sea areas. In other words, at the very starting time of its claim to the continental shelf in the East China Sea, China failed to comprehend the true concept of the continental shelf, and has ever since maintained the position that the edge of the “natural prolongation” of its land territory constitutes the boundary with the Japanese continental shelf.<sup>56</sup>

Following the *North Sea* cases, however, the arbitral jurisprudence and the ICJ case law of maritime boundary delimitation have evolved the “distance criterion” as the basis for title to the continental shelf and the quasi-customary application of the “equidistance principle”, with necessary qualifications in the later stage of delimitation.<sup>57</sup> Thus, in the most recent case before the ICJ, *Romania/Ukraine Maritime Delimitation in the Black Sea* of February 2009, the Court summarised the “Delimitation methodology” in these words:

In keeping with its settled jurisprudence on maritime delimitation, the first stage of the Court’s approach is to establish the provisional equidistance line.<sup>58</sup>

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 . . .<sup>59</sup>

<sup>54</sup> See Park, Choon-Ho, “Joint development of mineral resources in disputed waters: the case of Japan and South Korea in the East China Sea”, in Valencia, Mark J. (ed.), *The South China Sea: Hydrocarbon Potential and Possibilities of Joint Development*, Oxford: Pergamon Press, 1981, at 1337.

<sup>55</sup> The Committee for Coordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas (CCOP) of the United Nations Economic Commission for Asia and the Far East (ECAFE) made a series of seismic surveys in the East China Sea in October/November 1968 and published its report in May 1969, which caused a sensation by stating that the continental-shelf areas between Taiwan and Japan likely had one of the world’s richest deposits of petroleum. 2 *CCOP Technical Bulletin* 41 (1969).

<sup>56</sup> See ns. 13 and 14 and the accompanying text. However, in a broad-termed agreement of 2008 with Japan on joint development of seabed areas in the East China Sea, which has yet to be implemented, China seems to have made a slight concession to the Japanese position that the median line be the boundary between the two countries. See, for example, Miyoshi, Masahiro, “Japan’s arrangements with South Korea and China for the development of oil and gas in the East China Sea: a memorandum”, 134 *The Journal of International Affairs* (Aichi University) 117–120 (2009).

<sup>57</sup> For a more detailed discussion of this evolutionary process, see Miyoshi, *loc. cit.*, n. 20, at 108–115.

<sup>58</sup> *ICJ Rep. 2009*, at 37, para. 118 (emphasis added).

<sup>59</sup> *Ibid.*, at 37, para. 120 (emphasis added).

## CONCLUSION

Given this evolution of the law applicable to maritime boundary delimitation, whether in the East China Sea or elsewhere, the correct delimitation should be a provisional application of the “equidistance principle” (or “median line” principle in a situation of opposite coasts) in the first instance, and qualification of the boundary line thus delimited by taking the “relevant circumstances” of the case into account as necessary and appropriate at a later stage. This is *the* law of maritime boundary delimitation today that should be applied in the Northeast Asian seas.

## LEGAL MATERIALS



## PARTICIPATION IN MULTILATERAL TREATIES\*

### Editorial introduction

This section records the participation of Asian States in open multilateral law-making treaties, which mostly aim at worldwide adherence. It updates the treaty sections of earlier Volumes until 31 December 2009. New data are preceded by a reference to the most recent previous entry in the multilateral treaties section of the *Asian Yearbook of International Law*. Where no new data are available, the title of the treaty is listed with a reference to the last Volume containing data on the treaty involved. For the purpose of this section, States broadly situated west of Iran, north of Mongolia, east of Papua New Guinea and south of Indonesia will not be covered.

#### Note:

- Where no other reference to specific sources is made, data were derived from *Multilateral Treaties Deposited with the Secretary-General*, <http://treaties.un.org>.
- Where reference is made to the Hague Conference on Private International Law, data were derived from [http://www.hcch.net/index\\_en.php?act=conventions.listing](http://www.hcch.net/index_en.php?act=conventions.listing).
- Where reference is made to the International Atomic Energy Agency (IAEA), data were derived from <http://ola.iaea.org/OLA/treaties/index.asp>.
- Where reference is made to the International Civil Aviation Organization (ICAO), data were derived from <http://www2.icao.int/EN/LEB/Pages/TreatyCollection.aspx>.
- Where reference is made to the International Committee of the Red Cross (ICRC), data were derived from <http://www.icirc.org/ihl>.
- Where reference is made to the International Labour Organization (ILO), data were derived from <http://www.ilo.org/ilolex/english/convdisp1.htm>.
- Where reference is made to the International Maritime Organization (IMO), data were derived from *Status of Multilateral Conventions and Instruments in respect of which the International Maritime Organization or its Secretary General Performs Depository or other Functions*, as at 3 May 2011, available through <http://www.imo.org>.
- Where reference is made to the Hague Conference on Private International Law, data were derived from [http://www.hcch.net/index\\_en.php?act=conventions.listing](http://www.hcch.net/index_en.php?act=conventions.listing).

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- Where reference is made to the United Nations Educational, Scientific and Cultural Organization (UNESCO), data were derived from [http://portal.unesco.org/en/ev.php-URL\\_ID=12025&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=-471.html](http://portal.unesco.org/en/ev.php-URL_ID=12025&URL_DO=DO_TOPIC&URL_SECTION=-471.html).
- Reservations and declarations made upon signature or ratification are not included.
- Sig. = Signature; Cons. = Consent to be bound; Eff. date = Effective date; E.i.f. = Entry into force; Rat. = Ratification; Min. age spec. = Minimum age specified.

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(Status as provided by UNESCO)

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Afghanistan		30 Mar 2009
Bangladesh		11 Jun 2009
Laos		26 Nov 2009

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(Continued from Vol. 13 p. 264)

(Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Afghanistan		30 Mar 2009

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(Corrected from Vol. 14 p. 228)

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Amendment to the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1995: *see* Vol. 12 p. 238.

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<i>State</i>	<i>Rat.</i>	<i>E.i.f.</i>
Turkmenistan	21 Sep 2009	20 Dec 2009

**Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1971**

(Continued from Vol. 13 p. 265)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Turkmenistan		3 Jul 2009

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(Continued from Vol. 13 p. 265)

<i>State</i>	<i>Rat.</i>	<i>E.i.f.</i>
Turkmenistan	4 Feb 2009	4 May 2009

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(Continued from Vol. 11 p. 246)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Timor-Leste		16 Sep 2009

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<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Brunei		3 Mar 2009
Timor-Leste		16 Sep 2009

**Amendment to the Montreal Protocol, 1990**

(Continued from Vol. 13 p. 266)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Timor-Leste		16 Sep 2009

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(Continued from Vol. 13 p. 266)

(Status as provided by IMO)

<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>
Mongolia	8 Aug 2008	8 Aug 2009
Turkmenistan		21 Sep 2009

**Amendment to the Montreal Protocol, 1992**

(Continued from Vol. 14 p. 229)

<i>State</i>	<i>Cons.</i>
Brunei	3 Mar 2009
Myanmar	22 May 2009
Tajikistan	7 May 2009
Timor-Leste	16 Sep 2009

**Protocol to the Framework Convention on Climate Change, 1997**

(Continued from Vol. 14 p. 229)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Brunei		3 Mar 2009
Tajikistan		7 May 2009
Timor-Leste		16 Sep 2009

**Amendment to the Montreal Protocol, 1997**

(Continued from Vol. 14 p. 230)

<i>State</i>	<i>Cons.</i>
Brunei	3 Mar 2009
Tajikistan	7 May 2009
Timor-Leste	16 Sep 2009

**Amendment to the Montreal Protocol, 1999**

(Continued from Vol. 14 p. 230)

<i>State</i>	<i>Cons.</i>
Brunei	3 Mar 2009
Tajikistan	7 May 2009
Timor-Leste	16 Sep 2009

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(Continued from Vol. 14 p. 230)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Pakistan	4 Jun 2001	2 Mar 2009

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<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
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Convention on the Law Applicable to Maintenance Obligations Towards Children, 1956: *see* Vol. 6 p. 244.

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Convention on the Elimination of All Forms of Discrimination against Women, 1979: *see* Vol. 11 p. 250.

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<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Laos	7 Dec 2000	25 Sep 2009
Pakistan	17 Apr 2008	

**Optional Protocol to the International Covenant on Civil and Political Rights, 1966**

(Corrected from Vol. 14 p. 232)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kazakhstan	25 Sep 2007	30 Jun 2009

**Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984**

(Corrected from Vol. 14 p. 231)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Pakistan	17 Apr 2008	

**Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1999**

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<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Turkmenistan		20 May 2009

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(Continued from Vol. 14 p. 232)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bhutan	15 Sep 2005	9 Dec 2009

**Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000**

(Continued from Vol. 14 p. 232)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bhutan	15 Sep 2005	9 Dec 2009



**Convention on the Rights of Persons with Disabilities, 2008**

(Continued from Vol. 14 p. 233)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Iran		23 Oct 2009
Laos	15 Jan 2008	25 Sep 2009
Mongolia		13 May 2009
Uzbekistan	27 Feb 2009	

**Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2008**

(Continued from Vol. 14 p. 233)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Mongolia		13 May 2009

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Entry into Force: 23 December 2010

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<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Japan	6 Feb 2007	23 Jul 2009
Kazakhstan		27 Feb 2009

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(Status as provided by IMO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Afghanistan		10 Nov 2009

**Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977**

(Continued Vol. 12 p. 244)

(Status as provided by IMO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Afghanistan		10 Nov 2009

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**International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961**

(Continued from Vol. 14 p. 234)

(Status as included in WIPO doc. 423(E) of 15 Jan 2010)

<i>State</i>	<i>Cons. (deposit)</i>
Korea (Rep.)	18 Mar 2009

**Patent Cooperation Treaty, 1970 as amended in 1979 and modified in 1984 and 2001**

(Continued from Vol. 12 p. 245)

<i>State</i>	<i>Party</i>
Thailand	24 Dec 2009

**Trademark Law Treaty**

Geneva, 27 October 1994

Entry into Force: 1 August 1996

(Status as included in WIPO doc. 423(E) of 15 Jan 2010)

<i>State</i>	<i>Party</i>
Indonesia	5 Sep 1997
Japan	1 Apr 1997
Kazakhstan	7 Nov 2002
Korea (Rep.)	25 Feb 2003
Kyrgyzstan	15 Aug 2002
Sri Lanka	1 Aug 1996
Uzbekistan	4 Sep 1998

**WIPO Copyright Treaty, 1996**

(Continued from Vol. 14, p. 235)

(Status as included in WIPO doc. 423(E) of 15 Jan 2010)

<i>State</i>	<i>Party</i>
Tajikistan	5 Apr 2009

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#### **Slavery Convention, 1926 as amended in 1953**

(Corrected from Vol. 14 p. 235)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kazakhstan		1 May 2008

#### **Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988**

(Continued from Vol. 12 p. 247)

(Status as provided by ICAO)

<i>State</i>	<i>Cons. (Deposited)</i>	<i>E.i.f.</i>
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#### **Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991**

(Continued from Vol. 14 p. 236)

(Status as provided by ICAO)

<i>State</i>	<i>Sig.</i>	<i>Eff. Date.</i>
Brunei	9 Jul 2009	7 Sep 2009

**International Convention for the Suppression of the Financing of Terrorism, 1999**

(Continued from Vol. 14 p. 236)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Pakistan		17 Jun 2009

**United Nations Convention Against Transnational Organized Crime, 2000**

(Continued from Vol. 14 p. 236)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Indonesia	12 Dec 2000	20 Apr 2009
Timor-Leste		9 Nov 2009

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(Continued from Vol. 14 p. 237)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Indonesia	12 Dec 2000	28 Sep 2009
Malaysia		26 Feb 2009
Timor-Leste		9 Nov 2009

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(Continued from Vol. 14 p. 237)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Indonesia	12 Dec 2000	28 Sep 2009
Malaysia		26 Feb 2009
Timor-Leste		9 Nov 2009

**United Nations Convention Against Corruption, 2003**

(Continued from Vol. 14 p. 238)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
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Laos	10 Dec 2003	25 Sep 2009
Timor-Leste	10 Dec 2003	27 Mar 2009
Vietnam	10 Dec 2003	19 Aug 2009

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<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>
Mongolia	2 Apr 2009	31 Dec 2009

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(Corrected from Vol. 14 p. 239)

<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>
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(Continued from Vol. 12 p. 249)

(Status as provided by the ILO)

*State*                      *Rat. registered*

Timor-Leste              16 Jun 2009

**Freedom of Association and Protection of the Right to Organise Convention,  
1948 (ILO Conv. 87)**

(Continued from Vol. 9 p. 292)

(Status as provided by the ILO)

*State*                      *Rat. registered*

Timor-Leste              16 Jun 2009

**Right to Organise and Collective Bargaining Convention, 1949 (ILO Conv. 98)**

(Continued from Vol. 10 p. 280)

(Status as provided by the ILO)

*State*                      *Rat. registered*

Timor-Leste              16 Jun 2009

**Minimum Age Convention, 1973 (ILO Conv. 138)**

(Continued from Vol. 11 p. 257)

(Status as provided by the ILO)

*State*                      *Rat. registered*

Uzbekistan              6 Mar 2009

**Worst Forms of Child Labour Convention, 1999 (ILO Conv. 182)**

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(Status as provided by the ILO)

*State*                      *Rat. registered*

Timor-Leste              16 Jun 2009

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Agreement Concerning the Suppression of the Manufacture of, Internal Trade in, and Use of, Prepared Opium and amended by Protocol, 1925, amended 1946: *see* Vol. 6 p. 261.

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Agreement Concerning the Suppression of Opium Smoking, 1931, amended by Protocol, 1946: *see* Vol. 6 p. 261.

Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 1931, and amended by Protocol, 1946: *see* Vol. 7 p. 334.

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(Continued from Vol. 12 p. 251)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Laos		16 Mar 2009

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<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
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Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1986: *see* Vol. 9 p. 295.

Convention on Nuclear Safety, 1994: *see* Vol. 12 p. 252.

Protocol to amend the 1963 Convention on Civil Liability for Nuclear Damage, 1997: *see* Vol. 8 p. 188.

Convention on Supplementary Compensation for Nuclear Damage, 1997: *see* Vol. 8 p. 189.

#### **Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, 1997**

(Continued from Vol. 13 p. 276)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
Uzbekistan		29 Jan 2009

#### **Amendment to the 1980 Convention on the Physical Protection of Nuclear Material, 2005**

(Continued from Vol. 14 p. 241)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
China		14 Sep 2009

#### OUTER SPACE

Treaty on Principles Governing the Activities of the States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 1967: *see* Vol. 6 p. 266.

Agreement governing the Activities of States on the Moon and other Celestial Bodies, 1979: *see* Vol. 10 p. 284.

**Convention on Registration of Objects launched into Outer Space, 1974**

(Continued from Vol. 10 p. 284)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Korea (Rep.)		10 Mar 2009

PRIVILEGES AND IMMUNITIES

Convention on the Privileges and Immunities of the United Nations, 1946: *see* Vol. 14 p. 242.  
 Convention on the Privileges and Immunities of the Specialized Agencies, 1947: *see* Vol. 7 p. 338.

Vienna Convention on Diplomatic Relations, 1961: *see* Vol. 13 p. 277.

Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, 1961: *see* Vol. 6 p. 269.

Vienna Convention on Consular Relations, 1963: *see* Vol. 13 p. 278.

Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 1963: *see* Vol. 6 p. 269.

Convention on Special Missions, 1969: *see* Vol. 6 p. 269.

Optional Protocol to the Convention on Special Missions concerning the Compulsory Settlement of Disputes, 1969: *see* Vol. 6 p. 269.

United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004: *see* Vol. 14 p. 342.

REFUGEES

Convention relating to the Status of Refugees, 1951: *see* Vol. 12 p. 254.

Protocol relating to the Status of Refugees, 1967: *see* Vol. 12 p. 254.

ROAD TRAFFIC AND TRANSPORT

Convention on Road Traffic, 1968: *see* Vol. 12 p. 254.

Convention on Road Signs and Signals, 1968: *see* Vol. 7 p. 338.

SEA

Convention on the Territorial Sea and the Contiguous Zone, 1958: *see* Vol. 6 p. 271.

Convention on the High Seas, 1958: *see* Vol. 7 p. 339.

Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958: *see* Vol. 6 p. 271.

Convention on the Continental Shelf, 1958: *see* Vol. 6 p. 271.

Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, 1958: *see* Vol. 6 p. 272.

United Nations Convention on the Law of the Sea, 1982: *see* Vol. 10 p. 285.

Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1994: *see* Vol. 12 p. 255.

**Agreement for the Implementation of the Provisions of the United Nations  
Convention on the Law of the Sea (. . .) relating to the Conservation and  
Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995**  
(Continued from Vol. 14 p. 243)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Indonesia	4 Dec 1995	28 Sep 2009

SEA TRAFFIC AND TRANSPORT

Convention Regarding the Measurement and Registration of Vessels employed in Inland Navigation, 1956: *see* Vol. 6 p. 273.

International Convention for the Safety of Life at Sea, 1960: *see* Vol. 6 p. 273.

Convention on Facilitation of International Maritime Traffic, 1965 as amended: *see* Vol. 12 p. 255.

Special Trade Passenger Ships Agreement, 1971: *see* Vol. 6 p. 275.

International Convention for Safe Containers, as amended 1972: *see* Vol. 10 p. 286.

Protocol on Space Requirements for Special Trade Passenger Ships, 1973: *see* Vol. 6 p. 275.

Convention on a Code of Conduct for Liner Conferences, 1974: *see* Vol. 6 p. 276.

Protocol Relating to the International Convention for the Safety of Life at Sea, 1974 as amended 1978: *see* Vol. 12 p. 256.

UN Convention on the Carriage of Goods by Sea, 1978: *see* Vol. 6 p. 276.

Protocol Relating to the International Convention on Load Lines, 1988: *see* Vol. 12 p. 256.

**International Convention on Load Lines, 1966**  
(Continued from Vol. 12 p. 256)  
(Status as provided by IMO)

<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>
Turkmenistan	4 Feb 2009	4 May 2009

**International Convention on Tonnage Measurement of Ships, 1969**

(Continued from Vol. 6 p. 274)

(Status as provided by IMO)

<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>
Turkmenistan	4 Feb 2009	4 May 2009

**Convention on the International Regulations for Preventing Collisions at Sea, 1972**

(Continued from Vol. 10 p. 286)

(Status as provided by IMO)

<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>
Turkmenistan	4 Feb 2009	4 Feb 2009

**International Convention for the Safety of Life at Sea, 1974**

(Continued from Vol. 6 p. 286)

(Status as provided by IMO)

<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>
Turkmenistan	4 Feb 2009	4 May 2009

**Protocol Relating to the International Convention for the Safety of Life at Sea, 1988**

(Continued from Vol. 14 p. 244)

(Status as provided by IMO)

<i>State</i>	<i>Cons (dep.)</i>	<i>E.i.f.</i>
Kazakhstan	17 Feb 2009	17 May 2009

## SOCIAL MATTERS

International Agreement for the Suppression of the White Slave Traffic, 1904, amended by Protocol 1949: *see* Vol. 6 p. 278.

International Convention for the Suppression of the White Slave Traffic, 1910, amended by Protocol 1949: *see* Vol. 6 p. 278.

Agreement for the Suppression of the Circulation of Obscene Publications, 1910, amended by Protocol 1949: *see* Vol. 6 p. 278.

International Convention for the Suppression of the Traffic in Women and Children, 1921: *see* Vol. 6 p. 277.

Convention for the Suppression of the Traffic in Women and Children, 1921, amended by Protocol in 1947: *see* Vol. 6 p. 277.

International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, 1923: *see* Vol. 6 p. 277.

Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications, 1923, amended by Protocol in 1947: *see* Vol. 6 p. 277.

International Convention for the Suppression of the Traffic in Women of Full Age, 1933: *see* Vol. 6 p. 277.

Convention for the Suppression of the Traffic in Women of Full Age, 1933, amended by Protocol, 1947: *see* Vol. 6 p. 277.

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950: *see* Vol. 12 p. 257.

Final Protocol to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950: *see* Vol. 12 p. 257.

#### TELECOMMUNICATIONS

Constitution of the Asia-Pacific Telecommunity, 1976: *see* Vol. 13 p. 280.

Convention on the International Maritime Satellite Organization (INMARSAT), 1976 (as amended): *see* Vol. 8 p. 193.

Amendment to Article 11, Paragraph 2(a), of the Constitution of the Asia-Pacific Telecommunity, 1981: *see* Vol. 8 p. 193.

Amendments to articles 3(5) and 9(8) of the Constitution of the Asia-Pacific Telecommunity, 1991: *see* Vol. 9 p. 298.

Agreement establishing the Asia-Pacific Institute for Broadcasting Development, 1977: *see* Vol. 10 p. 287.

Amendments to the Agreement establishing the Asia-Pacific Institute for Broadcasting Development, 1999: *see* Vol. 10 p. 288.

Amendments to the Constitution of the Asia-Pacific Telecommunity, 2002: *see* Vol. 13 p. 280.

#### **Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, 1998**

(Continued from Vol. 14 p. 245)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Pakistan		30 Jan 2009

#### TREATIES

Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 1986: *see* Vol. 6 p. 280.

Vienna Convention on the Law of Treaties, 1969: see Vol. 12 p. 258.

## WEAPONS

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Warfare, 1925: see Vol. 6 p. 281.

Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 1963: see Vol. 6 p. 281.

Treaty on the Non-Proliferation of Nuclear Weapons, 1968: see Vol. 11 p. 262.

Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, 1971: see Vol. 6 p. 282.

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1972: see Vol. 13 p. 281.

Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1976: see Vol. 12 p. 258.

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1993: see Vol. 12 p. 259.

Comprehensive Nuclear Test Ban Treaty, 1996: see Vol. 12 p. 259.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997: see Vol. 13 p. 281.

Amendment of Article 1 of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to have Indiscriminate Effects, 2001: see Vol. 12 p. 259.

### **Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to have Indiscriminate Effects, and Protocols, 1980**

(Continued from Vol. 11 p. 263)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kazakhstan		8 Jul 2009

### **Convention on Cluster Munitions, 2008**

Entry into Force: 1 August 2010

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Japan	3 Dec 2008	14 Jul 2009
Laos	3 Dec 2008	18 Mar 2009



# STATE PRACTICE OF ASIAN COUNTRIES IN THE FIELD OF INTERNATIONAL LAW\*

## PEOPLE'S REPUBLIC OF CHINA<sup>1</sup>

### JUDICIAL DECISIONS

#### **Extradition**

#### EXTRADITION CASE (11 DECEMBER 2008)<sup>2</sup>

The Republic of Yemen requested the extradition of criminal Al-Jabar Abdulsalam Saleh Hasan (“Al-Jabar”), citizen of Yemen. Hasan was convicted by the Higher People’s Court of Guangdong Province and sentenced to 6 years’ imprisonment for the crime of illegal trading in firearms.

Al-Jabar had made a written declaration to express his willingness to complete the remainder of his sentence in his home country. Al-Jabar did not have other judicial proceedings ongoing in the People’s Republic of China or any outstanding liabilities. There did not exist any other conditions to reject a request for extradition. The extradition request was justified in accordance with extradition conditions laid down in the relevant laws. The Supreme People’s Court of the People’s Republic of China, the Supreme People’s Procuratorate of the People’s Republic of China, the Ministry of Justice, the Ministry of Foreign Affairs and the Public Security Bureau agreed to extradite Al-Jabar to Yemen. On 21 November 2008, the “Decision to Extradite Yemeni Convicted Person Al-Jabar to the Main Organization in the Republic of Yemen for the Continued Enforcement of Punishment” was passed.

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\* Edited by BS Chinni. The responsibility for the content of the materials is that of the national contributor to the State Practice section. The original footnote form has been retained in each contribution. State practice has been collated for the years 2008 and 2009. However, in some cases, State Practice for early years has been included.

<sup>1</sup> Contributed by ZHAO Yun, Associate Professor, Faculty of Law, the University of Hong Kong.

<sup>2</sup> Details of the case are available at <<[http://www.moj.gov.cn/sfxzws/content/2009-08/26/content\\_1144102.htm?node=7380](http://www.moj.gov.cn/sfxzws/content/2009-08/26/content_1144102.htm?node=7380)>> (last visited on 31 March 2010).



## OTHER STATE PRACTICE

1. Amending Protocol to the Free Trade Agreement between the Government of China and Pakistan (15 October 2008)<sup>3</sup>

Reaffirming the Free Trade Agreement between the Government of the People's Republic of China and the Government of the Islamic Republic of Pakistan (hereinafter referred to as "the Agreement") signed on 24 November 2006, the Parties agree to amend the Agreement to provide for the establishment of "China – Pakistan Investment Zones" through the addition of the following provisions:

- (a) Chapter II Article 5: "'China–Pakistan Investment Zones' means special industrial zones located in the territory of Pakistan notified by the Board of Investment, Government of Pakistan having not less than 40 percent investment by approved Chinese investors."
- (b) Chapter III "Tariff Elimination" Article 8A: "Notwithstanding the provisions of Article 8, the parties shall facilitate the establishment of China–Pakistan Investment Zones including the Haier–Ruba Economic Zone. China and Pakistan shall consider reduction/elimination of tariffs on goods produced in the China–Pakistan Investment Zones including the Haier–Ruba Economic Zone and other goods of export interests of the Parties on the basis of principle of mutual economic benefits. The tariff reduction/elimination shall be part of the tariff reduction schedule as specified in Annex I of the Agreement."
- (c) Chapter IX: "56-A-Incentive package for investment in China–Pakistan Investment Zones. For the development of China–Pakistan Investment Zones in Pakistan and for the investors in the zones, Pakistan shall provide a package of incentives as provided in the Annex to this Amending Protocol."

2. Joint Statement between the People's Republic of China and the Republic of Tajikistan on Further Developing Good-Neighbourliness, Friendship and Cooperation (27 August 2008)<sup>4</sup>

The People's Republic of China and the Republic of Tajikistan (hereinafter referred to as "the two sides") both viewed the Treaty of Good-neighbourliness, Friendship and Cooperation between the People's Republic of China and the Republic of Tajikistan signed on 15 January 2007 by the two heads of State as having important historic and immediate significance as it laid a solid legal foundation for the long-term, steady and sound growth of China–Tajikistan relations. The two sides are committed to the policies and principles laid out in the Treaty and will earnestly implement all bilateral political

<sup>3</sup> The full text is available at <<<http://fta.mofcom.gov.cn/inforimages/200810/20081023143246189.pdf>>> (last visited on 31 March 2010).

<sup>4</sup> The full text is available at <<<http://www.fmprc.gov.cn/eng/zxxx/t511334.htm>>> (last visited on 31 March 2010).

documents signed since establishment of bilateral relations to constantly advance the China–Tajikistan good-neighbourly and cooperative relationship.

The two heads of State applauded the current State of the China–Tajikistan good-neighbourly and cooperative relationship and believed that fast-growing cooperation between the two countries in diverse fields delivers real benefit to the two peoples. The two sides emphasized that they will maintain frequent high-level visits and exchange views on bilateral relations and major issues concerning international situations in a timely manner. The two sides will continue to increase contact between the two governments and various departments, expand and deepen exchanges and cooperation in political affairs, economy and trade, security, people-to-people and cultural fields, and continuously lift the China–Tajikistan good-neighbourly and cooperative relationship to higher levels.

The two sides will further support the exchanges and cooperation between the National People’s Congress of China and the Supreme Assembly of Tajikistan and between their specialized committees and friendship groups, constantly improve the legal foundation for bilateral relations, enhance traditional friendship and deepen the mutual understanding between the two peoples.

The two sides reiterated the important significance of delineation of the China–Tajikistan boundary. The two sides will strictly abide by all bilateral agreements and documents on the boundary issue and stay committed to maintaining durable peace and lasting friendship in the border areas.

The two sides agreed to continue to support each other on major issues concerning State sovereignty and territorial integrity. The Tajik side reiterated its firm commitment to the one China policy, recognizing the Government of the People’s Republic of China as the sole legal government representing the whole of China and Taiwan as an inalienable part of China’s territory. The Tajik side is opposed to any attempt to create “two Chinas” or “one China, one Taiwan”, opposes “Taiwan independence” and Taiwan’s membership in any international or regional organizations open only to sovereign States. It refuses to establish official ties or conduct official exchanges in any form with Taiwan. The Tajik side supports all efforts of the Chinese Government for national reunification. It holds that the Taiwan issue is a domestic affair of China, in which external forces have no right to interfere. The Chinese side highly appreciated the principled position of the Tajik side and reaffirmed its support for the efforts of the Tajik side to safeguard independence, sovereignty, territorial integrity, maintain domestic stability and develop national economy.

The two sides viewed the fight against “East Turkistan” terrorist forces as an important part of the global efforts against terrorism. The two sides will honour their commitments in the Cooperation Agreement on Combating Terrorism, Separatism and Extremism Between the People’s Republic of China and the Republic of Tajikistan and the Shanghai Convention on Combating Terrorism, Separatism and Extremism; continue to work closely with each other in the security field; and take effective measures to jointly fight all forms of terrorism, including the “East Turkistan” terrorist forces in the interest of peace and stability in both countries and in the region at large.

The two sides held that drug crime is a serious threat to the social stability and national security of all countries in the region. The two sides will strengthen coordination and cooperation and take effective measures to combat narcotics production and trafficking and other forms of drug crime.

The two sides maintained that to strengthen bilateral economic and trade cooperation is of great significance to comprehensively advancing bilateral relations. The two sides agreed to strengthen the work of the trade and economic cooperation commission between the two governments; further upgrade trade mix, promote economic and technical cooperation; improve the trade and investment environment; and expand cooperation in transportation, communications, mining and reprocessing, agriculture and infrastructure construction on the basis of equality and mutual benefit.

The two sides will continue to explore the cooperation potential in road transport and cross-border transport, enhance the transfer capacity of border passes, and provide facilitation to each other in road, railway and air transport. The two sides will adopt policies to encourage border trade based on equality and mutual benefit and promote practical cooperation in the border areas.

