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as at 1 January 2004

B.S. Chimni – Miyoshi Masahiro – Surya P. Subedi

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# INTRODUCTION BY THE GENERAL EDITORS

It is now over twelve years since the *Asian Yearbook of International Law* was launched with a view to providing an intellectual forum for the promotion and dissemination of international law in Asia; for the analysis of issues of international law as they apply to Asia and, further, to providing an insight into Asian views and practices on issues of international law for the benefit of both the Asian and the non-Asian reader. With the help of a group of distinguished Asian international lawyers all over the world, the three founding General Editors of the *Yearbook*, Ambassador M.C.W. Pinto, Professor Ko Swan Sik and Professor J.J. Syatauw, published the first volume of the *Yearbook* in 1991 in The Hague. Looking back, it was a remarkable event and a worthwhile venture. After making a great contribution for several years to the objectives of the *Yearbook*, one of the three founding General Editors, Professor Syatauw, decided following the publication of Volume 6 to take his richly deserved retirement from the *Yearbook*.

Knowing that there was by then a significant number of international lawyers ready to take over and capable of taking the project to the next stage of development, the two other founding General Editors, Professor Ko Swan Sik and Ambassador M.C.W. Pinto, initiated a process of rejuvenation, designed to bring on board new faces. It resulted in the restructuring both of the Editorial Board of the *Yearbook* and of the publishing body, the Foundation for the Development of International Law in Asia (DILA). The process included the successful convening of two major meetings of Asian international lawyers, the first in Manila in 1998 and the second in Singapore in 2001. Consequently, a number of changes took place around the publication of Volume 7; the internal restructuring of the Editorial Board of the *Yearbook* led to the appointment of three of us, the undersigned, as new General Editors. It also led to the restructuring of the Governing Board of DILA under the chairmanship of Professor Kriangsak Kittichaisaree of Thailand.

This took time, of course, and the publication of the *Yearbook* fell behind schedule. Now, since the rejuvenation process is complete, the new Editorial Board is determined to publish the *Yearbook* on a regular basis. Both Professor Ko Swan Sik and Ambassador M.C.W. Pinto decided that they preferred, after the publication of Volume 8, to retire as General Editors from the *Yearbook*, but were requested to remain on the Editorial Board, to which they were so kind as to agree. These Asian

luminaries have worked tirelessly over the years to guarantee the success of the project they launched in 1991. Out of his love of international law and a strong desire to promote it in Asia, Professor Ko, Professor Emeritus of Erasmus University, Rotterdam, has devoted much of his time to the publication of *Yearbook* over the last twelve years. Thanks to all their efforts, it is now on a sound footing and has acquired for itself a reputation as a refereed international law publication. Our sincere thanks go to all three former General Editors of the Yearbook for their vision and hard work; we hope to continue to benefit from the wisdom, guidance and cooperation of Professor Ko and Ambassador Pinto in their capacity as members of the Editorial Board.

Collaboration with our new publisher, Brill – who publishes the *Yearbook* under the imprint of Martinus Nijhoff – is as strong as that which we previously enjoyed with Kluwer Law International, and we are grateful to Ms Annebeth Rosenboom for her unstinting support. We are also fortunate in having Ms Paddy Long join us as our new copy-editor; she brings with her a wealth of experience in editing work of a high quality. It is, furthermore, a pleasure to have Ms Anne-Marie Krens as our lay-out editor, with the splendid skills required in producing the manuscript of the *Yearbook*. We look forward to working with our friends and colleagues in the publication of the *Yearbook*, and to serving our readers optimally wherever they may be: both within and outside Asia.

B.S. Chimni Masahiro Miyoshi Surya P. Subedi

February 2004

# ABBREVIATIONS

| | | |
|---|---|---|
| AIR | - | All India Reports |
| AJIL | - | American Journal of International Law |
| AsYIL | - | Asian Yearbook of International Law |
| BJC | - | British Journal of Criminology |
| BYIL | - | British Yearbook of International Law |
| CTS | - | Consolidated Treaty Series (C. Parry, Ed.) |
| DJILP | - | Denver Journal of International Law and Policy |
| GATS | - | General Agreement on Trade in Services |
| GATT | - | General Agreement on Tariffs and Trade |
| Hague Receuil | - | Receuil des cours de l'Académie de droit international de la Haye |
| ICAO | - | International Civil Aviation Organization |
| ICJ | - | International Court of Justice |
| ICLQ | - | International and Comparative Law Quarterly |
| IHT | - | International Herald Tribune |
| IJIL | - | Indian Journal of International Law |
| IJMCL | - | International Journal of Maritime and Coastal Law |
| ILM | - | International Legal Materials |
| IYIA | - | Indian Yearbook of International Affairs |
| JIA | - | Journal of International Affairs |
| JAIL | - | Japanese Annual of International Law |
| JP | - | The Jakarta Post |
| MLJ | - | Malayan Law Journal |
| NATO | - | North Atlantic Treaty Organization |
| OECD | - | Organization for Economic Cooperation and Development |
| RIAA | - | Reports of International Arbitral Awards |
| SCMP | - | South China Morning Post |
| SCRA | - | Supreme Court Reports Annotated (Phil.) |
| SLR | - | Singapore Law Reports |
| TIAS | - | Treaties and other International Acts Series (US Department of State) |
| UNTS | - | United Nations Treaty Series |
| UNCLOS | - | United Nations Convention on the Law of the Sea |

| | | |
|---|---|---|
| UNCTAD | - | United Nations Conference on Trade and Development |
| UNGA | - | United Nations General Assembly |
| UNTS | - | United Nations Treaty Series |
| UST | - | Treaties in Force, A List of Treaties and Other International Agreements of the United States |
| YILC | - | Yearbook of the International Law Commission |

# ARTICLES

# DANGEROUS WATERS: COMBATING MARITIME PIRACY IN ASIA

Scott Davidson*

## 1. INTRODUCTION

Piracy *iure gentium* is arguably the first of all international crimes.[1] As early as the eighteenth century the English and American courts considered pirates *hostes humani generis* – enemies of all humankind – and it was accepted that universal jurisdiction could be exercised over any pirate who was captured.[2] This meant that, regardless of a pirate's nationality, any state could apprehend, try and punish him or her.[3] The reasons for this are not hard to fathom. Not only did pirates interfere with national interests by attacking seaborne trade, they also showed scant respect for human life, with both crew and passengers frequently robbed and terrorised, and often murdered.[4] The major sea powers, although having sanctioned the privateers who subsequently gave rise to the pirates of the so-called 'Golden Age', eventually deployed their navies against them, with considerable success.[5]

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[1] Sunga, Lyal S., *The Emerging System of International Criminal Law* (1997) at 3, 253 and 338. *See* also Dubner, Barry Hart, *The Law of International Sea Piracy* (1980) at 42-4.

[2] *See* the dissenting opinion of Judge Moore in the *Lotus* case (France *v* Turkey), PCIJ, Ser. A, No. 10 (1927), at 70. *See* also O'Connell, D. P., *The International Law of the Sea* (1984), Vol. II, at 966-70 and Rubin, Alfred P., "The Law of Piracy", (1987) *Denver Journal of International Law and Policy* 173.

[3] Dissenting opinion of Judge Moore in the *Lotus* case, n. 2, at 70.

[4] Konstam, Angus, *The History of Pirates* (1999); Johnson, Charles, *A General History of the Robberies and Murders of the Most Notorious Pirates* (with an introduction and commentary by David Cordingly) (1998); Cordingly, David, *Life Among The Pirates: The Romance and The Reality* (1995); Gottschalk, Jack A. and Flanagan, Brian P., *Jolly Roger with an Uzi: The Rise and Threat of Modern Piracy* (2000), 1-20.

[5] *See* generally, Starkey, David J., van Eyck van Heslinga, E.S., de Moor, J. A. (eds.), *Pirates and Privateers: New Perspectives on the War on Trade in the Eighteenth and Nineteenth Centuries* (1997).

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By the end of the nineteenth century, large-scale piracy had almost been eradicated from the high seas. Other factors also led to the diminution of piratical activity during this period, most particularly the increase in the size, speed and sophistication of vessels, which left the pirates ill-equipped to tackle this new kind of shipping.

Although references to piracy were included in the 1958 Geneva Convention on the High Seas,[6] the delegates at the UNCLOS III negotiations considered the provisions on piracy to be obsolescent,[7] if not obsolete. Little attention, therefore, was paid to their negotiation and the 1958 provisions were included without amendment into the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

In recent years, however, there has been a massive increase in the incidence of piracy, especially in Asia. There are numerous reasons for this, but the most compelling explanations are the prevailing economic conditions, the diminution in naval presence, particularly in South East Asia, since the end of the Cold War and the pirates' access to more sophisticated craft and weaponry. It is fair to say that during the 1990s, piracy and armed robbery at sea has reached almost epidemic proportions in Asian waters, and it is only now that the governments of the region are beginning to tackle it in a serious and concerted way. It is the purpose of this paper to investigate a number of issues associated with modern piracy and to chart what progress, if any, has been made by States in the region in combating the pirate menace.

## 2. THE RISE AND FALL AND RISE OF PIRACY

The traditional image of the pirate is that which has been perpetuated in fiction and film; it is of the Caribbean buccaneer or freebooter of piracy's so-called 'Golden Age'. It is the image evoked by Stephenson's *Treasure Island* or Errol Flynn's *Captain Blood*. Neither of these pictures is accurate for, even during this period, the reputation of pirates was particularly unsavoury. Often using smaller but faster vessels with which to out-sail their merchantmen quarry, pirates would not hesitate to resort to brutality if they were resisted. The hoisting of a red flag by pirates during an engagement signified that no quarter would be given.[8] Nor is it true that pirates were interested only in heavily laden treasure ships. This image belonged to the age of the early privateers such as Drake and Morgan. Eighteenth-century pirates would take most vessels and cargoes, although, of course, coin and treasure was always highly desirable.

The pirate threat began, for a number of reasons, to recede during the nineteenth century. One of these has already been mentioned: the techno-

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[6] Articles 14-22. On the evolution of these provisions *see* Dubner, n. 1.

[7] Dubner, n. 1, at 3.

[8] Gottschalk and Flanagan, n. 4, at 9.

logical developments which gave rise to bigger and faster merchant vessels that left the pirates at a considerable disadvantage. The age of steam and the iron ship proved to be too much for pirates to withstand. The second reason for the decline in piratical activity in the world's oceans was the increase in naval presence in the major seaways of the world. This was essentially a by-product of colonialism in which the flag followed trade. The colonial powers were assiduous in ensuring that hard-won trade in far-flung regions of the world would not be assaulted or diverted by lawless pirates. Considerable naval resources were therefore directed towards policing the oceans with the aim of eradicating any threat of piracy. Thirdly, while piracy is a seaborne offence, it frequently has its origins on land. Pirate vessels must equip and provision themselves, and the increased land-based civil presence during the colonial period also meant that it was more difficult for pirates to secure the materiel they required to prosecute their nefarious activities. Finally, regard must be had for the effect of legal regulation. While piracy proper was an offence committed on the high seas, many states adopted an extended definition of piracy in their domestic laws, which dealt with what was essentially armed robbery within their territorial waters, internal waters and ports.[9] The penalties for the offence of piracy were often severe, with capital punishment frequently available to the domestic criminal courts.[10]

At the turn of the twentieth century piracy was an almost negligible problem, although its legal regulation was discussed at some length at the unsuccessful Hague Conference on the codification of the law of the sea in 1908 and at the rather more successful UNCLOS I in 1958.[11] The ensuing definition of piracy in article 15 of the Geneva Convention on the High Seas has been incorporated without amendment as article 101 UNCLOS. There was a lack of attention devoted to the drafting of the provisions on piracy at UNCLOS III; it is attributable to the fact that, by that time, it was thought that maritime piracy was of such little practical concern to the world community as to require scant consideration. This approach was to prove particularly myopic, as subsequent events have demonstrated.

The reasons for the rise of modern piracy in the twentieth and twenty-first centuries have been almost the inverse of the reasons for its fall in the late eighteenth and early nineteenth centuries.[12] First, pirates have gained access to some of the technological advances that once gave merchant vessels an element of protection against these maritime marauders. Modern pirates use fast, manoeuvrable craft, often working in pairs. They are equipped with up-to-date communications equipment and are armed with light but powerful

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[9] O'Connell, n. 2, at 979-83.

[10] *Ibid.*

[11] Dubner, n. 1, *passim.*

[12] Kawamura, Sumihiko, "Combating Piracy and Armed Robbery at Sea: Charting the Future in Asia Pacific Waters", Regional Cooperation Against Piracy and Armed Robbery, Conference held at Montien Riverside Hotel, Bangkok, 24-25 March 2001.

weapons. It has been suggested that some pirates in South East Asian waters are, in fact, military personnel 'moonlighting' as pirates to supplement their income, but this suspicion has never been proved beyond doubt.[13] Furthermore, technological advances have meant that very large ships with valuable cargoes can be operated by small crews, a fact that makes them more vulnerable to pirates.

The second reason for the increase in piratical activity in the last decade is a direct result of the 'peace dividend' that has arisen from the end of the Cold War. The reduction in size of the British navy, the almost complete disappearance of the former Soviet navy, and the corresponding lack of necessity for the United States and British navies to patrol the ocean spaces of Asia have together caused a vacuum in which piracy has been able to thrive. Thirdly, many States in the South East Asian region are unable to afford the appropriate naval resources necessary to patrol their coastal waters, especially with the advent of the 200 mile exclusive economic zone (EEZ) which has placed greater policing demands on existing law enforcement vessels.[14] The emergence of the archipelagic State in UNCLOS has also increased the pressures on maritime surveillance in States such as Indonesia, the Philippines, Malaysia and Singapore. In the Indonesian archipelago alone, for example, there are over 20,000 islands and rocks to be policed. Finally, there is some suggestion that the problem of piracy has been exacerbated by the expansion of open registry shipping or flags of convenience, as they are also known. The States that operate open registries do not have the naval resources to police the high seas in protection of the vessels flying their respective flags. If, for example, British or American flagged shipping were attacked by pirates, it is likely that protective measures would be taken by the navies or coastguards of those States. Indeed, Japan has become so concerned about attacks on its own vessels that it has engaged in joint anti-piracy patrols in the Malacca Straits.[15] Liberia and Panama cannot offer the same level of, if any, practical protection to vessels flying their flags.[16]

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[13] *See infra*.

[14] Kidd, Joanna, "Indonesia's overstretched navy", *IISS Strategic Pointers*, 28 February 2001.