The two sides will facilitate investment and trade activities in each other's country and economic and technical cooperation in accordance with their respective laws, and protect the safety of life and property and legitimate rights and interests of each other's nationals.

The two sides will expand exchanges and cooperation in education, culture, science and technology, media, tourism, sports, health, social security and other fields, and support the exchanges and cooperation between institutions of higher learning, scientific research institutions and friendship organizations for youth and the general public.

The two sides held that the Shanghai Cooperation Organization has maintained a good momentum of growth. As an important platform for deepening good-neighbourly relationship among member States on the basis of mutual trust and mutual benefit, it is playing an important, constructive role in promoting stability in Central Asia and the common development of member States. The two sides will continue to make concerted efforts to constantly deepen practical cooperation in security, economic affairs and people-to-people and cultural exchanges under the framework of the Shanghai Cooperation Organization.

The two sides stressed that Central Asian countries have unique historical and cultural traditions. The international community should respect the development path independently chosen by the people in Central Asian countries in keeping with their national conditions. Stability and security, steady economic growth and social progress conform to the common aspiration and serve the fundamental interests of all the people in the region. China applauded the efforts of the Tajik side in promoting security, stability and development in Central Asia.

The two sides pointed out that China and Tajikistan have common or similar positions on a number of major international and regional issues, and expressed their resolve to further strengthen bilateral cooperation within the framework of the United Nations and other international organizations. The two sides will strictly abide by the purposes and principles of the UN Charter and other universally recognized norms of international law and establish a new security structure featuring mutual trust, mutual benefit, equality and coordination. The two sides held that international disputes should be settled through peaceful means, that the United Nations should play a leading role in upholding world peace and security, and that diversity in world civilizations and in development models should be respected in order to build a harmonious world of durable peace and common prosperity.

3. Air Transport Agreement between the Government of the People's Republic of China and the Government of the Democratic People's Republic of Korea (17 June 2008)<sup>5</sup>

The Government of the People's Republic of China and the Government of the Democratic People's Republic of Korea, being parties to the Convention on International Civil Aviation opened for signature at Chicago on 7 December 1944, have agreed on the establishment of international air services between and beyond their respective territories as follows in the Agreement to facilitate the friendly contacts between their two peoples and develop mutual relations between the two countries in the field of civil aviation.

4. Agreement between the Government of the People's Republic of China and the Government of the United Republic of Tanzania relating to Air Services (11 April 2008)<sup>6</sup>

The Government of the People's Republic of China and the Government of the United Republic of Tanzania, being Parties to the Convention on International Civil Aviation opened for signature at Chicago on 7 December 1944, have agreed on the following matters in the Agreement in the desire to promote an international aviation system based on competition among airlines, to facilitate the expansion of international air services opportunities. The Parties recognize that efficient and competitive international air services enhance trade, the welfare of consumers and economic growth. The Parties desire to make it possible for airlines to offer the travelling and shipping public a variety of service options, and wish to encourage individual airlines to develop and implement innovative and competitive prices. The Parties desire to ensure the highest degree of safety and security in international air services and reaffirmed their grave concern about acts or threats against the security of aircraft, which jeopardize the safety of persons or property, adversely affect the operation of air services, and undermine public confidence in the safety of civil aviation.

5. Arrangement on Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters by Courts of Mainland and HKSAR pursuant to Agreed Jurisdiction by Parties Concerned (3 July 2008)<sup>7</sup>

The Supreme People's Court and the Hong Kong Special Administrative Region (HKSAR) achieved consensus on Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the

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<sup>5</sup> The full text is available at << <http://tradeinservices.mofcom.gov.cn/en/b/2008-06-17/51877.shtml> >> (last visited on 31 March 2010).

<sup>6</sup> The full text is available at << <http://tradeinservices.mofcom.gov.cn/en/b/2008-04-11/54398.shtml> >> (last visited on 31 March 2010).

<sup>7</sup> Fa Shi [2008] No. 9.

Mainland and of the HKSAR in Pursuant to Choice of Court Agreements Between Parties Concerned (hereinafter referred to as “Arrangement”) through consultation and signed on 14 July 2006, according to prescription in Article 95 of The Basic Law of Hong Kong Administrative Region of the People’s Republic of China. The Arrangement was passed in the 1,390th meeting of the Judicial Committee of the Supreme People’s Court on 12 June 2006. This Arrangement takes effect on 1 August 2008 according to agreement achieved between both parties.

In accordance with the provision of Article 95 of the Basic Law of the HKSAR of the People’s Republic of China and through mutual consultation between the Supreme People’s Court and the Government of the HKSAR, the Arrangement is hereby made for the recognition and enforcement of judgments in civil and commercial matters pursuant to choice of court agreements made between the parties concerned.

6. Free Trade Agreement Between the Government of the People’s Republic of China and the Government of the Republic of Singapore (23 October 2008)<sup>8</sup>

The Government of the People’s Republic of China and the Government of the Republic of Singapore (“the Parties”), recognizing their long-standing friendship, strong economic ties and close cultural links as well as the special relationship shared by both countries, desired to strengthen and enhance the economic, trade and investment cooperation between the Parties through deepening economic integration for acceleration of economic development and cooperation for the benefit of both domestic consumers and producers of both Parties.

The Parties agreed to establish a free trade area to (a) liberalize and promote trade in goods in accordance with Article XXIV of the GATT 1994; (b) liberalize and promote trade in services in accordance with Article V of the WTO General Agreement on Trade in Services (GATS), including promotion of mutual recognition of professions; (c) establish a transparent, predictable and facilitative investment regime and provide a more stable policy framework for investors; (d) promote economic cooperation, explore new areas of collaboration, and further strengthen bilateral cooperation in view of recent regional and international strategic developments; (e) promote mutually beneficial economic relations as well as to encourage greater collaboration among their respective professional bodies and academic institutions; (f) enhance bilateral linkages through other sector-specific collaborations, including sanitary and phytosanitary measures, technical barriers to trade, and customs co-operation; and (g) improve the efficiency and competitiveness of their manufacturing and services sectors and to expand trade and investment between the Parties, including joint exploitation of commercial and economic opportunities in non-Parties.

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<sup>8</sup> The full text is available at << <http://tradeinservices.mofcom.gov.cn/en/b/2008-10-23/59036.shtml> >> (last visited on 31 March 2010).

**INDIA<sup>9</sup>****JUDICIAL DECISIONS**

*Copyright protection for compilation of judgments – what constitutes “originality” in a compilation? Evolution of concept of “originality” – references to various cases in foreign jurisdictions*

EASTERN BOOK COMPANY AND OTHERS v. DB MODAK AND ANOTHER

**Supreme Court of India, 12 December 2007**  
**<http://JUDIS.NIC.IN>**

**Facts**

Appellant, Eastern Book Company, published all reportable judgments along with the non-reportable judgments of the Supreme Court of India. They sought copyright protection to their published work contending that various inputs were made to the compilation of these judgments and orders so as to make them user-friendly. According to the appellant, this was done by addition of cross-references, standardization or formatting of the text, paragraph numbering, verification and other inputs. Appellants also contended that they provided head notes with catch/lead words written in bold; and the long note that provided the brief discussion of the facts and the relevant extracts from the judgments and orders of the Court. All this, according to appellants, involved considerable amount of skill, labour, expertise and capital expenditure, besides recurring expenditure on both the management of human resources and infrastructural maintenance. Defendants brought out CD-ROMs compiling the judgments that allegedly copied the work of the appellants. Appellants moved the High Court of Delhi by filing a suit for temporary injunction against the defendants. The High Court did not fully agree with the contentions of the appellants and held that while the appellants could claim copyright protection with regard to head notes, they did not have copyright in the copy-edited judgments of the Supreme Court. Aggrieved by this decision of the High Court, appellants appealed to the Supreme Court.

**Judgment**

The Court noted the assertion made by the appellants that originality inhered in several aspects of their editorial process. The Court outlined each of these factual assertions and aspects of editorial processes in the judgment. On the substantive legal

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<sup>9</sup> Contributed by V. G. Hegde, Associate Professor, School of International Studies, Jawaharlal Nehru University, New Delhi.

issues, the Court first narrated the evolution of the Indian Copyright Law and thereafter outlined, briefly, some of the basic concepts of copyright: (a) that the justifications for the copyright protection could be found in fair play; (b) that it sought to protect the skill and labour of the original author; (c) that it prohibited unlawful reproduction or exploitation of copyrighted works; (d) that it was a right to stop others from exploiting the work without the consent or assent of the owner of the copyright; (e) that it sought to balance the interests and rights of the author and that of the public; (f) that it established a link between originality and public domain; (g) that there was no protection in facts *per se*, as the facts were not created nor had they originated with the author of any work which embodied these facts; and (h) that the issue of copyright was closely connected to that of commercial viability, commercial consequences and other implications.

The Court framed the questions that needed answers in the following way: (a) what should be the standard of originality in the copy-edited judgments of the Supreme Court which was a derivative work and what could be required in a derivative work to treat it as the original work of an author and thereby extending copyright protection? (b) whether the entire version of the copy-edited text of the judgments published by the appellants would be entitled for a copyright protection as an original literary work?

The Court began its analysis of the above questions by referring to the scheme of the Indian Copyright Act, 1957 with specific reference to Section 13 of the Indian Copyright Act, which provided for copyright throughout India in original literary work, dramatic, musical and artistic works, cinematograph films and sound recordings subject to certain exceptions that included reproduction or publication of any judgment or order of a Court, Tribunal or other judicial authority unless the reproduction or publication was prohibited by the Court.

The Court noted that in a derivative work (i.e. a work derived from an existing work), a new copyright would be created provided it fulfilled various criteria such as skill, capital and labour. The Court also noted both appellant's and defendant's references, besides the Indian ones, to several English, US and Canadian case laws to substantiate their contentions on "originality". One of the decisions, besides several other old decisions, on this issue was by the House of Lords in *Ladbroke (Football) Ltd v. William Hill (Football) Ltd.* (1964), where the issue related to the concept of originality on the basis of skill, judgment and/or labour in the context of compilation. The Court also referred to *University of London Press Limited v. University of Tutorial Press Limited* (1916), one of the most cited judgments regarding originality. The *Feist Publications Inc. v. Rural Telephone Service Co. Inc.* was another well-known US case dealing with the question of "originality" with regard to compilations that was discussed by the Court, besides several other US cases. The Court also extensively discussed one of the Canadian Supreme Court cases, namely *CCH Canadian Ltd v. Law Society of Upper Canada* (2004).

Based on these case laws, the Court granted partial relief to the appellants. It did not grant copyright protection to the entire compilation. It excluded the narration of the text of the judgments from the copyright protection. The Court extended copyright protection (in addition to head notes) to paragraphs made by the appellants in their copy-edited version for internal references.

*Sustainable development and the concept of “balance” in an emerging economy – principle of proportionality – precautionary principle*

RESEARCH FOUNDATION FOR SCIENCE TECHNOLOGY AND NATURAL RESOURCE POLICY v. UNION OF INDIA AND OTHERS

**Supreme Court of India, 11 September 2007**

**2007 (9) Supreme Court Reporter 906; also see 2007(11) SCALE 75**

**Facts**

In the present case, the Court was hearing an interlocutory application that sought clearance to dismantle a decommissioned passenger liner, namely *Blue Lady*. This dismantling activity was to take place on the coast of the State of Gujarat at Alang, which was known for widespread ship-breaking activity leading to the production of a variety of toxic substances. This largely unregulated activity along the coast not only damaged the coastal environment but also affected the health of the large number of workers handling these substances. These issues were initially brought before the Court in a petition filed in 1995.<sup>10</sup> The Court, after hearing the matter in 2006, had constituted a Technical Expert Committee (TEC) that suggested detailed guidelines to preserve the environment and the health of the workers. Thereafter, any ship-breaking activity was subjected to a formal clearance from the Court on a case-to-case basis as per the recommendations of the TEC.

**Judgment**

While accepting in this case the recommendation of the TEC in respect of the safety and health of the workmen, including its effect on the environment while dismantling the ship, the Court *inter alia* reiterated that “precautionary principle” constituted an important element of the concept of sustainable development. Invoking the concept of “balance”, it noted that:

... we have to balance the priorities of development on one hand and environmental protection on the other hand . . . . When we apply the principle of sustainable development, we need to keep in mind the concept of development on one hand and the concepts like generation of revenue, employment and public interest on the other hand.

The Court, accordingly, while accepting the recommendations of the TEC concerning infrastructure, environmental hazards and the health and safety of workers, gave clearance to dismantle the *Blue Lady*.

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<sup>10</sup> The original petition was heard by the Court on 17 February 2006 pursuant to a Writ Petition filed in 1995 (657 of 1995). The Court, while hearing this petition in the context of dismantling of another ship, “Clemenceau”, had identified certain aspects that needed closer scrutiny, such as issues concerning infrastructure, capacity of Alang to handle a large volume of ship-breaking activity, safeguards to be provided to the workers who were likely to face health hazards on account of this and the need for the study of the environmental impact assessment of the whole area. In order to assess these aspects, the Court had constituted a Committee of Technical Experts. See also *Research Foundation for Science v. Union of India and Another*, 2007 (10) Supreme Court Cases (SCC) 583.



*US–India Extradition Treaty – domestic extradition procedures – legal limits of the words “information” and “evidence” in the Indian Extradition Act*

SARABJIT RICK SINGH v. UNION OF INDIA

**Supreme Court of India, 12 December 2007  
(2008) 2 Supreme Court Cases (SCC) 417**

### **Facts**

A formal request was made by the government of the United States of America (USA) to the government of India seeking extradition of the appellant, alleging that he was involved in aiding and abetting the sale and supply of a controlled substance and other offensive substances in the USA. He was also charged with being a member of a criminal organization involved in drug trafficking and money laundering. At the time of this request the appellant, an Indian national, was located in India. An Extradition Treaty existed between both countries, concluded in July 1999. Pursuant to this request by the government of the USA, the appellant was arrested by India on 10 November 2002 and, as per Section 5 of the Indian Extradition Act 1962, Additional Chief Metropolitan Magistrate, New Delhi was requested to make an enquiry in respect of the alleged offences levelled against him. He was, accordingly, produced before the Magistrate and given a copy of the formal request for extradition. He was also given an opportunity to file a written statement. The appellant, however, took a plea that the copy of the document containing the formal request for his extradition did not satisfy the requirements of Article 9<sup>11</sup> of the USA–India

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<sup>11</sup> Article 9 of the USA–India Extradition Treaty provides that “(1) All requests for extradition shall be submitted through diplomatic channels; (2) All requests for extradition shall be supported by: (a) documents, statements or other types of information which describe the identity and probable location of the persons sought; (b) information describing the facts of offense and the procedural history of the case; (c) a statement of the provisions of the law describing the essential elements of the offense for which extradition is requested; (d) a statement of the provisions of the law describing the punishment for the offense; and (e) the documents, statements, or other types of information specified in paragraph 3 or paragraph 4 of this Article, as applicable; (3) A request for extradition of a person who is sought for prosecution shall also be supported by: (a) a copy of the warrant or order of arrest, issued by the judge or other competent authority; (b) copy of the charging document, if any, and (c) such information as would justify the committal for trial of the person if the offense had been committed in the Requested State; (4) A request for extradition relating to a person who has been convicted of the offense for which extradition is sought shall also be supported by: (a) a copy of the judgment of conviction or, if such copy is not available, a statement by a judicial authority that the person has been convicted; (b) information establishing that the person sought is the person to whom the conviction refers; (c) a copy of the sentence imposed, if the person sought has been sentenced, and a statement establishing to what extent the sentence has been carried out; and (d) in the case of a person who has been convicted *in absentia*, the documents required in paragraph 3.”

Extradition Treaty as well as Section 7<sup>12</sup> of the Indian Extradition Act 1962. He filed an application for supply of deficient documents to lead his defence. The Magistrate declined the request by an order stating that the extradition enquiry would proceed only on the documents filed by the respondent in the trial court subject to all legal consequences. Subsequently, the Magistrate recommended the extradition of the appellant to the USA. The appellant challenged the legality and validity of this order of the Magistrate through a writ petition before the Delhi High Court. The High Court had dismissed this petition and the appellant went before the Supreme Court arguing that “. . . under Article 21 of the Constitution of India, it was obligatory on the part of the learned Magistrate as also of the High Court to pass an order of extradition on the basis of the material which would constitute ‘evidence’ and as some of the documents upon which the reliance was placed by the respondent did not satisfy the requirement of the said term within the meaning of Section 7 of the Act”.

### Judgment

After considering its earlier decisions on the question of what kind of standard of proof or evidence is required in an enquiry of this kind, the Court pointed out that: “Consistent view of the courts of India in this behalf, however, appears to be that an enquiry conducted pursuant to the order of the Central Government is only to find out whether there was a *prima facie* case against the fugitive criminal for extradition to the treaty country. Mode and manner of enquiry has nothing to do with the rule in regard to standard of proof.”

Referring to the relationship between provisions of the USA–India Extradition Treaty (Article 9 specifically) and the provisions of the Indian Extradition Act 1962 (Section 7 specifically), the Court noted that:

When a statute is required to be read with an International Treaty, consideration of the provisions contained in the latter is also imperative. On a conjoint reading of Section 7 and Section 10 of the Act read with paragraphs 2 and 3 of Article 9 of the Treaty, we are of the opinion that the word “information” occurring in Section 7 could not mean evidence

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<sup>12</sup> Section 7 provides “(1) When the fugitive criminal appears or is brought before the Magistrate, the Magistrate shall inquire into the case in the same manner and shall have the same jurisdiction and powers, as nearly as may be, as if the case were one triable by a Court of Session or High Court; (2) Without prejudice to the generality of the foregoing provisions, the Magistrate shall, in particular, take such evidence as may be produced in support of the requisition of the foreign State and on behalf of the fugitive criminal, including any evidence to show that the offence of which the fugitive criminal accused or has been convicted is an offence of political character or is not an extradition offence; (3) If the Magistrate is of opinion that a *prima facie* case is not made out in support of the requisition of the foreign State, he shall discharge the fugitive criminal; (4) if the Magistrate is of opinion that a *prima facie* case is made out in support of the requisition of the foreign State, he may commit the fugitive criminal to prison to await the orders of the Central Government and shall report the result of his inquiry to the Central Government, and shall forward together with such report and written statement which the fugitive criminal may desire to submit for the consideration of the Central Government.”

which has been brought it on record upon strict application of the provisions of the Evidence Act. The term “information” contained therein has a positive meaning. It may in a sense be wider than the words “documents and the evidence”, but when a document is not required to be strictly proved upon applying the provisions of the Indian Evidence Act or when an evidence is not required to be adduced strictly in terms thereof, the use of the word “information” in Section 10 of the Extradition Act as also Articles 9 (2) and 9 (3) of the Treaty becomes relevant.

In conclusion, the Court stated: “What is necessary is to arrive at a *prima facie* case finding that a case has been made out for extradition from the depositions, statements, copies and other informations which are to be gathered from the official certification of facts and judicial documents that would include the indictment by the Grand Jury.” According to the Court, the Extradition Act was a “special statute” and for that reason it would “. . . prevail over the provisions of a general statute like the Code of Criminal Procedure”. The “information”, according to the Court “need not be documentary evidence or oral evidence as is understood under the Indian Evidence Act”. The plea of the appellant was dismissed.

*Carriage of Goods by Sea – applicable law issues – determination of liability – contents of bill of lading – invoice not part of bill of lading*

SHIPPING CORPORATION OF INDIA v. M/S BHARAT EARTH MOVERS LTD  
AND ANOTHER

**Supreme Court of India, 5 December 2007**  
**(2008) 2 Supreme Court Cases (SCC) 79**

### **Facts**

The question before the Court related to the applicability of correct law to arrive at the quantum of liability. The appellant was a carrier and he was entrusted with carriage of certain goods by sea from Kobe, Japan to Chennai, India by the respondent. A part of the consignment was found in a damaged condition. Respondents filed a suit for damage in the Madras High Court (now “Chennai”). The appellant argued that since the contract of carriage was concluded in Japan, the Japanese Carriage of Goods by Sea Act 1992 would apply, not the Indian Carriage of Goods by Sea Act 1925. Further to this, and taking into account the provisions of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague Rules), the appellant contended that as the price of the cargo had not been disclosed in the Bill of Lading, the liability of the appellant must be held to be confined only to the amount specified therein.

### **Judgment**

Perusing both the Indian and the Japanese enactments relating to Carriage of Goods by Sea, the Court noted:

A bare perusal of Section 2 of the Indian Act would clearly demonstrate that the same applies to the carriage of goods by sea in ships carrying goods from any port in India to any other port whether in or outside India which would mean that the Indian Act shall apply only when the carriage of goods by sea in ships takes place from a port situate within India and not a port outside India. The Japanese Act, on the other hand, applies in a situation where carriage of goods by a ship is either from a loading Port or from a discharging Port, either of which is located outside Japan. Therefore, Japanese Act will clearly be applicable in the instant case.

As regards the quantum of liability, the Court referred to Clause 5 of The Hague Rules to which both India and Japan were parties. It, *inter alia*, provided that the liability would accrue on the carrier-shipper only when the nature and value of goods have been declared before shipment and inserted in the Bill of Lading. The Court also did not accept the contention that the mere reference to an invoice in the Bill of Lading could not be taken as declaring the exact value of the goods as the invoice was not part of the Bill of Lading. The Court emphasized that “The value of the goods is required to be stated on the Bill of Lading so as to enable the shipping concern to calculate the quantum of freight. It cannot, in absence of any statutory provisions, be held to be incorporated therein by necessary implication or otherwise.” Accordingly, the Court, in the light of its observations, sent the matter back to the Chennai High Court for a fresh consideration of the quantum of liability.

*Enforcement of Foreign Arbitral Awards – scope and applicability of Section 2 of the Indian Arbitration and Conciliation Act 1996*

VENTURE GLOBAL ENGINEERING v. SATYAM COMPUTER SERVICES LTD  
AND ANOTHER

**Supreme Court of India, 10 January 2008**  
**(2008) 4 Supreme Court Cases (SCC) 190**

### **Facts**

The appellant (Venture Global Engineering), a United States (US) entity and the respondent (Satyam Computer Services Ltd), an Indian Company entered into a joint venture agreement in 1999 to constitute a company named Satyam Venture Engineering Services Ltd. Both the appellant and the respondent had 50 percent equity shareholding in this company. Both of them also concluded a Shareholders’ Agreement according to which all disputes would have to be resolved amicably between parties, failing which they should invoke arbitration proceedings. In 2005, a dispute arose between the parties pursuant to which the respondent filed a request for arbitration with the London Court of International Arbitration (LCIA). The sole arbitrator appointed by the LCIA passed an award and the respondent (in whose favour the award was given) sought the enforcement of the award before the Eastern District Court of Michigan (a US court). The appellant entered an appearance to defend this proceeding and argued that the enforcement of the

award sought by the respondent violated Indian Laws, specifically the Foreign Exchange Management Act 1999 (FEMA). Meanwhile, the appellant also filed a suit in India (in the district court of Secundrabad, State of Andhra Pradesh) seeking to set aside the arbitration award. The district court in India stayed the operation of the award. The respondent challenged this order of the district in the High Court of Andhra Pradesh and the High Court stayed the order of the district court.

After this complex web of litigation, the matter was taken to the Supreme Court on the narrow, but significant, question of the nature of the award given (i.e. whether it was an Indian award or a foreign arbitral award) and the extent and scope of the Indian Arbitration and Conciliation Act 1996 to enforce such an award. The appellant argued that provisions of Part I of the Indian Arbitration and Conciliation Act 1996 applied to foreign awards and that it had been well covered by the judgment of the Supreme Court in *Bhatia International v. Bulk Trading S.A. and Another* in 2002.<sup>13</sup> The respondent, while opposing this view, pointed out that as per Section 44 of the Indian Arbitration and Conciliation Act, no suit would lie in India to set aside the arbitration award, which was a foreign award. The Supreme Court primarily considered and reiterated the *Bhatia International* case as it noted that the contentions of both parties were based on this lone case.

## Judgment

The scope, meaning and application of Section 2 of the Indian Arbitration and Conciliation Act 1996 was the key issue. This provision stated that Part I of the 1996 Act should apply when the arbitration takes place in India, while Part II applied to foreign awards. Part II of the 1996 Act refers to the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958, known as the “New York Convention”, and the Convention on the Execution of Foreign Arbitral Awards 1927, known as the “Geneva Convention”.

The Court primarily summed up the views and decision in the *Bhatia International* case by referring to relevant paragraphs. The views were, briefly: that there could be a lacuna as neither Part I nor II would apply to arbitrations held in a country that was not a signatory to the New York Convention or the Geneva Convention (a non-convention country); that it would lead to a situation wherein it would “leave a party remediless inasmuch as in international commercial arbitrations which take place out of India, the party would not be able to apply for interim relief in India even though the properties and assets are in India. Thus, a party may not be able to get any interim relief at all.”

The Court, however, referred to an inverse interpretation in relation to Section 2 of the 1996 Act as provided in the *Bhatia International* case. To state this, briefly:

... it is not providing that Part I shall not apply where the place of arbitration is not in India. It is also not providing that Part I will **only** apply where the place of arbitration is in

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<sup>13</sup> See (2002) 4 Supreme Court Cases (SCC) 105.

India. Thus the legislature has not provided that Part I is not to apply to arbitrations which take place outside India. The use of the language is significant and important. The legislature is emphasizing that the provisions of Part I would apply to arbitrations which take place in India, but not providing that the provisions of Part I will not apply to arbitrations which take place out of India, the wording of the sub-section (2) of Section 2 suggests that the intention of the legislature was to make provisions of Part I compulsorily applicable to an arbitration (emphasis added).

Accordingly, the Court reaffirmed that the provisions of Part I of the 1996 Act would apply to all arbitrations, whether held inside or outside India. The Court further noted that as regards the international commercial arbitrations held out of India, provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. It, accordingly, held that “Part I of the Act is applicable to the Award in question even though it is a foreign award”.

*Definition of “foreign-going vessels” – Maritime Zones Act and United Nations Convention on Law of the Sea (UNCLOS) – Applicability of Indian Laws in the Exclusive Economic Zone and Continental Shelf Areas as Designated Areas*

ABAN LOYD CHILES OFFSHORE LTD v. UNION OF INDIA AND OTHERS<sup>14</sup>

**Supreme Court of India, 11 April 2008**  
**2008(6) SCALE 128**

### **Facts**

The appellants were engaged in drilling operations for exploration of offshore oil, gas and other related activities under contracts awarded by the Oil and Natural Gas Corporation (ONGC), a government enterprise. The drilling operations were carried on at oil rigs/vessels situated outside the territorial waters of India. Until November 1993, the appellants and others were permitted to tranship stores to the oil rigs without levy of any customs duty regardless of their location (i.e. within designated or non-designated areas) as per the Customs Act 1962. After November 1993 the appellants were subjected to payment of customs duty on transshipment of goods/stores imported into India. Aggrieved by this, the appellants challenged these orders for collection of customs duty by the revenue authorities in Mumbai High Court. The Mumbai High Court granted them relief, allowing them clearance of the ship stores and spares for use on the oil rigs without

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<sup>14</sup> *Jindal Drilling Industries Ltd and Another v. Union of India and Others; Great Offshore Ltd. and Another v. Union of India and Others*; as regards these two cases, the Court stated: “These appeals are being disposed of by this common judgment as the facts and question of law involved in these appeals are the same.”

recovery of customs duty. Revenue authorities preferred an appeal in the Supreme Court against this order of the Mumbai High Court.

The issues before the Court were: whether oil rigs engaged in operations in the exclusive economic zone (EEZ)/continental shelf of India fell outside the territorial waters of India; whether “foreign-going vessels”, as defined in the Customs Act 1962, were entitled to consume imported stores without payment of customs duty.

The above issues were examined by the Court in the context of three notifications issued by the Central Government under the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zone Act 1976 (“Maritime Zone Act” hereinafter) by which (a) certain areas were identified as “designated areas”. The “designated areas” were more than 12 nautical miles away from the shore and were outside the territorial waters of India; (b) extending the Customs Act 1962 and the Customs Tariffs Act 1975 to the “designated areas”; and (c) declaring certain areas in the continental shelf and the exclusive economic zone where the installations, structures and platforms were located as “designated areas”.

## **Judgment**

The Court referred to the relevant provisions of the Constitution of India, Customs Act 1962, Maritime Zones Act 1976 and the international conventions to ascertain the scope and extent of definition of the “territory of India”. The court noted that the Maritime Zones Act 1976 was enacted to provide for certain matters relating to territorial waters, continental shelf, exclusive economic zone and other maritime zones of India. The Court also noted that the Maritime Zones Act 1976 was a sequel to the amendment to Article 297 of the Indian Constitution and that it was in consonance with what had been accepted by the international community of States. According to Article 297, all lands, minerals and other things of value underlying the ocean within the territorial waters or the continental shelf or the EEZ, as well as other resources of the EEZ vested in the Union, were to be held for the purposes of the Union. The Court further pointed out that as per Article 297, limits of the territorial waters, the continental shelf, the EEZ and other maritime zones of India are to be such as may be specified, from time to time, by or under any law made by the Parliament.

The Court referred and briefly extracted the basis of the Maritime Zones Act from its Statement of Objects and Reasons. These were: “The territorial waters and the continental shelf are traditional concepts of international law and the national jurisdiction in these zones is well established. The concept of the exclusive economic zone which has been developed at the initiative of developing countries has gained acceptance of the international community of States. The concept of contiguous zone which is located with the exclusive economic zone and over which additional jurisdiction is claimed by coastal States has also been accepted by the international community of States.”

Accordingly, the Court concluded that the Maritime Zones Act had also referred to the historic waters of India that were adjacent to its land territory and over which India had sovereignty. The Maritime Zones Act, it was noted, empowered the Central Government to alter the limits of maritime zones after due procedure. After this, the

Court surveyed the entire legislative framework, including international conventions such as United Nations Conventions on Law of the Sea 1982 (UNCLOS 1982), relating to various maritime zones as incorporated in Maritime Zones Act 1976.