[15] Valencia, Mark, "Joining Up With Japan to Patrol Asian Waters", *International Herald Tribune*, 28 April 2000; Chanda, Nayan, "Foot in the Water: A Japanese plan to send armed coastguard vessels to combat pirate attacks in Asia's sea lanes is finding a surprisingly positive response", *Far Eastern Economic Review*, 9 March 2000. Japan has also offered to train personnel from other states in the region in anti-piracy activities at its Coast Guard Academy.

[16] According to the International Maritime Bureau, the following nationalities suffered the greatest number of pirate attacks: Bahamas (25), Cyprus (35), Liberia (27), Malta (33) and Panama (86). Singaporean flagged vessels suffered 46 attacks. ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January- 31 December 2000* (January 2001), (hereafter '*IMB Piracy Report 2000*'), at 9.

## 3. THE EXTENT AND NATURE OF MODERN PIRACY

In recent years there has been an exponential increase in piracy, so much so that in May 1995 the Maritime Safety Committee of the International Maritime Organization (IMO) instructed its Secretariat to compile monthly figures of all incidents of piracy and armed robbery against ships reported to it. In its report of 28 February 2001,[17] the IMO Secretariat disclosed that since it started keeping these figures 2,211 incidents had been reported to it. These numbers have increased steadily year by year. In 2000 there were 501 incidents reported to the IMO; that is nearly a quarter of all offences in the five years since reporting began.[18] In January and February 2001 alone, 81 piratical incidents were reported to the IMO.[19] According to the Piracy Reporting Centre of the International Maritime Bureau (IMB), which is itself an organ of the International Chamber of Commerce, piracy, according to its definition, increased by 56 per cent between 1999 and 2000.[20] Although these figures are undoubtedly significant in themselves, they do not reveal the full extent of the problem, since not all incidents of piracy are reported. There are at least two major reasons for this. First, acts of piracy or armed robbery committed against small local craft may not be reported by victims for fear of reprisal. Second, owners sometimes instruct their ship-masters not to report incidents since the delay inevitably incurred by investigations can be extremely costly, ranging from US$ 10-50,000 per day.[21] There is also the added problem that in certain parts of the world, there is little chance that pirates will be either detected or apprehended. This may be because of an insufficiency of law enforcement personnel or a lack of expertise in combating maritime crime among such personnel as there may be.[22] There is also the possibility of collusion between local officials and

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[17] MSC/Circ.990.

[18] Figures compiled from MSC/Circ.985, Monthly report – December 2000; MSC/Circ.977, Monthly report – November 2000; MSC/Circ.976, Monthly report – October 2000; MSC/Circ.975, Third quarterly report 2000 – (July to September); MSC/Circ.970, Second quarterly report 2000 (April to June); MSC/Circ.944, First quarterly report 2000 (January to March). The *IMB Piracy Report 2000* reports a figure of 469 reported pirate attacks.

[19] MSC/Circ.990, Monthly report – February 2001; MSC/Circ.989, Monthly report – January 2001.

[20] *IMB Piracy Report 2000*, at 12.

[21] *See Oceans and the Law of the Sea, Report of the Secretary-General 1998*, A/53/456, paras 147-8.

[22] Such is not always the case. *See*, for example, the much-celebrated apprehension of the *Alondra Rainbow*. The ASAM report states "The 7,762-ton, Panamanian-flag cargo ship, *Alondra Rainbow*, was boarded and hijacked by ten pirates armed with pistols, knives and swords, operating from speedboats, in the vicinity of Kuala Tanjung, Indonesia (03-21N 099-29E). The vessel was en route to Miike, Japan with a cargo of 7,000 tons of aluminium ingots. The fifteen crewmembers were set adrift in life-rafts on 29 Oct. and were later rescued by Thai fishermen 8 Nov. off Phuket, Thailand. The Indian Coast Guard and Navy recovered the vessel off Goa, India on 16 Nov. Fifteen suspects were arrested. The hijackers attempted to scuttle the vessel by setting her afire and flooding her holds. 3,000 tons of cargo was reported missing and suspected to have been bartered in Cambodia

pirates, which, apparently, is not a negligible factor. Indeed, there may be a suspicion that law enforcement officials and pirates could be one and the same.[23]

There are a number of so-called piracy 'hot-spots' around the world. While there have been, and continue to be, a number of incidents off both coasts of South America and Africa and, more recently, in the Red Sea, the major geographical region for piratical activity is Asia, and most particularly South East Asia.[24] Of the more than five hundred piracy incidents reported to the IMO, nearly four hundred were committed in Asian waters, particularly in the vicinity of the Indonesian archipelago, the Straits of Malacca and off the port of Chittagong in Bangladesh.[25] These are areas that are particularly heavy in maritime traffic, particularly the Straits of Malacca, which are used by over 50,000 vessels a year. The reports of the IMO and the IMB Piracy Reporting Centre also reveal an increase in the level of violence perpetrated against seafarers. The IMB report for 2000 indicates that 72 seafarers were killed, 99 were injured and 26 remained missing at the time the report was compiled.[26] This was an increase from three killed, 24 injured and one missing in 1999. The number of seafarers taken hostage in 2000 was 202, which amounted to half the number taken in 1999. The various reports from the IMO, the IMB and Maritime Safety Information Center (MSIC) of the US National Imagery and Mapping Agency (NIMA)[27] also give a flavour of the techniques used by pirates in the commission of their offences. Vessels

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or Thailand for weapons destined to LTTE insurgents (Tamil Tigers) in Sri Lanka". *See* also "International cooperation beats modern-day pirates", International Chamber of Commerce, <http://www.iccwbo.org/home/news_archives/1999/international_cooperation_beats_pirates.asp>. *See* more recently the capture of the Singaporean registered tanker *Selayang* by Indonesian naval forces after it had been hijacked in Malaysian waters. *Washington Post*, June 24, A24.

[23] *See*, for example, the case of the *M/V Hye Mieko*. The MSIC report provides the following narrative:
"On 23 June 1995 twelve men wearing Chinese army uniforms boarded the Panamanian-flagged general cargo ship Hye Mieko and hijacked the vessel. The ship's master confirmed the seizure occurred north of Redang Island off the east coast of Malaysia and in international waters. The Hye Mieko departed Singapore 21 June en route to Cambodia. The ship was carrying cigarettes and photographic equipment (US$ 2 million). On 25 June the ship was reported to be under escort by a Chinese patrol boat 140nm southeast of Ho Chi Minh City. The hijackers sailed the vessel to the Chinese port of Shanwei. On 23 July, after removing the cargo, the ship and crew were released." A legitimate inference might be that these were members of the Chinese coastguard engaged in freelance activities. *See* also Jon Vagg, "Rough Seas? Contemporary Piracy in South East Asia", 35 *British Journal of Criminology*, 63-80 (1995).

[24] *IMB Piracy Report 2000*, especially at 76-8.

[25] IMO, *Reports on Acts of Piracy and Armed Robbery against Ships Annual Report – 2000*, MSC/Circ.991, 31 March 2001.

[26] *IMB Piracy Report 2000*, at 7, Table 6.

[27] These can be conveniently located at http://www.fas.org/irp/world/para/docs/ASAM-1999.htm.

may be boarded while they are at anchor or in harbour.[28] Alternatively, they may be boarded whilst underway or 'hijacked' by 'crew members'.[29] The primary method used by pirates for boarding ships underway is to use small, fast craft and approach the victim vessel from the stern, usually during the small hours of the morning when only a reduced watch is on duty. Since a ship's crew is usually more concerned with where they are going rather than where they have been, they are often not aware of having been boarded.[30] The reports of the various concerned bodies also show that pirates are often well armed with firearms, machetes or knives. Even vessels travelling at speeds of seventeen knots or above are not immune from attack since the craft used by pirates can often travel at considerably greater speeds.[31] Furthermore, many of these craft are equipped with state of the art navigational equipment such as radar and global positioning systems. Indeed, there is a strong suspicion that some of the vessels are, in fact, government vessels.[32]

While theft at sea for their own enrichment is the fundamental objective of all pirates, this may take place on a large or a small scale. The aim of the majority of pirate attacks is to obtain money. Most merchant vessels travel with substantial amounts of cash in their onboard safes in order to pay harbour dues, to pay the crew's salary and to defray other costs associated with the running of the ship. It is estimated that the average pirate raid nets approximately $5,000.[33] More ambitious pirates may, however, take over a vessel and steal its cargo or may even steal the ship and its cargo in their entirety.

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[28] *See*, for example, the case of the Panamanian registered general cargo ship *Tradenes* which was boarded in the Samarinda River Road, Indonesia. The report notes: "While at anchor, four pirates armed with long knives boarded from stern and stole ship's equipment. The duty officer noticed them and raised the alarm. When the duty policemen fired at the pirates, they jumped overboard and escaped in a small wooden boat". *Piracy Report 2000*, 27, no. 68.

[29] *See*, for example, the case of the Panamanian registered LPG carrier *Gas Fortune,* which was boarded in the Malaccca Strait. The report notes that: "While underway, six pirates armed with long knives boarded. They took hostage of one crew [sic] and threatened to kill him. They stole S$10,000 from the ship's safe". *Piracy Report 2000*, 27, no. 71.

[30] Enhanced vigilance that is recommended in IMO Circular 623, paras 19-22, together with other measures of preparedness can often turn away a pirate attack. *See*, for example, the case of Malaysian registered tanker, *Meridian Star* which was attacked in Malaysian waters. The report states: "While underway five men in two … speedboats attempted to board from stern. Alert crew sounded the whistle and activated water hoses thus foiling the boarding. Pirates were wearing masks and they sped off towards Pulau Tiga". *Piracy Report 2000*, 60, no. 24.

[31] Department of the Environment, Transport and the Regions, *Marine Guidance Note No 75: Piracy and Armed Robber*, para 5, <http://www.shipping.detr.gov.uk/mgn/mgn075/>.

[32] *See*, for example, the case of the Singaporean registered container vessel *X Press Makalau* which was attacked north east of the Andaman Islands off Myanmar (Burma). The report states: "While underway, an unidentified suspicious 'naval boat' tried to approach the ship at close range. The ship tried to contact the 'naval boat on VHF CH 16 to identify herself. The 'boat' remained on radio silence and slowly retreated". *Piracy Report 2000*, 60, no. 21. *See* also the case of the case of the *Hye Mieko*, *supra*.

[33] Gottschalk and Flanagan, n. 4, at 88-9.

Some stolen vessels then become so-called 'phantom ships'. These ships are vesselsthat, after their theft, are renamed and re-registered, usually under a flag of convenience. They then find a shipper with a cargo; the pirates, or an individual acting as their agent, issue a bill of lading when the cargo is loaded. The ship then sails with the cargo, but diverts from the port indicated on the bogus bill of lading and discharges the cargo elsewhere for direct payment. The ship is then renamed, re-registered and the practice is repeated.

There is little doubt that modern piracy is costly both in terms of losses to the shipping industry, and to the lives and welfare of mariners. It may also one day result in a major environmental catastrophe in some of the busiest shipping areas of the world. There have been reports of a tanker in the Straits of Malacca being without an officer on the bridge while pirates held the officers and crew hostage.[34] While all these problems have been recognised by the IMB, the IMO, the International Transport Workers Union and a variety of NGOs, States have, on the whole, been slow to react to the worsening problem.[35] It is now apparent, however, that the necessity of combating piracy is gaining some impetus, particularly among the nations of South East Asia, and that cooperation at both a formal and an informal level is beginning to be seen as the major practical method of defeating the pirate threat. Although this might be seen as a strictly pragmatic response, it is also a question of legal obligation. Article 14 of the High Seas Convention 1958 and article 100 UNCLOS 1982 both provide:

> All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

Of all the mandatory obligations in international law, this is perhaps one of the most precise and draconian, since it commits every State to participate, and to use their utmost endeavours, in the defeat of piracy. The threat or actual use of force seems to be implicit in this injunction.[36]

## 4. THE LEGAL DEFINITION OF PIRACY

The term "piracy" is often used in a loose, colloquial sense to describe conduct which commentators find reprehensible taking place at sea or against

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[34] *See* generally, Dubner, Barry Hart, "Human Rights and Environmental Disaster – Two Problems that Defy the 'Norms' of the International Law of Sea Piracy", (1997) *Syracuse Journal of International Law and Commerce* 1. *See* also "Asia seen as high risk for oil spills due to piracy", *South China Morning Post*, 26 April 2001.

[35] *See* "Piracy: Political will needed to halt attacks", *South China Morning Post*, 30 July 2001.

[36] Note the use of the milder word 'suppression' in relation to illicit trade in drugs (article 108) and unauthorised broadcasting on the high seas (article 109). The only other sea-borne activity that the drafters considered to be worthy of repression was the slave trade (article 99).

vessels. In its ordinary or dictionary meaning, piracy is also given a broad definition, with the *Concise Oxford Dictionary* defining it simply as robbery at sea. Furthermore, while piracy has a particular meaning in international law, it also has a variety of definitions in municipal law. It is, however, primarily with the definition of piracy in international law with which this article is concerned. Piracy is defined for the purposes of international law in Article 101 UNCLOS. This replicates article 15 of the Geneva Convention on the High Seas, which was thought at the time of drafting to represent customary international law.[37] Article 101 provides:

> Piracy consists of any of the following acts:
> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with the knowledge of facts making it a pirate ship or aircraft;
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

If this definition is analysed in detail it is apparent that there are a number of criteria that must be fulfilled if any particular activity is to be defined as piracy:

(a) there must be acts of violence, detention or depredation;
(b) those acts must be illegal;
(c) they must be committed for private ends;
(d) they must be committed by the crew or passengers of a private ship or aircraft;
(e) they must be committed on the high seas or in a place outside the jurisdiction of any State; and
(f) they must be directed against another ship or aircraft or persons or property on board a ship or aircraft.

When each of these criteria is examined in turn, it becomes apparent that piracy in international law is limited to a rather restricted set of circumstances. If we take the acts of violence, detention or depredation, it is clear that these will cover offences such as murder, all forms of physical injury, confinement, including hostage taking and damage. The question arises whether, however,

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[37] Brownlie, Ian, *Principles of Public International Law* (5th edn., 1998), 236. *See* also the commentary of the International Law Commission at YILC 1956, Vol. II: 282.

it includes theft[38] Certainly, robbery which requires the use of violence or the threat of violence will be included in this definition, but then a classification must be found for a thief who is able to slip aboard a vessel while it is on the high seas and steal some item of equipment or the crew's belongings. Such a person may be deemed to be a pirate if the other criteria are satisfied. Whether this is so depends on the definition attributed to "depredation". The *OED* defines depredation as "the action of making a prey of; plundering, pillaging, ravaging …" If the accepted canon of construction *noscitur a sociis* is applied, all this seems to point to deprivation or destruction of property by violent means and would not seem to include the example of the sneak thief.[39] Furthermore, these actions must be *illegal*. While proof of such illegality will not in general be problematical, article 101 does not state under whose law this must be so. It would seem to be reasonable to assume, however, that the violence, detention or depredation must be illegal under the law of the flag State. Any other reading would appear to be unreasonable.[40] It is also possible, however, that it could refer to any illegality arising in the context of States which exercise passive personality jurisdiction if one of their citizens were the victim of a crime on board a vessel of a different nationality. Next, the illegal acts must be committed for private ends. This would seem to raise few difficulties initially, but on closer inspection it has the potential to cause problems of interpretation.

In most cases, attacks upon shipping are undoubtedly for private ends. Pirates, as indicated above, are usually interested in stealing money, cargo and even vessels themselves. In other words, pirates are concerned mainly with self-enrichment. There have been cases, however, where violence, threats of violence and taking of vessels have been for political rather than private ends. In the case of the *Santa Maria*, a Portuguese cruise vessel was reported

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[38] O'Connell, n. 2, at 967-8 writes, "a narrow definition of piracy assumes theft to be an essential element in the crime." It would appear, therefore, that a broader definition does not. In *Re Piracy Iure Gentium* [1934] AC 586, the Privy Council concluded that "actual robbery is not an essential element of the crime under international law". In US law, theft was not considered to be a necessary element of piracy: violence or damage inflicted for private ends was enough. *See The Marianna Flora*, 11 Wheat 1 (1826) and *Harmony v US (The Brig Malek Adhel)*, 2 How 210 (1844).

[39] While the IMB definition of piracy requires the intent or capability of using force to commit theft or any other crime (*see infra*), it seems that this is not always reflected in its piracy statistics. Take, for example, the case of the Singaporean registered tanker *Baroness.* The report states: "While at anchor, crew found the forecastle store locks broken. It was believed that during the rain, pirates had gained access to the ship via anchor chain. Ship's stores were stolen". Although it is clear that theft had taken place here, it is equally clear from the report that no one was in a position to know whether the 'pirates' had the capability to use force. It is arguable, therefore, whether this incident should have been reported in the statistics as one of piracy. *Piracy Report 2000*, 26, no. 62.

[40] *See* Menefee, Samual Pyeatt, "The New 'Jamaica Discipline': Problems with Piracy, Maritime Terrorism and the 1982 Convention on the Law of the Sea", 6 *Connecticut Journal of International Law* 127 (1960).

to have been captured by pirates in the Caribbean.[41] The Portuguese government issued a request for assistance from the British, Dutch and US navies, which began searching for the vessel. Upon further investigation by the State Department, however, it was found that the *Santa Maria* had been boarded by a Captain Henrique Galvão and his men while the ship was in port and had then been hijacked on the high seas. The reason for the hijacking by Galvão and his men was to make a political point prior to elections that were to be held in Portugal. In consequence of this, it was clear that the action was not piracy since it had not been undertaken for private ends, and the US refused to intervene further.[42] It should be observed, however, that since the *Santa Maria* was a Portuguese registered vessel, Portugal was entitled to seek assistance from any friendly State to both locate and apprehend the vessel.

Although the *Santa Maria* incident took place in 1961, no attempt was made to amend the rules relating to piracy during the protracted negotiations leading to the adoption of UNCLOS in 1982. Considerations that piracy must be undertaken for private ends therefore remained unaltered. The possible inadequacy of the definition of piracy was once again exposed in 1986 when Palestinian Liberation Organisation hijackers took over the Italian-registered cruise ship *Achille Lauro* in the Mediterranean and killed an American hostage, Leon Klinghoffer.[43] The four hijackers were eventually intercepted while in transit from Egypt by US fighter aircraft and forced to land in Italy where they were tried by the Italian courts and convicted of murder. Although the US issued warrants for their arrest on the grounds, *inter alia*, of piracy under 18 USC sub-section 1651, it is clear that their actions did not constitute piracy under international law. The hijackers' actions were politically motivated and there was no satisfaction of the requirement of two vessels or two aircraft. The response of the international community to the *Achille Lauro* affair was to negotiate and adopt the Convention for the Suppression of Unlawful Acts Against the Safety of Navigation 1988.[44]

The requirement stating that piracy can be committed only by the passengers or crew of a private ship or aircraft raises the question of whether there are circumstances in which the crew of a warship or ship on public

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[41] Whiteman, 4 *Digest* 665-7; Dubner, n. 1, at 146-9 and Green, L. C., "The Santa Maria: Rebels or Pirates?" 37 BYIL 496 (1961).

[42] It can also be observed that this incident did not satisfy the 'two vessel' requirement of article 15 of the Geneva Convention on the High Seas 1958. Galvão and his insurgents eventually put into the Brazilian port of Recife and were granted political asylum.

[43] Freestone, David, "the Convention for the Suppression of Unlawful Acts Against the Safety of Navigation", 3 *International Journal of Estuarine and Coastal Law* 305 (1988); Halberstam, Malvina, "Terrorism on the High Sea: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety", 82 AJIL 269 (1988).

[44] Otherwise known as the 'Rome Convention' or 'SUA'. On SUA *see infra*.

service can commit piracy.[45] If the crew of a warship, without having mutinied, were to engage in acts having a piratical character, the normal rules of state responsibility relating to the imputability of such acts to the State would apply, even if the acts were clearly *ultra vires*.[46] There are numerous examples of military personnel exceeding their authority where tribunals have determined that if, to all intents and purposes, those personnel appeared to be acting on behalf of the State, that in itself would be sufficient to engage state responsibility.[47] The case of the *Mayaguez*, however, raised different issues. In this case, a US merchant vessel, *Mayaguez*, was arrested by a Cambodian warship in the Gulf of Thailand, sixty miles from the Cambodian coastline. Normally, the rules of state responsibility would apply in such a case, but here the US government had refused to recognise the Khmer Rouge as the legitimate government of Cambodia. The consequences of characterising such an act as piracy are not simply terminological, but have the effect of seeking to transform what would normally be considered a bilateral inter-State dispute into an international crime in the suppression of which all States are bound to cooperate. UNCLOS also deals with the circumstances in which the crew of a warship or government aircraft has mutinied. Article 102 provides that where a crew of such a vessel or aircraft has mutinied and taken control of the ship, their acts are assimilated to acts committed by a private ship. The acts of mutineers do not thus engage State responsibility on the part of the flag State or State of registration.

For the purposes of international law, piracy can take place only within clearly prescribed locations, those being the high seas or a place outside the jurisdiction of any State. Under the provisions of article 86 UNCLOS the high seas are defined as "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State". An act having piratical characteristics which takes place in the ports, internal waters, archipelagic waters or territorial sea of a State would thus not be piracy under international law, although it may be so under the domestic law of the State in question. There are sound reasons for this. Since States have sovereign rights in these maritime zones, it is clear that both their prescriptive and their enforcement jurisdiction in respect of criminal acts holds sway there. Different considerations apply in respect of the EEZ, since this is a hybrid zone having high seas characteristics together with sovereign rights to resource exploitation and management on the part of coastal States. While it might be thought that

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[45] The terms 'warship' and 'ship on public service' or 'public vessel' will be used interchangeably.

[46] Cases in which a ship's crew has mutinied are dealt with by Article 102 of UNCLOS. This provides that where the crew of a warship has mutinied and taken control of the ship "are assimilated to acts committed by a private ship …"

[47] *See* Article 7 of the International Law Commission's *Draft Articles on State Responsibility*. On *ultra vires* acts *see* also the *Caire Claim* (1929), 5 RIAA 516, the *Youman's Claim* (1926), 4 RIAA 110 and the *Mallen Claim* (1927), 4 RIAA 173.

the existence of these sovereign rights might operate to exclude the possibility of piracy under international law being committed in the EEZ, the position appears to be preserved by the second sentence of article 86 which provides that the provision "does not entail any abridgement of the rights or freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58". It might seem strange to consider that piracy could be a "right or freedom" in this context, but a closer examination of article 58(2) reveals that "Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this part". Since the provisions referred to include those on piracy in articles 101-107, it is clear that not only can piracy be committed in the EEZ, but also that the enforcement provision, article 105, applies, too, to piracy in this zone. It is also arguable that if piracy were to be considered contrary to customary international law, which its status as a possible *jus cogens* norm would seem to confirm,[48] it could be argued that the reference in article 58(2) to "other pertinent rules of international law" apply not only the act of piracy itself, but also to the engagement of universal jurisdiction, which would permit the public vessels of any State to take appropriate enforcement action against pirates. Furthermore, it seems clear that the prohibition of piracy and the ability of all States to take action against pirate vessels is not 'incompatible' with Part V of UNCLOS relating to the EEZ, given that it does not significantly affect the coastal State's right to resource management and exploitation. Indeed, it might be cogently argued that the defeat of piracy within the EEZ is likely to enhance the coastal State's ability to carry on its rightful activities in a peaceful manner in the zone.

The definition of piracy in article 101 also indicates that it comprehends acts that take place "outside the jurisdiction of any State". The high seas are undoubtedly an area outside the jurisdiction of any state, but since they are covered explicitly by article 101(1)(a)(i) they must be taken to be excluded from subparagraph (ii) according to the normal principles of treaty interpretation. It must, then, be asked which of these places can be considered to be "outside the jurisdiction of any State" During the drafting of the equivalent provision in the Geneva Convention on the High Seas, the ILC made the following comment:[49]

> In considering as 'piracy' acts committed in a place outside the jurisdiction of any State, the Commission had chiefly in mind acts committed by a ship or aircraft on an island constituting *terra nullius* or on the shores of an unoccupied territory. But

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[48] The International Law Commission's Commentary on article 53 of the Vienna Convention on the Law of Treaties 1969 gives as an example of a *jus cogens* norm "a treaty contemplating or conniving at the commission of acts, such as … piracy … in the suppression of which every state is called upon to cooperate". YILC 1966, Vol. II: 247-8.

[49] "Report of the International Law Commission to the General Assembly", YILC 1956, Vol. II: 282, Commentary on draft art. 39, at para (4).

> the Commission did not wish to exclude acts committed by aircraft within a larger unoccupied territory, since it wished to prevent such acts committed on ownerless territories from escaping all penal jurisdiction.

This comment by the ILC raises a number of difficulties in respect of the definition of piracy. First, despite the ambiguous language – '*terra nullius*' and 'unoccupied territory' do not necessarily refer to the same constituent – it seems clear that given the overall context of the comment, the Commission was, in fact, concerned with land belonging to no –one, or unclaimed territory. What, however, would be the position where territory were claimed by a number of States, but because of the lack of resolution of the conflicting claims the territory remained unoccupied? It could be asked whether this would truly be *terra nullius* because, in an objective sense, the territory must belong to the contesting party who can show the better claim. Until the question of title is finally settled, however, ownership remains in doubt and it could be said that until resolution such territories remain factually *res nullius* if they have remained unoccupied. This latter argument is, however, difficult to sustain since very often the question of whether or not unoccupied territory belongs to a particular State depends on the fact whether this State has acted as sovereign of the territory through the application and enforcement of legislative and administrative measures.[50] A State which thus applies its criminal law to acts of a piratical character taking place on unoccupied but disputed territory will, in fact, be reinforcing its claim as sovereign. While this might appear to be a merely theoretical question, there are areas of the world where it could have practical consequences were criminal acts having the character of piracy to occur on the territory in question. The Spratly and Paracel Islands in the South China Sea are, for the most part, unoccupied, but their sovereignty is contested by a multiplicity of regional States, including China, Vietnam, Malaysia, and the Philippines. Were an act having a piratical character to take place on one of these islands, the question would be whether it was piracy within the meaning of article 101(1)(a)(ii) since it took place on *terra nullius*, on the one hand, and on the other, whether any of the States contesting sovereignty would be able to apply their own domestic criminal law to the events. If it were the former, then all States would be able to exercise jurisdiction over the pirates no matter where they were subsequently apprehended; if it were the latter then the States whose criminal law applied would have jurisdiction and the situation would have to be dealt with through the normal methods of extradition or rendition of fugitive offenders. It is arguable that in the interests of law and order, it would be better to view acts

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[50] *See*, for example, the case concerning the *Legal Status of Eastern Greenland (*Norway *v* Denmark*)* PCIJ, Ser. A/B, No 53 (1933) and the *Minquiers and Ecrehos* case (France *v* United Kingdom), ICJ Rep. 1953 at 47 in which the exercise of legislative and administrative jurisdiction by Denmark and the United Kingdom respectively were taken to be of particular significance in determining that they had good title to the disputed territory.

of a piratical character committed on unoccupied territory, the title of which is contested, as piracy, despite any doubts which there might be about the status of the territory as *terra nullius* proper. This need not preclude claimant States' exercising their own criminal law in order to buttress their own territorial claims, and could, in fact, lead to a useful form of concurrent jurisdiction by which to combat piracy in these contested regions.

Finally, piracy requires that the illegal acts of violence, detention or depredation be directed by those on a private ship or aircraft *against* another ship or aircraft or persons or property on board a ship or aircraft. It has already been demonstrated in the *Santa Maria* and *Achille Lauro* incidents that hijackings of vessels do not fall within the definition of piracy. This point was confirmed by the ILC, which commented that "acts committed on board a ship by the crew or passengers and directed against the ship itself, or against persons or property on the ship, cannot be regarded as acts of piracy".[51] Furthermore, as indicated above, following the *Achille Lauro* incident, the international community decided to deal with the 'two ships' rule and to fill some of the jurisdictional gaps left by the traditional definition of piracy by adopting the Convention for the Suppression of Unlawful Acts Against the Safety of Navigation 1988 (SUA) and its protocols at Rome on 10 March 1988. Under SUA, a State party is obliged to make punishable under its domestic law the seven offences listed in article 3 SUA when they are committed by any person unlawfully and intentionally. The offences are committed where a person:

(a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
(b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
(c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
(f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
(g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

[51] ILC, n. 49, at 282, para (6).

If these offences in their substantive or inchoate form are committed against or on board vessels navigating or scheduled to navigate beyond the outer limits of a State's territorial sea, a State party must take jurisdiction when the offences take place:

(a) against or on board a ship flying the flag of the State at the time the offence is committed; or
(b) in the territory of that State, including its territorial sea; or
(c) by a national of that State.

A State Party may also establish its jurisdiction over any offence prescribed in the Convention when:

(a) it is committed by a stateless person whose habitual residence is in that State; or
(b) during its commission a national of that State is seized, threatened, injured or killed; or
(c) it is committed in an attempt to compel that State to do or abstain from doing any act.