The principal contentions of the appellants were restated by the Court. These were, briefly (a) since oil rigs were vessels and were carrying on operations more than 12 nautical miles from the shore of India, they should be regarded as “foreign-going” vessels carrying on operations outside the territorial waters of India; (b) the very fact that the Customs Act was made applicable to the continental shelf and the EEZ itself demonstrated that the continental shelf and the EEZ did not, and in fact could not, form part of the territory of India; (c) that none of the notifications issued under the provisions of the Maritime Zones Act purported to extend the limits of territorial waters. The territorial water limit remained at 12 nautical miles and the limited sovereignty that could be exercised therein for the purpose of exploration and exploitation of resources did not result in the definition or meaning of territorial waters of India or foreign-going vessel challenged.

The Court, however, clarified that “there is a clear distinction between the concept of (i) the territory of India; and (ii) the deeming provisions regarding the extension of an enactment to designated areas and such areas being deemed to be a territory of India for the purposes of extension of law”.

The Court also recorded the contentions of the respondents according to which “the coastal State has ‘sovereignty’ over ‘territorial waters’. But, it has only sovereign rights over the continental shelf and the exclusive economic zone”. It also referred to the contentions of the respondents that “the provisions of the Customs Act cannot be read in isolation”. While summing up the arguments, it stated that: “. . . the limits of the territorial waters are not extended. It is only the extension of the sovereign power over an area which is recognized as the maritime limit of the coastal State which was being exercised.”

Outlining the scheme of the Maritime Zones Act 1976 vis à vis UNCLOS 1982 and noting that the Indian enactment was consistent with the mandate of international law, the Court elaborated:

With the adoption of UNCLOS, 1982, the legal incidents of the high seas have been partly modified. UNCLOS, 1982 is a comprehensive code on the international law of sea. It codifies and consolidates the traditional law within a single, unificatory legal framework. It has changed the legal concept of continental shelf and also introduced a new maritime zone known as Exclusive Economic Zone. Exclusive economic zone is a new concept having several new features. What is significant for our purpose is that the coastal State has in its zone only sovereign rights of exploitation of the resources and not sovereignty in the sense of territoriality or dominium. Exclusiveness attaches to resources exploitation only but does not incorporate the ownership of title of the coastal State. . . . It is concept of restricted sovereignty linked to the resources sans the incidents of territoriality. This is so because, in other respects, the status of the waters in this area as a part of the high seas is specifically recognized and retained in the Convention.

According to the Court, therefore, any mineral oil produced in the EEZ or in the continental shelf would be chargeable to central excise duty as goods produced in India.



Referring to notifications issued under the Maritime Zones Act 1976, it further pointed out that the “combined effect of these notifications is to extend the application of the Customs Act and the Customs Tariff Act to the aforesaid areas declared as ‘designated areas’ under the Maritime Zones Act 1976”.

As regards the application of international law and international conventions while interpreting domestic laws, the Court, referring to *Gramophone Company of India Ltd v. Birendra Bahadur*<sup>15</sup> and *Vishaka and Others v. State of Rajasthan and Others*,<sup>16</sup> reiterated the position that “even in the absence of municipal law, the treaties/conventions can be looked into and enforced if they are not in conflict with the municipal law”.

The Court, accordingly, concluded that “our municipal law i.e., Maritime Zones Act, 1976 is not in conflict with international law, rather the same is in consonance with UNCLOS, 1982”.

The Court dismissed these appeals as it did not find any merit in the appellants seeking such a relief.

*Indian copyright law framework relating to licensing of sound recordings for the purpose of broadcasting – to what extent international law could fill the gaps in the domestic law – issuance of compulsory license for refusal to allow communication by broadcast*

M/S ENTERTAINMENT NETWORK (INDIA) LTD v. M/S SUPER CASSETTE INDUSTRIES LTD

**Supreme Court of India, 16 May 2008  
2008 (9) SCALE 69**

### **Facts**

The main issues before the Court related to the broadcasting of sound records through various FM radio stations without a valid licence and payment of royalty. Some of the music companies who owned these sound recordings challenged this violation and sought appropriate royalty and compensation. Before coming to the Supreme Court, the matter was litigated before the Copyright Boards of Hyderabad and Mumbai. The music companies, not satisfied with the decision of the Copyright Boards, preferred appeals to the Mumbai and Delhi High Courts at various points in time on the question of fixation of royalty and other related issues. Finally, the matter was brought before the main Copyright Board at Delhi by the users of the sound recordings, mainly FM radio stations, for grant of compulsory licence pursuant to Section 31 of the Indian Copyright Act to use the music recordings. The Copyright Board, after hearing the matter, had fixed royalties for a period of two years in 2002 and decided to reconsider the matter in October 2004. The

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<sup>15</sup> (1984) 2 Supreme Court Cases 534.

<sup>16</sup> (1997) 6 Supreme Court Cases 241.

Supreme Court, before whom the matter finally appeared, noted that on the question of issuance of a compulsory licence, Mumbai and Delhi High Courts had opposite views. The Mumbai High Court had opined that in terms of Section 31 of the Act, the grant of compulsory licence on reasonable remuneration would be permissible, while the Delhi High Court, on the other hand, had held otherwise.

## Judgment

The Supreme Court, in the first instance, noted the contentions of the appellants. They had contended that the issuance of compulsory licence under Section 31 of the Copyright Act should seek to strike a balance between creations of monopoly, which was generally considered opposed to public interest, and protecting intellectual property rights as a measure to encourage creativity in the respective fields. Appellants raised several issues that needed to be taken into account before issuing a compulsory licence, such as (a) the work in question should have been published or performed in the public domain; (b) the owner of the copyright should have refused to republish or allow republication or the performance in public of the work by reason of which the work was withheld from the public; (c) refusal to allow a communication by a broadcast of such work on terms that the complainant considered reasonable; (d) the owner of the copyright not to discriminate between one broadcaster and another; and (e) take into account the fact that India was a signatory to various international conventions such as the Berne Convention, Rome Convention etc., as would appear from the International Copyright Order 1999, issued by the Central Government, and Section 31 must also be construed having regard to the laws indicated by other countries in the light of the said Convention.

Respondents, on the other hand, contended that (a) the importance of the copyright protection for the owners of the copyrights should be the prime consideration for determining the issue. The object of the Copyright Act should be to maintain a balance between the interest of the owner of the copyright in protecting his works on the one hand and the interest of the public to have access to the works on the other hand; (b) ownership of any copyright, like ownership of any other property, must be considered having regard to the principles contained in Article 19(1)(g), read with Article 300A of the Constitution,<sup>17</sup> besides the human rights on property; (c) copyright owner's right of recourse to civil remedies and to allow him to enjoy the fruits of his work by earning an agreed fee or royalty through the issuance of licence; and (d) to underscore the limited jurisdiction of the Copyright Board to issue compulsory licence only when the owner refuses or withholds the work from public or, as in the case of broadcast, the work had not been allowed to be communicated to the public.

The core issue, according to the Court, was the issuance of a compulsory licence to broadcast and under what terms and conditions. While examining the core issue, the

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<sup>17</sup> Article 19(1)(g) of the Indian Constitution confers on all its citizens the right "to practise any profession, or to carry on any occupation, trade or business". According to Article 300A, "No person shall be deprived of his property save by authority of law."

Court surveyed the key provisions of the Indian Copyright Act, including Section 31, and also all the international conventions to which India was a party. The Court specifically outlined the relevant provisions of the Berne and Rome Conventions. The Court noted that while the Berne Convention dealt with literary and artistic works, the Rome Convention dealt with rights of the authors of dramatic, dramatic–musical and musical works and their public performance, including such public performance by any means or process.

The Court noted the relationship between the right of the author of copyright vis à vis the Society (i.e. that it could be exercised in almost all walks of life from the radio stations to a small hairdressing salon). In light of this, the Court posed this question – if the right of an author/society is so pervasive, is it necessary to construe the provisions of Section 31 of the Act having regard to the International Covenants and the laws operating in other countries? The Court chose to answer this in the affirmative and noted that the interpretation of a statute could not remain static. The Court, while envisaging an expanding role to the copyright particularly in the context of international conventions, accordingly pointed out:

While India is a signatory to the International Covenants, the law should have been amended in terms thereof. Only because laws have not been amended, the same would not by itself mean that the purport and object of the Act would be allowed to be defeated. If the ground realities changed, the interpretation should also change. Ground realities would not only depend upon the new situations and changes in the societal conditions vis-à-vis the use of sound recording extensively by a large public, but also keeping in view of the fact that the Government with its eyes wide open have become a signatory to International Conventions.

As a next step, the Court listed the areas wherein it was legitimate to use tools of international law to interpret domestic/municipal law. These were (a) as a means of interpretation; (b) justification or fortification of stance taken; (c) to fulfil the spirit of international obligation that India has entered into, when they are not in conflict with the existing domestic law; (d) to reflect international changes and reflect the wider civilization; (e) to provide a relief contained in a covenant, but not in a national law; and (f) to fill gaps in the law. The Court traces this trend of applying norms of international laws, in particular the international covenants to interpret domestic legislation, from its decision in *Kesavananda Bharati v. State of Kerala*.<sup>18</sup> Since then, it found no dearth of case laws and, in fact, had categorically held that “there would be no inconsistency in the use of international norms to the domestic legislation, if by reason thereof the tenor of domestic law is not breached and in case of any such inconsistency, the domestic legislation should prevail”.

For the Court, applicability of the international conventions and covenants for the purpose of interpreting domestic statute would also depend upon the acceptability of the

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<sup>18</sup> (1973) 4 Supreme Court Cases 225.

conventions in question (e.g. even if India was a signatory to an international convention, that convention could be utilized for interpretative purposes provided it was consistent with the domestic law). According to the Court, “Where International Conventions are framed upon undertaking a great deal of exercise, upon giving an opportunity of hearing to both the parties and filtered at several levels, as also upon taking into consideration the different societal conditions in different countries by laying down the minimum norm, as for example, the ILO Conventions, the court would freely avail the benefits thereof. Those Conventions to which India may not be a signatory but have been followed by way of enactment of new Parliamentary statute or amendment to the existing enactment, recourse to International Convention is permissible . . . Furthermore, as regards the question where the protection of human rights, environment, ecology and other second-generation or third-generation right is involved, the courts should not be loath to refer to the International Conventions.”

Before examining the provisions of the Indian Copyright Law framework, the Court surveyed the copyright law provisions of other countries such as Australia, China, Japan and the United Kingdom to assess the computational patterns and the actual payment of royalty to be made for broadcasting of published sound recording and also the circumstance for issuance of compulsory licensing.

The Court did not approve the methodology adopted by the Copyright Board to determine the royalty amounts. Accordingly, it remitted the case back to the Board to examine the entire case afresh in the light of the various sources of interpretations outlined by it in the judgment.

*Meaning of sustainable development – balancing of development vis à vis environment – intergenerational equity – scope and meaning of “rehabilitation”*

TN GODAVARAMAN THIRUMULPAD v. UNION OF INDIA AND OTHERS<sup>19</sup>  
(vide I.A.Nos. 1324 and 1474 with I.A. Nos. 2081–2082 @ W.P. (C) No. 549/2007)

**Supreme Court of India, 23 November 2008**

**<http://JUDIS.NIC.IN>**

### **Facts**

This case was originally brought before the Court in 1995, challenging the existing methodology of computation of quantum of compensation to be paid for the acquisition or

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<sup>19</sup> The original petition in the case was filed in 1995 vide Writ Petition (Civil) 202 of 1995. In the *TN Godavaraman case*, the Supreme Court made it mandatory to seek its approval before alienating any part of the forest land. The parties seeking forest land for developmental purposes will have to file an application before the court to show that all regulatory approvals, including proper environmental clearances have been taken. Parties also will have to show that they have a sustainable plan and a proper rehabilitation package to manage environment and displacement.

alienating of forest land for any designated public purpose. While deciding this case, considering the fast and reckless degradation of forest land, the Court decided and outlined certain guidelines and principles for such alienation on a case-by-case basis. Thereafter, all cases involving alienation of forest land had to get clearance from the Court. The present case was before the Court for the purpose of consideration and approval of the application of M/s Vedanta Aluminum Ltd, which had sought clearances of the proposal for use of 723,343 ha of land (including 58,943 ha of reserve forest land) in Lanjigarh Tehsil of Kalahandi District of the State of Orissa to set up a large, integrated aluminum complex.<sup>20</sup>

## **Judgment**

As a matter of preface, the Court observed that:

... adherence to the principle of Sustainable Development is now a constitutional requirement. How much damage to the environment and ecology has got to be decided on the facts of each case. While applying the principle of Sustainable Development one must bear in mind that development which meets the needs of the present without compromising the ability of the future generations to meet their own needs is Sustainable Development. Therefore, courts are required to balance development needs with the protection of the environment and ecology. It is the duty of the State under our Constitution to devise and implement a coherent and co-ordinated programme to meet its obligation of Sustainable Development based on inter-generational equity ... Mining is an important revenue generating industry. However, we cannot allow our national assets to be placed into the hands of companies without proper mechanism in place and without ascertaining the credibility of the User Agency.

Having stated this, the Court went on to examine whether requisite permissions had been obtained by the applicant or not. The Court also examined the legality of mining leases and other related issues. The Court considered objections to the clearance of this application such as (a) total dependency of the aluminium refinery complex on mining of bauxite from Niyamgiri Hills, Lanjigarh which is the only vital wildlife habitat, part of which constitutes an elephant corridor; (b) the obstruction to the proposed wildlife sanctuary; (c) disturbance to the residence of tribes like Dongaria Kandha; (d) the impact on the water source of two rivers; and (e) destruction to flora and fauna of the entire region resulting in soil erosion. The Court also referred to the picture of abject poverty in which local people, especially tribal people, were living without proper housing and medical facilities.

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<sup>20</sup> The Court considered the same case again in I.A. No. 2134 of 200 dated 8 August 2008 and granted clearance to the forest diversion proposal, noting that the concerned company and the State of Orissa had accepted the rehabilitation package as suggested by the Court in its previous Order dated 21 November 2007.

After examining the documents and the potential employment and rehabilitation package suggested by the company, the Court came out with its list of suggestions on the rehabilitation package. While stating that the Court was not in principle against the project, it was made clear that the company's application would not be entertained unless it fulfilled all these requirements. Accordingly, the Court dismissed the present application of the company.

*Article 5 of the Universal Declaration of Human Rights – torture and custodial death –  
Article 21 of the Indian Constitution and the Chapter V of the Code of Criminal Procedure*

DALBIR SINGH v. STATE OF UTTAR PRADESH AND OTHERS

**Supreme Court of India 3 February 2009**

**<http://JUDIS.NIC.IN>**

### **Facts**

This was a case of alleged custodial torture that resulted in the death of a young boy of about 17 years. All attempts by the petitioner, the boy's father, to file a first information report were thwarted by the police and they pressurized him to accept the theory of suicide. To quote a part of the factual narration by the Court itself: "... the untimely murder of the youngest child who was a law-abiding citizen and had never been involved in any antisocial or criminal activities had lost his life in the hands of the police and petitioner did not accept the statements, even at the cost of threat from police". The respondent-State, on the other hand, submitted that the police, after investigation, had not found any evidence of murder and therefore the charge sheet had not been filed. However, this was not accepted by the petitioner considering the fact that there were external injuries all over the body of the deceased and the post-mortem report itself was not accurate as compared with the photographs.

### **Judgment**

The petitioner was before the Supreme Court seeking sanction to prosecute the police officials. The respondent-State, meanwhile, had accepted this plea and sanction to prosecute was given and the charge sheet was also filed. The Court noting this stated the following:

Custodial violence, torture and abuse of police power are not peculiar to this country, but it is widespread. It has been the concern of international community because the problem is universal and the challenge is almost global. The Universal Declaration of Human Rights in 1948 which marked the emergence of worldwide trend of protection and guarantee of certain basic human rights stipulates in Article 5 that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Despite this pious declaration, the crime continues unabated, though every civilized nation shows its concern and makes efforts for its eradication.

Article 21, which is one of the luminary provisions in the Constitution of India, 1950 (in short “Constitution”) and is a part of the scheme for fundamental rights, occupies a place of pride in the Constitution. The Article mandates that no person shall be deprived of his life and personal liberty except according to the procedure established by law. This sacred and cherished right, i.e., personal liberty has an important role to play in the life of every citizen. Life of personal liberty includes a right to live with human dignity. There is an inbuilt guarantee against torture or assault by the State or its functionaries. Chapter V of the Code of Criminal Procedure, 1973 (for short the “Code”) deals with the powers of arrest of persons and the safeguards required to be followed by the police to protect the interest of the arrested person. Articles 20 (3) and 22 of the Constitution further manifest the constitutional protection extended to every citizen and the guarantees held out for making life meaningful and not a mere animal existence. It is therefore difficult to comprehend how torture and custodial violence can be permitted to defy the rights flowing from the Constitution. The dehumanizing torture, assault and death in custody which have assumed alarming proportions raise serious questions about the credibility of rule of law and administration of criminal justice system. The community rightly gets disturbed. They cry for justice becomes louder and warrants immediate remedial measures. This Court has in a large number of cases expressed concern at the atrocities perpetuated by the protectors of law.

Noting that the sanction to prosecute police officials involved in the alleged crime had been granted, the Court observed that: “Rarely in cases of police torture or custodial death, there is any direct ocular evidence of the complicity of the police personnel alone who can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues – and the present case is an apt illustration – as to how one after the other police witnesses feigned ignorance about the whole matter.”

Considering this, the Court felt that no further action was necessary at present. It, however, pointed out that if, at any point in time, evidence surfaces before the concerned Court to show that some other offences appear to have been committed, necessary orders could be passed. The Court also did not accept the plea for compensation at this stage as that would depend upon whether there was custodial death.

#### OTHER RELEVANT STATE PRACTICE

*Intervention by the External Affairs Minister of India at the Round Table during the Climate Change meeting at the United Nations on 22 September 2009*<sup>21</sup>

Emphasizing the need for galvanizing political momentum for the real negotiations at the UN Framework Convention on Climate Change, India noted that it was an enormous

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<sup>21</sup> For this Indian statement, see <http://meaindia.nic.in> or <http://www.un.int/india/Table2009.htm>.

development challenge wherein “nearly 200 millions live on less than a 1\$ a day and nearly 500 million do not have access to modern sources of energy”.

Referring to “rooted inequity”, India cited the provisions and principles of the Convention, especially common but differential responsibilities and also historical responsibility. For developing countries, India argued, there must be scope to “pursue accelerated development, also so that they have the resources to cope and adapt to climate change”.

While arguing for “equitable burden sharing”, India called on developed countries to “commit and deliver on significant reduction in their emissions of at least 40 percent by 2020 from the agreed 1990 baseline”. As regards its own track record on emissions, India noted:

India’s per-capita emissions are only around 1 tonne of CO<sub>2</sub> equivalent per annum, which is a quarter of the global average and half that of the developing countries as a whole . . . We have also repeatedly reaffirmed that our per-capita emissions would never exceed the average per capita emissions of the developed countries, even as we pursue our development objectives. We are taking many domestic adaptation and mitigation actions on a voluntary and systematic basis. Those include national missions and other actions in the area of solar energy, extensive deployment of renewable, use of clean coal technologies, boosting energy efficiency, adoption of green building codes, large scale reforestation efforts and promotion of green agriculture, among others. Many of the mitigation efforts in different sectors like energy, transport, industry, agriculture and forestry will have specific quantitative and time-bound domestic goals, with even mid-term deadlines, that would enable our national democratic institutions to monitor and check their implementation.

As regards its expectations from Copenhagen, India pointed out that they were with regard to “provision of financial resources and access to technology”, which would enable it to upscale national efforts. The External Affairs Minister further noted: “Naturally, efforts that are supported by external sources will be subject to international monitoring, but it is important that the ambition levels of domestic actions are not crimped by an international review obligation.”

On the issue of private funding for new green technologies to be deployed effectively in the developing world, India felt that “rewards for innovators would need to be balanced with the needs of humankind”.

On a broader framework, India wanted the climate negotiations to focus on developed countries from where the problem had emanated and who were reluctant even to meet their commitments on emission reduction, let alone provide technological and financial support to developing countries on the vast scale that was required.

*Intervention by India at the Pre-COP Meeting at Copenhagen on 16 November 2009<sup>22</sup>*

Indian intervention noted that it was prepared to reflect in any agreement its commitment to keep its *per capita* emissions below that of the developed countries. It clarified that its

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<sup>22</sup> For the text of the Statement see <http://moef.nic.in/downloads/public-information>.



“*per capita* emissions are now around 1.2 tonnes of CO<sub>2</sub> equivalent and are expected to be around 2 to 2.5 tonnes by 2020 and 3 to 3.5 tonnes by 2030. The *per capita* limit is an onerous limit that India has imposed on itself.”

The second commitment referred to India’s several nationally appropriate mitigation actions (NAMAs) “which it is considering to convert to nationally accountable mitigation outcomes (NAMOs) by indicating specific performance targets in industry, energy, transport, agriculture, buildings and forestry for the years 2020 and 2030. These NAMOs could be institutionalized through either legislative or executive action and are derived from the National Action Plan on Climate Change and the 11th Five Year Plan document.”

In the third commitment, India was “prepared to submit a National Communication once every two years to UNFCCC covering both supported and unsupported actions and their outcomes as well as their impacts on emissions. This National Communication could be used as a basis for international consultations with the UNFCCC. This will more than meet the demand for international reflection of domestic commitments and obligations taken on unilaterally. The format of reporting could be decided by the UNFCCC after discussions and consensus among Parties.”

Finally, India stated that it “will make low carbon sustainable growth a central element of its 12th Plan growth strategy. This will mean taking on commitments to reduce energy to GDP intensity and corresponding emission reduction outcomes for the year 2020.”

*Indian Statement at the High-Level segment of the UN Climate Conference, Copenhagen, 16 December 2009.*<sup>23</sup>

India noted that it was profoundly impacted by climate change and referred to its national action plan on climate change with eight focused national missions and 24 critical initiatives. Further, the Indian Statement referred to the establishment of its own version of IPCC comprising more than 120 of its leading scientific and technological institutions to continuously measure, monitor and model the impacts of climate change on different sectors and in different regions of the country. Reference was also made to a plan to put in place the nationally accountable mitigation outcomes in different sectors like industry, energy, transport, building and forests, and its low-carbon strategy.

The important elements of the Indian Statements were (a) that its *per capita* emissions will never exceed the *per capita* emissions of the developed countries; (b) the establishment of a National Communication Process to reflect the nature and impact of actions taken domestically; (c) transforming of environmental governance systems through the establishment of the National Green Tribunal and National Environmental Protection Agency; (d) that its entire approach to this Conference anchored in the sanctity of the troika – the UNFCCC, the Kyoto Protocol and the Bali Action Plan – and that it believed as sacrosanct well-known and widely accepted principles of (i) common but

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<sup>23</sup> For the text of the Statement see <http://moef.nic.in/downloads/public-information>.

differentiated responsibility, and (ii) historical responsibilities; and (e) that India subscribed to the view that the temperature increase ought not to exceed 2 degrees Celsius by 2050 from mid-nineteenth century levels and that this objective should firmly be embedded in a demonstrably equitable access to atmospheric space, with adequate finance and technology available to all developing countries.

*Statement by India on Measure to Eliminate International Terrorism at the Sixth Committee of the United Nations General Assembly on 6 October 2009*<sup>24</sup>

India noted that terrorism remained one of the major threats facing the international community and humankind as a whole. Referring to its own fight against terrorism in the context of the Mumbai attacks, the Indian Statement described India as “a victim of terrorism”. Outlining the steps taken by it to strengthen international cooperation to combat terrorism, India noted that it had become party to all 13 sectoral conventions on terrorism that had been adopted by the United Nations. The Indian Statement referring to its efforts at the national level, pointed out:

We have entered into several bilateral treaties with other countries in the areas of combating terrorism, organized crime, money laundering, terrorist financing and illicit drug trafficking. At the same time we have also concluded with many countries treaties on extradition and mutual legal assistance in criminal matters to further strengthen and enhance international cooperation in this regard. These treaties also facilitate exchange of operational information and development of joint programmes to combat money laundering, organized crime and terrorism. They also facilitate transfer of fugitive offenders and suspected terrorists so that they can stand trial in the State in which the offence is committed. The treaties on mutual legal assistance assist in the prosecution of offences, location of fugitives, and transfer of witnesses and exhibits. A combined bilateral and multilateral treaty regime that we have in place in combating terrorism play a vital role in the punishment of crime and prosecution of offenders. In addition to having this treaty regime in place, we have also strengthened our legislation entitled Unlawful Activities Prevention Act, 1967 and have integrated in this a mechanism for the effective enforcement of the measures laid down by the 1267 Committee against designated individuals and entities.

The Indian Statement also reiterated the urgent need for the adoption of the Draft Comprehensive Convention against International Terrorism (CCIT). According to India, there were few outstanding issues in CCIT negotiations and those issues could be resolved by referring to ample agreed texts that were available within the UN, and could be easily incorporated to concretize the text of the CCIT.

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<sup>24</sup> For India’s statements, *see generally* <http://meaindia.nic.in> or <http://www.un.int/india/Table2009.htm>.

*Indian Statement on Oceans and the Law of the Sea and Sustainable Fisheries made at the United Nations General Assembly on 4 December 2009*<sup>25</sup>

India thanked the UN Secretary General for various reports on the subject and appreciated the presentation of the report on the work of the Ad Hoc Working Group of the Whole, established pursuant to GA Resolution 63/111 on the regular process for the global reporting and assessment of the state of the marine environment, including socio-economic aspects. India was happy to note that the regular process would be guided by international law, including the United Nations Convention on the Law of the Sea (UNCLOS) and other applicable international instruments and capacity-building, sharing of data, information and transfer of technology.

According to India, UNCLOS provided the basic framework for carrying out any activity in the oceans and seas, for the use of its resources and for national, regional and international action and cooperation to counter threats and challenges to marine environment.

On the issue of protection and preservation of marine biodiversity, in particular in areas beyond national jurisdiction, India recognized the need to consider new approaches within the overall framework of UNCLOS to promote international cooperation aimed at conservation and sustainable use of living resources of the high seas, and to benefit from sharing seabed resources located in areas beyond national jurisdiction. It also sought promotion of the flow of scientific data and information and the transfer of technology resulting from marine scientific research, especially to developing States.

On the issue of marine navigation, India expressed serious concern over piracy and armed robbery at sea. It laid emphasis on capacity-building, including training of law-enforcement officials, transfer of equipment etc., to take effective measures against the threats of maritime security. It also laid emphasis on the principle of freedom of navigation, including the right of innocent passage as well as transit passage through straits used for international navigation. In this regard, India sought to reaffirm its view that the States bordering straits might adopt laws or regulations relating to transit passage through straits but such laws should be enforced in a non-discriminatory manner and fully consistent with Article 42 of the UNCLOS.

On fisheries, India supported increased adherence to the 1995 UN Fish Stock Agreement and to strengthen its implementation. India further noted:

The effective implementation of measures proposed to combat the adverse impact of bottom fishing on vulnerable marine ecosystems in Resolution 61/105 was an area of particular interest during the negotiation of this year's Fisheries Resolution. We hope that additional measures agreed to that end which include, *inter alia*, identification of vulnerable ecosystems, assessment of impact of bottom fishing on such ecosystems, exchange of best scientific information and adoption of conservation and management measures to

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<sup>25</sup> For India's statements, see generally <http://meaindia.nic.in> or <http://www.un.int/india/Table2009.htm>.

prevent adverse impact on such ecosystems, would help towards regulating bottom fishing in areas beyond national jurisdiction . . . In this context we particularly support OP 27 of the Sustainable Fisheries Resolution that invites States and international financial institutions and organizations to, *inter alia*, provide assistance to developing States to enable them to develop their national capacity to exploit fisheries resources, including developing their economic base in the fishing industry.

*Indian Statement on Implementing the Responsibility to Protect at the United Nations General Assembly on 24 July 2009*<sup>26</sup>

The Indian Statement began with recording deep appreciation to the UN Secretary General of the presentation of the report entitled “Implementing the responsibility to protect” before the General Assembly on 21 July 2009. India also emphatically stated: “It has been India’s consistent view that the responsibility to protect its population is one of the foremost responsibilities of every State.” Right to life, according to India, was a core obligation and there could be no derogation from that, even during emergencies.

As regards the responsibility of the international community, India referred to the Genocide Convention and the authority placed with the competent organs of the UN as per the Charter towards prevention and suppression of acts of genocide. India regretted that, despite all these safeguards and obligations, the international community failed in its duty to respond to mass atrocities even when they were a clear threat to international peace and security.

Referring to the World Summit Document, India clarified that it enjoined on the international community to use appropriate diplomatic, humanitarian and other peaceful means to help protect populations in the specific situations of genocide, ethnic cleansing, war crimes and crimes against humanity. As regards its actual implementation, India further stated:

Willingness to take chapter VII measures can only be on a case-by-case basis and in cooperation with relevant regional organizations with a specific proviso that such action should only be taken when peaceful means are inadequate and national authorities manifestly fail in discharging their duty.

India reaffirmed that these measures should be used as a last resort and should be in conformity with the provisions of the Charter. Further, it pointed out:

We don’t live in an ideal world and, therefore, need to be cognizant that creation of new norms should at the same time completely safeguard against their misuse. In this context, responsibility to protect should in no way provide a pretext for humanitarian intervention or unilateral action . . . Perhaps finalization and adoption of the definition of aggression

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<sup>26</sup> For India’s statements, *see generally* <http://meaindia.nic.in> or <http://www.un.int/india/Table2009.htm>.

under the Rome Statute would assuage to some extent the concerns regarding the misuse of this idea.

India concluded by saying “The key aspect, therefore, is to address the issue of ‘willingness to act’. Here, of course, a necessary ingredient is real reform of decision-making bodies in the UN, especially the Security Council in its permanent membership, to reflect contemporary realities and make them forces of peace and capable of acting against mass atrocities.”