Although SUA goes some way towards, potentially, resolving the problems associated with the definition of piracy in article 101 UNCLOS,[52] it does not entirely eliminate the difficulties related to hijackings of a political character where a State party might still refuse to extradite on the grounds of the political offence exception. Where hijackings occur for private ends, however, SUA is likely to cover most of the events that might escape the definition of piracy. This is particularly so where States Parties decide to exercise their discretion and to take jurisdiction on grounds which relate to the seizure, threat to, injury or killing of any one of its nationals, that is, on grounds of the passive personality principle. Furthermore, the territorial application of SUA provides a useful adjunct to the more limited scope *ratione territoriae* of article 101 UNCLOS, since it applies not only to vessels located on the high seas or within the EEZ of any State party, but also to a ship which is "navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State …". If an offender thus commits one of the prohibited acts within the territorial sea of a State party in such circumstances, the relevant States parties' various jurisdictional competences and obligations will be engaged. The SUA does not, however, cover ports and harbours, river mouths, internal waters or archipelagic waters, unless a vessel is scheduled to navigate through the adjacent territorial waters. It would seem that the assumption here is that if criminal acts having piratical characteristics take place on board a vessel while it is in one of these loca-

[52] The UN has observed that implementation of SUA provides a "more useful vehicle for prosecution than the nineteenth century pirate statutes", UN Doc. A/53/456, para 152.

tions, as well as in circumstances where a ship does not leave the territorial sea, then the coastal State will have the full range of jurisdictional powers in order to deal with such occurrences.

The potential usefulness of SUA as a supplement to the UNCLOS rules on piracy has, however, been considerably diminished by the relatively low number of ratifications of the instrument, particularly by those States in the Asian region. While China, India and Pakistan have ratified SUA, the States where piracy and armed robbery at sea is most in evidence – Bangladesh, Indonesia and the Philippines – have failed to do so.[53] A first step in combating piracy in South East Asia might therefore be for these States to make ratification of SUA a priority.

## 5. OTHER 'INTERNATIONAL' DEFINITIONS OF PIRACY

While much of the discussion so far has been concerned with the definition of piracy in international law and with the attempt by SUA to fill some of the gaps, it still remains clear that many acts of so-called piracy in the Asian region are simply robbery on board ship which takes place in the ports, harbours, roads, river mouths, internal waters, archipelagic waters, and the territorial seas of States. Although the definition of piracy in international law may be something of a hindrance in permitting the exercise of enforcement jurisdiction, it also fails to convey the full extent of the problem. Various organisations have thus adopted different definitions in order to accommodate this difficulty. When the Maritime Safety Committee of the IMB at its sixty-fifth session in May, 1995 instructed the Secretariat to prepare reports, they asked it to do so not only in relation to piracy as defined by article 101 UNCLOS, but also in relation to armed robbery against ships. For the purposes of the IMO 'armed robbery' is defined as:[54]

> … [A]ny unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of "piracy", directed against a ship or against persons or property on board such ship, within a State's jurisdiction over such offences.

The wording of the IMB takes a much broader definition that comprehends acts which take place both within and without a States territorial jurisdiction. It defines piracy as:[55]

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[53] IMO, *Summary of Status of Conventions as at 30 April 2001*, <http://www.imo.org/HOME.html>. For details of ratifications *see* IMO, *Status of Complete Listings of Conventions*, *ibid.* The Convention entered into force on 1 March 1992.

[54] Article 2.2 of the IMO Draft Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships, MSC/Circ.984.

[55] ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships, Annual Report 1 January-31 December 2000*, 1.

> An act of boarding or attempting to board any ship with the intent to commit theft or any other crime and with the intent or capability to use force in furtherance of that act.

The IMB notes that this definition "covers actual or attempted attacks whether the ship is berthed, at anchor, or at sea". Petty thefts are excluded from the IMB figures, unless the thieves are armed. It is particularly noteworthy that the IMB definition does not concern itself with the locus of the offence; it is simply concerned with persons who:

(a) board or attempt to board a ship;
(b) with the intention of committing a crime; and
(c) with the intention or capability of using force to commit that crime.

It should be noted, however, that this broad definition that focuses on the intention and conduct of the individual is only used for IMB reporting purposes. Similarly, the United States National Imagery and Mapping Agency's (NIMA) Maritime Safety Information Centre (MSIC) which produces Anti-Shipping Activity Messages (ASAM) does not stipulate any pre-requisites for the compilation of reports which might represent a threat to shipping. As a consequence of this, NIMA's database includes not only acts which fall within the definition of piracy proper, but it also includes, for example, information on interference by the pacifist organisation Greenpeace with navigation in the conduct of its protest activities and interference by naval or other public vessels with merchant shipping.

## 6. THE SEIZURE OF PIRATES

Much of the foregoing discussion concerning the definition of piracy is not simply of theoretical interest. The classification of any act as piracy, within the meaning of article 101 UNCLOS, entails certain jurisdictional consequences. While it is assumed that the occurrence of acts having a piratical quality which take place within a State's territorial jurisdiction will be dealt with by the local authorities, piracy which takes place on the high seas confers universal jurisdiction upon States not only to apprehend, but also to try and punish pirates. The rationale for this is the maintenance of law and order on the high seas. Under article 105 UNCLOS any and every State may seize a pirate ship or aircraft or a ship or aircraft taken by piracy and under the control of pirates. Such seizure can be effected either on the high seas or in any other place outside the jurisdiction of any State only by the warships, military aircraft or other ships and aircraft on authorised govern-

ment service and which are clearly marked and identifiable as such.[56] The ILC also suggested that a merchant vessel which was attacked by a pirate ship would be entitled in self-defence to overpower it, if it were able, and hand it over to the authorities of any State.[57] Where a properly authorised public vessel seizes a vessel which it suspects of being a pirate ship without adequate grounds and it transpires that the vessel is not, in fact, a pirate, the State making the seizure is liable to the flag State for any loss or damage caused by the seizure.[58]

The pirates who are arrested may be tried by the seizing State whose courts are granted broad discretion to determine the appropriate penalties to be imposed on the individuals concerned and may also determine the action to be taken with regard to the ships, aircraft or property seized, subject to the rights of any third parties acting in good faith.[59]

## 7. PROBLEMS IN DEALING WITH PIRACY

The vast majority of so-called pirate attacks take place within the internal waters, archipelagic waters and territorial seas of a number of Asian States. This means that the primary responsibility for tackling the problem of piracy lies with the coastal State that has jurisdiction over such events occurring within its territory. While it may be possible for regional States to police the main shipping routes within their jurisdiction, it is apparent that States such as Indonesia, the Philippines and Malaysia are, despite their best efforts, unable to maintain complete maritime security throughout their entire archipelagic territories and territorial seas. There are two main reasons for this. First, they consist of widely dispersed islands of greater or lesser size, some of which are inhabited and some of which are not. This makes an ideal environment in which pirates can operate with relative impunity. Second, regional States do not have the material resources with which to police such a wide geographical area. Even if these regional States did have the requisite resources, they are further hampered by the physical proximity of their territories and the legal limitations placed on the exercise of enforcement jurisdiction. These problems may best be expressed by examining the following scenarios:

1. Pirates operate from the internal waters of State A and carry out their attacks on the high seas. They attack vessels from State B and then flee to the internal waters of State A.

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[56] Article 107, UNCLOS.

[57] *See* YILC 1956 Vol. II: 283.

[58] Article 106, UNCLOS.

[59] Article 105, UNCLOS.

2. Pirates operate from the internal waters of State A and conduct their operations in the territorial waters of State B. After carrying out their attacks they flee to the internal waters of State A.
3. Pirates from State A cruise the territorial waters of States B and C and attack vessels therein. They are spotted by the coastguard of State B, but flee to the waters of State C.

The normal method of enforcement of a coastal State's criminal law beyond the limits of its territorial sea is by the use of hot pursuit. The conditions under which hot pursuit might be undertaken are prescribed by article 111 UNCLOS. The main requirements for the conduct of hot pursuit by the public vessels of a coastal state are that:

1. the competent authorities of coastal state must have good reason to believe that a ship has violated the laws and regulations of that state;
2. the pursuit must be commenced when a foreign ship or one of its boats is within the internal waters, archipelagic waters, the territorial sea or contiguous zone of the pursuing state;
3. pursuit may continue outside the territorial sea or contiguous zone only if the pursuit has not been interrupted;
4. the order to stop must be given when pursuing vessel is itself within the territorial sea or contiguous zone;
5. if the ship is within the contiguous zone, pursuit may be effected only if there has been a violation of the rights for the protection of which the zone was established.

The right of hot pursuit also applies *mutatis mutandis* to violations of a State's law in its EEZ and continental shelf and the safety zones of installations in such maritime areas.[60] Most importantly for present purposes, however, the right of hot pursuit must cease when the pursued vessel enters the territorial sea of its own State or of that of a third State.[61] The jurisdictional barrier created by the outer limit of the coastal State's territorial sea can be overcome only by agreement between the States involved.[62] In the various scenarios outlined above, therefore, as soon as the pirate vessel enters the territorial sea of States A or C, the public vessels from State B must cease their pursuit immediately.[63] While there have been suggestions that it might be desirable to introduce a species of hot pursuit in reverse which would allow the public vessels of another State to pursue pirate vessels from the high seas

[60] Article 111(2), UNCLOS.
[61] Article 111(3), UNCLOS.
[62] Menefee takes the view that such an agreement would undoubtedly be valid under Article 311, UNCLOS. *See* Menefee, Samuel Pyeatt, "Foreign Naval in Cases of Piracy: Problems and Strategies", 14 *International Journal of Marine and Coastal Law* 353 (1999).
[63] *See* Poulantzas, Nicholas M., *The Right of Hot Pursuit in International Law* (1969), at 187.

or from their own territorial seas into the territorial seas of another State,[64] this would run contrary to the accepted norms of international law which prohibit the governmental authorities of a State from conducting their public functions in the territory of another State without its consent.[65] The high level of confidence and trust which would be required for this to take place does not currently exist, and probably will not exist for some time, in the Asian region.

## 8. NEW REGIONAL ANTI-PIRACY INITIATIVES AND ACTIVITIES

That there has been a marked increase in the number of reported piratical-type incidents in the Asian region in recent years is undeniable. These incidents not only create problems for seafarers, and ship and cargo owners, but they also represent a major security threat for the region. The lack of safety in sea lines of communication (SLOC) is real and tangible; it requires considerable cooperation on the part of the States of the region to remedy the situation. Not only is cooperation demanded by the practicalities of the pirate threat; it also constitutes a legally binding obligation, as reference to article 100 UNCLOS above demonstrates. Given the pressures which piracy has been placing on Asian States, particularly Indonesia, Malaysia, and the Philippines, such cooperation is now becoming evident, and a number of multilateral and bilateral international and regional initiatives are emerging. These initiatives are policy driven, but also have implications for the future development of international law.

In 1999 the Maritime Safety Committee of the IMO adopted *Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery against Ships*.[66] These recommendations not only establish a number of desirable jurisdictional and other practical measures which coastal and port States can take to combat piracy, but also suggest that flag States should develop Action Plans detailing the actions which should be taken in the event of a report of a pirate attack. In the Southeast Asian region, work has already begun on such an Action Plan. At an international conference involving fifteen regional States that took place in Tokyo in March 2000, the IMO and a number of ship-owners and their associations issued the *Tokyo Declaration* and a *Model Action Plan* which closely follows the IMO *Recommendations*.[67] These relate primarily to reporting structures and the development of effective

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[64] This was proposed by the Harvard Research in International Law Group. *See* Dubner, n. 1, at 78-80 for an evaluation of their draft articles.

[65] Poulantzas, n. 63, at 187.

[66] MSC/Circ.622/Rev.1, 16 June 1999.

[67] *International Conference of the Maritime Related Concerns both Governmental and Private on Combating Piracy and Armed Robbery against Ships*, March 28-March 30, 2000, Tokyo (the *Tokyo Appeal*). Copy on file with author.

communications between the various law enforcement agencies of regional States. The conference *communiqué* noted, however, that anti-piracy activities "including potential cooperation can only be done subject to relevant international treaties, each Participating Administration's domestic legislation as well as its availability of adequate resources to sustain these activities".[68]

Of particular significance in the development of cooperative instruments on a global scale is the IMO's *Draft Regional Agreement on Cooperation in Preventing and Suppressing Acts of Piracy and Armed Robbery against Ships.*[69] The *Draft Regional Agreement*, which appears to be based on similar agreements to combat trafficking in drugs, provides under article 3 that law enforcement liaison officers of a State Party may, in appropriate circumstances:

1. embark on the law enforcement vessels of other Parties;
2. authorize the pursuit by the law enforcement vessels on which they are embarked, of suspect vessels fleeing into the territorial waters of the liaison officer's Party;
3. authorize the law enforcement vessels on which they are embarked to conduct patrols to suppress acts of armed robbery against ships in the liaison officer's Party's national waters; and
4. enforce the laws of the Parties in national waters, or seaward therefrom in the exercise of the right of hot pursuit or otherwise in accordance with international law.

While the conclusion of such agreements would undoubtedly have far-reaching effects in reciprocal enforcement of the law and the consequent suppression of piracy, for the reasons identified earlier, it is unlikely that the ILO *Draft Regional Agreement* will find widespread favour in the South East Asia quite simply because there is a considerable degree of distrust concerning the operation of foreign military vessels in the territorial seas of neighbouring States. All regional States require prior notification by warships if they wish to exercise passage through their territorial waters, so the possibility of them allowing the use of force against pirate ships by foreign military vessels seems somewhat remote. In order to overcome this distrust, the adoption of confidence-building measures is necessary. There has been some evidence of such measures being developed on a bilateral basis. In 1992 Singapore and Indonesia agreed to establish direct communications between their navies and agreed to coordinate anti-piracy patrols,[70] as well as provisions for

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[68] Regional Conference on Combating Piracy and Armed Robbery against Ships, Asia Anti-Piracy Challenges 2000, Heads of Coast Guard Agencies of Brunei, Cambodia, China, Hong Kong, Taiwan, India, Indonesia, Japan, Laos, Malaysia, Myanmar, Philippines, Republic of Korea, Singapore, Thailand, and Vietnam, 27 to 29 April 2000, Tokyo, <http://www.japan-emb.org.in/PressReleases/Embassy_Of_Japan/press-embassy11.htm>

[69] See MSC/Circ.622/Rev.1, 16 June 1999, *Piracy and Armed Robbery Against Ships*, Appendix 5.

[70] Referred to as Indo-Sin Co-ordinated Patrols (ISCP).

coordinating the pursuit of pirates who fled from the waters of one State to the other. With prior authorisation the public vessels of one State might pursue pirate vessels into the territorial waters of the other.[71] Malaysia and Indonesia also in December 1992 used their Joint Border Committee for establishing a mechanism to coordinate maritime cooperation in the Straits of Malacca. The mechanism created led to coordinated patrols in the Malacca Straits. The result of this, together with unilateral measures against piracy by Singapore, Indonesia, and Malaysia, led to a noticeable decrease in piracy in the Malacca Straits throughout the period 1993 to 1999. Other regional cooperation on a bilateral basis has also been evident in recent years. In October 2000, for example, Vietnam and Cambodia conducted joint anti-drug smuggling and anti-piracy patrols in each other's national waters, and in March 2001 the Japanese Coast Guard and the Singaporean Navy engaged in joint anti-piracy exercises in the area of the Malacca Straits and Singapore Straits. The Japanese Coast Guard has also engaged in joint anti-piracy exercises with the Indian Navy in the Indian Ocean,[72] and has offered to train regional personnel in anti-piracy measures at its Coast Guard College. More recently, the Philippine and Malaysian navies have agreed to cooperate more closely in sharing information to combat the piracy, robbery and kidnappings that have been occurring within their proximate territories.[73] Despite these various bilateral measures, a meeting of the IMO in Singapore in March identified a need for States of the South East Asian region to operate in a more coordinated way if piracy were to be defeated. The IMO was therefore mandated to convene a meeting at some future date to consider establishing a regional agreement on cooperation against piracy and armed robbery against ships.[74]

In addition to the various developments that have been occurring at the inter-governmental level, there has also been some progress made in regional Track One and Two bodies. Track One bodies consist of governmental representatives at a variety of levels and are concerned with matters of security cooperation. Track Two bodies, on the other hand, are non-governmental groups designed to exchange views among academics, NGOs and concerned citizens. In the field of piracy, the Track One and Two bodies of

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[71] Beckman states that it has been reported that operations conducted by the Indonesian Navy in 1992 under this agreement resulted in the capture of 38 sea robbers operating along the Singapore Strait and Phillips Channel. Beckman, Robert, "Issues of Public International Law relating to Piracy and Armed Robbery Against Ships in the Malacca and Singapore Straits", <http://www.sils.org/seminar/1999-piracy-03.htm>.

[72] Weeks, Dr. Stanley B., "Sea Lines of Communication (SLOC) Security and Access", Policy Paper 33, University of California Institute on Global Conflict and Cooperation; "Japanese Coast Guard Vessel to Visit India to Conduct Joint Exercise with Indian Coast Guard at Chennai", <http://www.japan-emb.org.in/PressReleases/Embassy_Of_Japan/press-embassy34.htm>; Mark Valencia, n. 15; Chanda, n. 15.

[73] "Navies agree to anti-crime move", *The Star*, Wednesday, 8 August 2001.

[74] IMO, "Governments seek IMO help in fight against piracy", *IMO Newsroom*, 30 March 2001; "Singapore Hosts Meeting to Combat Regional Sea Crime", *Inside China Today*, 14 March 2001.

relevance are, respectively, the Western Pacific Naval Symposium (WPNS)[75] and the Maritime Cooperation Working Group (MCWG) of the Council for Security and Cooperation in Asia Pacific (CSCAP).[76] At the Seventh WPNS in Auckland, New Zealand in 2000, Admiral Soo-yong Lee, Director of Naval Operations of the Republic of Korea Navy suggested a number of measures which might be used in the fight against piracy.[77] Among these were the need for increased cooperation at a bilateral and multilateral level among States of the region; the need to increase joint anti-piracy patrol operations; the need to develop agreements to allow States to engage in hot pursuit of pirate vessels into each others waters and better coordination of on shore piracy measures.[78] In the Track Two MCWG of CSCAP the issue of co-operation for law and order at sea has been on the agenda for some time. It is the function of CSCAP to develop memoranda for presentation to the ASEAN Regional Forum (ARF), which then considers what action to take on the basis of any given memorandum. *CSCAP Memorandum No 4* which is entitled "Guidelines for Regional Maritime Cooperation"[79] provides as follows:

> 16. Parties recognize the importance of cooperation in the maintenance and enforcement of law and order at sea, including the prevention of piracy, drug smuggling and other crimes at sea, acknowledging the rights of states to enforce their domestic laws at sea to the extent permitted by international law.
> 17. Parties are encouraged to institute regular meeting to enhance cooperation in their maritime enforcement activities.

At following meetings, the MCWG elaborated *CSCAP Memorandum No 5* which is entitled "Cooperation for Law and Order at Sea". In the case of piracy, it suggested that a regional anti-piracy agreement might be considered for the region, but that as a prelude to this, some audit of national piracy laws might be undertaken to determine the compatibility of their scope and content and the possibility of their harmonization. It was also suggested that States could consider a redefinition of piracy. While these initiatives are conceivably

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[75] The Western Pacific Naval Symposium (WPNS) was established in 1988. It is a series of staff-level workshops and biennial meetings of the Chiefs of Naval Service (CNS) of 17 member and three observer countries with naval involvement in the Pacific. The WPNS CNS meetings are held on even-numbered years to complement the International Seapower Symposiums that are held on odd-numbered years. The WPNS seeks to increase transparency, promote confidence, reduce tension and enhance co-operation among the navies of member and observer countries.

[76] CSCAP is composed of representatives from 17 member countries and seeks to promote regional security through conferences among primarily academic strategic studies experts covering Maritime Cooperation, North Pacific Security, Comprehensive and Cooperative Security, Confidence and Security Building Mechanisms, and Transnational Crime.

[77] http://www.navy.mil.nz/rnzn/sub_page.cfm?Article_ID=629&Sequence_ID=69

[78] *Ibid.*

[79] On file with the author.

of longer-term importance, the need for immediate cooperation and measures to stem piratical activity is nevertheless apparent to regional States. At an Extraordinary General Meeting of ARF in Kuala Lumpur on 16 April 2001, four concrete measures for combating piracy were proposed. These were the need to establish operational contact points among ARF enforcement agencies; sharing and circulating information and experiences on the best practices to combat piracy among ARF countries; maintaining close cooperation including making consistent piracy reports to the IMO and IMB and the need to provide better training and exposure for coast guard or equivalent authorities. Some members of ARF also took the view that the participating States that had not yet ratified SUA should be encouraged to do so as soon as possible. This position reflects that adopted in the 1998 *Oceans and the Law of the Sea Report* of the United Nations Secretary-General[80] in which it was stated that SUA "provides another more useful vehicle for prosecution than the nineteenth century piracy statutes".[81]

In addition to these various multilateral measures, there have been certain unilateral actions and private initiatives designed to combat piracy. Indonesia, for example, has created a piracy reporting centre on Batam Island at the cost of some US$ million. It has been reported that the reporting centre is under-used at present, but with increased awareness of its existence and role, it has the capacity to contribute greatly towards the control of piracy in the Indonesian archipelago. This initiative has been supplemented by the development of a coordinating agency for maritime security that operates under the aegis of the Indonesian Minister for Security and Political Affairs. This body controls approximately 120-135 vessels drawn from the navy, coastguard, immigration, customs and police.[82]

As far as private initiatives are concerned, some mention must be made of the role of the IMB in helping to combat piracy. Following the increase in piratical activity in the 1990s the IMB decided in 1992 to establish a Piracy Reporting Centre. The functions of the Centre are to receive reports of suspicious or unexplained vessel movements, boarding and armed robbery from ships, and to alert other ships and law enforcement agencies in the area; to issue status reports of piracy and armed robbery by daily broadcasts on Inmarsat-C via its SafetyNET service to collate and analyse information received, and to issue consolidated reports to relevant bodies, including the IMO; to assist the owners and crews of ships that have been attacked, and to locate vessels that have been seized by pirates and recover stolen cargoes.

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[80] *Oceans and the Law of the Sea, Report of the Secretary-General 1998*, A/53/456, para 151.

[81] *Ibid. See* also General Assembly Resolution 54/31 of 18 January 2000 in which the General Assembly urged (at para. 23) States to become parties to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Protocol, and to ensure its effective implementation.

[82] Information provided at the Tenth Meeting of the MCWG of CSCAP, Kuala Lumpur, Malaysia, June 2001.

The Centre also provides an important twenty-four hour piracy reporting service throughout the year. This enables the Centre to monitor the extent of piratical activity, to warn shippers of such activity and to collaborate closely with regional law enforcement bodies.[83] The Centre also produces weekly piracy reports on the Internet that allow ship-owners and masters to identify current piracy hot-spots.

## 9. CONCLUSION

There is little doubt that the level and extent of piracy and armed robbery against ships is a major problem to the safety of shipping and the security of SLOC in the wider Asian region. Since most of the incidents of 'piracy' and armed robbery take place in maritime zones lying within the sovereignty and exclusive jurisdiction of many States in the region, the definition of piracy in article 101 UNCLOS is in most respects inadequate to meet with many of the acts of violence, detention and depredation which occur within these areas. Furthermore, given the jurisdictional impediments to effective pursuit of pirates and the lack of confidence and trust among regional States which would enable them to deal effectively with pirates, it seems clear that the development of confidence-building measures based upon forms of bilateral and multilateral cooperation represent the most desirable way of attacking the problem. Such bilateral and multilateral cooperation can take both practical and legal forms. An immediate step that would be relatively cost-free to States in the region would be to secure the ratification of SUA. By this single expedient, fugitive pirates and other sea-robbers would be subjected to a coordinated system of prosecution, rendition and punishment. Further legal measures might be the creation of regional piracy agreement or securing the redefinition of piracy at international law to ensure that the appropriate jurisdictional grounds existed for its repression. At a practical level, better communications between the law enforcement agencies of regional States, together with the pooling and joint deployment of sea-borne policing resources, might produce not only the better coordination of activities, but also desirable economies of scale. Of all the flag States, only Japan seems to be interested in contributing to policing SLOC and training within the region, such participation by Japan is still the subject of considerable sensitivity. The significance of unilateral efforts by States, such as Indonesia's establishment of a piracy reporting centre, should also be applauded, but it will take time before such initiatives will begin to bear fruit. Furthermore, the useful role played by private entities such as the Piracy Reporting Centre of the IMB should be given full credit. The existence of a 'clearing house' for information on piratical activities and, most especially, the management

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[83] The URL for the IMB website is www.iccwbo.org/ccs/imb_piracy

of an 'early warning system' is of considerable significance in helping vessels to avoid piracy 'hot spots'.

As have most criminal activities, piracy has probably been with the international community almost since the beginning of time. Where economic incentives exist, individuals will always be willing to take the risk of piracy. It should be the function of the international community to make this risk less attractive. While practical measures such as a stronger naval presence in the region and joint anti-piracy patrols will constitute one of the most obvious and direct methods of dealing with the problem of piracy, there is also a need for States to provide an appropriate legal framework in order to ensure that when pirates are apprehended, they cannot hide behind jurisdictional barriers.

# AN INDIAN PERSPECTIVE ON THE EVOLUTION OF INTERNATIONAL LAW ON THE THRESHOLD OF THE THIRD MILLENNIUM

V.S. Mani*

> "It is perhaps imagined by some people that international law took shape under Grotius or some other scholars in the West, and that there was no such thing in the countries of Asia or elsewhere. That, of course, cannot be correct, because if there is any kind of civilised order there must be some kind of international law and ideas in regard of the relationships of States."
>
> *Jawaharlal Nehru*[1]

## INTRODUCTION

An attempt is made here to portray an overview of some of the aspects of international law as it evolved, and as it was understood in India through the centuries. The selection of materials for research has necessarily been eclectic. Any endeavour of this kind is beset with difficulties. First, delving into a more than five-thousand-year-old civilisation is itself a daunting task. Second, the record of history of the ancient period has, by and large, been an eclectic reconstruction based on archaeological findings as and when they come to light and on the later literary and religious works. Indeed, this is largely true of the Middle Ages as well, when some travelogues and records of foreign pilgrims, travellers or ambassadors had started appearing. Even these writings of foreigners might have revealed flaws in conceptual or cultural misunderstanding. Third, most European, predominantly English, works on Indian history, particularly of the colonial period, have not exactly been unbiased.

For the convenience of discussion, the historical survey of India's perspectives on international law is divided into four periods, namely (1) the

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[1] Address on the occasion of the inauguration of the Indian Society of International Law, New Delhi on 29 August 1959, reprinted in 1 IJIL (1960-61) 5-9, 6.

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ancient period (up to 711 AD), (2) the middle ages (711 to 1600), (3) the colonial period (1600 to 1947), and (4) the modern period (since 1947).[2]

## 1. ANCIENT INDIA[3]

The ancient India generally encompasses the early Vedic period (starting from 3000 BC) and the early empires (the Mauryas, the Guptas, the Kushans, the Pushyabhutis, the Pratiharas, the Palas, the Seras, the Chalukyas, the Rashtrakutas, the Pallavas, the Cholas, etc.). The Mohanjodaro and the Harappan excavations of the 1920s revealed the existence of a civilisation dependent on river basins. The advent of the Aryans from Central Asia, obviously a slow migration of a people spread over a few centuries, gave way to the establishment of their pastoral tribal settlements, perhaps into self-sufficient villages. The four-fold division of labour in these village communities led to its transformation into the caste system, which over time petrified into a rigid system, synonymous with social stratification symbolised by levels of deprivation of human rights, worst hit being the lowest caste, the *Sudras*. This degeneration took place perhaps towards the end of the ancient period.[4]

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[2] From a strictly historical point of view, the colonial period is included in the "modern period", but to many countries in Asia and Africa, colonialism was an historical anachronism, and it could not, therefore, be rightly considered part of the "modern" period. The above classification of historical periods is by and large based on R.C. Majumdar, A.C. Raychaudhuri and Kalikinkar Datta, *An Advanced History of India* (London, Macmillan, 1963) – except for separation of the colonial period from the "modern period".

[3] *See* generally, Nagendra Singh, *India and International Law* (New Delhi, 1969), H. Chatterjee, *International Law and Inter-State Relations in Ancient India Calcutta,* 1958), M.K. Nawaz, "The Law of Nations in Ancient India", VI *Indian Yearbook of International Affairs* (1957), 172-188. C.J. Chacko, International Law in India**:** Ancient India", 1 IJIL (1960-61) 194-192, 589-598.