## JAPAN

JUDICIAL DECISIONS<sup>27</sup>*Civil jurisdiction over a vessel on the high seas*

X S.A v. B K.K.

**Sendai District Court, 19 March 2009****2052 *Hanrei Jiho* (Judicial Reports) 72 [2009]; 1305 *Hanrei Taimuzu* (Judicial Times) 276 [2009]**

This case is a tort claim for damages based on a collision in the Northeast Pacific high seas off the Kuril Islands between the vessel that the plaintiff (corporation of the Republic of Panama) bareboat-chartered and the vessel that the defendant (Russian company) owns. It was contested whether Japan has jurisdiction over a collision on the high seas between two vessels of neither of which it is the flag State, before the merits hearing.

The facts were that at 10:10 local time (0:10 GMT) on 3 July 2004, the Panama-registered cargo ship, which the plaintiff had leased from the corporation of Panama, collided with the Russian-flagged fishing trawler owned by the defendant at 48 degrees 07 minutes north latitude, 154 degrees 35 minutes east longitude on the high seas (exclusive economic zone of Russia). As a result of the accident, the plaintiff's ship had difficulty in sailing and put into Ishinomaki Port, Miyagi Prefecture on 6 July, where temporary repairs were made. After that, it was towed to Hakodate Port for more repairs on 8 July, and left the port on 21 July.

The captain and crew of the ship chartered by the plaintiff consisted of South Korean and Myanmar nationals, while the defendant's ship was manned by an all-Russian crew.

Before the hearing of the merits, the defendant claimed that the case was beyond the jurisdiction of Japan for the following reasons:

- (a) National jurisdiction shall be exercised as a function of sovereignty, and the area in which one nation may exercise its jurisdiction shall be equivalent to that under its sovereignty. Consequently, the jurisdiction of Japan cannot extend to the defendant foreign corporation with its head office abroad, except when the corporation proceeds to submit to the Japanese jurisdiction.
- (b) The exception is a case where the defendant has some legal connection with Japan. In a case on Japanese land territory, regardless of its nationality or location, the defendant can be subject to the jurisdiction of Japan. Whether Japan should exercise

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<sup>27</sup> Contributed by Fukamachi Kiminobu, Professor of International Law, Kumamoto University; member of the Study Group on Decisions of Japanese Courts Relating to International Law.

its jurisdiction in such a case should be determined considering fairness between the parties or principles of appropriate and adequate proceedings and the expediting of the proceedings, because no relevant internationally recognized rule or customary international law exists.

- (c) The defendant should be subject to the jurisdiction of Japan when one of the venue provisions of the Code of Civil Procedure is applied in Japan for the lawsuit that has been filed in Japan, but the court should deny the jurisdiction of Japan if special circumstances exist which are deemed contrary to the idea of fairness between the parties or principles of appropriate and adequate proceedings and the expediting of the proceedings.
- (d) In this case, which occurred on the high seas, there exists no venue to the provisions of the Code of Civil Procedure in Japan and no special circumstances exist which are deemed contrary to the idea of fairness between the parties or principles of appropriate and adequate proceedings and the expediting of the proceedings. Therefore, it was alleged, the Japanese court should not exercise the jurisdiction over the defendant.

The plaintiff claimed that Japan has jurisdiction over this case for the following reasons:

- (a) The plaintiff's ship went directly to Ishinomaki Port after the accident, not calling at other ports. Therefore this port is the first place where the damaged ship docked after the accident, as Article 5(x) of the Code of Civil Procedure stipulates. Japan has the jurisdiction over this case, because that provision is deemed to be the basis not only for internal jurisdiction but also for international jurisdiction.
- (b) The plaintiff's vessel is a flag-of-convenience ship registered in Panama where controls and restrictions for ships are not strict. In this case it is not appropriate to choose the law of the flag State as applicable law. So the law of the place of the forum or the law of the most closely connected place should be applied. Japanese law is the most closely connected law, because the management and operations of the plaintiff's ship are conducted by a Japanese company, and all the acts of the plaintiff are performed in Japan.

The court, for the following reasons, considered that it has no international jurisdiction on this issue.

National jurisdiction shall be exercised as a function of its sovereignty, and the area in which one nation can exercise its jurisdiction shall be equivalent to that of its sovereignty. So, the jurisdiction of Japan cannot extend to the defendant foreign corporation with its head office abroad, unless the corporation proceeds to submit to the Japanese jurisdiction.

In this issue of the collision on the high seas between the Russian-flagged vessel owned by the defendant, a corporation of the Russian Federation, and the Panamanian ship chartered by the plaintiff, a corporation of Panama, the defendant shall not be subject to the Japanese jurisdiction in principle.

However, the exception is when the defendant has some legal connection with Japan. In a case on Japanese land territory, regardless of its nationality or location, the defendant

can be subject to the jurisdiction of Japan. In other words, if one of the venue provisions of the Code of Civil Procedure applies to a case that arises in Japan, the defendant should be subject to the jurisdiction of Japan.

Though it is recognized that the Ishinomaki Port is the first place that the plaintiff's ship reached after the collision, the purpose for which Article 5(x) of the Code of Civil Procedure lays down that the venue of the court in an action for damages based on collisions is the first place where the damaged ship docked, is to facilitate an action immediately and to ensure that civil suits are carried out as expeditiously as useful for the investigation and collection of evidence.

However, that clause cannot be applied for the basis to acknowledge Japanese international jurisdiction, as the plaintiff's ship and its crew had already left Ishinomaki port when the case was brought to the court. No other circumstance allows the venue that the Code of Civil Procedure provides.

In addition, as the merits of this case are to claim damages from a collision that occurred on 3 July 2004, the Sendai District Court should judge the merits of the case applying the rules of choice of law provided in Article 11 of the old Horei (Application of Laws [General] Act), according to the Additional Rules Article 3(4) of the new Act on General Rules for Application of Laws. This case should be governed by the law of the place where the accident occurred: according to Article 11 of the old Horei, if a collision occurred on the high seas, the laws of both flag States should be interpreted and applied one after the other. In this case, the laws of Russia and Panama will be applied accumulatively.

In order to judge this case, the Sendai District Court shall interpret and apply tort laws in Russia and Panama, properly investigating them. The difficulties of research of foreign law will draw a limitation in ensuring the appropriate interpretation and application as compared with when they interpret or apply Japanese law.

Therefore, if the Sendai District Court judges the merits of this case, it will be against the ideas of a fair trial between the parties and appropriate proceedings and the expediting of trials.

#### *Civil jurisdiction over a foreign State*

X v. THE STATE OF GEORGIA, THE UNITED STATES OF AMERICA

**Supreme Court, Second Petty Bench, 16 October, 2009 (final appeal)**

**(Court of first instance) Tokyo District Court, 18 May 2006**

**(Appeal) Tokyo High Court, 4 October 2007**

**1493 *Saibansho Jihou* (Court Reports) 7 [2009]; 1313 *Hanrei Taimuzu* (Judicial Times) 129 [2009]**

The case in which the appellant, who had been an employee of the Port Authority office of the State of Georgia in Japan, claimed the confirmation of his status in the employment contract and the payment of wages after the dismissal as the dismissal is invalid.

The Supreme Court remanded the case to the court of first instance due to the fact that the judgment of the first instance was that the defendant shall be immune from



the civil jurisdiction of Japan because there are no special circumstances under which Japan may infringe on the exercise of the defendant's functions of sovereignty, by reason of the dismissal being an act of private law or a business management is mistaken.

The court held as follows:

Acts of foreign sovereign States may be immune from the civil jurisdiction of Japan. The State of Georgia has the capacity to exercise sovereign power because it is one of the United States of America, which itself is a single federal republic. So, its act of sovereignty can be immune from Japanese civil jurisdiction as an act of State.

However, an act with the nature of an act of private law or a business management shall not be immune from the civil jurisdiction of Japan unless special circumstances exist that Japan may infringe upon in the exercise of its functions of sovereignty. (Supreme Court, Second Petty Bench, 21 July 1967, *Saiko-Saibansho Minji-hanreishu* (Supreme Court Civil Reports), Vol. 60, No. 6, p. 2542.)

The appellant was employed by the defendant based only on a verbal exchange about the terms of contract with the representative of the Far East Delegation of the State Port Authority. The Delegation applied for the employee's pension, health, unemployment and industrial injury insurances in Japan, and the appellant may be entitled to a pension of the State Port Authority if he continued to work in the US.

These circumstances show that the character of the employment in this case is not one of the defendant's functions of public authority but a contractual relationship under private law. Business of the Far East Delegation of the State Port Authority is not deemed to be an act of sovereign authority, for its subject is to advertise the port facilities of the defendant and promote its use in Japan.

The dismissal of the appellant was based on the employment contract, due to the closure of the Far East Delegation for financial reasons. It does not differ from a dismissal for economic reasons in an employment contract between private persons.

In the discussions held between representatives of countries before the United Nations Convention on Jurisdictional Immunities of States and Their Property (which Japan has signed but which has not yet entered into force) was adopted by the UN General Assembly in 2004, it was the common understanding that if workers sought monetary relief from a foreign country as the employer, the country may not be immune from the jurisdiction in principle. Article 9(1), (2–3) and (2–4) of the Act on the Civil Jurisdiction of Japan over Foreign States, which was enacted after the adoption of the UN Convention, also assumes such circumstances.

In this case, in which the confirmation of the appellant's status in the employment contract and the payment of wages after his dismissal by reason of the dismissal being invalid is claimed, immunity from civil jurisdiction should apply only when "as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State", as paragraph 2(d) of Article 11 of the UN Convention stipulates.

It is recognized that no special circumstance exists that Japan may infringe on the exercise of the defendant's functions of sovereignty if it exercises civil jurisdiction

because the dismissal in this case has the nature of an act of private law or business management.

### *Recognition of Refugee Status*

X<sub>1</sub> v. DIRECTOR-GENERAL OF THE TOKYO IMMIGRATION BUREAU

**Tokyo High Court, 30 April 2009**

**(Court of first instance) Tokyo District Court, 27 June 2008**

**(Not yet reported)**

The appellant, a Myanmar national, had stayed in Japan beyond his permitted period of stay. This is the appeal of the case in which he sought the invalidation of the denial of Special Permission to Stay in Japan for him (case A) and the revocation of the denial of recognition of his refugee status (case B) for the reason that he struggled against his national government and fears persecution upon return to his home country.

The appellant is a member of the Japanese branch of an anti-government party of Myanmar and of a musical group carrying out anti-government musical activities. The court recognized him as a refugee as referred to in Article 2(iii-2) of the Immigration Control and Refugee Recognition Act, because he was intimidating the Government of Myanmar, which does not want the expansion of the pro-democracy movement but instead wants the junta to remain in power, and considered the fact that his wife had received a call warning him to stop his political activities. Article 2(iii-2) of the Immigration Control and Refugee Recognition Act provides that “The term ‘refugee’ means a refugee who falls under the provisions of Article 1 of the Convention relating to the Status of Refugees or the provisions of Article 1 of the Protocol relating to the Status of Refugees.”

The facts are as follows:

The appellant was a student of Yangon University in 1988, had joined in the democracy movement and belonged to the Student League for Democracy in Myanmar. However, he left the pro-democracy group when the military coup of 18 September 1988 occurred and suppression of the pro-democracy movement had begun.

He landed in Japan on 29 September 1998, with permission of stay for 90 days as a “temporary visitor”. Staying in Japan after this period without changing his Status of Residence meant that he was staying illegally.

In November 1999, he joined a band that consisted of Myanmar nationals, as the guitarist. The band played in concerts sponsored by the National League for Democracy (Liberated Area) Japan Branch (NLD (LA) JB), although initially they had no particular political intentions. They served as a backing band for Mun Aun, an iconic musician of the democratic movement in Myanmar, when the League for Democracy in Burma (LDB) sponsored his charity concert for the democratic movement in April 2001.

In May 2001, the appellant’s wife, who lived in Yangon, told him about a phone call she had received from a member of the military intelligence branch, telling her to warn

him that he would be unable to go back to Myanmar unless he stopped performing with the group in shows or charity concerts in Japan.

After that incident, the appellant heard about the Depayin massacre on 30 May 2003 and felt that the fight for democracy had been dealt a blow. He and his band mates joined NLD (LA) JB. Thereafter, the band appeared in concerts sponsored by democratic organizations and their activities were published in magazines and web pages.

In 2006, a military intelligence officer visited his wife and investigated the circumstances of his life.

The court estimated Myanmar's situation as follows:

It has been dominated by authoritarian military rule. Although the expectations of progress of democratization existed between 2001 and early 2003, after the Depayin massacre of 2003 a military junta continued to dominate the nation, inflicting torture and oppression. Almost all the political arrests are conducted by military intelligence. Legal procedures prescribed for arrest and detention do not exist. Arrests and detentions have been done arbitrarily. Many political prisoners are killed by torture following court-martial. It is estimated that the information-gathering capacity of the military regime was high and that they had identified almost all democratization and anti-government movements abroad. Western nations demanded improvements in the situation with economic sanctions against the military government.

It seems that the activity of the appellant's band brought them to the attention of the Myanmar government. Two members of the band had already been recognized as refugees. The appellant, as a band member, could be a threat to the government, which did not want the pro-democracy movement to expand.

The court held as follows:

On case A:

A refugee shall not be expelled or returned to the frontiers of territories where his life or freedom would be threatened (Immigration Control and Refugee Recognition Act Article 53(3), Convention relating to the Status of Refugees Article 33(1)), or even if he is not certified as a refugee, a State shall not expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture ((UN Convention against Torture Article 3(1)).

When an alien without a status of residence has filed an application for refugee status and is denied recognition as a refugee or the permission to stay is not granted, the Minister of Justice or the director-general of a regional immigration bureau shall examine whether there are grounds for granting special permission to stay to the alien without a status of residence, and may grant such special permission if he/she finds such grounds (Immigration Control and Refugee Recognition Act, Articles 61-2-2(2) and 69(2)).

The director-general of a regional immigration bureau shall grant special permission to stay if returning the alien to another State would leave them in danger of being subject to torture.

In a lawsuit seeking invalidation of an administrative disposition, it is necessary that the person seeking invalidation proves that there is an obvious and serious illegal

disposition. (Supreme Court, Second Petty Bench, 7 April 1967, *Saiko-Saibansho Minji-hanreishu* (Supreme Court Civil Reports), Vol. 21, No. 3 (1967), p. 572.)

However, in denying special permission to stay in this case, there is serious illegality although it is not obvious. So, there is no reason for the appellant to seek the invalidation of denial of Special Permission to Stay.

On case B:

Based on these facts, rulings of this case by the court of first instance should be reversed and the issuance of the deportation order should be revoked because the appellant is a refugee who should not be returned to Myanmar where the fear of persecution exists.

X<sub>2</sub> v. DIRECTOR-GENERAL OF THE TOKYO IMMIGRATION BUREAU

**Tokyo High Court, 30 April 2009**  
**(Court of first instance) Tokyo District Court, 9 September 2008**  
**(Not yet reported)**

This is the appeal of the case in which the appellant sought the invalidation of the denial of Special Permission to Stay in Japan for him and the revocation of the denial of recognition of his refugee status for the reason that he protested against his national government and feared persecution upon return to his home country.

The appellant, a Myanmar national, had stayed in Japan beyond the period of stay. He formed a musical group that supported the democratic movement of Myanmar in Japan. The court recognized him as a refugee as referred to in Article 2(iii-2) of the Immigration Control and Refugee Recognition Act, because he was intimidating the Government of Myanmar, which does not want the expansion of the pro-democracy movement but instead wants the junta to remain in power, and considered the fact that a military intelligence officer visited the wife of a member of his band and investigated the circumstances of that person's life in Japan after the band appeared in the concerts sponsored by democratic organizations and their activities were published through magazines and web pages.

The facts are as follows:

In 1988, the appellant was a high school student in the City of Rangoon (Yangon) and had joined the democratic movement, becoming a member of the High School Students Federation. But he had left the group after the military coup of 18 September and the subsequent suppression of the democracy movement. Afterwards, the appellant was engaged in navigation work and arrived at the port of Kagoshima on 6 May 1997, landing in Japan with a landing permission for crew members, which was valid until 13 May. However, he remained illegally in Japan beyond the period of stay, not returning to the ship because of his dissatisfaction with the way he was treated on the ship.

In 1999, the appellant formed a band consisting of Myanmar nationals. They served as the backing band at the charity concert of Mun Aun, an iconic musician of the pro-democracy movement, in April 2001, and played songs opposing the military regime.

In 2003, the appellant, along with his band mate, subscribed to the National League for Democracy (Liberated Area) Japan branch (NLD (LA) JB), and appeared in several concerts sponsored by democratic organizations thereafter.

In 2004, the appellant received a letter from his sister living in Myanmar, informing him that a military intelligence officer had visited her and told her that the appellant would not be able to come home unless he stopped his band activities.

The court summed up Myanmar's situation as follows:

It has been dominated by authoritarian military rule. Although the expectations of progress of democratization existed between 2001 and early 2003, after the Depayin massacre of 2003 a military junta continued to dominate the nation, inflicting torture and oppression. Almost all the political arrests are conducted by military intelligence. Legal procedures prescribed for arrest and detention do not exist. Arrests and detentions have been made arbitrarily. Many political prisoners are killed by torture following court-martial. It is estimated that the information-gathering capacity of the military regime was high and that they had identified almost all democratization and anti-government movements abroad. Western nations demanded improvements in the situation with economic sanctions against the military government.

It seems that the activity of the appellant's band brought them to the attention of the Myanmar government. Two members of the band had already been recognized as refugees. The appellant, as a band member, could be a threat to the government, which did not want the pro-democracy movement to expand.

The court held that based on the facts as above the appellant is a refugee who has a well-founded fear of being persecuted for reasons of his political opinion, is outside the country of his nationality and is unable or, due to such fear, is unwilling to avail himself of the protection of that country as the Immigration Control and Refugee Recognition Act article 2(iii-2) stipulates, and the ruling by the court of first instance should be reversed and the issuance of the deportation order revoked.

*Cancellations of Deportation Orders to those who stayed beyond the period of stay*

X v. DIRECTOR-GENERAL OF THE TOKYO IMMIGRATION BUREAU

**Tokyo District Court, 27 March 2009 (first instance)  
(Not yet reported)**

The plaintiffs are a Korean husband and wife who claimed the revocation of the decisions that they have stayed in Japan beyond the designated period and the cancellation of the deportation orders for them. The court admitted their claim, pointing out that they had built high economic status in Japan as a result of their long-term hard work, and the issuance of special residence for them would not encourage other illegal workers to stay in Japan beyond the designated period of stay.

The fact is as follows:

The plaintiffs entered Japan on 4 September 1988 with permission of 30 days' stay for husband, and of 60 days' stay for his wife, but after that they remained beyond the period of stay. They continued to work illegally since their arrival in Japan, and in 2004 began to run a restaurant in Tokyo.

On 24 April 2006 the plaintiffs appeared before the Tokyo Immigration Bureau to report on their overstay and conceded that they wanted to remain in Japan. However, on 30 November 2007 the Director-General of the Tokyo Immigration Bureau confirmed that they had stayed in violation of Article 24 (iv–b) of the Immigration Control and Refugee Recognition Act, and the Tokyo Immigration Inspector therefore decided on their deportation to South Korea on 11 December.

The plaintiffs alleged as follows:

They entered legally, have lived peacefully in Japan and have made such a success of their restaurant that they have 18 Japanese employees. These facts show the decision of the Director-General of the Tokyo Immigration Bureau to be an abuse of his discretion in deciding that the plaintiffs' stay was illegal. Consequently, the deportation order that the Tokyo Immigration Inspector issued on the basis of the Director-General's unjustified decision should be cancelled.

The court held as follows:

It is clear that the plaintiffs remained illegally in Japan and fell into the category of aliens who should be deported as set forth in Article 24(iv–b) of the Immigration Control and Refugee Recognition Act.

The plaintiffs declared the facts of their illegal stay to the Tokyo Immigration Bureau, hoping to continue to stay in Japan legally and to manage the restaurant. However, the business that they had built during their illegal overstay and illegal working does not deserve legal protection. (Supreme Court, Third Petty Bench, 23 October 1979, 17 *Saikou Saibansho Saiban-shu Minji* (Supreme Court Reports, Civil) p. 128.)

However, the plaintiffs had not interfered with the immigration administration; for example, they had not hired anyone in their restaurant who was staying illegally. Rather, their employment of more than a dozen Japanese has provided secure employment. If they are not granted special permissions to stay on these economic grounds, others who have similar reasons may hesitate in making voluntary statements like this. It is found that the Director-General of the Tokyo Immigration Bureau, who did not consider those positive elements in making his decisions, acted in excess of or abused the scope of his discretion. His decision lacks any factual basis and is not socially acceptable. Therefore, the determination in this case is illegal and to be cancelled. And the deportation orders that were issued on the basis of the illegal decision should be revoked.

### *Requirements in granting Status of Residence*

X v. DIRECTOR-GENERAL OF THE TOKYO IMMIGRATION BUREAU

**Tokyo District Court, 28 May 2009 (first instance)**  
**(Not yet reported)**

The plaintiff is a third-generation Japanese with foreign citizenship in Peru who had been residing in Japan with the status of "Permanent Resident", as provided for in Schedule II

of the Immigration Control and Refugee Recognition Act. He applied for an extension of his period of stay to the Tokyo Immigration Bureau, but its Director-General did not allow a renewal of the status of residence.

The plaintiff sought a confirmation that the denial of extension of the period by the Director-General was illegal and permission for extension of his period of stay.

The fact is as follows:

The plaintiff landed in Japan with a status of residence for 3 years in 2000. On 20 January 2003, he received a summary order because of a violation of the Waste Disposal and Public Cleaning Act. On 15 August 2003, the plaintiff was allowed an extension of his period of stay with a status of “Permanent Resident” for a further period of 3 years.

On 29 March 2006, Public Notice No. 172 by the Minister of Justice added the requirement that the alien’s behaviour and conduct must be good to be granted the status of “Permanent Resident” for Japanese–Americans and their families. This requirement is not imposed on the refugees from Indochina or Vietnam, or orphans left in China during World War II and their relatives. The Ministry of Justice explained the reason for this amendment: serious crimes by foreigners, especially by Japanese–American “permanent residents”, have caused increased concerns about security.

On 23 June 2006, the plaintiff applied to the Tokyo Immigration Bureau for an extension of his period of stay. The Director-General did not allow a renewal of the plaintiff’s status of residence because he did not satisfy the requirement of good conduct. The Director-General informed the plaintiff that he could stay for several days if he submitted a request to change his status in order to prepare for departure.

The plaintiff alleged, among other reasons, that Public Notice No. 172 contradicts Article 14(1) of the Constitution, which prohibits discrimination based on social status, and Section 1(a) of Article 2 and Article 4(c) of the International Convention on the Elimination of All Forms of Racial Discrimination, which prohibits the practice of racial discrimination in all its forms, because the amendment is not applied to the refugees from Indochina or Vietnam or orphans left behind in China during World War II and their relatives, but is applied solely to Japanese–Americans and their families who come mainly from Latin American countries and uses minor offences as reasons for refusing status of residence, such minor offences that do not matter when aliens other than Japanese–Americans apply for landing or stay in Japan.

The court dismissed the case for the following reasons:

The Constitution guarantees a national’s freedom to choose and change his or her residence. However, there is no provision for an alien’s entry into or stay in Japan. And no clear provision requires the State to allow foreigners entry into or residence in Japan.

A State has no obligation to accept aliens to come into it under customary international law. Unless particular demand of a treaty exists, a State has discretion with regard to the admission of an alien or over what conditions may be imposed on his or her entry if he or she is admitted. Therefore, foreigners are allowed to reside in Japan only within the framework of the system of residence under the Immigration

Control and Refugee Recognition Act. (Grand Court of Supreme Court Judgment of 4 October 1978, *Saiko-Saibansho Minji-hanreishu* (Supreme Court Civil Reports), Vol. 7, No. 32, p. 1223; Grand Court of Supreme Court Judgment of 19 June 1957, *Saiko-Saibansho Keiji-hanreishu* (Supreme Court Criminal Reports), Vol. 11, No. 6, p. 1663.)

When deciding to grant an extension of the period of stay of an alien, the Minister of Justice should judge each request in terms of national interest in maintaining domestic security and good custom, securing health and sanitation, or stabilizing the labour market. Such a decision is left to the discretion of the Minister of Justice responsible for a wide range of immigration administration. Therefore, the decision of the Minister of Justice is illegal only if he abused his power or his judgment lacked factual grounds. (Grand Court of Supreme Court, Judgment of 4 October 1978, *Saiko-Saibansho Minji-hanreishu* (Supreme Court Civil Reports), Vol. 7, No. 32, p. 1223.)

Japanese-Americans and their families are given preferential treatment in the granting of the Status of Residence. The addition of requirements of good behaviour does not result in discrimination against them or impose disadvantageous treatment on them, because its only effect is that it has decreased the preferential treatment that they received before.

The reason why no additional requirement of good behaviour is imposed on refugees from Indochina or Vietnam, or orphans left behind in China during World War II and their relatives, is that they are made a special exception from the perspective of (a) a refugee protection policy, which the Immigration Control and Refugee Recognition Act itself adopts as to refugees, or (b) a policy promoting the repatriation of Japanese orphans left behind in China in the specific historical context.

Therefore, the addition of the requirement of good behaviour does not impose any additional disadvantage on people of a certain race or nationality, and consequently does not fall into irrational engagement in or incitement of acts of racism or discriminatory practices.

## NATIONAL LAWS ON INTERNATIONAL LAW MATTERS AND OTHER RELEVANT STATE PRACTICE<sup>28</sup>

### Anti-Piracy Law

On 19 June 2009, the Japanese Diet enacted the Law on the Penalization of Acts of Piracy and Measures against Acts of Piracy<sup>29</sup> (hereinafter the “Law”), which defines and

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<sup>28</sup> Contributed by YOSHII Jun, Professor of International Law at Meiji-Gakuin University, Tokyo, and ISHIBASHI Kanami, Professor of International Law at Tokyo University of Foreign Studies.

<sup>29</sup> The Law on the Penalization of Acts of Piracy and Measures against Acts of Piracy (in Japanese): [http://www.kantei.go.jp/jp/singi/kaiyou/kaizoku/AMP\\_joubun.pdf](http://www.kantei.go.jp/jp/singi/kaiyou/kaizoku/AMP_joubun.pdf).



criminalizes an act of piracy under the Japanese legal system, thereby enabling Japan to take more effective and appropriate measures against acts of piracy.<sup>30</sup> The Law basically gives the Japan Coast Guard the primary role in anti-piracy operations by Article 5, but Article 7 also enables Self-Defence Forces to protect not only Japanese-related vessels but also vessels of other countries from acts of piracy. At present, two Maritime Self-Defence Force destroyers are dispatched in the Gulf of Aden and, from mid-June, two P-3C maritime patrol aircraft will also be deployed.<sup>31</sup>

Under the Law, the act of piracy is basically defined as acts committed on the high seas or in Japanese territorial sea or internal waters, such acts or threats of violence, or by any other means committed for private ends by the crew or the passenger of a private ship, while making other persons non-resistant, to seize or exercise full control of another ship. The law also covers those acts, while making other persons non-resistant by acts or threats of violence or by other means, to forcibly take possession of or gain or facilitate illegal profit from the property on board another ship. Abduction of persons on board another ship for the purpose of delivering property from the third person is also included. To intrude on or damage another ship or to navigate a ship, to unusually approach, hover about or interfere in the path of another ship for the purpose of doing acts of piracy, are prescribed as acts punishable by the Law as well. Punishments for committing acts of piracy are the death penalty, or short- or long-term imprisonment. The law authorizes the Coast Guard and Self-Defence Force vessels within reasonable range to use firearms against pirate vessels if they ignore warning signals and continue pirating activities.

*North Korea's nuclear test*

*Japan protested against the second underground nuclear test by North Korea*

On 25 May 2009, North Korea announced that it had conducted a successful underground nuclear test, more powerful than the previous one in October 2005. Japan protested against North Korea's announcement of the nuclear test on the same day. The official announcement of the Japanese Government was as follows:

1. The United Nations Security Council Resolution 1718 demands that North Korea not conduct any nuclear test, and the Security Council Presidential Statement of 13 April 2009 requests that North Korea fully comply with this resolution. North Korea's

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<sup>30</sup> Statements by the then Prime Minister, Aso, Taro, and the then Minister for Foreign Affairs, Nakasone, Hirofumi, can be seen at the website (English translation): [http://www.kantei.go.jp/foreign/asospeech/2009/06/19danwa\\_e.html](http://www.kantei.go.jp/foreign/asospeech/2009/06/19danwa_e.html); [http://www.mofa.go.jp/announce/announce/2009/6/1193289\\_1136.html](http://www.mofa.go.jp/announce/announce/2009/6/1193289_1136.html).

<sup>31</sup> Exchange of notes between the Government of Japan and the Government of the Republic of Djibouti concerning the status of the Self-Defence Forces of Japan and the Japan Coast Guard as well as their personnel and other personnel of the Government of Japan sent to the Republic of Djibouti with the aim of taking law enforcement measures to counter acts of piracy off the Somali coast, as well as of the offices established by the Government of Japan in the Republic of Djibouti to facilitate above mentioned dispatch can be seen at the site below (in English):

<http://www.mofa.go.jp/region/africa/djibouti/note0904-e.pdf>.

nuclear test was conducted despite these UN actions and constitutes a clear violation of the resolution. The test is totally unacceptable.