[4] It is needless to say that this degeneration took place mainly because the people who formed the upper castes, once in position of power and influence, made sure that that position is perpetuated. In fact Lord Krishna said to Arjuna in the battlefield in the *Mahabharata* Epic while enunciating his celebrated *Gita* (which is itself a Holy Book for the Hindus) as follows in chapter IV, stanza 13: "*Charturvarnyam mayaa srshtham gunakarmavibhagashah."* It means: "The four-fold classification of society that I have established is based on the functions and avocations undertaken by each class of people." As S. Radhakrishnan points out in his commentaries on *The Bhagavadgita* (New Delhi, India: Blackie & Son, 2nd edn., 6th Indian Reprint, 1977) 160, "The emphasis is on guna (aptitude) and karma (function) and not Jati (birth). The varna or the order to which we belong is independent of sex, birth or breeding. A class determined by temperament and vocation is not a caste determined by birth and heredity. Evidently, the Lord never meant the original allocation of work He made when He created the human society to be perpetuated in terms of social and economic stratification or any monopoly over enjoyment of privileges or power merely by virtue of a biological accident, namely birth into a particular functional caste. Hence the clarification elsewhere*: "Janmanaa jaayate Sudra, Karmanaa jayate Dwija,"* i.e., "Every man is born as *Sudra*, and by his efforts/work/choice of avocation he becomes a Brahmin." What happened subsequently

The ancient Indian polity, as it slowly stabilised with a territorial base, threw up, and perhaps came to recognise, a range of international law concepts, principles and rules, as these evolved through the centuries. They encompassed principally those relating to the concept of statehood, diplomatic relations, treaties, religious tolerance, non-use of force, humanitarian law of armed conflict, neutrality, and the Indian brand of imperialism.

## 1.1. The state

Historically, it is very difficult to date the origin of state system in ancient India. There must have been some sense of a concept of state as an autonomous political institution even before the various nomadic, cattle-grazing tribes moved about the river basins. The tribal chiefs must have exercised some of the elements of sovereignty *(Prabhutwata)*, as we know it today. A group of tribes might have elected or accepted a head chief who later came to be called as the *Rajan* (the king), as has been the case with many ancient societies. Slowly, however, when the tribes discovered agriculture, they must have decided to abandon the nomadic life and they thus settled down along the river basins. This surely gave a territorial foundation as the physical basis for the then evolving polity for exercise of elements of sovereign authority, both to correspond to its responsibility to protect the lives and property of its member communities and to ensure peace and order to enable them to pursue vocations of their choice.[5]

The state *(rashtra)* in the Vedic period was probably a collection of villages, ruled by a king (*rajan*) who was "without a rival, and a destroyer of rivals".[6] The kingship was usually hereditary, but there were also some

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in the evolution of the Indian society was the institutionalisation of a serious violation of the Lord's dictates, by those who happened to climb the social ladder before others and occupy positions of power and influence, as they ensured the preservation and perpetuation of hereditary enjoyment of the social and economic benefits of what was originally a 'division of labour' unto their own descendants, by effectively preventing social and functional mobility for the subsequent generations. The later interpretations (*Srutis* and *Smrtis*) of the Hindu religious scriptures by the upper castes became self-serving and self-perpetuating, bequeathing to the contemporary Indian society the now deep-rooted socio-economic burden of the caste system. This tendency of social exploitation of the 'lowly born' by the people of higher strata also finds place within each caste as well, a fact which is generally ignored, quite wrongly of course. Thus there are sub-castes within the same caste (even among the so-called *Sudras*) with gradations of social hierarchy, leading to further stratification, and hence exploitation of large sections of society by smaller ones. Radhakrishnan suggests 200 BC as the approximate date of the poetic rendering of the *Gita*. *See* his above work, at 14.

[5] On eventual emergence of territorial states, *see* generally, Manumdar *et al, op. cit*., n. 2, 53-55; Jawaharlal Nehru, *Glimpses of World History* (New Delhi: Oxford UP, 15th Impression, 1999) 23-26 on "The Village Republics of Ancient India"

[6] Majumdar *et al*, *op. cit*., n. 2 at 9.

elective monarchies.[7] There are references to the election of kings in the fourth Veda, i.e., the *Atharva* Veda, and in the *Mahabharata*, one of the two Great Epics. At any rate, even where the kingship was not elective, the scriptures emphasised the need for legitimising sovereignty with the people's approval.

The concepts of state, sovereignty, and even kingships, as they subsequently matured on the Subcontinent, were not as simplistic as they have been in Europe or in the Western literature. Functionally, there could be different tiers of statehood, sovereignty or kinship. The *Chakravartin* or the universal emperor was at once a monarch over a territorial state and a paramount ruler or an overlord over many other states/kingdoms whose rulers might owe allegiance to him. Indeed some of these rulers might themselves be emperors over other monarchies. These relationships could not be pigeonholed into that of the overlord and the vassals of the feudal era of Europe. The kings in ancient India were sovereigns in their own right. The paramount ruler had both the right of allegiance of his subordinate kings and the responsibility for their protection. If he could not fulfil his responsibility, he could not command or demand allegiance either. A king was free to switch allegiance to another paramount ruler, if he were powerful enough to do so, unless he himself became one.[8]

To Kautilya, the architect of the first strong Indian 'territorial' empire, sovereignty was what sovereignty did. Thus, he conceived it as a composite of factors. "The king, the minister, the country, the fort, the treasury, the army and the friend, and the enemy are the elements of sovereignty".[9] He evidently recognised sovereignty to be the authority of the state both internally and externally. It was the sum total of the ever-changing factors of power, the organisation of government, wealth and other factors of stability of the country, the external support it could ensure and its ability to keep its enemy weak. Except the enemy, the other seven elements, if "possessed of their

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[7] According to Kautilya, people suffering from anarchy at the dawn of human life on earth elected Vaivasvata Manu ('manus' were supreme kings in Hindu mythology appointed by Brahma, the Creator, in the beginning of life after each cycle of total destruction of all life in the universe through downpour of rains and floods, the *Pralaya.* Each such cycle of creation, growth and destruction of all life is believed to be coterminous with the life of one manu, and is called a 'manuantara') to be their first king and allotted 1/6 of the grain and 1/10 of the merchandise as "sovereign dues". The safety and security of subjects became his responsibility. Samasastry (trans.), *Kautilya's Artha Sastra* (5th ed., Mysore, 1956) 22-23. Kautilya was also known as Chanakya.

[8] One of the ways in which a king asserted his paramountcy was through an elaborate religious sacrifice called the *Aswamedhayagna*, at the conclusion of which a specially sanctified horse under the protection of troops was allowed to wander through territories whose kings had the choice of either accepting the paramountcy of the owner of the horse, or challenging his might by blocking or capturing the horse. The *Aswamedha* sacrifice is depicted in both the classical Sanskrit epics, the *Mahabharata* and the *Ramayana.*

[9] Samasastry, *op. cit.*, n. 5 at 287.

excellent characteristics are said to be the limb-like elements of sovereignty".[10] The king, "being possessed of good character and best-fitted elements of sovereignty" is the conqueror or the *Chakravartin*, i.e., the supreme king commanding the 'wheel or circle' of power residing at its centre.[11]

The ideal of a welfare state was prescribed for the kings to pursue. The *Ramarajyam* (Rama's rule) as described in the Epic *Ramayana* was that of heaven on earth.[12]

Rudiments of democracy can be traced to ancient India. There is historical evidence to show that there existed republics with elective governments on the subcontinent. Even under strong central dictatorships, the local government in towns and villages was largely democratic, self-sufficient and self-contained, excepting the obligation to pay the sovereign dues. Jawaharlal Nehru, for instance, underscores this phenomenon of ancient India. "This local autonomy was greatly prized and hardly any king or supreme ruler interfered with it".[13]

## 1.2. Diplomatic relations

The kingdoms in India had established substantial trade relations with China, Arabia, Egypt, Greece, Rome, and East Africa. There are references in ancient texts to the import of horses and slaves from Arabia and silk from China, and the export of Indian muslin and indigo to Egypt. The institution of ambassadors (*dutas)* was regarded as sacrosanct. In the *Ramayana*, the Monkey God, Hanumaan was sent by Rama as his *duta* to Raavana's court. The Epic narrates the various violations of diplomatic conduct by Raavana in mistreating Hanumaan. Similarly, Krishna himself went as the *duta* of the *Pandavas* to the court of the *Kauravas* in the *Mahabharata.*

It may also be noted that there was a deep understanding of the conduct of foreign relations. Indeed, it reflected a projection of inter-individual relations. Before launching an attack on the fortress of Raavana, Hanumaan considered the employment of four *upaayas* (means or strategies) of foreign policy – *saama* (negotiations), *daana* (gifts), *bheda* (discrimination; divide

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[10] *Ibid*. 289.

[11] *Ibid.* 290. For Kautilya's famous power-political theory of Circle of States or Kings, *see*, *ibid.* 290-292.

[12] Kautilya postulated that "Of the king, the religious vow is his readiness for action; satisfactory discharge of duties in his performance of sacrifice; equal attention to all is the offer of fees and ablution towards conservation.

"In the happiness of his subjects lies his happiness; in their welfare his welfare; whatever pleases himself he shall not consider as good, but whatever pleases his subjects he shall consider as good". *Ibid.* 38.

[13] Jawaharlal Nehru, *The Discovery of India* (Calcutta: Signet Press, 5th reprint.1948) 4.

and rule) and *danda* (use of force). Hanumaan dismissed negotiations because one could not negotiate the return of Sita (as for the return of Sita, Raavana must), one could not negotiate with *asuras* (the demon race: the unrighteous). He dismissed *daana,* because Raavana could not be bribed with anything that he did not have (as he had already acquired all conceivable material wealth); *bheda* could not be applied because Raavana was too powerful and the *asuras* were united under him. What was left then was *danda,* which could be applied in retaliation to the grave and inexcusable wrong Raavana had wantonly inflicted on Raama.[14]

It was the normal practice for states to send special missions (*ad hoc* embassies) to each other's capital cities. To denote a special relationship resident ambassadors were also sent. Megasthenes was the Greek ambassador to the Court of Pataliputra. His journals, cumulatively called the *Indica*, have helped us immensely in reconstructing the Indian history of his time. Ptolemy came as the Egyptian ambassador. Antiochus, son and successor of Selucus Nikator, the Greek Satrap of Persia, was married to Chandragupta Maurya, and also served as an ambassador at Pataliputra. In about 26 BC the King of Pandya of southern India sent a trade mission to Augustus Caesar, and later seven more missions were sent. In about 100 AD the Roman Emperor Trajan received an Indian embassy. In around 360 AD Sri Lanka sent an embassy to the Court of Samudra Gupta. There is a record of King Harsha's embassy to China of 641 AD.[15] Chalukyas, too, exchanged ambassadors with Sassaniol rulers of Persia. After his conversion to Buddhism, Emperor Asoka sent embassies with a religious mission to Syria, Egypt, Macedonia, Cyrene, Epirus, Burma, and Siam. He sent his son and daughter to Sri Lanka with the same mission.[16]

Kautilya would demand of the ambassadors a high standard of work. He prescribes identical qualifications for appointment of ministers and ambassadors. They should have practical experience, considerable wisdom, purity of purpose, bravery, and loyalty.[17]

## 1.3. Treaties

Treaties played an important role in keeping the peace of nations in ancient India. According to Kautilya, a treaty (*sandhi*) of peace, "dependent upon honesty or oath, is immutable both in this and the next world".[18] Emphasising the need to preserve mutuality of benefits as the basis for

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[14] R. Bhaskaran, "The Four Upayas of Hindu Diplomacy", III *Indian Yearbook of International Affairs* (1954) 126-130.

[15] *See* generally, Majumdar *et al*, *op. cit*., n. 2.

[16] Nehru, *op. cit*., n. 13 at 102.

[17] Samasastri, *op. cit*., n. 7 at 13, 29.

[18] *Ibid.* 341.

preservation of peace, Kautilya says, "when the profit accruing to kings under an agreement, whether they be of equal, inferior or superior power, is equal to all, that agreement is termed peace (*sandhi*); when unequal, it is termed defeat (*vikrana*). Such is the nature of peace and war".[19] Evidently, Kautilya highlights here the distinction between equal and unequal treaties and also the conflict potential of the latter.

The binding character of a treaty depended upon the nature of the treaty and the security of its performance. It was certain that a breach of a treaty would lead to conflict and a weaker king could ill afford it in his dealings with a stronger king. "It is for this material world only", says Kautilya, "that a security or a hostage is required for strengthening the agreement".[20] If simple swearing by God or by fire, for example, were unacceptable as a security for performance of a treaty, there could be an insistence upon the provision of wealth, land or hostages (such as the sons of the weaker king).

## 1.4. Religious tolerance

While Europe had to wait until 1648 to achieve even a modicum of recognition of the mutual respect for different religions (that too confined to just two schools of Christianity), there were more ancient examples in India of religious tolerance. Even at the height of rivalry between different sects of Hinduism, and between Hinduism and Buddhism, Asoka the Great (273-232 BC), who became a staunch Buddhist after the Kalinga war, proclaimed in one of his edicts thus: "All sects deserve respect for one reason or another. But thus acting a man exalts his own sect and at the same time does service to the sects of other people".[21] This high moral principle appears to have held sway in India to this day, despite a number of historical, and even contemporary, aberrations.

## 1.5. Law relating to foreign trade and shipping

Since there was considerable foreign trade – a reference to trade missions abroad has already been made above – there is also some evidence of rules relating to foreign trade and shipping. Kautilya suggested the creation of the posts of 19 superintendents for the Maurya Empire. Of these the Superintendents for Commerce, Ships and Passports were noteworthy. The Superintendent of Commerce must show favour to those who imported foreign merchandise. They and the mariners should be taxed less than otherswere. Foreigners importing merchandise enjoyed immunity from being sued for

[19] *Ibid.* 318.
[20] *Ibid.* 341.
[21] Quoted in Nehru, *op. cit.*, n. 13 at 102.

debts unless they were associated with local partners. The Superintendent of Commerce must keep himself informed of the value of the foreign merchandise in terms of local merchandise.[22]

The Superintendent of Ships was to examine accounts relating to the navigation of ships on oceans, river mouths and inland waters. A fixed tax was to be levied on villages on the seashore. A tax of one-sixth of their catch was to be levied on fishermen. Ports would levy their own customary tolls on merchandise (customs). A sailing fee (*vatravetanam*) was to be levied on passengers on board the king's vessels. The king's boats could be hired for fishing. Vessels carrying merchandise spoiled by water were to be taxed less than others or exempted from tax altogether. Ships *en route* to a port were required to pay a toll. Pirate ships and ships that violated the rules of customs and other rules of the port towns could be destroyed. Foreign merchants who were frequent visitors to the country should be favourably treated. Smugglers, criminals and other suspicious characters (including those concealing weapons and explosives) were to be arrested.[23]

The Superintendent of Passports had the power to issue passes on payment of a fee. A pass was necessary to enter the country as well as to leave it. Foreigners violating the pass rules were to be more severely punished than the locals.[24]

### 1.6. Non-use of force

At a time when use of force was the order of the day as the territorial states had just begun to emerge, the later part of the ancient period threw up a great king whose might not only won him many a war, but also taught him the futility of bloody victories and the value of non-violence. Emperor Asoka (273-232 BC) of the Maurya Dynasty, after winning a hard-fought Kalinga war in which 150,000 were held captive, 100,000 slain, and many times that number died otherwise, was "stricken with remorse and disgusted with war".[25] He then renounced war as an instrument of national policy.

### 1.7. Humanitarian law

Given the nature of weapons used in ancient times, and the need to protect a primarily pastoral population, it was not surprising that the ancient kings evolved certain laws and customs of warfare more civilised and humane than

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[22] Samasastry, *op. cit.*, n. 7 at 104-6.

[23] *Ibid.* 139-142.

[24] *Ibid.* 157-158.

[25] As Jawaharlal Nehru observes, "Unique among the victorious monarchs and captains in history, he decided to abandon warfare in the full tide of victory." *See* Nehru, *op. cit.*, n. 13 at 101.

those of the present day. For instance, there were agreements between belligerent parties and heads of self-governing village communities whereby the former undertook not to cause damage to the harvests in any way, but to give compensation for any damage caused to the land even unintentionally.[26]

Indeed, except for Kautilya's prescriptions, most other early publicists recorded a general theoretical agreement on a ban of illegitimate methods of warfare – "a war for righteous cause must be righteously conducted". The use of poisoned arrows, concealed weapons, the killing of refugees or persons who were asleep, or destruction of fine buildings, schools, temples and monasteries were all forbidden.[27] There are copious references to these humanitarian laws in both the Great Epics, as also in the Vedic literature.

In speaking of the operation of a siege, Kautilya's utilitarian advice was that "(t)he territory that has been conquered should be kept so peacefully that people might sleep without any fear". The conqueror should use force only if he were resisted in his peaceful attempt.[28] Again while speaking on restoration of peace in a conquered country, Kautilya's view was that the conqueror should make every effort to please the people of the conquered territory. "He should follow the friends and leaders of the people".[29] All prisoners should be released and the conqueror should "afford help to the miserable, helpless and diseased persons".[30]

## 1.8. Neutrality

Taking to task some of the classical Western writers such as Oppenheim and Lawrence,[31] K.R.R. Sastry argues that "(t)hough in Europe the doctrine of neutrality had not been developed until after the eighteenth century, there is evidence that, at least in Maurya times (i.e., in the fourth century BC) a *sui generis* conception of neutrality was well known in India."[32]

In Kautilya's Circle of States (*Mandala*), presided over by the Invader or *Chakravartin (Vijugishu)*, the Invader was surrounded by eleven kinds of kings: – the Enemy (the neighbouring king), after him the Invader's ally, then the Enemy's ally, then the Invader's ally, next the Enemy's ally, then the Rearward Enemy, after him the Invader's rear friend, then the Rearward

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[26] *Ibid.* 108.
[27] *Id.*
[28] *Ibid.* 433.
[29] *Ibid.* 437.
[30] *Ibid.* 438.
[31] On neutrality, *see* generally K.R.R. Sastry, "A Note on Udasina – Neutrality in Ancient India", III *Indian Yearbook of International Affairs* (1954) 131-134. He starts his presentation by noting Oppenheim's view (6th ed., vol. II, at 488) that the nations of antiquity could not have been conversant with "neutrality as a legal institution", and Lawrence's assertion (7th edn. at 58) that these nations did not even have appropriate appellations equivalent to modern neutrality.
[32] *Ibid.* 131.

Enemy's ally, then the ally of the rearward ally, and not included in his Invader-Enemy relationship were a *Madhyama* (Mediatory) king and a *Udaasina* (Neutral) king.[33]

The *Madhyama* king, who would support neither the Invader nor his Enemy, would play a mediatory role between them, if called upon, thereby seeking more power for himself. On the other hand, the *Udaasina* king would observe strict neutrality in the power struggle between the Invader and his Enemy. In other words, neutrality was an attitude of a state in relation to the Invader and his Enemy. It corresponded to the competitive power relationship between the Invader and the Enemy; furthermore, neutrality could change with any change in the latter relationship. Indeed, for a king to adopt the *udaasina* attitude, active hostilities between the Invader and the Enemy were not a condition precedent. The king would have nothing to do with the conflictual relationship between the Invader and his Enemy regardless of whether this relationship deteriorated into active hostilities. Quite possibly the *udaasina* attitude must have been a forerunner of the concept of 'non-alignment' of the Cold War era.

To Kautilya, during war, *udaasina* (indifference) was of three types: *sthaana* (keeping quiet without taking any action), *asana* (withdrawal from hostilities), and *upekshana* (an attitude of neglect). These nuances of attitudes had to be decided by the neutral king evidently after a cost-benefit analysis in each situation.[34]

Kautilya recommends neutrality to a king in three circumstances: (i) when in his assessment the destructive strengths of himself and those of his enemy were generally equal; (ii) when it would give him time to augment his resources to grow stronger than his enemy; or (iii) when he found that either peace or war would not, despite his superior strength, benefit him more than it would his enemy.[35] Evidently, there was an element of transience in Kautilya's concept of neutrality, yet it had its own dynamism and independence.

## 1.9. Imperialism – Indian style

The spirit of maritime adventures in search of the mythical golden land *(Suvarnabhoomi)* in the Far East took Indians to most parts of South-East Asia. There were many trade missions from the eastern coasts of India to these parts. From the second century AD onwards we find references to kingdoms and kings in South-East Asia and Indo-China, bearing Indian names. These kingdoms seem to have flourished between the second and the fifth centuries AD in the Malay Peninsula, Cambodia, Annam, and in the islands

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[33] *Ibid.* 132-133; *see* also Samasastry, *op. cit.*, n.7 at 290-292.

[34] K.R.R. Sastry, *op. cit.*, n. 31 at 133.

[35] *Id.*

of Sumatra, Java, Bali and Borneo. Saivism (a sect of Hinduism) and Buddhism were prevalent in some of these countries.[36]

The rise of these kingdoms is often described as the expansion of Indian imperialism. Some of the Western writers often argue that if the later Western imperialism were justified as "the White man's burden," the early Asian imperialism was based on the theory of the "Brown man's burden", and that each description is as hypocritical as the other.

In reply to a similar view expressed by Chester Bowles, a former US Ambassador to India,[37] K.K. Pillay asserts that the ancient Indian imperialism in South East Asia and the Western imperialism since the 17th century in Asia and Africa were fundamentally different in a number of respects.[38] First, the European imperialists were temporary settlers, birds of passage, in the newly discovered lands. The early Indian colonialists set up their colonies and adopted them as their permanent home, despite the fact that there was no pressure of population back in India. Second, the Indian settlers, unlike the Europeans in their colonies, did not form an exclusive class of alien community in their colonies. They mingled freely with the local people and became assimilated over time. There was no community overlordship by the Indian colonialists over the 'natives.'

Third, the Indian colonialists did not follow any policy of exploitation of colonies dictated by the mother country. Commerce was the basic motivational factor. In fact, some of these so-called colonies rose in such a prominence, power and prosperity at a time when their former 'mother countries' on the subcontinent were in the process of disappearence.

Fourth, the influence of Hinduism and Buddhism in these colonies was more comprehensive and powerful than that of the European religions in Europe's colonies. These religions had an Oriental appeal. Kingdoms founded by these religions rose to great heights – the *Sailendra* (*Sri Vijaya*) Empire in Sumatra and Java, the Kingdom of *Kambojadesa* (Cambodia) and the thirteen dynasties of *Champa*. Most importantly, the establishment of these kingdoms was not followed by the imperial control of the mother country by the despatch of a Warren Hastings or a Wellesley figure; there were no popular uprisings similar to the "Sipoy Mutiny" (i.e., 'soldiers' mutiny', to the British) of 1857, no developments comparable to the Proclamations of Queen Victoria, and no contradictory British parliamentary enactments. The connection with the mother country was religious and cultural, not of political and economic exploitation. Indeed, India did not have a supreme emperor at that time!

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[36] *See* Majumdar, *op. cit.*, n.2 at 215. According to these authors, the history of these kingdoms is known partly from the Sanskrit inscriptions found in these countries and party from the accounts preserved by the Chinese.

[37] Bowles wrote an article in *New York Times Magazine*, 5 September 1954.

[38] K.K. Pillay, "Early Indian Imperialism in the Far East", III *Indian Yearbook of International Affairs* (1954) 114-125.

These empires in South East Asia left behind glorious monuments of history and marvels of art, incomparable to what little colonial buildings that the British left in India.

It is small wonder that many Indian historians hold an unapologetic view that "the colonial and cultural expansion of India is one of the most brilliant but forgotten episodes of Indian history, of which any Indian may justly feel proud".[39]

## 2. MEDIEVAL INDIA

This period broadly covers the Muslim conquests of India, the establishment of a number of Hindu and Muslim kingdoms, and the re-emergence of a central empire, such as the Mughal Empire's consolidation of the greater part of India, to provide the conceptual continuum of Kautilya's *Chadravartin*. Yet the medieval India seemed to push Indian civilisation on the edge of a precipice, towards the end of that period. Some of the features of the ancient continuum were the principle of religious tolerance, the concept of a welfare state, the secularisation of the state, and humanitarian laws of armed conflict.

### 2.1. Religious tolerance

The clash of the two great religions, namely Hinduism and Islam, produced at once not only a doctrinal rivalry between the two, but at the same time an attempt to tolerate, if not assimilate aspects of each other – a phenomenon repeated now after the rise of Buddhism and Jainism as a challenge to Hinduism towards the end of the ancient period.

Despite the devastation of the Somnath Temple by Mehmud of Ghazni in 1025 AD, the feelings of hostility roused by the Turkish aggression wore off over time and King Arjuna of Gujarat had the broadmindedness to endow a mosque erected by the Muslim shop owners of Ormuz and provide it with funds for the conduct of certain Shi'ite festivals. Any surplus of this endowment was to be made over to Mecca and Medina.[40]

The Turko-Afghan rulers came and established themselves in India, generally aware of the need to live in peace with the vast Hindu majority of the people. "Through long association, the growth of the numbers of concerted Indo-Muslim community and influence of several liberal movements in India, the Hindu and Muslim communities came to imbibe each other's thoughts and customs, and beneath the ruffed surface of storm or stress, there

[39] Majumdar *et al*, *op. cit.*, n.2 at 223.
[40] *Ibid.* 185

flowed a genial current of mutual harmony and toleration in different spheres of life."[41]

Many Muslim rulers had Hindu ministers and advisers. Even Vijayanagara Emperors employed Muslims in their military service. The traditional system of administration of districts and villages continued, regardless of who the ruler was.

Hindu-Muslim assimilation had already become a fact of life before the rise of the Mughals. Many poets of the *Bhaki* (devotion of God) Cult spoke of the fundamental equality of all *religions* and the unity of Godhead. They preached that the dignity of man lay in the nature of his actions and not in his birth. They protested against the excessive ritualism and formalities in the practice of religion leading to the domination of the priests, and urged the people towards simple devotion to God as the sole path to salvation. Sant (i.e., Saint) Kabir, generally believed to belong to the 15th century AD, symbolised both in his life and his teachings a spirit of harmony between Hinduism and Islam. "Hindu and Turk are pots of {the} same clay; Allah and Ram are but different names", he said.

Sher Shah Suri, who filled part of the interlude (1540-1555) after the Mughal rule began, paved, through his policies of religious tolerance, the way for Akbar. Akbar*'s Din-I-Illahi* was a dream religion drawing on the best aspects of all religions. Shivaji, the devout Hindu king of the Marathas (1630 AD), had great respect for Muslim saints and granted rent-free lands to meet the expenses of illumination of Muslim shrines. He also showed respect for the Christian priests of Surat when he laid siege to that city.

## 2.2. Concept of a welfare state

During an era of many ruthless rulers who, with their often-misguided noblemen, generally revelled in self-aggrandisement, there were also cases of benevolence. The old Kautilyan theories about the king's duties persisted. The king, according to these, existed not for his own good, but owed to the people a duty which he could discharge only by good government.[42]

Mughal Emperor Jahangir's (1605-1627) famous "Chain of Justice" tied between the Shahburji in the Agra Fort and a stone pillar fixed on the banks of the Yamuna symbolised his general attitude towards his subjects. This chain, bearing sixty bells, could be shaken by any individual wishing to bring his grievances to the notice of the emperor.[43] During the Mughal period, when no written code or decree of laws existed (except for the twelve edits

[41] *Ibid.* 401.

[42] Krishnadeva Raya of Vijayanagara Empire (16th century) wrote his *Amuktamalyadu*. "[A] king should rule collecting around him people skilled in statecraft, … should levy taxes from his people moderately, … should protect one and all of his subjects ." *Ibid.* 379

[43] *Ibid.* 463, 470.

of Jahangir, or the Digest of Muslim Law prepared under Aurangzeb, generally known as the *Fatwa-I-Alamgiri*), judges followed Koranic injunctions, yet observed customary law and equity. On appeal against a judge's decision, the emperor's decision prevailed; provided it did not contradict the sacred laws.[44]

Yet except under a few benign, despotic rulers, the common people were an exploited lot. Of the high incidence of taxation on the peasants, AMIR Khusro, the distinguished poet of that time, had this to say: "every pearl in this royal crown is but the crystallised drop of blood fallen from the tearful eyes of the poor farmer".[45]

## 2.3. Secularisation of the state

Even while religious law (canon law) governed the affairs of administration, and public and private law relations, attempts were made to 'secularise' the state from the influence of religious authorities. The process of secularisation took place in two ways. One was Emperor Akbar's style, which had a close bearing on his concept of a Universal Religion. He commanded the undivided allegiance of his subjects. He did not brook the growing influence of *Ulemas* (Muslim priests) who exerted "a parallel claim to the obedience of the people". He proceeded step by step to establish himself as the supreme head of the Church (*Imam-I-Adil*). In September 1579, Akbar promulgated an Infallibility Decree, which made him the supreme arbiter in matters of religions. This was in conformity with his *Din-I-Illahi*, which gave equal respect to all religions.[46]

The other was the application of canon law (Islamic law) directly by the ruler. Ala-ud-din Khalji (1296-1313) had the courage to challenge for the first time the pre-eminence of the orthodox Church in matters of state. He declared that he could act without the guidance of the *Ulemas* (Muslim priests) for the political interests of his government. Yet acting on his own he applied what he thought to be the Koranic law.[47] Aurangzeb, the last powerful Mughal Emperor, adopted a similar practice.