2. In addition, the nuclear test is a serious challenge to the nuclear non-proliferation regime, and is against the Japan–DPRK Pyongyang Declaration and the Joint Statement of the Six-Party Talks. Japan strongly protests against North Korea’s action and finds it deeply regrettable.
3. Japan urges North Korea to fully and immediately implement the Joint Statement of the Six-Party Talks, which states North Korea’s commitment to abandon all nuclear weapons and existing nuclear programs and return to the Treaty on Non-Proliferation of Nuclear Weapons and to IAEA safeguards, as well as United Nations Security Council Resolution 1718. Japan strongly urges North Korea to take concrete measures towards comprehensively resolving the outstanding issues of concern, including the abduction, nuclear, and missile issues.<sup>32</sup>

The Japanese Diet also passed a resolution protesting the second nuclear test conducted by North Korea.<sup>33</sup>

### **Ratification of the Cluster Bomb Treaty**

On 14 July 2009, Japan deposited a ratification instrument with the United Nations and thereby became the 14th country to ratify an international treaty banning the use and stockpiling of cluster bombs. The Convention on Cluster Munitions (CCM) was adopted on 30 May 2008 in Dublin and was opened for signature in Oslo on 3 December 2008. It entered into force on 1 August 2010. Parties of the Convention are required to stop using cluster bombs immediately and to dispose of their stockpiles in eight years.

Japan enacted a law against production and stockpiling of cluster bombs on 17 July 2009.<sup>34</sup> The object of the law is to prohibit production and regulate possession of cluster bombs in order to ensure appropriate and effective implementation of the Convention.

*Japanese submission to the ICJ on 17 April 2009 of its written statement concerning “Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government only of Kosovo”*

“Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government only of Kosovo (Request for Advisory Opinion)”<sup>35</sup> was requested by the UN General Assembly regarding the 2008 unilateral

<sup>32</sup> [http://www.mofa.go.jp/announce/announce/2009/5/1192257\\_1134.html](http://www.mofa.go.jp/announce/announce/2009/5/1192257_1134.html).

<sup>33</sup> The Resolution of Protest against North Korea’s nuclear test is posted (in Japanese) at: [http://www.shugiin.go.jp/itdb\\_gian.nsf/html/gian/honbun/ketsugian/g17113005.htm?OpenDocument](http://www.shugiin.go.jp/itdb_gian.nsf/html/gian/honbun/ketsugian/g17113005.htm?OpenDocument).

<sup>34</sup> The law is uploaded on: <http://law.e-gov.go.jp/announce/H21HO085.html>.

<sup>35</sup> <http://www.icj-cij.org/docket/files/141/14799.pdf>.

declaration of independence by Kosovo. Kosovo's declaration of independence was adopted and issued by the Provisional Institutions of Self-Government of Kosovo on 17 February 2008. In respect of Kosovo's case, the International Court of Justice (ICJ) issued an Order dated 17 October 2008 and requested written statements on the question from the United Nations and its Member States by setting up the deadline for submission as 17 April 2009<sup>36</sup> and the deadline for written comments on the other written statements as 17 July 2009, in accordance with Article 66(2),(4) of its Statute.

On 17 April 2009, in response to the above Order of 17 October 2008, Japan submitted its "Written Statement of the Government of Japan"<sup>37</sup> to the ICJ in connection with a request from the General Assembly of the United Nations.

In the first place, Japan expresses its doubt as to whether it would be appropriate for the ICJ to give an advisory opinion on this matter because a political character of Kosovo's declaration of independence is rather clear; it would not be the so-called "legal question" that should be requested upon Article 96 of the UN Charter and Article 65(1) of the ICJ Statute.<sup>38</sup>

Japan understands that the Court was only requested to address "the issue of whether or not the issuance of Kosovo's declaration of independence itself is prohibited by any rule of international law". However, Japan feels that the substance of the main question asked was the legality of Kosovo's declaration of independence itself; that is, "the legal assessment on the act of secession and independence of Kosovo", although the Court essentially should avoid dealing with "the issue of the present and future status of Kosovo" (i.e. "whether or not Kosovo is a State") because it is beyond the request if considered literally.<sup>39</sup>

That is the reason why Japan also examined the request including the question of the legality of independence *per se* as follows:

- (1) A declaration of independence is a "factual event". There is no rule or principle to govern the issuance of a declaration of independence. It is not legally relevant to the question of whether an entity meets the requirements of Statehood. Therefore, Kosovo's declaration of independence practically exists as a fact and cannot be denied in itself.<sup>40</sup>
- (2) Based on the above facts, Japan took a step further to explore the legality of independence of Kosovo, although the issue of recognition was not taken up. In its Statement, the Japanese Government confirmed that: "International law, in general, neither approves nor prohibits secession or independence by an entity which meets the requirements of Statehood."<sup>41</sup> At the same time, Japan also reaffirmed that this needed to be considered carefully in the formality or process of independence and

<sup>36</sup> <http://www.icj-cij.org/docket/files/141/14813.pdf>.

<sup>37</sup> <http://www.icj-cij.org/docket/files/141/15658.pdf>.

<sup>38</sup> "Written Statement of the Government of Japan", *ibid.*, preamble, p. 1.

<sup>39</sup> *Ibid.*, para. 1, p. 2.

<sup>40</sup> *Ibid.*, para. 2, pp. 2–3.

<sup>41</sup> *Ibid.*, para. 3(1), p. 3.

secession; it should be consistent with international law and can never be approved if it is achieved in a way to violate, for example, the principle of non-use of force.<sup>42</sup>

Japan's other concern was possible various legal assessments of the independence, especially in the context of secession from a State. Unlike the colonial peoples' right of self-determination, the general right to self-determination of a group of people within a sovereign State, outside the colonial context, has been interpreted in different ways, although the so-called "right of people to self-determination" *per se* is stated in the ICECSR (International Covenant on Economic, Social and Cultural Rights) and the ICCPR (International Covenant on Civil and Political Rights), and also recognized by the Court in the Advisory Opinion of South West Africa in 1971.<sup>43</sup>

Because it might also undermine the political stability of a State, and even the world, if this kind of right of self-determination is easily invoked by a group of people within a sovereign State, many States including Japan tend to be cautious and underline the principle of territorial integrity of sovereign States.

- (3) From one of the most relevant documents, UN Security Council Resolution 1244, Japan considered that "the resolution applies only to the period of transition until the final status of Kosovo is settled and does not preclude a declaration of independence by Kosovo (followed by its secession and independence)".<sup>44</sup>
- (4) Concerning the process of Kosovo's secession and independence, Japan clarified that it should be considered as a special case (*sui generis*), which is widely recognized in the international community.<sup>45</sup> The reason is follows:
  - (a) Kosovo was a quite autonomous province within the Republic of Serbia until 1989 and in the course of the dissolution of the former Yugoslavia, the fierce ethnic conflict between Kosovo Albanians and Serbian forces has caused serious human rights violations and a large number of refugees and internally displaced persons.<sup>46</sup>
  - (b) After the 1999 NATO air campaign against Serbia, the UN Security Council adopted resolution 1244 and set up a UN mission for an interim administration and an international security force led by NATO, thus contributing to avoiding any further interference of Serbia in Kosovo.<sup>47</sup>
  - (c) In 1999, Kosovo established and began to organize its own government institutions, which led up to the aspirations of Kosovo's people for early independence.<sup>48</sup>
  - (d) In March 2007, a proposal concerning the independence of Kosovo under the supervision of the international community was proposed to the UN, which was rejected by Serbia and could not be dealt with in a way to make any progress.<sup>49</sup>

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<sup>42</sup> *Ibid.*, pp. 3–4.

<sup>43</sup> *Ibid.*, p. 4.

<sup>44</sup> *Ibid.*, para. 3(2), p. 5.

<sup>45</sup> *Ibid.*, para. 3(3), pp. 5–6.

<sup>46</sup> *Ibid.*, para. 3(3)(a), pp. 6–7.

<sup>47</sup> *Ibid.*, para. 3(3)(b), p. 7.

<sup>48</sup> *Ibid.*, para. 3(3)(c), p. 7.

<sup>49</sup> *Ibid.*, para. 3(3)(d), pp. 7–8.

- (5) From the above examination, Japan concluded that the declaration of independence by Kosovo is a factual event, and there is no rule of international law which regulates it.<sup>50</sup> However, Japan also examined the substance of the question posed by the UN General Assembly before the ICJ, and reached the conclusion that “the secession and independence of Kosovo is justified in consideration of its *sui generis* nature, and does not contravene any applicable rule of international law, including UNSC resolution 1244”.<sup>51</sup> Besides, Japan clearly expressed its concern about the establishment by the ICJ, on this occasion, of any general principle on the secession and independence of a State.<sup>52</sup>

On 22 July 2010, the ICJ finally gave its Advisory Opinion on the question of “the Accordance with international law of the unilateral declaration of independence in respect of Kosovo”.<sup>53</sup> Compared with the above Japanese statement, the Court, rather deliberately, took a quite narrow approach, by answering only “the issue of whether or not the issuance of Kosovo’s declaration of independence itself is prohibited by any rule of international law”,<sup>54</sup> although this might have been what Japan wanted. The Court neither tried to examine the “substance” of the question posed nor responded to the legal consequences of the declaration itself.<sup>55</sup>

The Court addressed whether it had jurisdiction and discretion to give an advisory opinion, responding to the UN General Assembly (UNGA) request. The Court concluded that it had jurisdiction under Article 96 of the UN Charter and Article 95 of the ICJ Statute to respond to the UNGA’s request, even if the UN Security Council (UNSC) was seized of the same matter and the question posed has “political aspects”, as some States advocated.

Concerning the competence matter between the UNSC and the UNGA relating to Article 12, paragraph 1 of the Charter, the Court considered as follows:

“a request for an advisory opinion is not in itself a ‘recommendation’ by the General Assembly ‘with regard to a dispute or situation’” (*Legal Consequences of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004(I)*, p. 148, para. 25).<sup>56</sup> Furthermore, the Court did not question the issue of “political aspects” by stating that: “the fact that a question has political aspects does not suffice to deprive it of its character as a legal question. Whatever its political aspects, the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially

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<sup>50</sup> *Ibid.*, para. 4.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> Advisory Opinion of 22 July 2010 on the question of “the Accordance with international law of the unilateral declaration of independence in respect of Kosovo”, <http://www.icj-cij.org/docket/files/141/15987.pdf>.

<sup>54</sup> *Ibid.*, para. 51.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*, para. 24.

judicial task, namely, in the present case, an assessment of an act by reference to international law”.<sup>57</sup>

Regarding its discretion, the Court reaffirmed that “only ‘compelling reasons’ should lead the Court to refuse its opinion in response to a request falling within its jurisdiction” (*Judgments of the Administrative Tribunal of the ILO upon complaints made against the Unesco*, ICJ Reports 1956, p. 86; *Legal Consequences of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004(I), p. 148, para. 44)<sup>58</sup> and decides that “the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion, will not have regard to the origins or to the political history of the request or to the distribution of votes in respect of the adopted resolution” (*ICJ Reports 1996(I)*, p. 237, para. 16),<sup>59</sup> irrespective of such as the alleged fact that the sole sponsor of the resolution was Serbia and the kind of political motives hidden behind the request.<sup>60</sup>

Despite such a positive attitude towards responding to the request, the Court only assesses the international legality of “declaring” independence. The Court considers that the declaration of independence did not violate general international law and even the *lex specialis*, such as the UNSC resolution 1244 and the UN Mission in Kosovo (UNMIK) Constitutional Framework.<sup>61</sup>

Although several States contended that “the prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity”,<sup>62</sup> referring also to the same instances in which the UNSC decides its illegality concerning the unilateral declaration and the Court also confirms the importance of the principle in the international legal order, provided in Article 2, paragraph 4, of the UN Charter, it should be noted that the Court, at the same time, clarified that “the scope of the principle of territorial integrity is confined to the sphere of relations between States”, which is not the case for Kosovo.<sup>63</sup>

On the other hand, the Court was so restrained as to not give any ruling on the “substance” of the question raised by Japan, namely the matter of the right of self-determination; more specifically the right to “remedial secession”, so that it remains undecided. The Court noted that as almost all States agreed, “that issue is beyond the scope of the question posed by the General Assembly”.<sup>64</sup>

After the Court’s advisory opinion was given, Serbia reacted aggressively against it and tried to persuade the international community not to recognize Kosovo’s statehood.

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<sup>57</sup> *Ibid.*, para. 27.

<sup>58</sup> *Ibid.*, para. 30.

<sup>59</sup> *Ibid.*, para. 33.

<sup>60</sup> *Ibid.*, para. 32.

<sup>61</sup> *Ibid.*, paras. 119, 121.

<sup>62</sup> *Ibid.*, para. 80.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*, paras. 82, 83.

On the contrary, Mr Sejdiu, the President of Kosovo, encouraged States to make recognition of the statehood of Kosovo. Despite the Court's self-restrained attitude, the practical effect of the advisory opinion was, probably, quite different from the Court's intention: more affirmative for Kosovo's independence and broadcast widely in an inaccurate way that the legitimacy of independence was confirmed by the ICJ, especially in the headlines such as: "Kosovo's independence is legal, court finds" (CNN World, 22 July 2010).<sup>65</sup>

Under such circumstances of distortion by the media, it remains unclear whether or not the Court's self-restrained approach will mean it could respond to the UNGA request and resolve the Kosovo situation properly. Whether or not Kosovo can achieve its statehood still depends on political solutions, as well as State practice and the principle of effectivity.

In this sense, the approach suggested by the Statement of Japan related to the legality of independence *per se*, which deals with Kosovo as a *sui generis* case, should have been one of the least problematic solutions, setting aside the more controversial case of South Ossetia or Abkhazia, since it could create legal stability instead of political confusion and would not yet infringe any future decision-making or rulings on "debates regarding the extent of the rights of self-determination and the existence of any right of 'remedial secession'".<sup>66</sup>

### **Protest against North Korea's Ballistic Missile Launches**

In 2009, missiles were launched towards the east from North Korea (i.e. towards Japan) twice, one in April and again in July.

- (1) The first "flying object". The first launch of a missile was on 5 April 2009 and it was initially called a "flying object", not a missile, because North Korea announced that it was an artificial satellite launched into space. However, it was never confirmed whether such a satellite was launched, so it was decided to be a "missile" later on.<sup>67</sup> At about 11:30 am, on 5 April, a flying object was launched and part of it became detached, presumed to have fallen into the Sea of Japan, around 280 km (modified to 320 km on 15 May 2009) off the west coast of Akita.<sup>68</sup>

Japan protested on 5 April 2009 through the "embassy route" in Beijing as follows:

The launch of a flying object violates the relevant UNSC resolutions and the Japan–DPRK Pyongyang Declaration" and "is also incompatible with the Joint Statement of the

<sup>65</sup> [http://articles.cnn.com/2010-07-22/world/kosovo.independence.court\\_1\\_kosovo-serbian-president-boris-tadic-declaration?\\_s=PM:WORLD](http://articles.cnn.com/2010-07-22/world/kosovo.independence.court_1_kosovo-serbian-president-boris-tadic-declaration?_s=PM:WORLD).

<sup>66</sup> *Supra* note 7, para. 83.

<sup>67</sup> <http://www.yomiuri.co.jp/politics/news/20090410-OYT1T00419.htm> (in Japanese).

<sup>68</sup> <http://www.mod.go.jp/j/approach/defense/bmd/20090515.html>.

Six-Party Talks. Moreover, it is a threat to the peace and stability of the region, and directly impacts the security of Japan.<sup>69</sup>

Japan strongly requested the DPRK to implement the relevant UNSC resolutions relating to its ballistic missile programme. At the same time, domestically, on 10 April, the Japanese government decided to extend the economic sanctions against the DPRK (prohibition of importing goods from the DPRK without authorization of the Minister of Economy, Trade and Industry)<sup>70</sup> and add more restrictive measures on surveillance of money flow to the DPRK (upper limit of payment or capital transactions subject to the notification or reporting lowered from 1 million yen to 300,000 yen in the case of direct payment in hand, or from 30 million yen to 10 million yen in the case of bank transactions).<sup>71</sup> And besides, Japan decided to continue the measures to prohibit the DPRK's vessels entering any port of Japan, by extending the time limit of the "Act on Special Measures to prohibit the designated vessels entering ports in Japan" (author's provisional translation), legislation mainly targeted at the DPRK.<sup>72</sup>

On 14 April, the UN Security Council adopted the President's Statement (S/ PRST/2009/7) unanimously, demanding as follows:

The Security Council bears in mind the importance of maintaining peace and stability on the Korean peninsula and in northeast Asia as a whole.

The Security Council condemns the 5 April 2009 (local time) launch by the Democratic People's Republic of Korea (DPRK), which is in contravention of Security Council resolution 1718 (2006).

The Security Council reiterates that the DPRK must comply fully with its obligations under Security Council resolution 1718 (2006).

The Security Council demands that the DPRK not conduct any further launch.<sup>73</sup>

Mr Nakasone, Hirofumi, Japan's Minister for Foreign Affairs, welcomed and appreciated the UNSC's response to the DPRK's missile launch by issuing such a unified message in the form of a "Presidential Statement", which clearly accused North Korea of the missile launch, using strong words such as "condemned" and identifying it as a breach of UNSC resolution 1718.<sup>74</sup>

<sup>69</sup> [http://www.mofa.go.jp/announce/announce/2009/4/1190114\\_1132.html](http://www.mofa.go.jp/announce/announce/2009/4/1190114_1132.html).

<sup>70</sup> <http://www.kantei.go.jp/jp/tyokan/aso/2009/0410seimei.html>. [http://www.meti.go.jp/policymeeting/2009/pdf/091026\\_01.pdf](http://www.meti.go.jp/policymeeting/2009/pdf/091026_01.pdf).

<sup>71</sup> Kantei HP, *ibid*. See also, [http://www.mof.go.jp/jouhou/kokkin/kitachousen\\_210422\\_2.htm](http://www.mof.go.jp/jouhou/kokkin/kitachousen_210422_2.htm).

<sup>72</sup> Kantei HP, *ibid*. See also, <http://law.e-gov.go.jp/htmldata/H16/H16HO125.html>.

<sup>73</sup> [http://www.unic.or.jp/security\\_co/pdf/prst\\_2009\\_7.pdf](http://www.unic.or.jp/security_co/pdf/prst_2009_7.pdf).

<sup>74</sup> [http://www.mofa.go.jp/announce/announce/2009/4/1190511\\_1132.html](http://www.mofa.go.jp/announce/announce/2009/4/1190511_1132.html).



- (2) The second launch of missiles. On 4 July 2009, around 12 pm, the DPRK launched seven “scud-type” ballistic missiles into the Sea of Japan, in contravention of UNSC Resolution 1874,<sup>75</sup> following the launch of the four previous missiles two days before. Again, through the “embassy route” in Beijing, Japan seriously protested as follows:

The launch of ballistic missiles by North Korea is a grave and provocative act against the security of its neighbouring countries, including Japan, and violates UN Security Council Resolutions 1965, 1718, and 1874.

Japan urges North Korea to fully and immediately implement the related UN Security Council Resolutions such as suspension of all activities related to ballistic missile programs.

On 7 July 2009, Japan promptly responded and took the “Measures to Prevent Transfer of Assets that can Contribute the DPRK’s Nuclear-, Ballistic-, or Other Weapons of Mass Destruction-Related Programs or Activities”, under the Foreign Exchange and Foreign Trade Law, based on UNSC Resolution 1784, particularly paragraph 18, which stated as follows:

*Calls upon* Member States, in addition to implementing their obligations pursuant to paragraphs 8 (d) and (e) of resolution 1718 (2006), to prevent the provision of financial services or the transfer to, through, or from their territory, or to or by their nationals or entities organized under their laws (including branches abroad), or persons or financial institutions in their territory, of any financial or other assets or resources that could contribute to the DPRK’s nuclear-related, ballistic missile-related, or other weapons of mass destruction-related programmes or activities, including by freezing any financial or other assets or resources on their territories or that hereafter come within their territories, or that are subject to their jurisdiction or that hereafter become subject to their jurisdiction, that are associated with such programmes or activities and applying enhanced monitoring to prevent all such transactions in accordance with their national authorities and legislation.

In line with the above paragraph 18 of the UNSC resolution, the “Measures” provide for four types of restrictions as follows:<sup>76</sup>

- (1) Payment restrictions: the obligation to obtain permission for payment made or received for the purpose of contributing to activities that could possibly be conducive to North Korea’s nuclear-, ballistic missile development- or other WMD-related programmes or activities that will be designated by the Ministry of Foreign Affairs’ notification to be issued on July 7;

<sup>75</sup> <http://www.un.org/News/Press/docs/2009/sc9679.doc.htm>.

<sup>76</sup> [http://www.meti.go.jp/english/press/data/20090706\\_01.html](http://www.meti.go.jp/english/press/data/20090706_01.html).

- (2) Restrictions on imports and exports of means of payment: the obligation to obtain permission to import or export any means of payment or securities for the purpose of contributing to the activities potentially conducive to North Korea's nuclear-related programmes;
- (3) Restrictions on capital transactions: the obligation to obtain permission for capital transactions and specified capital transactions made for the purpose of contributing to the activities potentially conducive to North Korea's nuclear-related programmes; and
- (4) Restrictions on service transactions: the obligation to obtain permission for financial service transactions made for the purpose of contributing to the activities potentially conducive to North Korea's nuclear-related programmes.

Besides, on 23 July 2009, Japan also took the "Measures to freeze assets of entities engaged in North Korea's nuclear-, other WMD- and ballistic missile development-related programs",<sup>77</sup> to freeze assets of the five entities and five individuals, which were additionally designated by the UNSC's Sanction Committee as being engaged in North Korea's nuclear-, other WMD- and ballistic missile development-related programmes under UNSC Resolutions 1718 and 1874 on 16 July 2009, and the measures to prevent such designated individuals from entering or even passing through Japan.<sup>78</sup> The contents of measures to be taken are the same as the previous measures<sup>79</sup> set up on 21 May 2009, although the previous measures were targeted against just three concerned entities and not individuals.

- (1) Payment restrictions: the obligation to obtain permission for payment to entities and individuals designated by the Ministry of Foreign Affairs' notification as being engaged in North Korea's nuclear-, other WMD- and ballistic missile development-related programmes; and
- (2) Restrictions on capital transactions: the obligation to obtain permission for capital transactions (deposit contracts, trust contracts and money loan contracts) with entities and individuals designated by the Ministry of Foreign Affairs' notification as being engaged in North Korea's nuclear-, other WMD- and ballistic missile development-related programmes.

Furthermore, a bill on special measures for cargo inspection<sup>80</sup> was submitted to the 171st Diet (from 5 January to 21 July 2009), but it was scrapped under the unstable political situation of the Democratic Party of Japan, the party in power. However, eventually, on 28 May 2010, it was enacted as the "Act on Special Measures concerning Cargo Inspections, etc. for implementation of UNSC Resolution 1874, etc." (author's

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<sup>77</sup> [http://www.meti.go.jp/english/press/data/20090723\\_01.html](http://www.meti.go.jp/english/press/data/20090723_01.html).

<sup>78</sup> [http://www.kantei.go.jp/jp/tyoukanpress/rireki/2009/07/090723\\_siryou1.pdf](http://www.kantei.go.jp/jp/tyoukanpress/rireki/2009/07/090723_siryou1.pdf) (in Japanese).

<sup>79</sup> [http://www.meti.go.jp/english/press/data/20090521\\_01.html](http://www.meti.go.jp/english/press/data/20090521_01.html).

<sup>80</sup> [http://www.kantei.go.jp/jp/tyoukanpress/rireki/2009/07/090707\\_siryou2.pdf](http://www.kantei.go.jp/jp/tyoukanpress/rireki/2009/07/090707_siryou2.pdf).

provisional translation)<sup>81</sup> by the 174th Diet<sup>82</sup> and, also in line with UNSC Resolution 1874 and consistent with international law, the Act authorizes the Coast Guard and Customs to carry out the following tasks, not only in the Japanese territorial sea but also in the high seas (including the EEZ). Specific focus should be placed on the new inspection system introduced by this Act since, in Japan, up to the time this Act was enforced, had not been allowed to inspect foreign vessels or aeroplanes on the high seas. The Act provides for onsite inspections in internal waters, the territorial sea and on the high seas (including the EEZ) by the Coast Guard and Customs, or by compelling vessels to move to an appropriate and convenient port for inspection, if necessary. The contents of inspection, although the words and the provisions are transformed in a way to be consistent with the existing national legislations, are described in the words of the relevant paragraph of UNSC resolution 1784 as follows:

- (1) inspection on “all cargo to and from the DPRK, in their territory, including seaports and airports, if the State concerned has information that provides reasonable grounds to believe the cargo contains items the supply, sale, transfer, or export of which is prohibited by paragraph 8(a), 8(b), or 8(c) of resolution 1718 or by paragraph 9 or 10 of this resolution, for the purpose of ensuring strict implementation of those provisions” (para. 11); and
- (2) inspection on “vessels, with the consent of the flag State, on the high seas, if they have information that provides reasonable grounds to believe that the cargo of such vessels contains items the supply, sale, transfer, or export of which is prohibited by paragraph 8(a), 8(b), or 8(c) of resolution 1718 (2006) or by paragraph 9 or 10 of this resolution, for the purpose of ensuring strict implementation of those provisions” (para. 12).

Admittedly, these Japanese measures are not necessarily enough to respond to the DRPK issue. However, it should be noted that, among the measures so far taken, the “Act on Special Measures concerning Cargo Inspections, etc. for implementation of the UNSC Resolution 1874, etc.” might be one of the most powerful tools against the DPRK under the Japanese Constitution.

*The Possibility of Spreading New Renewable Energy and Signing of the Statute of the International Renewable Energy Agency (IRENA)*

On 29 June 2009, the Government of Japan signed the Statute of International Renewable Energy Agency (IRENA), which provides for the founding of the new international organization, IRENA, for promoting the use of so-called “renewable energy” such as solar, wind, biomass, geothermal, hydropower and water (ocean). As is already well known, with its highly advanced technology in such fields, “Japan has been actively

<sup>81</sup> <http://hourei.hounavi.jp/hourei/H22/H22HO043.php> (in Japanese).

<sup>82</sup> <http://www.yomiuri.co.jp/politics/news/20100528-OYT1T00420.htm>.

involved in international cooperation related to energy and climate change, including assistance such as installing solar panels through implementation of the Cool Earth Partnership”.<sup>83</sup> Japan is confident that the signing of this statute will be an important step towards solving the problem of global warming in an environmentally sound way and towards creating a low-carbon society.

The Statute was approved by the Diet on 16 June 2010, its instrument of ratification deposited on 1 July, and it entered into force on 31 July 2010 in Japan.<sup>84</sup> As of December 2010, 148 countries and the European Union have signed the Statute and 49 countries have ratified it.<sup>85</sup>

*Towards more effective and sustainable fishery management: Japan actively expanding its cooperation with a regional fishery regime in the South-East Atlantic Ocean*

The Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean, adopted in Namibia on 20 April 2001, was approved by the Diet on 30 November 2009 and entered into force in Japan on 10 January 2010.<sup>86</sup>

Japan has been a contracting party to many multilateral and regional treaties aimed at fishery management, either specifically or partially, as follows:

- Convention on the Conservation of Antarctic Marine Living Resources
- Convention for the Conservation of Southern Bluefin Tuna
- International Convention for the Regulation of Whaling: ICRW
- Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries
- International Convention for the Conservation of Atlantic Tuna
- Agreement for the Establishment of the Indian Ocean Tuna Commission: IOTC
- Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean
- Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean
- The Agreement for the establishment of the General Fisheries Commission for the Mediterranean (GFCM)
- Convention between the United States of America and the Republic of Costa Rica for the Establishment of an Inter-American Tropical Tuna Commission
- Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea
- Convention for the Conservation of Antarctic Seals: CCAS

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<sup>83</sup> [http://www.mofa.go.jp/announce/announce/2009/6/1193441\\_1136.html](http://www.mofa.go.jp/announce/announce/2009/6/1193441_1136.html). For “Cool Earth Partnership”, see <http://www.mofa.go.jp/policy/economy/wef/2008/mechanism.html>.

<sup>84</sup> [http://www.mofa.go.jp/announce/announce/2010/7/0701\\_03.html](http://www.mofa.go.jp/announce/announce/2010/7/0701_03.html).

<sup>85</sup> <http://www.irena.org/memberState/index.aspx?mnu=mem>.

<sup>86</sup> <http://www.mofa.go.jp/policy/treaty/submit/session173/agree-3.html>.

- 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: UNFSA
- Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas: Flagging Agreement

Because Japan is highly dependent on deep-sea or high seas fisheries, it is very clear that such active participation in fishery management conventions, either on global or regional levels, is necessary to cooperate for sustainable management of fishery resources in their designated areas of the conventions and, at the same time, to ensure a chance of fishery in the areas for Japanese fishery industries and consumers, keeping its influential power in the decision-making process of total allowable catch (TAC), and so on.<sup>87</sup>

The SEAFO (South East Atlantic Fisheries Organisation) was established by the Convention on the Conservation and Management of Fisheries Resources in the South East Atlantic Ocean in line with Article 118 of the United Nations Convention on the Law of the Sea and the 1995 United Nations Fish Stocks Agreement (UNFSA). The preamble of the Convention also specially refers to the “Responsible Fisheries”, which was firstly stipulated in the FAO Code of Conduct for Responsible Fisheries.<sup>88</sup> The meaning of “responsible fisheries” is discussed in Article 6(1) of the Code: “The right to fish carries with it the obligation to do so in a responsible manner so as to ensure effective conservation and management of the living aquatic resources.” Furthermore, in the preamble, the Convention clearly intends to apply the precautionary approach, stating that it is “dedicated to exercising and implementing the precautionary approach in the management of fishery resources”, which is also reiterated in Article 3(b), as shown below.

Japan has been catching the Patagonian toothfish and the deepwater red crab in the “Convention Area”.<sup>89</sup> Now SEAFO has Angola, Namibia, Norway and the EU as its Contracting Parties, together with Japan. The objectives of the Conventions are to ensure the long-term conservation and sustainable use of the fishery resources in the Convention Area (Art. 2) and, to give effect to such objectives, the Contracting Parties shall, as provided in Article 3:

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<sup>87</sup> [http://www.mofa.go.jp/mofaj/gaiko/treaty/treaty173\\_3gai.html](http://www.mofa.go.jp/mofaj/gaiko/treaty/treaty173_3gai.html).

<sup>88</sup> <http://www.fao.org/DOCREP/005/v9878e/v9878e00.htm>.

<sup>89</sup> “[A]ll waters beyond areas of national jurisdiction in the area bounded by a line joining the following points along parallels of latitude and meridians of longitude:

beginning at the outer limit of waters under national jurisdiction at a point 6° South, thence due west along the 6° South parallel to the meridian 10° West, thence due north along the 10° West meridian to the equator, thence due west along the equator to the meridian 20° West, thence due south along the 20° West meridian to a parallel 50° South, thence due east along the 50° South parallel to the meridian 30° East, thence due north along the 30° East meridian to the coast of the African continent.” (Art. 4.)

- (a) adopt measures, based on the best scientific evidence available, to ensure the long-term conservation and sustainable use of the fishery resources to which this Convention applies;
- (b) apply the precautionary approach in accordance with Article 7;
- (c) apply the provisions of this Convention relating to fishery resources, taking due account of the impact of fishing operations on ecologically related species such as seabirds, cetaceans, seals and marine turtles;
- (d) adopt, where necessary, conservation and management measures for species belonging to the same ecosystem as, or associated with or dependent upon, the harvested fishery resources;
- (e) ensure that fishery practices and management measures take due account of the need to minimize harmful impacts on living marine resources as a whole; and
- (f) protect biodiversity in the marine environment.

Actually, Japanese activities in the designated area are quite limited to just one bottom long-line fishing boat for catching the Patagonian toothfish and one crab-pot fishing boat for catching the deepwater red crab. However, Japan was actively participating in the 7th Meeting of the Parties, held from 11 to 15 October 2009 in Windhoek, Namibia and negotiated in the TAC issue<sup>90</sup> to obtain its allowance (230 tons for toothfish and 400 tons for red crab).<sup>91</sup>

Traditionally, as provided in Article 87(1) of UNCLOS, “freedom of the high seas” should include “freedom of fishing” on the high seas, although it should be subject to the conditions as laid down in Article 87(2), in that: “These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.” However, even on the high seas, marine pollution is getting serious and the insufficiency of fishery resources has been exposed and therefore, nowadays, the States are “recognising the urgent and constant need for effective conservation and management of the fishery resources in the high seas” (preamble, para. 2 of the Convention).

Based on the traditional “freedom of the high seas”, it might be doubtful to establish such RFMOs (Regional Fisheries Management Organizations) for fishery management and to promote establishing the special fishery management areas in the high seas as if they were a kind of “enclosure of the high seas” or “new demarcation of the high seas” by excluding any chance of fishery for non-parties to the conventions. Somehow, this kind of tendency has also been recognized specially for the purpose of marine protection; that is, it is well known that the unilateral establishment by a State or several States of a so-called marine protected area, sometimes in the form of “Particularly Sensitive Sea Areas”, has prevailed rapidly beyond national jurisdiction, even in the high seas, and caused or would cause sooner or later the issue of conflict with the UNCLOS,

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<sup>90</sup> [http://www.jfa.maff.go.jp/j/press/kokusai/101008\\_3.html](http://www.jfa.maff.go.jp/j/press/kokusai/101008_3.html).

<sup>91</sup> <http://www.jfa.maff.go.jp/j/press/kokusai/101018.html>.

although the International Maritime Organization seems rather supportive of such an approach.

It is worth saying that such RFMOs are quite useful and efficient for fishery management, including measures for growing illegal, unregulated and unreported (IUU) fishing issues; they make tailored strategies and responses possibly based on the contracting parties' special needs (Arts. 20(1), 21) and also because of their rather limited "Convention Area", which enables the contracting parties to establish "the System" of observation etc., provided in Article 16, and to discern between the authorized vessels under the Convention and others that are engaging in IUU fishing.

It should also be noted that RFMOs are now indispensable for fishery management, especially for the regional high seas fishery management, complementing the global fishery management conventions such as the UN Fish Stocks Agreement (UNFSA), which targets the conservation of so-called "straddling fish". In this sense, active Japanese participation in RFMOs should be welcomed in order to establish a more comprehensive regime for global fishery management.

*How to tackle the DPRK's abduction: Japan's ratification of the International Convention for the Protection of All Persons from Enforced Disappearance*

On 10 June 2009, the International Convention for the Protection of All Persons from Enforced Disappearance was approved by the Diet and ratified on 23 July 2009.<sup>92</sup> It came into force on 22 December 2010.<sup>93</sup> This convention "prescribes enforced disappearance, including abduction, as a crime. It also provides for the necessary measures to be taken by States Parties in order to ensure a framework for punishment and for prevention."<sup>94</sup>

The definition of "enforced disappearance" under the Convention is as follows: "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by person or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law" (Art. 1).

Concerning the punishment of such crimes, the Convention obliges the State Party to take the necessary measures to criminalize "enforced disappearance" under its domestic law (Art. 4), by punishing the offender with appropriate penalties (Arts. 6, 7) and establishing the procedures for criminal prosecution (Arts. 8–12), including extradition between States Parties (Art. 13). Also, the Convention provides for the management of information, in that secret detention shall not be allowed and any person deprived of liberty must

<sup>92</sup> <http://www.mofa.go.jp/policy/treaty/submit/session171/agree-17.html>.

<sup>93</sup> [http://www.mofa.go.jp/mofaj/press/release/22/12/1222\\_01.html](http://www.mofa.go.jp/mofaj/press/release/22/12/1222_01.html) (in Japanese).

<sup>94</sup> [http://www.mofa.go.jp/announce/announce/2010/12/1222\\_03.html](http://www.mofa.go.jp/announce/announce/2010/12/1222_03.html).

be registered by the detaining authority (Art. 17). Besides, any relevant information shall be open to any person with a legitimate interest (Arts. 18–20). As for other features, the Convention provides for the establishment of a system in which a victim invokes his right to obtain reparation and to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person (Art. 24). Furthermore, the Convention has a committee that should serve an urgent request that a disappeared person should be sought and found (Art. 30).

Japan thinks that its ratification of this Convention and also its entry into force is “meaningful in showing the international community the strong intention of Japan to oppose enforced disappearance including abduction”,<sup>95</sup> and to increase the international community’s interest in the matter of enforced disappearance including the Japanese abduction issue, although, unfortunately, it might be impossible for Japan to adapt this Convention to such issue in that the Convention has no retroactive effect on the previous incidents before its entry into force, even if North Korea could be a contracting party to this Convention.

*Promoting safe and reliable commercial transactions: United Nations Convention on Jurisdictional Immunities of States and Their Property was approved by the Diet*

On 10 June 2009, the United Nations Convention on Jurisdictional Immunities of States and Their Property was approved by the Diet and deposited with the Secretary General on 11 May 2010. Prior to this, Japan got the necessary domestic legislation enacted and the so-called “Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc.”<sup>96</sup> was passed by the Diet on 17 April 2009, coming into force from 1 April 2011.

Traditionally in international law and practice, the range of State immunity has been a matter of controversy. It used to be quite usual for States to obtain absolute immunity from the jurisdiction of foreign courts. However, as more commercial transactions are growing internationally and States are being involved in such transactions like private entities, “the restrictive theory”, in which States are not always absolutely immune from the jurisdiction of foreign courts, replaces “the absolute theory” and now prevails. According to the restrictive theory, States can still enjoy their immunity when they are engaging in official or sovereign activities (*acta jure imperii*), but cannot invoke their immunities from the jurisdiction of foreign courts in respect of other commercial or private law activities (*acta jure gestionis*). However, since the delimitation of *acta jure imperii* and *acta jure gestionis* is always sensitive and varies from State to State, in order to solve the problem and to bring legal stability to international commercial transactions, this Convention was adopted as the first multilateral agreement on the initiative of the United Nations.

This Convention was adopted on 2 December 2004 and was signed by the Government of Japan on 11 January 2008. Meanwhile, there was an important change of case law in

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<sup>95</sup> [http://www.mofa.go.jp/announce/announce/2009/7/1194155\\_1138.html](http://www.mofa.go.jp/announce/announce/2009/7/1194155_1138.html).

<sup>96</sup> <http://www.japaneselawtranslation.go.jp/law/detail/?id=1948&vm=04&re=01>.



Japan; on 21 July 2006, the Supreme Court clearly applied the restrictive theory in *X vs. Islamic Republic of Pakistan*,<sup>97</sup> ruling that the contract for the sale of computers between X and the Islamic Republic of Pakistan was a private law activity or *acta jure gestionis* and could not be immune from Japanese civil law jurisdiction unless the circumstances are so exceptional that it could be an infringement of a foreign State's sovereignty, in this case, the sovereignty of the Islamic Republic of Pakistan.

On 16 October 2009, the Supreme Court again clearly applied the restrictive theory in *X vs. the US State of Georgia*<sup>98</sup> and, referring to Article 11 of the Convention, denied the immunity of the State of Georgia in that the dismissal of X by the State of Georgia should be an act within Article 2(d) and regarded as a normal private law activity, unless the State of Georgia could duly claim that such judicial procedure might infringe the United States' interests in security issue.

The "Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc." provides for cases in which immunities are not to be invoked as follows: the general principle of immunity (Art. 4); the consent of foreign States (Art. 5); the consent fiction (Arts. 6, 7); commercial transactions (Art. 8); labour contracts (Art. 9); killing and injuring of persons or loss of property (Art. 10); real property rights (Art. 11); intellectual property rights (Art. 13); operation of ships (Art. 15), and so on.

Although the above contents of the Japanese legislation are almost the same as the Convention, it should be noted that any provision of the Act, unlike the Convention, does not clarify the possibility of considering "purpose" by adding any consideration to "nature" of commercial transactions. Article 2(2) of the Convention provides as follows:

In determining whether a contract or transaction is a "commercial transaction" under paragraph 1(c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.

However, as the leading Supreme Court case law of *X vs. the Islamic Republic of Pakistan* shows, it should be noted that even the Japanese Act also implies the possibility of allowing immunities invoked by foreign countries on the ground that the "purpose" of such "commercial contract or transaction" is of a non-commercial character and should be treated as an activity within the meaning of *acta jure imperii*.

In view of this approval of the Convention by the Diet and the new legislation of Japan, the stability of commercial transactions between private companies and foreign States has been dramatically ensured. For example, it was broadcast that "the private companies are not necessarily compelled to accept unjustified treatment by the foreign

<sup>97</sup> <http://www.courts.go.jp/search/jhsp0010.jsessionid=9045426589B83E3DF521323BCAA4E3B4>.

<sup>98</sup> [http://www.courts.go.jp/search/jhsp0030?action\\_id=dspDetail&hanreiSrchnbn=02&hanreiNo=38074&hanreiKbn=01](http://www.courts.go.jp/search/jhsp0030?action_id=dspDetail&hanreiSrchnbn=02&hanreiNo=38074&hanreiKbn=01) (only in Japanese).

State”,<sup>99</sup> because, almost 80 years from the previous leading case law of the former Supreme Court, Japan has been stuck with the theory and restrained from exercising its civil law jurisdiction except in the case of immunity claims of foreign States concerning real property rights or with the consent of the foreign State concerned.

*Japanese contribution to the rule of law in the international society*

It is worth noting the contributions of several eminent Japanese citizens in 2009 to the rule of law in the international society.

On 6 February, Judge OWADA Hisashi, the Japanese Member of the International Court of Justice, was elected President of the Court. The Government of Japan welcomed this election and announced:

Given the increasing role of the ICJ in the peaceful settlement of international disputes as the most authoritative judicial organ in the international community, the contribution of Japanese judges in the ICJ is extremely significant. Japan believes that the election of Judge Owada, who has already played this important role for the last six years as a Member of the ICJ, as the first Japanese President of the Court, is significant in that it indicates the high evaluation given to him. Judge Owada is expected to play an ever greater role as the President of the Court.<sup>100</sup>

On 19 November, Ms OZAKI Kuniko, Professor at the National Graduate Institute for Policy Studies and Special Assistant to the Ministry of Foreign Affairs of Japan, was elected as Judge of the International Criminal Court (ICC). The Government of Japan stated that this appointment clearly showed the enthusiastic intention of Japan to assist in the development of the ICC and, at the same time, welcomed the appreciation of other States for Japan’s position.<sup>101</sup>

Actually, this election was a by-election, held after the sudden passing of Ms SAIGA Fumiko, Japan’s first Judge at the ICC. She had served from November 2007 to April 2009, until her death in hospital in the Netherlands at the age of 65. The Government of Japan expressed its deepest condolences to her family and honoured her significant contributions in the field of human rights and humanitarian affairs, making special mention of her membership of CEDAW (Committee on the Elimination of All Forms of Discrimination against Women) (2001–2007) and her role as the first Ambassador in charge of Human Rights (2005–2007).<sup>102</sup>

On 16 March 2009, Prof. IWASAWA Yuji of the University of Tokyo was elected as Chairperson of the Human Rights Committee under the International Covenant on Civil

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<sup>99</sup> Yomiuri News Paper, 2006.7.22, p. 3 (in Japanese).

<sup>100</sup> [http://www.mofa.go.jp/announce/announce/2009/2/1187764\\_1128.html](http://www.mofa.go.jp/announce/announce/2009/2/1187764_1128.html).

<sup>101</sup> [http://www.mofa.go.jp/announce/announce/2009/11/1197505\\_1146.html](http://www.mofa.go.jp/announce/announce/2009/11/1197505_1146.html).

<sup>102</sup> [http://www.mofa.go.jp/announce/announce/2009/4/1191168\\_1132.html](http://www.mofa.go.jp/announce/announce/2009/4/1191168_1132.html).

and Political Rights.<sup>103</sup> He served as a Member of the Committee from January 2007 to the present, and was re-elected on 2 September 2010 with the highest number of votes.<sup>104</sup> In addition to direct approaches to the rule of law in such fields as dispute settlement, human rights and humanitarian affairs by eminent Japanese citizens in roles such as judges or committee members, Japan actively participated in a new field and made a significant step by contributing “rather politically” to the management of nuclear security. On 14 September 2009, Ambassador AMANO Yukiya was elected as the first Director-General from an Asian country. From 1 December 2009,<sup>105</sup> as the Director-General, he was in charge of ensuring nuclear non-proliferation, and promoting the peaceful use of nuclear energy, and nuclear safety and security, in addition to technical cooperation.<sup>106</sup> The Government of Japan is confident that this will greatly contribute to the international society because Japan is the only country that has experienced the calamity of nuclear weapons and realizes the difficult aspects of nuclear management, peaceful use of nuclear energy and nuclear safety.<sup>107</sup> Furthermore, Japan is confronted with the DPRK in a neighbouring country, which is also a serious concern for the entire world.<sup>108</sup>

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<sup>103</sup> [http://www.mofa.go.jp/mofaj/gaiko/kiyaku/iwasawa\\_02.html](http://www.mofa.go.jp/mofaj/gaiko/kiyaku/iwasawa_02.html).

<sup>104</sup> [http://www.mofa.go.jp/mofaj/press/release/22/9/0903\\_02.html](http://www.mofa.go.jp/mofaj/press/release/22/9/0903_02.html).

<sup>105</sup> <http://www.mofa.go.jp/policy/energy/state0909-1.html>; [http://www.mofa.go.jp/announce/announce/2009/12/1197663\\_1148.html](http://www.mofa.go.jp/announce/announce/2009/12/1197663_1148.html).

<sup>106</sup> [http://www.mofa.go.jp/announce/announce/2008/9/1183508\\_1050.html](http://www.mofa.go.jp/announce/announce/2008/9/1183508_1050.html).

<sup>107</sup> <http://www.mofa.go.jp/policy/energy/state0903.html>.

<sup>108</sup> *Ibid.*

NEPAL<sup>109</sup>

## JUDICIAL DECISIONS

*Convention against Torture and International Covenant on Civil and Political Rights apply as domestic laws under section 9 of the Treaty Act, 1990 of Nepal.*

ADVOCATE RAJENDRA GHIMIRE v. PRIME MINISTER OF NEPAL AND OTHERS

**Division Bench of the Supreme Court of Nepal** (Hon. Balaram, KC and Hon. Tahir Ali Anshari, JJ), **decided on 17 December 2007**

**Facts**

Claiming widespread torture by police in custody and impunity to all acts of torture in Nepal, the petitioner had asked the Supreme Court of Nepal to issue a directive order to His Majesty's Government of Nepal (HMGN) to proscribe all acts of torture, to declare them offences and to penalize such offences through a legal regulatory mechanism. The petitioner had claimed that despite the fact of being a party to the UN Convention against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR), which require the State Party to formulate necessary laws to penalize the offence of torture, the HMGN was disrespecting these international instruments by failing to enact the necessary laws.

**Judgment**

The Supreme Court of Nepal laid down that, as a party to the UN Convention against Torture and the International Covenant on Civil and Political Rights, HMGN was required to take effective legislative, administrative and other necessary measures to prevent acts of torture. In this regard, Article 14(4) of the Constitution of Nepal 1990 and the Compensation Relating to Torture Act 1996 had already forbidden torture. Nevertheless, as claimed by the petitioner, HMGN had not taken the necessary steps to declare all acts of torture as offences and penalize them.

Under section 9 of the Treaty Act 1990,<sup>110</sup> both the CAT and ICCPR form part of the domestic laws of Nepal. Article 7 of the ICCPR proscribes torture or cruel, inhuman or

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<sup>109</sup> Contributed by Surendra Bhandari, Associate Professor, Ritsume University, Japan.

<sup>110</sup> Section 9 of the Treaty Act 1990 of Nepal provides: "In case of inconsistency between the provisions of a treaty, to which Nepal or the Government of Nepal is a party upon its ratification, accession, acceptance, or approval by the Parliament and the provisions of prevailing laws of Nepal, the inconsistent provision of the law shall be void for the purpose of that treaty, which shall be enforceable as good as law of Nepal."

degrading treatment or punishment. Article 4 of the Convention against Torture requires each State Party to ensure that all acts of torture and attempts to torture are offences and thus punishable under criminal law.

The Supreme Court emphasized that it was the duty of the court to protect and promote human rights and the fundamental rights of each individual. Custodial death and violence are not rare in Nepal but are acts inconsistent with the rules of law. Such acts also violate human rights and the fundamental freedoms of the individual. Acts of torture, custodial death and violence are perpetrated by those officers of the State who are primarily responsible for maintaining peace and security. Acts of torture have no justification. They degrade human values and dignity. It is unfortunate that acts of torture are carried out by officers in uniform. Against this backdrop, the Supreme Court stipulated that Nepal could not refrain from its obligation to proscribe all acts of torture, declare them offences and penalize them. Further, the Supreme Court ordered the Government of Nepal to take necessary steps to declare all acts of torture as offences and penalize the offences through enacting necessary laws.

*State should not discriminate individuals suffering mental illness or diseases from enjoying fundamental rights guaranteed by the Constitution and human rights enshrined in the international conventions, covenants, declarations, and resolutions.*

ADVOCATE RAJU PRASAD CHAPAGAIN AND OTHERS v. PRIME MINISTER OF NEPAL AND OTHERS

**Special Bench of the Supreme Court of Nepal** (Hon. Balaram, KC, Hon. Damodar Prasad Sharma and Hon. Kalyan Shrestha JJ), **decided on 16 October 2008**

### **Facts**

The petitioners had challenged a number of provisions of different domestic laws, including section 6 of the Chapter on Treatment of the National Code of Nepal 1964. They had claimed that the impugned provisions were inconsistent with the fundamental rights guaranteed by the Constitution of Nepal 1990, and human rights enshrined in different international covenants, conventions, declarations, and resolutions, especially with the UN General Assembly Resolution 46/119 on the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care adopted on 17 December 1991. Section 6 of the Chapter on Treatment of the National Code provided that a mentally disabled person should be imprisoned or put into custody and fastened with iron chains for medical treatment until recovered. The petitioners argued that, along with other impugned provisions, section 6 was inhuman, cruel, discriminatory and derogatory to human rights.

### **Judgment**

The Supreme Court of Nepal held that a mentally disabled person, by virtue of their Nepalese citizenship, cannot be deprived of exercising fundamental rights guaranteed by

the Constitution. In terms of exercising fundamental rights, the Constitution does not allow any discrimination between mentally disabled citizens and other citizens. Like other individuals, mentally disabled people are also eligible to exercise their human rights enshrined by the Universal Declaration of Human Rights 1948, and all other human rights covenants, conventions, declarations and resolutions. In the context of this case, the Protection of Persons with Mental Illness and the Improvement of Mental Health Care adopted by the General Assembly of the United Nations on 17 December 1991, Resolution 46/119 is especially important. The Supreme Court noted that, "... as a member of the United Nations, Nepal is obliged to pursue the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care adopted by the United Nations General Assembly on 17 December 1991, Resolution 46/119".

The Supreme Court has reasoned that neither mental nor physical illness can remove human personality. Thus, all individuals, whether or not they are suffering from mental or physical illness or disability, have an equal right to enjoy legal, constitutional and fundamental rights. Disease cannot be a condition for the termination of rights. Instead, the State should follow the standards of ethics and internationally recognized standards while treating mentally ill or disordered people in accordance with Article 9(3) and (4) of Resolution 46/119. The State is obliged to preserve and enhance the personal autonomy of mentally ill or retarded people. Further, the Supreme Court has emphasized the importance of the Resolution 46/119 in light of Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>111</sup> The Supreme Court has laid down that as a party to the ICESCR, Nepal has a duty to implement the provisions of the ICESCR and other human rights covenants to enable mentally disabled or ill people to enjoy human rights with dignity.<sup>112</sup>

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<sup>111</sup> Article 12 of the ICESCR reads as follows:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  - (a) The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child;
  - (b) The improvement of all aspects of environmental and industrial hygiene;
  - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
  - (d) The creation of conditions that would ensure to everyone medical service and medical attention in the event of sickness.

<sup>112</sup> This judgment of the Supreme Court of Nepal is especially important on three counts. First, it has elevated soft laws (e.g. declarations and resolutions) to the level of binding international laws like treaties. Second, while protecting and promoting human rights, the government is expected to follow internationally accepted ethical standards, by drawing ethics into the body of binding laws. Third, the Supreme Court has unequivocally established treaties to which Nepal is a party as a part of enforceable domestic laws under Section 9 of the Treaty Act 1990 of Nepal.

*Whether a treaty needs to be ratified is to be decided by the parties to the treaty in accordance with their constitutional provisions and processes. It is not for the court but the government to take a decision as to whether a treaty should be submitted to the parliament for ratification.*

RAM CHANDRA CHATAUT AND OTHERS v. GOVERNMENT OF NEPAL AND OTHERS

**Division Bench of the Supreme Court of Nepal** (Hon. Anup Raj Sharma and Hon. Kalyan Shrestha JJ), **decided on 9 September 2008**

### **Facts**

The petitioners had challenged an agreement entered between His Majesty's Government of Nepal (HMGN) and Snowy Mountains Engineering Corporation (SMEC) of Australia regarding production of 750 megawatt (MW) electricity by constructing a dam in the West Seti River of Nepal. The main argument of the petitioners was that utilization of the water resources of the West Seti River to construct a dam, produce electricity and sell all of this electricity to India was an issue of distribution of natural resources and thus needed to be ratified by parliament following a constitutional process. However, HMGN had not submitted the matter to the parliament for its ratification. The petitioners thus demanded the agreement be declared *ultra vires* of the Constitution.

### **Judgment**

The Supreme Court laid down a number of far-reaching interpretations on the issue of international laws in this case. The interpretations can be summarized as follows.

First, whether a treaty should be ratified needs to be decided by the parties to the treaty in accordance with their constitutional provisions and processes.

Second, it does not fall to the remit of the court but to that of the government to take a decision about whether a treaty produces serious, far-reaching and long-term implications for the country and thus should be submitted to parliament for its ratification.

Third, the Supreme Court of Nepal based its decision on the rules and principles enshrined in the UN Convention on the Law of the Non-Navigational Uses of International Watercourses 1997, which had not come into force at that time. Nepal had neither signed nor ratified the Convention. The Supreme Court also offered no explanation as to whether the Convention could be taken as part of customary rules of international law.

Fourth, the Supreme Court of Nepal denied the contention of the applicants that by virtue of a high dam created for production of electricity in the West Seti River, the lower-riparian state (India) will get additional and multiple benefits without any contribution to the flow of water from the dam. Likewise, the Supreme Court declined to endorse the contention that out of the flow of water from the dam, India would receive multiple benefits free of charge for which Nepal was entitled to receive financial contributions from India.

Fifth, the Supreme Court of Nepal emphasized that to manage and share riparian benefits, riparian states are free to enter into diplomatic and commercial dialogue. But it

declined to impart any order in this regard. Further, the Supreme Court laid down that above-mentioned issues do not fall within the domain of judicial review.

Sixth, when two companies registered in Nepal and India under the domestic laws of the respective countries enter into an electricity-purchase contract, it cannot include subject matter relating to the use of national resources like a river. Indeed, the issue of the distribution of natural resources could not be a part of the electricity-purchase contract.

Seventh, the Supreme Court of Nepal found that the agreement on selling the whole amount of electricity to India was a matter of commercial contract between two companies and not an issue involving agreement between two countries. Further, the Supreme Court laid down that whether the government had to allow selling the whole amount of electricity to India at an inexpensive rate was a matter of administrative nature and policy and thus could not be a justiciable matter for the court.<sup>113</sup>

*The Government of Nepal and UN declarations on right to food*

#### BAZUDDIN MINYA AND OTHERS v. PRIME MINISTER OF NEPAL AND OTHERS

**Division Bench of the Supreme Court of Nepal** (Hon. Balaram, KC and Hon. Krishna Prasad Upadhyaya, JJ), **decided on 16 February 2009**

#### **Facts**

A number of petitioners approached the Supreme Court of Nepal asking the court to issue an order in the name of the Government of Nepal to pay compensatory damages to the applicants for the destruction of their farms by wildlife protected in the national parks by the State. Due to encroachment on national parks and deforestation of the peripheral area of the national parks, the protected wild animals were often coming out of the national parks looking for food and damaging farms in the surrounding areas. The issue in this case was whether the Government of Nepal was responsible for the damage caused to the farmers by protected wild animals and whether it was obliged to pay compensatory damage to the applicant farmers.

#### **Judgment**

The Supreme Court of Nepal laid down that the government should bear vicarious liability and pay compensatory damages to the affected farmers under the obligation arising from both domestic and international laws. Wild animals are the property of the State. They are increasingly under threat, including the threat of extinction. It is a duty of the State to protect wild animals. Due to deforestation, among other reasons, wild animals are coming

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<sup>113</sup> In this decision, the Supreme Court of Nepal has made serious endeavour to interpret many intertwined and complex issues of domestic and international laws. Perhaps this decision of the Supreme Court of Nepal will have far-reaching implications for Indo–Nepal relations, especially on the issue of utilization of water resources.



out of the national parks and damaging farms and properties of the local people. Since it is a duty of the State to protect the wild animals and to protect local people from any harm from the wild animals, any damage to the local farms by the wild animals creates an obligation on the State. The State cannot be insensitive to the right of the people to food sovereignty. The Government of Nepal cannot cite any excuses in the name of the lack of specific laws to pay compensation to the petitioners. The government can always take policy decisions for the sake of justice and to protect the rights of the people.

While analysing the state of law, the Supreme Court of Nepal referred to different laws including international declarations, resolutions and conventions. Article 18(3) of the Interim Constitution of Nepal 2007 provides for the right to food sovereignty of every citizen of Nepal. The court also analysed Article 11 of the UN Millennium Declaration, which provides that members of the UN will spare no effort to free their fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected. They have also made a commitment to make the right to development a reality for everyone, and to free the entire human race from want. The UN Declaration on Social Progress and Development 1969 aims to eliminate hunger and malnutrition, with a guarantee of the right to proper nutrition.

Article 1 of the Universal Declaration on the Eradication of Hunger and Malnutrition 1974 provides an inalienable right to be free from hunger and malnutrition to every man, woman and child. Article 2 of the Declaration lays down a fundamental responsibility to the government to formulate appropriate food policies. Further, the principles laid down in these resolutions and declarations are integrated into binding international law under Article 11(2) of the International Covenant on Economic, Social and Cultural Rights, which ensures the right to food for every individual. Thus, as a member of the United Nations, the Government of Nepal should take into consideration the different UN declarations while preparing plans, policies and necessary laws related to the right to food.

*Right to life consists of right to healthy environment – the responsibility of the State under the Stockholm Convention on Persistent Organic Pollutants*

ADVOCATE RAJU PRASAD CHAPAGAIN v. GOVERNMENT OF NEPAL AND OTHERS

**Division Bench of the Supreme Court of Nepal** (Rt. Hon. Min Bahadur Rayamajhi, CJ and Hon. Kalyan Shrestha, J), **decided on 21 October 2009**

### **Facts**

For many years, chemicals listed in Annexes A and B of the Stockholm Convention on Persistent Organic Pollutants 2001 were being deposited in large quantities in different parts of the country. Most of them were deposited in close proximity to homes, schools and public places. The petitioner asked the Supreme Court of Nepal to issue an order in the name of the Government of Nepal for the safe disposal of these deposited toxic chemicals.

**Judgment**

The Supreme Court of Nepal decided that it was the duty of the Government of Nepal to take necessary measures for the safe disposal of the persistent organic pollutants deposited in different parts of the country; most of them had already exceeded the expiration date. It was not only expected but mandatory for the government to design its programmes and activities to support the right to life and the right to live in a clean and healthy environment, which are already institutionalized as fundamental human rights in the domestic laws of Nepal and in a number of international laws.

The Supreme Court also directed the Government of Nepal to develop a mechanism to give full effect to the Stockholm Convention on Persistent Organic Pollutants, to which Nepal is a party. The Supreme Court found it necessary to act to protect the local community and the environment from the harmful effects of toxic chemical pollutants. The Supreme Court also called upon the international community to bear responsibility for these effects as the producer, transporter and exporter of the toxic chemical pollutants, especially exporting to poor and developing countries. The court found the activities of the international power centres, especially of the multinational corporations, unfortunate in this regard as they produce hazardous toxic chemicals and export their products to poor and developing countries without respecting international standards.

The Supreme Court also directed the Government of Nepal to take necessary diplomatic and political steps to fulfil the obligations of the Stockholm Convention on Persistent Organic Pollutants and other relevant international treaties.



**THE REPUBLIC OF THE PHILIPPINES<sup>114</sup>**

## JUDICIAL DECISIONS

*Diplomatic negotiations and the executive privilege versus freedom of information*

AKBAYAN, ET AL. v. AQUINO, ET AL.

G.R. No. 170516, 16 July 2008, Carpio Morales, J

**Facts**

This is a case for *mandamus* and prohibition by petitioners, composed of both private interest groups and members of Congress, for Undersecretary Aquino to produce the full text of the Japan–Philippine Economic Partnership Agreement (“JPEPA” hereinafter).<sup>115</sup> On 28 May 2003, the President issued Executive Order No. 213 for the negotiation of JPEPA. The House of Representatives, wanting to know more about the details of the negotiation, issued House Resolution No. 551 on 25 January 2005. Pursuant thereto, several demands were made by congressmen, through the House Special Committee on Globalization, from Undersecretary Aquino and other cabinet members for the production of copies of the latest draft of the agreement, including the requests and offers made during such negotiation. All these demands, however, were ignored; instead, there was a promise that the congressmen would be provided with a copy of the agreement once it had been completed. The present petition was filed on 9 December 2005. JPEPA was signed on 9 September 2006 and the final text made publicly available on 11 September 2006.

**Judgment**

Petitioners argued on their right to information on matters of public concern. Respondents agreed that JPEPA was a matter of public concern but contended that the claim was barred by the executive privilege accorded to diplomatic negotiations. The court recalled that in *People’s Movement for Press Freedom (PMPF) v. Manglapus*,<sup>116</sup> the right to information on the ongoing negotiations for the RP–US Military Bases Agreement was disallowed since the secrecy of negotiations with foreign countries does not violate the freedom of access to information – confidentiality being an essential feature of diplomatic negotiations. Exchanges and offers were made in the negotiations with the understanding that “historic confidentiality” would govern the same. A disclosure would

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<sup>114</sup> Contributed by Harry L. Roque Jr, Faculty Member, College of Law, University of Philippines, Diliman, Quezon City.

<sup>115</sup> The JPEPA was concurred with by the Senate on 8 October 2008 through Senate Resolution No. 131, less than three months after this decision was promulgated.

<sup>116</sup> G.R. No. 84642, Resolution of the Court En Banc dated 13 September 1988.

impair the ability of the Philippines to deal with other foreign governments in the future.

Petitioners next argued that *PMPF v. Manglapus* did not apply because it involved a matter of national security, whereas the present case only involved an economic treaty. The court held that it is incorrect to assume that the privilege covers only matters of national security and, giving examples, the court cited “informer’s privilege”, “presidential communications privilege” and “deliberative process privilege”. The purpose of the diplomatic negotiations privilege is “to encourage a frank exchange of exploratory ideas between the negotiating parties by shielding such negotiations from public view”.

Petitioners also asserted their claim on the right of the public to meaningfully participate in the decision-making process. Moreover, the congressmen argued that the power of the President to negotiate international trade agreements is merely by delegation from Congress under Article 6, Section 28(2) of the Constitution. The court invoked the mootness of the claim since the full text of JPEPA had already been released to the public pending the petition. Further, the constitutional provision cited by the congressmen only referred to the power of the President to fix tariff rates and quotas. The court held that the treaty-making power is vested solely on the President as the state’s “sole organ” on external relations.

Petitioners lastly argued that the claim for executive privilege was not raised during the House Committee hearings. They claimed that since executive privilege was raised for the first time in the respondents’ comments, it was barred due to waiver. The Supreme Court held that the House Committee merely made requests for the documents and thus an assertion of the executive privilege was not required. The court, however, acknowledged that the Comment of the respondents was deficient since it did not allege that the claim of the executive privilege was “by order of the President”, which was a new requirement under the case of *Senate v. Ermita*.<sup>117</sup> However, since *Senate v. Ermita* was not yet finalised when the Comment of the respondents was filed, and the Executive Secretary was impleaded as respondent, strict compliance with requirement was relaxed.

Petition was dismissed.

### *Right to Security and Right to Liberty under UDHR*

SECRETARY OF NATIONAL DEFENSE, ET AL. v. MANALO, ET AL.<sup>118</sup>

G.R. No. 180906, 7 October 2008, Puno, CJ

### **Facts**

This case was originally a petition for prohibition, an injunction and a temporary restraining order filed in the Supreme Court (SC) on 23 August 2007. While it was pending, the rule on the writ of *amparo* took effect on 24 October 2007, thus Raymond

<sup>117</sup> G.R. No. 169777, 20 April 2006, 488 SCRA 1.

<sup>118</sup> This is the first petition for a writ of *amparo* filed in the court.

Manalo and Reynald Manalo (“Manalos” hereinafter) submitted a manifestation to the court to treat the said petition as an *amparo* petition.<sup>119</sup> The court thereafter issued a writ of *amparo* and remanded the case to the Court of Appeals (CA), directing the petitioners to file a verified written return within five days from service of the writ. The Manalos recounted that they were abducted by members of the Citizen Armed Force Geographical Unit (CAFGU) and high-ranking officers of the Armed Forces of the Philippines, charged with being members of the New People’s Army and tortured to admit their membership thereto, until their escape. After summary hearing, the CA granted the privilege of the writ of *amparo*,<sup>120</sup> directing therein petitioners to: 1) furnish the CA with copies of all official and unofficial reports on the investigation in connection with the case of the Manalos; 2) confirm in writing the present whereabouts of two named persons; and 3) produce medical reports or records of medical treatment prescribed to the Manalos, including the names of medical personnel who attended to them.

Thus, the appeal by petitioners.

### Judgment

Petitioners first assailed the decision of the CA in that it erred in its appreciation of the evidence presented by the Manalos. The court explained that the writ of *amparo* is a remedy available to a person whose right to life, liberty and security is violated or threatened with violation.<sup>121</sup> Citing Section 17 of the rule on the writ of *amparo*, the court said that the quantum of proof required is mere substantial evidence<sup>122</sup> for the granting of the privilege of the writ. Based on its assessment of the findings of the CA, the court affirmed that the Manalos were abducted, detained and tortured. The testimony of Raymond Manalo was corroborated by the testimony of his older brother, Reynaldo. This was further corroborated by the testimony and medical reports of forensic specialists. The court held that due to the secret nature of an enforced disappearance, much of the evidence will logically come from the victims themselves, and depends greatly on their credibility and candidness.

As to the right of the Manalos to the privilege of the writ of *amparo*, the court held that even though the Manalos had already escaped, they were not yet free from the threat to their right to life, liberty and security, since their abductors and the people responsible for their torture had not yet been held accountable for their acts. Moreover, these people were members of no less than the Armed Forces of the Philippines.

Under the Universal Declaration of Human Rights (UDHR), the right to security includes the right to “freedom from fear” and this, the court said, is an individual

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<sup>119</sup> A writ of *amparo* is “a remedy available to any person whose right to life, liberty and security is violated or threatened with violation by an unlawful act or omission of a public official or employee, or of a private individual or entity. The writ shall cover extralegal killings and enforced disappearances or threats thereof.” (See Rule on the Writ of Amparo, Section 1.)

<sup>120</sup> CA GR AMPARO No. 00001, 26 December 2007.

<sup>121</sup> Section 1 of Rule on the Writ of *Amparo*.

<sup>122</sup> “Substantial evidence” has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

international human right. The right to security is also enunciated in the International Covenant on Civil and Political Rights (ICCPR). The Philippines is signatory to both these instruments. In the *amparo* context, the right to security is more accurately described as the “freedom from threat”.

The right to security includes both physiological and psychological integrity. This guarantee of protection must be derived from the government itself. The court cited the United Nations’ Human Rights Committee in declaring that the right to security of a person is independent from his right to liberty – deprivation of liberty is not a condition precedent to invoking the right to security.

As the Manalos had filed the case against herein petitioners, there is thus an apparent threat that they may again be abducted, possibly even executed. As to the duty of the government to protect their right to security, the court held that the one-day investigation conducted by the Armed Forces of the Philippines was limited, superficial and one-sided.

As to the relief sought by the Manalos, granted by the CA, the court held that the production of records under *amparo* cannot be likened to a search warrant for law enforcement – the constitutional guarantee is intended for the protection of the people from the unreasonable intrusion of the government, not for the protection of the government from the demands of the people.

Petition was dismissed.

### *Associative Relationship and Indigenous Peoples’ Right to Self-determination*

THE PROVINCE OF NORTH COTABATO, ET AL. v. THE GOVERNEMENT OF THE REPUBLIC OF THE PHILIPPINES PEACE PANEL ON ANCESTRAL DOMAIN (GRP), ET AL.

G.R. No. 183591, 14 October 2008, Carpio Morales, J

### **Facts**

Pursuant to the president’s efforts in the peace process, the Philippines Peace Panel on Ancestral Domain (“GRP” hereinafter) drafted a Memorandum of Agreement on Ancestral Domain (“MOA–AD” hereinafter) with the Moro Islamic Liberation Front (MILF), which was scheduled to be signed on 5 August 2008 in Kuala Lumpur, Malaysia, as one of the three aspects of the GRP–MILF Tripoli Agreement of Peace of 2001.<sup>123</sup> Prior to this, the GRP and MILF signed the Agreement on the General Framework for the Resumption of Peace Talks Between the GRP and the MILF, on 24 March 2001 in Kuala Lumpur. The other two aspects of the Tripoli Agreement of Peace, the Security aspect and the Humanitarian Rehabilitation aspect, had been signed in 2001 and 2002, respectively. Instrumental to the success of the negotiations was the intervention of the Malaysian Prime Minister in convincing the MILF to take part in the peace talks.

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<sup>123</sup> 20–22 June 2001 in Tripoli, Libya.

On 23 July 2008, the first petitioner filed a petition for *mandamus* with Prohibition with Prayer for Issuance of Writ of Preliminary Injunction and Temporary Restraining Order. They sought to be furnished with a copy of the MOA–AD based on their right to information on matters of public concern, and subsequently for the MOA–AD to be declared unconstitutional. Several petitions were also filed by other parties, which were all consolidated with this petition.

On 4 August 2008, the court issued a temporary restraining order stopping the GRP from signing the MOA–AD. The court was furnished with a copy of the MOA–AD by the Solicitor General.

Below is a summary of the Court’s discussion as to the contents of the MOA–AD

#### *Terms of Reference*

It includes four agreements between the GRP and the MILF, and two agreements with the MNLF; the ARMM Organic Act and the Indigenous People’s Rights Act (IPRA); ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries; UN Declaration on the Rights of the Indigenous Peoples; UN Charter; compact rights entrenchment emanating from the regime of “territory under compact” (*dar-ul-mua’hada*) and “territory under peace agreement or treaty” (*dar-ul-sulh*) that partakes the nature of a treaty device.

#### *Concepts and Principles*

Bangsamoros – includes all indigenous people of Mindanao including Palawan and Sulu at the time of colonization; they have a right to self-governance through their sultanates with all the elements of a nation-State in the modern sense;<sup>124</sup> referred to in the MOA–AD exclusively as the “First Nation.”<sup>125</sup>

Bangsamoro homeland – those lands owned by the Bangsamoros by prior right of occupation; ancestral domain does not form part of the public domain.

Bangsamoro Juridical Entity (BJE) – granted authority and jurisdiction over the Ancestral Domain and Ancestral Lands of the Bangsamoro.

#### *Territory*

It includes the Mindanao–Sulu–Palawan geographic region with the Autonomous Region in Muslim Mindanao (ARMM)<sup>126</sup> as the core of the BJE. The BJE shall have jurisdiction within the internal waters of the territory<sup>127</sup> and territorial waters up to the baselines of the Republic of the Philippines (RP), southeast and southwest of Mindanao. Joint jurisdiction

<sup>124</sup> A specific case example cited was the *Pat a Pangampong ku Ranaw* of the Maranaos, akin to a confederation of principalities ruled by datus and sultans.

<sup>125</sup> The term is of Canadian origin referring to the Indians or people indigenous to that territory. However, there it was used in the plural to denote non-exclusivity (i.e. “First Nations”).

<sup>126</sup> Includes Lanao del Sur, Maguindanao, Sul, Tawi-Tawi, Basilan, Marawi City, and municipalities of Lanao del Norte that voted for inclusion in the ARMM in the 2001 plebiscite.

<sup>127</sup> Defined as 15 kilometres from the coastline of the BJE territory.



by the RP and the BJE shall be exercised only within here-defined territorial waters; this allows sharing of minerals, exploration and utilization of natural resources, maritime regulation and security enforcement.

#### *Resources*

The BJE is allowed foreign trade relations, environmental cooperation, participation in international meetings as in the ASEAN and the UN, and to establish trade missions, excluding aggression against the GRP. However, external defence remains the responsibility of the GRP. It may also participate in GRP official missions on border agreements or protocols for environmental protection. The production sharing on natural resources is 75:25 in favour of the BJE. It modifies or cancels land tenure instruments<sup>128</sup> already granted by the GRP and the ARMM.

#### *Governance*

The GRP and the BJE have an “associative” relationship of shared authority and responsibility outlined in the Comprehensive Compact, which requires “amendments to the existing legal framework” to take effect upon its signing. “The BJE is granted the power to build, develop and maintain its own institutions inclusive of civil service, electoral, financial and banking, education, legislation, legal, economic, police and internal security force, judicial system and correctional institutions, the details of which shall be discussed in the negotiation of the comprehensive compact.”

### **Judgment**

The court, in denying the respondents motion to dismiss the case and holding that the MOA–AD was contrary to law and the Philippine Constitution, dealt with the concept of “associative” relationship in the context of international law, expressly found in the governance part of the MOA–AD. In this set-up involving two states of unequal power, the associates delegate responsibility to the principal while maintaining their international status as a state – a middle ground between integration and independence. “This is usually a transitional device of former colonies on their way to independence.” Indications of this relationship are consistent with those found in the MOA–AD with its capacity for foreign relations with right to prior consultation and the responsibility of the GRP for external defence. This makes the BJE an associated state, a concept not recognized under the Constitution. What the Constitution recognizes is the creation only of autonomous regions in Muslim Mindanao and the Cordilleras.<sup>129</sup> Under the Montevideo Convention, the BJE complies with the criteria of a state, namely: permanent population, defined territory, government, and the capacity to enter into relations with other states. The concept

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<sup>128</sup> Forest concessions, timber licences, contracts or agreements, mining concessions, Mineral Production and Sharing Agreements (MPSA), Industrial Forest Management Agreements (IFMA).

<sup>129</sup> Article X, Section 1 of the 1987 Constitution.

of association runs counter to the national sovereignty and territorial integrity of the Philippines.

Although international law recognizes people's right to self-determination,<sup>130</sup> it does not include a unilateral right of secession. The court then distinguishes between internal and external self-determination. Internal self-determination is that pursued within the framework of an existing state. External self-determination contemplates secession and thus may only arise as an exception, such as in cases where people are under colonial rule, subject to foreign domination or exploitation outside a colonial context, or prevented from exercising meaningful internal self-determination.

The court then discussed the rights of indigenous people. The court held that in international law, indigenous people do not have the right to independence or secession but have the right to internal self-determination. On 13 September 2007, the Philippines became party to the United Nations Declaration on the Rights of Indigenous Peoples (UN DRIP), which recognizes the indigenous peoples' rights to self-determination, autonomy or self-government in matters relating to their internal and local affairs – including rights to land, territories and resources they traditionally owned or occupied. The UN DRIP does not require States to grant indigenous people near-independent status of an associated State.

The associative relationship between the GRP and the BJE is unconstitutional since it presupposes that the BJE is a state on its way to independence.

The court took note of the concern that the Memorandum of Agreement on Ancestral Domain (MOA-AD) would amount to a unilateral declaration binding on the Philippines under international law. Citing *Australia v. France* (Nuclear Test Case), the court held that the following conditions must concur: "the statements were clearly addressed to the international community, the State intended to be bound to that community by its statements, and that not to give legal effect to those statements would be detrimental to the security of international intercourse." Thus, in this case, the court held that it is not binding as a unilateral declaration since the GRP acted only with intent to be bound to the MILF and other States participated merely as witnesses and facilitators. Moreover, there is nothing in the MOA-AD to indicate that the GRP committed to be legally bound to the international community.

The guarantee granted by the GRP to amend the legal framework, interpreted by the court as broad enough to include the Constitution, constitutes grave abuse of discretion.

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<sup>130</sup> International Convention on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; case of Canadian Supreme Court in Reference Re. Secession of Quebec.

NATIONAL LAWS ON INTERNATIONAL LAW MATTERS<sup>131</sup>

*RA 9496 – Act extending the Agricultural Tariffication Act (RA 8178)*<sup>132</sup>

28 February 2008

RA 8178 created the Agricultural Competitiveness Enhancement Fund (ACEF) in lieu of quantitative import restrictions in line with the Philippines' commitment to the General Agreement on Tariffs and Trade (GATT), which prohibits the use of quantitative restrictions under Article 11.

This amendatory law seeks to extend the life of ACEF until 2015: it originally only had a life of nine years from its promulgation on 28 March 1996.

*Senate Resolution No. 300 – Sense of the Senate on Visit by the Taiwanese President on Spratly Islands*<sup>133</sup>

11 February 2008

This was occasioned by the visit of the Taiwanese President, Chen Shui-bian, on 2 February 2008 to the Ligao Island, the biggest island occupied by Philippine forces in the Spratly Islands. In reaction thereto, Foreign Secretary Alberto Romulo made the following statement:

The Philippines expresses serious concern over this reported development that works against the joint efforts by claimant countries in the South China Sea to achieve peace and stability in the region in accordance with the Declaration on the Conduct of Parties in South China Sea.

The Senate called the actions of the Taiwanese President ill-advised. Vietnam and China joined in the admonition.

*Senate Resolution No. 64 – Concurrence in Ratification of Headquarters Agreement with the International Rice Research Institute (IRRI)*

28 April 2008

The Headquarters Agreement with IRRI was signed on 28 August 2008 and grants it the privileges and immunities accorded to international organizations. For this purpose, a

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<sup>131</sup> For treaties signed by the Executive Branch of the Philippine Government to be legally binding, the concurrence of two-thirds of the Members of the Senate is required under Article VII Section 21 of the 1986 Philippine Constitution. As to other matters covered by Senate Resolution, they are of persuasive character and reflect the current legislative intent or sentiment, which may also be reflective of current State practice.

<sup>132</sup> Origin: House (HB02976 / SB01648); for the year 2008, only 23 legislations were promulgated.

<sup>133</sup> This Resolution has been pending adoption by the Senate since 3 June 2008. This was introduced by Senator Miriam Defensor Santiago on 11 February 2008.

hearing was conducted on 7 February 2008 with the participation of government agencies and other stakeholders who endorsed concurrence in the ratification.

*Senate Resolution No. 117 – Concurrence in Ratification of the Protocol Amending the Convention with Japan for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with Respect to Taxes on Income*

15 September 2008

The said protocol was signed in Manila on 9 December 2006 and will partially amend the Income Tax Treaty signed in Tokyo on 13 February 1980 by reducing the withholding taxes imposed on dividends, interest and royalties paid between the two countries, including the expansion of the scope of tax-sparing credit.

*Senate Resolution No. 118 – Concurrence in Ratification of the Protocol Amending the Convention with New Zealand for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with Respect to Taxes on Income*

15 September 2008

The said protocol was signed in Wellington, New Zealand on 21 February 2002 and amends the “Convention Between the Government of the Republic of the Philippines and the Government of New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income”, which was signed on 29 April 1980. The protocol primarily seeks to eliminate economic double taxation.

*Senate Resolution No. 119 – Concurrence in Ratification of the Protocol Amending the Convention with United Arab Emirates for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*

15 September 2008

The said protocol was signed in Dubai on 21 September 2003 and allows taxes paid as credit against taxes payable in respect of the same income.

*Senate Resolution No. 127 – Concurrence in Ratification of Treaty on Mutual Legal Assistance in Criminal Matters with the Kingdom of Spain*

6 October 2008

The said treaty was signed on 2 March 2004 in Manila with the aim of improving the coordination and mutual legal assistance in criminal matters, disregarding the characterization of the offense by the requested state, except in cases for requests for searches and seizures, forfeiture of assets, restitution and collection of fines.

*Senate Resolution No. 128 – Concurrence in Ratification of Treaty on Mutual Legal Assistance in Criminal Matters with Republic of Korea*

6 October 2008

The said treaty was signed on 3 June 2008 in Seoul, Korea with the stated purpose of complementing global efforts to combat transnational crimes.

*Senate Resolution No. 129 – Concurrence in Ratification of the Charter of the Association of Southeast Asian Nations (ASEAN)*

7 October 2008

The charter was signed on 20 November 2007 in Singapore and confers on the ASEAN legal personality as an intergovernmental organization with immunities and privileges for the fulfilment of its purposes, among which are: regional and comprehensive peace and security; political, economic and sociocultural cooperation; the preservation of Southeast Asia as a Nuclear Weapon-Free Zone and free of other weapons of mass destruction; protection of human rights; promotion of sustainable development and protection of the environment; and promotion of the ASEAN identity of diverse cultural heritage.

*Senate Resolution No. 131 – Concurrence in Ratification of the Japan–Philippines Economic Partnership Agreement (JPEPA)*

8 October 2008

The said agreement was signed on 9 September 2006 in Helsinki, Finland. The Senate concurred in the JPEPA, which has been modified by the Supplemental Agreement consisting of the Exchange of Notes between the Philippine Secretary of Foreign Affairs and the Japanese Minister of Foreign Affairs,<sup>134</sup> and the Exchange of Notes between the Philippine Secretary of Foreign Affairs and Japanese Ambassador to the Philippines.<sup>135</sup>

*Senate Resolution No. 157 – Creating an Oversight Committee on Climate Change to Monitor and Oversee the Country’s Compliance with International Commitments Addressing Global Warming*

17 December 2008

The resolution invokes the Philippine responsibility as party to the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol, and in compliance therewith, the enactment of the Clean Air Act and the Ecological Solid Waste Management Act. The committee is composed of five Senators appointed by the Senate President with the charge of monitoring and oversight of the country’s compliance with international commitments addressing global warming, specifically the reduction of greenhouse gas emissions. For this purpose, the committee has authority to subpoena for testimonies and the production of documents.

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<sup>134</sup> Romulo–Aso Exchange of Notes of 23 May 2007.

<sup>135</sup> Romulo–Komura Exchange of Notes of 28 August 2008.

## OTHER RELEVANT STATE PRACTICE: EXECUTIVE ORDERS

*Administrative Order No. 229 – Creating the Inter-Agency Task Force for the Senate Concurrence on the Ratification of the ASEAN Charter*

18 June 2008

The ASEAN Charter was signed by the heads of states of the ASEAN members on 20 November 2007 in Singapore. The Charter enters into force on the 30th day after the deposit of the 10th instrument of ratification with the ASEAN Secretary-General. The Charter is treated as one that requires Senate concurrence.

*Administrative Order No. 249 – Renewal of Commitment to the Universal Declaration of Human Rights on occasion of its 60th anniversary*

10 December 2008

As one of the first signatories to the Universal Declaration of Human Rights (UDHR), the Philippines expresses the renewal of its commitment to the said declaration on occasion of the 60th anniversary, on 10 December 2008, of its adoption and proclamation.

Several government departments were directed by the President to exhaust all efforts in realizing its commitment to the UDHR.

*Executive Order No. 702 – Modifying Rates of Duty to Implement Preferential Tariff Rates under the ASEAN Industrial Cooperation Scheme (AICO) in favour of Philippine Auto Components, Inc.*

22 January 2008

Pursuant to its obligations under the Basic Agreement on the ASEAN Industrial Cooperation Scheme (AICO) on 27 April 1996,<sup>136</sup> and its amendatory protocol,<sup>137</sup> and the AICO Arrangements of Philippine Auto Components, Inc. (PACI) with Indonesia and Malaysia, tariff rates on automotive parts under the Tariff and Customs Code are modified to 0–5 percent preferential tariff rates, to be extended by the participating countries.

*Executive Order No. 703 – Modifying Rates of Duty to Implement Zero Percent Tariff on 80 Percent of Products in the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA)*

22 January 2008

Upon the recommendation of the National Economic and Development Authority (NEDA), the President granted zero per cent Common Effective Preferential Tariff (CEPT) rate to 80 per cent of the products in the Philippine Inclusion List.

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<sup>136</sup> Signed in Singapore.

<sup>137</sup> Signed in Singapore on 21 April 2004.

The rate applies only to ASEAN member states applying the CEPT concession to the same products.

*Executive Order No. 704 – Lifting the Suspension on Tariff Reduction on Petrochemicals and certain Plastic Products under the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA)*  
22 January 2008

Due to the availability of technologies other than naphtha cracking in the manufacture of ethylene, propylene and other monomers, the President lifted the suspension of the CEPT tariff reduction on petrochemicals and certain plastic products.

*Executive Order No. 767 – Modifying Duty Rates to implement Tariff Rate Reduction under its Commitment in the Agreement between Philippines and Japan for an Economic Partnership*  
7 November 2008

Pursuant to its Agreement with Japan for an Economic Partnership, signed on 9 September 2006, the President has lowered tariff rates on certain imports originating from Japan. This Agreement was concurred in by the Philippine Senate on 8 October 2008.<sup>138</sup>

*Executive Order No. 768 – Modifying Import Duty Rates on certain articles to implement the ASEAN Integration System of Preferences (AISP) Package of the Philippines*  
7 November 2008

Pursuant to its commitment to implement the ASEAN Integration System of Preferences<sup>139</sup> on a bilateral basis, the Philippines – as one of the preference-giving countries<sup>140</sup> – through the President, has reduced its tariff rates for certain goods imported from preference-receiving countries.<sup>141</sup> This EO specifically covers only certain imported goods from Cambodia and Myanmar. The AISP rate is effectively zero per cent.

*Memorandum Circular No. 162 – Guidelines on Matters Pertaining to North Borneo (Sabah)*  
20 August 2008

This circular prohibits any part of the Philippine Government from making any act or statement that recognizes any foreign state's sovereignty over North Borneo (Sabah) or

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<sup>138</sup> Senate Resolution No. 131.

<sup>139</sup> Formerly known as the ASEAN Generalized System of Preferences Scheme.

<sup>140</sup> Among the other preference-giving countries are Brunei, Indonesia, Malaysia, Singapore and Thailand.

<sup>141</sup> Among the preference-receiving countries are Cambodia, Lao PDR, Myanmar and Vietnam.

derogating recognition of the Philippine title, claim and rights over Sabah. Moreover, any official act or statement relating to Sabah must have prior clearance from or be in consultation with the Department of Foreign Affairs. The same proscription is mandated in official documents referring to Sabah.

*Proclamation No. 1592 – Declaring 20 October and every year thereafter as Philippine–British Friendship Day*<sup>142</sup>  
20 August 2008

This is pursuant to the request of the UK Ambassador to the Philippines, Peter Beckingham, for a change in the date of the celebration of Philippine–British Friendship Day from 7 December to 20 October to coincide with the inauguration of the new British Embassy.

*Proclamation No. 1620 – Enjoining the Nation to Celebrate 15 September 2008 as International Day of Democracy and Every Year Thereafter*  
9 September 2008

With the Department of Foreign Affairs as lead agency, pursuant to the United Nations General Assembly Resolution A/62/L.9 on 8 November 2007, for the annual observance of an International Day of Democracy, the President directs all government departments and agencies, and enjoins national and local media, to help in promoting awareness and public support for the event.

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<sup>142</sup> Amending Proclamation No. 381 (2000).





**SRI LANKA**<sup>143</sup>

## NATIONAL LAWS ON INTERNATIONAL LAW MATTERS

*Conventions against Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act No. 1 of 2008*

The long title of this Act demonstrates that it gives effect to two Conventions to which Sri Lanka has become a party. These are the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 and the Convention on Narcotic Drugs and Psychotropic Substances adopted at the Fifth Summit of the South Asian Association for Regional Co-operation (SAARC) signed at Malé on 23 November 1990. Being a party to these two Conventions, Sri Lanka is obliged to give legal effect to them to enable it to deal with the international aspects of illicit trafficking in these substances.

Part I of the Act sets out the acts that constitute offences under the Conventions. These acts, if committed by any person, whether in or outside Sri Lanka or whether they are a Sri Lankan citizen or not, will make such person liable, on conviction after trial on indictment in the High Court, to a prison term of between 10 and 15 years. These acts include the following:

The production, manufacture, sale, distribution, delivery, transport, import and export, etc. of the substances, or possession or purchase of any narcotic drug or psychotropic substance for these purposes;

Cultivation of opium poppy, coca bush or cannabis plant in order to produce narcotic drugs;

Procurement, manufacture, storage, transportation, sale, delivery or distribution of any equipment, material or any substance set out in Table I or II of the First Schedule to the Act, knowing that it is to be used for the unlawful cultivation and production of these substances.

Those who assist in or benefit from the above acts are also guilty of offences under the law. This includes organizing, arranging or financing any of these acts; acquiring, possessing or using any property knowing that it was derived from any of these acts; possessing any equipment or material specified in the First Schedule, knowing that it is to be used for furthering these acts and publicly inciting or inducing other persons to commit these acts or to use narcotic drugs or psychotropic substances. Attempting to commit, aiding the commission of and conspiring to commit the acts is also an offence.

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<sup>143</sup> Contributed by Camena Guneratne, Senior Lecturer, Department of Legal Studies, Open University of Sri Lanka.

The Act sets out certain aggravating factors that shall be considered in imposing punishments for these offences. These are as follows:

- The involvement of the offender in the offence of an organized criminal group of which the offender is a member;
- The involvement of the offender in other international criminal activities;
- The involvement of the offender in other illegal activities that are facilitated by the commission of this offence;
- The use of violence of arms by the offender in the commission of the offence;
- The fact that the offender holds a public office and the offence is connected to that office;
- The victimization or use of minors in the commission of the offence;
- The fact that the offence is committed in a prison or in an educational or social service institution or in their immediate vicinity, or in any other place to which school children or students resort for educational, sports or social activities.

Provision is also made for procedural matters in the trying of such offences. The High Court of Sri Lanka, sitting in Colombo, shall have exclusive jurisdiction to try such offences. Where an act constituting an offence under this Act is committed outside Sri Lanka, provision is made to determine when the High Court shall have jurisdiction to try such offence (Section 3(2)). Provision has also been made to safeguard the rights of non-citizens who may be arrested for an offence under this Act (Section 4). Section 7, entitled “Forfeiture”, provides that any article or substance in connection with which the offence was committed, and the proceeds of such offence, shall be forfeited to the State. Any property so forfeited shall vest absolutely in the State.

Part II of the Act sets out provisions to deal specifically with the UN Convention and provides for extradition laws to be expanded to cover offences under this Convention and Act. It also provides for the establishment of the Precursor Control Authority to implement the provisions of the Act and sets out its duties.

Part III of the Act deals with the SAARC Convention. This part also deals with extradition issues between SAARC countries.

## OTHER RELEVANT STATE PRACTICE

### SUBMISSIONS TO THE UN HUMAN RIGHTS COMMITTEE

*Imposition of death penalty following alleged unfair trial – mandatory death penalty – notion of most serious crime – least possible suffering with regard to the method of execution – conditions of detention – unfair trial*

#### ANURA WEERAWANSA v. SRI LANKA

Communication No. 1406/2005, Human Rights Committee, 95th session, 16 March to 3 April 2009, CCPR/C/95/D/1406/2005, 14 May 2009

The author of the communication is Anura Weerawansa, a Customs officer who was, at the time, under sentence of death in a Sri Lankan prison. He claimed that his right to life under Article 6 of the ICCPR<sup>144</sup> had been violated by the Sri Lankan Government. He also raised issues under the following Articles: Article 7,<sup>145</sup> Article 10 (1)<sup>146</sup> and Article 14.<sup>147</sup>

According to the author's submission, he was arrested on 8 March 2002 and his statement recorded, allegedly under duress. Later, he was charged with conspiracy to commit the murder of another Customs officer and with aiding and abetting others to do so. The crime had taken place in 2001. He was not allowed contact with family members while in custody, although he was represented by a lawyer of his choice throughout the legal proceedings.

The trial took place in 2002. The author was convicted as charged and sentenced to death by hanging. He appealed to the Supreme Court, which dismissed his appeal and affirmed the conviction and sentence. The author alleged that his conviction was a result of a conspiracy as he was involved in actions against a number of key people who were involved in money laundering. He also alleged that the judiciary was not impartial but was under the influence of the President. He claimed that there were irregularities in the conduct of the trial, including influencing of witnesses. He alleged that his lawyers were influenced to "double-cross" him and he was not given the option of a jury trial. He also claimed that the conditions of his incarceration were inhuman.

The specific complaint of the author related to Article 6. He stated that the offences of which he was convicted were not the "most serious crimes" and that capital punishment by hanging violates the ICCPR as it has been proved that a person takes 20 minutes to die.

The State Party responded as follows. It stated that the author and two others were indicted by the Attorney General on a charge of conspiracy to murder, and aiding and abetting murder. Due to the gravity of the offence, it was decided to conduct the trial of all three accused before a three-judge Bench. The accused all chose their own lawyers to defend them and also all chose to testify. On the basis of the evidence, they were convicted of the charges against them. The law of Sri Lanka provides that the offences of murder, conspiracy to murder and abetment to murder carry a mandatory death sentence. The

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<sup>144</sup> Article 6(1) of the ICCPR states: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Article 6(2) states: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court."

<sup>145</sup> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

<sup>146</sup> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

<sup>147</sup> All persons shall be equal before the courts and tribunals.

State Party considers murder a “most serious crime” within the terms of the Covenant. However, there has been a moratorium on carrying out the death sentence for nearly 30 years.

The State Party noted that the author’s appeal was unanimously dismissed by the Supreme Court and rejected the claim that the trial and appeal courts were biased. Importantly, the State Party reiterated that, by ratifying the Optional Protocol, “it never intended to recognise the competence of the Committee to consider communications involving decisions handed down by a competent court in Sri Lanka. The government has no control over judicial decisions and a decision of a competent court may only be reviewed by a Superior Court. Any interference by the Sri Lankan Government with regard to any decision of a competent court would be construed as interference with the independence of the judiciary, which is guaranteed under the Sri Lankan Constitution.”

At the outset, the Committee considered whether the claim was admissible under the Optional Protocol in accordance with Rule 93 of its rules of procedure. In this regard it considered the contention of the State Party that, by ratifying the Optional Protocol, it did not intend to recognise the competency of the Committee to consider decisions of its courts. This contention was rejected by the Committee, which noted its General Comment No. 31 on the Nature of the General Legal Obligation imposed on States Parties, paragraph 4. According to this paragraph, the obligations of the Covenant and Article 2 in particular are binding on every State Party as a whole and all branches of government (executive, legislative and judicial) are in a position to engage the responsibility of the State Party. The executive branch, which usually represents the State Party internationally, cannot argue that any action incompatible with the Covenant was carried out by another branch of government. Therefore, the Committee may proceed with issues of admissibility and merits.

However, the Committee held that the author’s allegations were unsubstantiated and he had not established that the courts were clearly arbitrary and denied him justice. Regarding the author’s claim that he did not have the option of a jury trial, the Committee held that such a right is not found in the Covenant. He had also failed to substantiate his claim that his lawyers “double-crossed” him.

The Committee addressed the issue of the mandatory death sentence passed on the author. It noted its jurisprudence on this subject: “the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of Article 6, Paragraph 1 of the Covenant, in circumstances where the death penalty is imposed without any possibility of taking into account the defendant’s personal circumstances or the circumstances of the particular event.” Thus, although there is a moratorium on the execution of the penalty, its imposition constitutes a violation of the author’s rights under the Covenant. In view of this finding, the Committee did not address the issue of the method of execution.

The Committee also found that the State Party had not refuted the author’s allegations regarding the conditions of his incarceration, which violated his rights under Article 10(1).

The Committee therefore held that, in accordance with Article 2(3) of the Covenant, the State Party is under an obligation to provide the author with an effective remedy, including commutation of his death sentence and compensation. As long as he is kept incarcerated, he must be treated with humanity and dignity. The State Party was requested to respond to the communication within 180 days.

A separate opinion by a Committee Member, Mr Fabian Omar Salvioli, further addressed the issue of the mandatory death penalty imposed upon the author and the abolition of capital punishment as envisaged in Article 6 of the Covenant. He firstly argued that the Committee is competent to find violations of Articles not referred to in the complaint. He then referred to Article 2(2), which states: “Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” He noted that Article 6 imposes certain restrictions on the imposition of capital punishment in those countries that have not yet abolished it. A mandatory imposition of a death sentence, disregarding the circumstances of the case or the individual concerned, prevents a judge from tailoring the punishment to the individual and compels them to apply it indiscriminately to what may be different forms of human behaviour. This is unacceptable when a human life is at stake and amounts to arbitrariness. He therefore held:

- (a) That the Sri Lankan legislation that makes the death penalty mandatory for the offences of murder, conspiracy to murder and aiding and abetting a murder is itself incompatible with the ICCPR.
- (b) That the facts of the case reveal a violation of Article 2, Paragraph 2 of the Covenant and the rule requiring the death penalty, having been applied to the victim, the violation was committed in relation to Articles 6 and 7 of the Covenant, to Mr Anura Weerawansa’s detriment.
- (c) That the State must, as a guarantee of non-recurrence, rescind the provision in criminal law stipulating the death penalty for the offences of murder, conspiracy to murder and aiding and abetting a murder that was applied to Mr Anura Weerawansa as being incompatible with the ICCPR.

*Ill-treatment of author by police officers while in detention – prohibition of torture and cruel, inhuman and degrading treatment – right to security of the person – right to an effective remedy – equality of arms*

DALKADURA ARACHCHIGE NIMAL SILVA GUNARATNA v. SRI LANKA

Communication No. 1432/2005, Human Rights Committee, 95th session, 16 March to 3 April 2009, CCPR/C/95/D/1432/2005, 23 April 2009

The author of this communication was illegally arrested by officers of the Sri Lanka Police, held in custody for several days and brutally tortured. He was hospitalized for treatment for his injuries and, on release, again taken to the police station and further assaulted. The author had submitted evidence with regard to his injuries. As a result of his experience, he had been unable to pursue his livelihood or support his family. After this torture, he faced threats to his life and pressure to withdraw the complaints he had made and settle the case. Complaints to the relevant authorities were of no avail, allegedly because one of the perpetrators was the son of a former Inspector General of Police. The

author made a statement to the Human Rights Commission and also filed a fundamental rights petition in the Supreme Court. However, the latter petition took several years to reach a conclusion and, at the time of the original communication on 1 August 2005 to the Committee, it had not yet been decided. Therefore, the domestic mechanism had failed to bring the perpetrators to justice. Although an investigation had been ordered, none of the perpetrators has been indicted. On 14 December 2006, the State Party informed the Committee that the Supreme Court judgment on the author's petition had been handed down. The judgment found that several officers had violated the author's constitutional rights regarding illegal arrest,<sup>148</sup> illegal detention,<sup>149</sup> and torture.<sup>150</sup>

The author complained of the violation of his rights under the following provisions of the Covenant – Article 7 (relating to freedom from torture or to cruel, inhuman or degrading treatment or punishment), Article 9 (relating to arbitrary arrest and detention) and Article 2(3) (each State Party to the present Covenant undertakes to ensure an effective remedy to a victim of human rights violations). He argued that despite filing a fundamental rights action in the Supreme Court, he faced numerous threats to his life for which he was not given relief or an effective remedy. The Supreme Court judgment cannot be considered an adequate remedy as it exonerates the chief perpetrator. He was also given inadequate compensation as compared to other instances of compensation awarded in such cases. Thus, his rights under Article 14(1) (which guaranteed procedural equality and fairness), read with Article 2(3), have also been violated.

The Committee first considered the question of admissibility. In regard to the allegation that the author's rights under Article 14(1) had been violated, the Committee held that generally it is for domestic courts to review facts and evidence and apply the existing legislation in cases before it. In the absence of compelling evidence that it was clearly arbitrary and partial, the Committee cannot question the Supreme Court's evaluation of the evidence and its findings. Therefore, this part of the communication was inadmissible. For the same reasons, the author's claim that the quantum of compensation awarded to him is inadequate could also not be addressed by the Committee.

Regarding the alleged violations of Articles 7 and 9 of the Covenant, read in conjunction with Article 2(3), the Committee found that the inordinate delay in concluding the fundamental rights case and lodging indictments against the police officers concerned amounted to an unreasonably prolonged delay within the meaning of Article 5(2) of the Optional Protocol to the Covenant. Therefore, the author had exhausted all the domestic remedies available to him.

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<sup>148</sup> Sri Lanka Constitution Article 13(1) – No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.

<sup>149</sup> Sri Lanka Constitution Article 13(2) – Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.

<sup>150</sup> Sri Lanka Constitution Article 11 – No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Regarding the merits of the case, specifically claims of violations of Articles 7 and 9 of the Covenant, the Committee found on the facts that his rights had been violated. It noted that expedition and effectiveness are particularly important in the adjudication of cases involving torture. The remedies provided by the State had been unduly delayed without any valid reason or justification, amounting to a failure to implement those remedies. Further, the fact that the State Party failed to investigate the complaints made by the author to the police amounted to a violation of the right to security of persons under Article 9(1) of the Covenant.

Therefore, the Committee found that the author's rights under Articles 2(3), read with Articles 7 and 9 of the Covenant, had been violated and, further, that there was a separate violation of Article 9(1). The State Party was requested to submit its views within 180 days and also to publish the Committee's views.





## LITERATURE



## BOOK REVIEWS

Yaël Ronen, *The Iran Nuclear Issue* (Oxford: Hart Publishing, 2010, 550 pages)

Javaid Rehman

This book examines the legal issues emerging from Iran's nuclear programme, and the response to this programme by the International community as represented by the International Atomic Energy Agency (IAEA) and the United Nations (UN). The volume is primarily a set of documents consisting *inter alia* of the resolutions from the UN Security Council and the IAEA. The volume commences with a critical introduction to the legal and political complications emanating from Iran's nuclear ambitions. This section sets out the history of Iran's nuclear programme, although with a focus on events during the US-led, so-called "war on terror" under the administration of George W. Bush. The discussion examines the role played by the IAEA in determining the position of Iran, and the subsequent referral of the IAEA Board of Governors of Iran's apparent non-compliance with the provisions of Treaty on the Non-Proliferation of Nuclear Weapons (NPT) 1970. A brief review is also conducted on the role played by member States of the European Union, led by the UK, France and Germany (EU3) in their attempts to resolve the dispute and to draw Iran to the discussion-table during the past decade.

Section II very helpfully sets out a Chronology of events, which is followed by international agreements. Amongst the treaties provided is the Text of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), the relevant provisions from the UN Charter and the Statute of IAEA, documentation from the Security Council, primarily Resolutions by the Council and debates on the Resolutions, documentation from the IAEA, Iran's correspondence with various officers of the UN, official statements and responses from individual members of the UN Security Council and EU3 (UK, France and Germany).

A critical examination of Iran's programme of acquiring nuclear capability reveals a number of interesting aspects of international law as well as limitations within the NPT regime. As the study

explains, NPT provides for an "inalienable right of all the Parties . . . to develop research, production and use of nuclear energy for peaceful purposes without discrimination" (Article IV.1). (For the text of the Treaty, see pp. 81–85.) Relying upon this "inalienable right", Iran continues to assert full rights and legitimacy in an effort to acquire nuclear capability: Iran claims this right as a peremptory norm that partakes "from the universally accepted proposition that scientific and technological achievements are the common heritage of man" (cited at p. 9). Yet, as the study appropriately describes, the NPT itself is limited by the absence of a mechanism for reviewing and overseeing implementation of the Treaty (p. 15). With such a lacuna within the NPT, IAEA statute and the safeguard agreement allows the IAEA Board of Governors to refer relevant cases of concern to the UN Security Council. The UN Charter establishes the Security Council as the primary executive body that could authorize enforcement action under Chapter VII of the Charter. The IAEA, as well as members of the Security Council, viewed Iran's non-compliance with great concern "because of the pattern of concealment; the perceived technical and economic inutility of the Iranian programme; the potential involvement of the military; the potential military dimensions as evidenced in the documents; Iran's lacklustre record of cooperation with the IAEA once its activities had been revealed; its bellicose attitude towards Israel and hostility towards other states in the Middle East; and its support of organisations that practice terrorism" (at p. 19).

For its part, Iran has always insisted on the inherent and inalienable right to develop a nuclear programme for peaceful purposes, and has always insisted on full cooperation with the IAEA and the UN Security Council. Supporters of the Iranian position could also legitimately claim the political bias that exists with the IAEA and the Security Council. Thus, for instance, Libya (without its own suspect record of support for international terrorism) was referred to the Security Council "for information purposes only" during 2003 (at p. 19). Critics would argue that, by 2003, the path for

military action was directed towards invasion of Iraq on the falsified perception of Iraq's weapons of mass destruction, and hence it was not in the interests of the US and its allies to engage with Libya.

A similar story of political expediency emerges from the Security Council's ineffective action against North Korea. There is a considerable element of truth in criticisms forwarded by the Iranian camp that the Security Council is a political animal, where national and political interests often override an objective position. Within the Security Council, the position of the United States has been a key feature in determining the kind of action to be taken against Iran. The study appropriately reflects on changes in the global position towards Iran during the regime of George W. Bush and under the new Obama administration. The shift in stance was reflected "in a speech in June 2009, Obama adopted a relatively conciliatory approach towards Iran. First, he openly admitted the United States played a role in the overthrow of a democratically-elected Iranian government, although he stopped short of apologizing for that intervention. With respect to the nuclear issue, he hinted that the direct dialogue expected to begin after the Iranian elections will touch on 'many issues', suggesting a possible relaxation of the urgency for which the US was calling earlier" (p. 35).

Although the focus of the study is on Iran, this analysis of NPT also reveals the limited role that the international community can have on those States that are non-members of the NPT. This includes such forceful nuclear powers as Pakistan, India and Israel (at p. 8). Their refusal to sign up to international standards, when they could avoid condemnation through political manoeuvring within the Security Council, reveals the unfortunate reality within which international law currently operates.

The author of the work is Yaël Ronen, an assistant professor at Shar'arei Mishpat College, Israel and a former diplomat in the Israeli Foreign Service. Notwithstanding the considerably politicized nature of the subject, and the hostility that prevails between Iran and Israel, the objectivity and scholarly approach in which this subject is debated deserves credit and applause. The volume presents a wealth of materials providing an invaluable source to specialists working in or researching Iran's nuclear programme and its repercussions on regional and global politics. In addition, the critical and analytical examination of issues will greatly assist not only international lawyers but also those generally interested in the geopolitical tensions within the Middle East.

JAVOID REHMAN

Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* (Oxford: Hart Publishing, 2008, 244 pages)

Dr S. Paramalingam

This treatise demonstrates the evolution of regimes of international investment law and its role in regulating the activities of foreign investment including formulation of agreement and settlement of disputes. The first four of the seven chapters focus on evolution of international investment law, international efforts in developing the regime, the role of customary international law in protecting foreign investment and how bilateral investment agreements played a role in protecting overseas investments respectively. The author has given considerations to analyse the principles and jurisprudence of the regime, while exploring the current issues in chapters five and six.

The issues identified in this book are of interest to academics, practioners and policymakers. The

book systematically treats the issues of overseas investments and their impact on the environment, human rights and social and economic fields. It also deals with the issues of dispute settlement of foreign investment, in the final chapter, and traces the various existing mechanisms available to parties of disputes. Although the work is limited in its scope, it deals with the more important aspects of contemporary legal issues of investment law and can be treated as a guide for further research. It is also a valuable and helpful source of reference to practioners.

On the whole, it is one of the few scholarly works in this field and reflects the deep academic and wider practical experience of the author in international investment law.

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Dr Rabia Bhuiyan, *Gender and Tradition in Marriage & Divorce: An Analysis of Personal Laws of Muslims and Hindu Women in Bangladesh* (Dhaka: UNESCO, 2010, 302 pages)

Javaid Rehman

Dr Rabia Bhuiyan's book, which is based on her Doctor of Science of Jurisprudence (JSD) from Cornell University in the USA, represents an excellent, incisive and matured examination of the personal laws of Muslim and Hindu women in Bangladesh. The study, consisting of five substantive chapters, begins with a powerful and impressive introduction that sets women's rights in the appropriate context, as established within the legislative and constitutional framework of Bangladesh. Within the introductory comments, Dr Bhuiyan presents an analysis of the rough justice that women receive as a consequence of arbitrary religious and personal laws, and highlights the fact that the *Sharia*, in particular, has been shaped (and re-interpreted) by cultural practices and then applied in a way that is highly discriminatory towards women.

Chapter 1 of the book provides a historical overview of Muslim personal laws and examines the position of women in the *Sharia* and Hindu classical laws. Chapter 2 traces the historical origins of the personal laws within the Indian sub-continent. It goes through a survey of the constitutional provisions on gender equality, and also presents a useful historical survey of the development of Muslim and Hindu Personal Laws in marriage and divorce within British India, followed by the legal position in Pakistan (1947–1971) and Bangladesh (1971–). In conducting this examination, Dr Bhuiyan highlights a number of legislative reforms, including changes brought about in the age of consent through the Marriage Act 1891 (Act X of 1891) and the Child Marriage Restraint Act 1929, which raised marriageable age of boys to 18 and girls to 14 – this applied to all, irrespective of religion. The author also points to the fact that the current marriageable age for girls is 18 years and for boys is 21 years in Bangladesh and reminds the readers that the Dissolution of Muslim Marriages Act 1939 brought reforms in Muslim divorces which allowed Muslim women to institute divorce proceedings for the first time, albeit on very limited grounds. A highly significant legislative reform during the Pakistan era has been the induction of the Muslim Family Laws Ordinance (1961). The chapter also analyzes, through case law, the re-interpretation of Islamic family laws including

the doctrine of *Khul*. In *Balqis Fatima v. Najim-ulkram Qureshi*, it was held by the Lahore High Court that *Khul* can be awarded as of right, provided that the court was satisfied the marriage had irretrievably broken down.

Chapter 3 examines the critical issue pertaining to Muslim and Hindu women in marriage. There is a useful analysis of the concept of *ijtihad* and a survey of the established theory that doors of *ijtihad* were closed at the end of the tenth century. Also contained in this chapter is a powerful analysis of Marriage under Muslim Personal Law, and issues of equality within marriage, consent, polygamy and child marriages. The chapter contains a fascinating debate about the apparent conflict between the element of consent for Muslims to enter into a marriage contract and the apparent *Sharia* doctrines of the “option of puberty” that legitimize child marriages. In Muslim personal laws, marriage is a civil contract and every Muslim of sound mind who has attained puberty is entitled to marry. Consent and mental capacity to consent to marriage form an essential ingredient of the marriage. Yet, at the same time, it is important to note the continuing recognition given to the classic Islamic law concept of “option of puberty”, whereby the father has the power to give his children in marriage without their consent, until they reach the age of puberty. Under the *Hanafi* interpretation of Muslim family laws, the guardian's power to agree to the child marriage comes to an end once the child has attained the age of puberty. Once the child has reached the age of puberty, he or she could invoke the “option of puberty” in order to rescind the marriage, provided that the marriage has not been consummated. In the case of Bangladesh, the “option of puberty” is legitimized and legislatively enshrined in the Dissolution of Muslim Marriage Act 1939 (as amended by Muslim Family Law Ordinance 1961). The relevant provisions are:

#### *Grounds for decree for dissolution of marriage*

A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely: that she, having been given in marriage by her father or other guardian before she attained the age of [eighteen] years, repudiated the marriage before attaining the age of [nineteen] years: Provided that the marriage has not been consummated



In order to highlight the aforementioned prevalent tensions, Dr Bhuiyan examines in detail the recent case of *Abdus Sattar Malik and another v. Harun-ur-Rashid Mollah and another* (Criminal Revision Case No. 274 of 1987, with the judgment of the High Court division being passed on 5 February 2003), in which the author herself appeared as an advocate (pp. 105–106).

Chapter 4 of the book raises further complex issues relating to divorce, within both Muslim and Hindu personal laws. Bhuiyan eloquently elaborates on the persisting gender inequality for both Muslim and Hindu women on the subject of divorce. She makes the valid point that although the Muslim Family Laws Ordinance 1961 has brought about “notice requirements”, discrimination still persists: while the man can pronounce divorce (*Talaq*) unilaterally and without having the need to produce grounds for such an action, the woman, in order to end an unhappy marriage (and in instances where the husband is unwilling to agree to divorce), remains dependent on either establishing that the marriage has irretrievably broken down or on proving one of the grounds as stated in Dissolution

of Muslim Marriages Act 1939. The concluding chapter, chapter 5, engages with the complicated and controversial issue of reform of personal law. Bhuiyan begins this assessment with the bold yet accurate statement that “[i]t is quite clear that both Muslim and Hindu personal laws on marriage and divorce are discriminatory to women and therefore require substantive legal reforms. The traditional Shari’a law is unable to meet the needs of modern life in Bangladesh” (p. 244). In her concluding remarks, in treating *ijtihad* and *ijma* as “the most important instrument of change” (p. 288), Dr Bhuiyan places faith in the Muslim jurists and scholars to reformulate and reinterpret the principles of *Sharia*.

There is clearly no doubt that aspects of the *Sharia* and Muslim family laws are in urgent need of reform. Dr Bhuiyan’s excellent study will prove to be an enormously valuable contribution to the reform movement of family laws, not only within Bangladesh but in the entire Muslim world.

JAVAID REHMAN

Jacqueline Peel, *Science and Risk Regulation in International Law*, (Cambridge University Press, 2010, 398 pages)

Muhammad Nizam Awang

The major contestation in regulating technological risks is the rift between uncertainties of risk and legitimacy of (international) law. Rooted in the conflict is how far scientific objectivity has to be taken into account in the governing of risk – it is the tension the author identifies between the authority of science and the legitimacy of law that informs the development of risk regulation both in domestic and international fora. Connecting science and risk regulation, Jacqueline Peel's work delves into the dealings of international law in the area of highly complex regulations, involving primarily human health and the environmental risks.

In the second chapter, her investigation into these two closely related subjects considers the place of international law in the context of democracy and global governance. In a world of interdependence, she argued, transition of power in law making from the domestic sovereign states to global administration is inevitable. Despite democracy presumably being susceptible to change in the hands of international institutions, participatory norms would remain in its substance. In conditions of growing transboundary harms and uncertainty of risks, the preferred approach goes with governance arrangements at international level, as unilateral action by individual sovereign states could not be an efficient, and relatively weak, solution. Nonetheless, diversity across national government practices is not to be dispensed with. As such, "expertise-based legitimacy" provides leeway in which domestic differences are celebrated.

Moving further into substantive theoretical grounding, the third chapter addresses scientific objectivity as an embedded element employed in a multitude of policy and legislative instruments. Put another way, scientific or technical consideration gives profound influence not only in the law making, but most importantly in the attitudes of the participating states, leading to acceptance as international norms or legal principles, for instance as inserted in the Codex Alimentarius and Biosafety Protocol. Scientific knowledge is important for the governance of risk, yet it is not evidence of an effective one. The lack of humanities or cultural risk may result in serious injury to the implementation measures of governance as has been witnessed in genetically modified organisms. The position is

that democratic global governance contains far-reaching implications; hence, human values and perception are critically necessary on the same footing with the body of scientific knowledge. The proposal, however, needs to find a concrete framework for implementation under the current legal jurisprudence explained in Chapter 7.

This issue brings the reader to Chapter 4, in which the conflicts between "two competing paradigms" (i.e. sound science and precautionary principle) predominantly applied in the United States and the European Union respectively. Here, the author deals with the major confusion stemming from differing safety approaches in the face of scientific uncertainty. While both approaches/principles are science based, differences are expounded in terms of "sensitivities to uncertainties and differing level of emphasis placed on social and economic matters" (p. 169). In relation to treaty interpretation and judicial approaches, it appears to be restricting trade measures, "exonerating" States from prescribed legal obligation in international treaty.

Chapter 5 reveals that interpretation of legal text under the Sanitary and Phytosanitary Agreement (SPS) never dealt with the substantive "conflict" of law of differing approaches in risk assessment. Instead, the complaint was made on procedural reasons, involving the delay in regulatory process as seen in *Hormones* litigation. Surprisingly, the scientific basis was never challenged, but the contended area failed to be consistent with "the science-based disciplines of the SPS Agreements as well as its procedural requirement for members to maintain transparent assessment process and proceed to decision without undue delay" (p. 243). In short, the court decisions made no intervention in the role of scientific expert, but more on whether due and fair consideration had been taken in the course of risk assessment. At any cost, the courts acceded to the insufficiency of data, and, following the suit, the action must be based on the best available evidence. However, it was nowhere mentioned in any part of the law reports about the advantages and disadvantages of doing so. In reiteration, the court's decision was not concerned with the complexities or uncertainties of data, but more with the ways in which regulatory authorities handled application for approval in each case.

Chapter 6 contains a number of case studies, including health and environmental disputes, food safety and climate change. As each case demonstrates a different scenario and legal solution, it is interesting to see how science is handled in the courtroom. The weighing factor still prevails – to

strike the balance between trade-restrictive measures and aims of protecting health and the environment. The way nature of risk is assessed and managed, together with how science is utilized in international fora, variably hinges on institutional contexts, in which history, mandate, power and flexibility for adaptation have to be taken into account.

Taking stock, Chapter 7 evaluates the possibility of importing trajectories in promoting global risk governance. The author attempted to extend the debate from being narrowly scientific and expand it to cover the role of social sciences, in view of fragmented interests and preferences in the international arena. Deference in this sense has to be navigated in the context of transparency, and politics certainly plays an important role. In the

concluding chapter, she attempts to differentiate risk situations as red, amber and green to signify the degree and intensity of exposure to risk. In addition, she calls for a revisit of the use of science based on the "colour" of the risk situation. Further account has also to be grounded on sociopolitical structures by welcoming participation from various stakeholders in the decision making. This book presents an interdisciplinary approach necessary to the understanding of the regulation of risk. Although it provides conclusive answers to the problems, the book has come up with plausible considerations for the regulators and courts in dealing with risk issues that may arise in future legal disputes involving other emergent technologies.

MUHAMMAD NIZAM AWANG

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The *Yearbook* invites contributions in the form of:

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- Notes for the Developments section containing succinct critical analysis of international legal developments relevant to Asia (2,000–4,000 words generally);
- Translated versions of articles originally written in a language other than English;
- Materials in the field of municipal or international state practice of Asian states and organizations, with relevance to international law;
- Data on events and incidents relating to Asia and Asian countries and with relevance to international law and relations;
- Information on literature and documents (in any language) either concerning international law in Asia or concerning international law in general and published or issued in Asia.

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Authors are encouraged to send their manuscript by email as an attached file. Alternatively, a soft copy may be submitted by mail on a CD in the form of a document processed by Word under Windows 95 or higher.

## SATA PRIZE 2012

This writing competition is open to young international lawyers (aged 40 or below) of Asian nationality. The article can be on any topic relating to public or private international law (not confined to Asia). The article must be in English and be between 8,000 and 14,000 words in length, excluding footnotes. The deadline for the 2012 competition is 30 August 2012. The winning entry will receive a cash prize of US\$2,000 and will be published in the *Asian Yearbook of International Law*.

This prize is named after its sponsor, Mr Sata Yasuhiko, President of Tokibo Co., Ltd.

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