## 2.4. Humanitarian laws of armed conflict

While the ancient traditions of Hinduism and the Islam forbade excesses being committed during war, limits were, in actual practice, seldom placed

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[44] Emperor Akbar considered himself subject to law. "If I were guilty of an unjust act", he said, "I would rise in judgement against myself". *Ibid.* 559

[45] *Ibid.* 39.

[46] *Ibid.* 459-60.

[47] *Ibid.* 306.

on the methods and weapons of warfare. Religious versions of a 'just war' doctrine were fanatically interpreted to permit even the total elimination of the non-believer Invaders such as Mahmud of Ghazni, Mohammad of Ghur, NadirShah of Persia and Timur of Samarquand invaded India mainly to plunder its riches, and therefore their military campaigns were marked by senseless pillage, looting, destruction, and killings. Ala-ud-din Khalji's campaigns into South India were associated with "the sack of cities, the slaughter of the people and the plunder of temples".[48]

The institution of political asylum was well known, but then, as it is now, there was no obligation to grant political asylum. For instance, when Chengiz Khan attacked Jalal-ud-din Mangabarni, the last Shah of Kwarazm or Khiva (in the twelfth century), who ran away to Delhi seeking asylum, Itlumish, the then Delhi Sultan of the Slave Dynasty refused to grant it,[49] perhaps for fear of the great Khan. On the other hand, history records a Bahmini King on the west coast of India granting asylum to Yusuf Adil Khan in the fifteenth century. Yusuf, a son of Sultan Murad of Turkey, later, in 1440, established the Adilshahi Sultanate in Bijapur.[50]

## 3. THE COLONIAL ERA

The seven Crusades fought over the control of the Holy Lands in the twelfth and the thirteenth centuries ended with a decisive defeat of the Christian forces at the hands of the Muslims. With the 'fall' of Constantinople in 1453 the Turks wrested from the Byzantine Empire the control of the Great Silk Route over land that led to India and China. New routes for the spice trade with the East had now to be discovered, if only to escape from the clutches of the 'Moors'. The Egyptian middlemen had been claiming a large cut, as much as 800 per cent, over the original prices of the Indian spices in the European market.

In 1454, Prince Henry of Portugal received from Pope Nicholas V the right to all discoveries as far as India. The Papal Bull "conceded to King Alfonso, the right, total and absolute, to invade, conquer and subject all countries which are under the rule of the enemies of Christ, Saracen or Pagan". The Bull further allowed the King, the Prince "and their successors, [to] occupy and possess in exclusive right the said islands, ports and seas…" It proclaimed that "all faithful Christians are prohibited without the permission of the said Alfonso and his successors to encroach on their sovereignty. Of the conquests already made, or to be made, all the conquests which extend to… all the Orient is perpetually and for the future the sovereignty of King

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48 *Ibid.* 306.

49 *Ibid.* 284.

50 K.M. Panikkar, *Asia and Western Dominance: A Survey of the Vasco da Gama Epoch of Asian History, 1498-1945* (London: George Allen and Unwin, 1959, 8th Imp., 1970) 31.

Alfonso."[51] This was in response to Prince Henry's expressed desire to find a sea route to India "which, it is said, is already subject to Christ," the Bull said: "If he enters into relations with these people, he will induce them to come to the help of the Christians of the West against the enemies of the faith. At the same time, he will bring under submission, with the King's permission; the pagans of the countries not yet afflicted with the plague of Islam and give them knowledge of the name of Christ".[52]

The Papal Bull thus set two objectives for the Portuguese search for India: one, it was necessary to continue the Crusades against the Muslims, from the rear, with the help of people now to be converted into Christianity; two, the geographical discoveries should encourage the spread of the Christian Church.

A number of legal questions could be raised in respect of this Papal Bull. What legal authority did the Pope have to issue such a Bull? Did the Bull, in the fifteenth century, constitute an acceptable basis for "an absolute and incontestable legal title" to Portuguese conquests in the East?[53] Did Portugal need such an authorisation for assertion of its sovereignty over conquered territories? Since there were sovereign states in existence in the Orient and certainly in India at that time, did the Pope of Rome have authority to confer sovereignty on Portugal in respect of them? Could sovereignty over the seas as well be conferred on Portugal? Could sovereignty be conferred in advance of annexation, according to the international law then pertaining? Some of these questions will be addressed in the subsequent discussion.

The Portuguese reached India when Vasco da Gama landed at the Port of Kozhikode, on the west coast of Kerala, on 27 May 1498, and sought and received permission from the Zamorin (Saamoodiri, the local sovereign) to trade. Thus began the 450 years of European colonialism in India. In November 1510 Alfonso De Albuquerque captured the port of Goa from the Bijapur Sultan; this was followed by the fall of Diu, Daman, Salsotte, Bassein, Chaul and Bombay, San Tom (near Madras), and Hugli (near Calcutta).

On 31 December 1600, the (English) East India Company was formed in London. The Royal Charter granted it "the monopoly of commerce in eastern waters" and nothing more.

On the other hand, the United East India Company of the Netherlands, formed on 20 March 1602 under a Charter granted by the Dutch States-General, had been specifically empowered to make war, conclude treaties,

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[51] *Ibid.* 27.

[52] *Ibid*. 26-27. In these pages Panikkar reproduces the whole papal bull. In 1456 Pope Calictus confirmed this bull by a second bull. By the Treaty of Trodesilhas of 9 June 1494, Spain and Portugal fixed a line 370 leagues west of Cape Verde demarcating their colonial zones. Pope Alexander VI was the arbiter.

[53] *Ibid*. 27.

acquire territories and build fortresses: it was "a great instrument of war and conquest".[54]

The Danish East India Company took shape in 1616 and its French counterpart in 1664. The Swedish East India Company was formed in 1731, but it exclusively dealt with China.

The British, with a show of force against the Surat traders in the coastal Gujarat, obtained permission from Mughal Emperor Jahangir in 1613 to establish a factory in Surat on the West Coast. By 1619, they had established factories in Surat, Agra, Ahmedabad, and Broach. In 1639 a fortified factory was set up in Fort St. George (Madras). In December 1687, the Directors of the company in London instructed its chief in Madras, most significantly, "to establish such politie of civil and military power, and create and secure such large revenue to secure both … as may be the foundations of a large, well grounded, secure English domain in India for all time to come."[55]

In 1690 the English company established a factory at Hugli and in 1698 it was granted by the Mughal emperor *zamindari* (landlordship) over three villages (one of these became Calcutta).

The aggressive policy of colonial expansionism, endorsed by Oliver Cromwell's Charter of 1657 and also by Charles II and James II, had transformed the English company, originally chartered to be a peaceful trading body, into a political and military power hungry for territorial acquisitions on the Indian subcontinent. The decaying Mughal Empire and the internecine quarrels among local princes facilitated the ready success of this policy. The 1857 uprising was a last-ditch effort on the part of some of the local princes backed by some sections of soldiers and peasants to overthrow the rule of the British company and re-establish the sovereignty of the local princes. This was suppressed with brute force and in 1858, the British Government in London established in India its direct rule, which was finally dismantled only in 1947.

The colonial era has thrown up a number of issues bearing on international law: the legality of the British rule, the status of the 'Indian' states, the use of force and interventionism, the law of the sea, treaty practice, and humanitarian laws of armed conflict.

### 3.1. The legal status of the British rule[56]

As noted already, the original Charter of the English East India Company authorised the company to establish the monopoly of trade with India. Con-

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[54] Majumdar, *op. cit.*, n. 2 at 633.

[55] *Ibid.* 638-639.

[56] *See* generally, R. Kemal, "The Evolution of British Sovereignty in India', VI *Indian Yearbook of International Affairs* (1957) at 142-171. *See* also M.K. Nawaz, "Anglo-Burmese Relations in the Seventeenth Century", III *Indian Yearbook of International Affairs* (1954) 141-159.

stitutionally, therefore, at least until the Cromwell Charter of 1657, the company could not legally have acquired and administered territories in India, except for purposes of establishing and maintaining trade with India, unless such acquisitions were ratified or otherwise approved by the British Parliament. It is doubtful, therefore, if the company was legally permitted to resort to force both to establish and to fortify factories, on behalf of the British sovereign. The principle of freedom of trade as generally recognised in the colonial era did not permit such use of force. Indeed, it was a different matter, whether trade, once established, could be *protected* by use of force under the traditional international law, if the territorial sovereign failed to extend the necessary protection.

In the *Island of Palmas* arbitration between the US and the Netherlands, Arbitrator Max Huber recognised that the acts of the Dutch East India Company "must, in international law, be entirely assimilated to acts of the Netherlands State itself. From the end of the sixteenth until the nineteenth century, companies formed by individuals and engaged in economic pursuits (Chartered Companies) were invested by the State to whom they were subject with public powers for the acquisition and administration of colonies". Particularly in respect of the Island of Palmas, the arbitrator observed that the native states, of which the island was a part, "were from 1677 onwards connected with the [Dutch] East India Company, and thereby with the Netherlands, by contracts of suzerainty, which conferred upon the suzerain such powers as would justify his considering the vassal State as a part of his territory."[57]

Arbitrator Max Huber's doctrine of assimilation of the rights and responsibilities of a company formed by private individuals to those of their national state might have generally held good in respect of the Dutch East India Company, which had been specifically empowered to conclude treaties, make war, acquire territories and erect fortresses. It is doubtful whether it would apply to the English East India Company lock, stock and barrel, except for the general international law of state responsibility, whereby a state is held responsible for the unlawful acts of its nationals under its jurisdiction or control. In other words, the British could not claim rights (including the rights and title to territorial acquisitions) but could only incur responsibility for unlawful acts committed by the English East India Company in India until 1657.

The lack of legal competence and standing on the part of the English East India Company was well realised by the British government itself, when James I had to send a formally accredited ambassador, Sir Thomas Roe, to the Court of Emperor Jahangir at Agra in 1615, and Roe sought to negotiate a commercial treaty with the Mughal Empire between 1615 and 1618. Although he could not persuade the Emperor to conclude a treaty, the Emperor issued a *firman* (decree of grant) granting certain privileges to the

[57] *Island of Palmas* Arbitration Award, Permanent Court of Arbitration, 1928, 2 UN RIAA 829.

company. By the time Roe left India in 1619, the company had already established factories at Surat, Agra, Ahmedabad, and Broach, all pursuant to the Mughal *firman*.

Fort St. George was established at Madras under a lease from the ruler of Chandragiri, representing the Vijayanagar Empire. As for Calcutta, as already seen, the company was granted *zamindari* (landlordship) by the Nawab of Bengal, as governor of Mughal Empire. K.M. Panikkar recounts that in addressing the Emperor, one of the Presidents of the company described himself as the "smallest particle of sand, John Russel, President of the East India Company with his forehead at command rubbed on the ground".[58] This symbolised the relationship between the company and the Indian sovereigns, particularly before the infamous Battle of Plassey of 1757, which laid the foundation of the British Empire in India, thanks chiefly to the cunning and treachery of Robert Clive.

There appear to have been three principal views on the legality of British acquisitions in India through the English East India Company. One view was that being a creature of the English law, the British sovereign was responsible for all the actions of the company *vis-à-vis* other countries according to the *Palmas* doctrine. As already pointed out, assimilation by the British Government of responsibility for the company's international conduct is undoubted under general international law. However, the same may not be true of whatever *rights*, if any, 'acquired' by the company through its conduct. Where the company was not constitutionally competent to acquire the rights, such rights might not, as a rule, have accrued to the British government, unless the company had acted as an authorised agent of the government. Could such authorisation even implicitly be given *ex post facto*, without the consent of the grantor of the rights in question? One very much doubts whether it could.

The second and the third views arose after the 1857 uprising. After quelling the uprising, the British Government, by way of a Queen's Proclamation and an Act of British Parliament ('An *Act* for Better Government of India'), both of 1858, took over the government of India. It is generally agreed that the 1858 constitutional changes merely formalised *de jure* the *de facto* situation that had existed since 1657. This gave rise to two further views on the status of the British rule in India. There was the argument that beginning with the Battle of Plassey, the company, a vassal of the Mughal Empire, slowly replaced the empire. Yet could a vassal usurp the powers of the emperor to the total defeat of the latter? This position was evidently illegal, and indeed beyond reason.

The third proposition was based on the fact that after the defeat of the Marathas in 1803, the Mughal Emperor was held prisoner, and surrendered all his rights in favour of the company. The Marathas were "the Paramount '*Vakil*' (advocates, attorneys) of the Mughals (*Vakil-ul-Mutlak,* the principal).

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[58] Panikkar, *op. cit.,* n. 49 at 74.

The concept of paramountcy might have come from this. Given such a premise, the company could not have legitimately fought these wars at all under British law itself. The Pitts India Act of 1784 had forbidden the company from intervening in the affairs of the Indian States. Yet, the Charter Act of 1813 proclaimed "the undoubted sovereignty of the crown" in and over the possessions of the East India Company! If the original acquisition of these possessions were illegal, and even if it be argued that such illegality could be cured by the British Parliament for purposes of British constitutional law, the question still remains whether the illegality could simultaneously be deemed to be cured on the plane of international law. Nevertheless, those were the days of brute force, and forcible retention legitimised everything; neither logic nor legality had any influence over the matter.

Finally, as if to tie up any legal loose ends, after the death of the last Mughal Emperor, Bahadur Shah Zafar, who was then being held prisoner in Rangoon, Queen Victoria was formally proclaimed "Empress of India" by an Act of 1876.

### 3.2. Status of the 'Indian' state system

At the arrival of colonial powers in India, there was the awesome Mughal Empire based in Delhi/Agra, which slowly spread southwards and took the weakening Vijayanagara Empire under its wings. There were states totally independent of the Mughal Empire. There were many vassal states of the empire. Some of these themselves had their vassal states. The Mughal attitude to the suzerain-vassal relationship greatly resembled that of the Kautilyan perception of *Chakravartin* or *Vijigishuu*. The empire had its own territories directly ruled by it through its governors or viceroys (many of whom were imperial princes) and the vassal states were sovereign for all practical purposes, except that they displayed allegiance to the empire. In other words, their sovereignty was left unchecked, except when they conspired against the empire or failed to pay tributes. They could indeed establish and maintain their own treaty and other foreign relations with other states. They exercised exclusive territorial sovereignty, including criminal, civil and revenue jurisdictions over their subjects.

Thus, when the colonial companies arrived in the East, they were confronted with a full-blown political organisation and state system. In fact, the Indian rulers found it difficult to negotiate treaties with these companies as, in their view, these companies were merely traders and did not represent their national sovereigns. This was one reason why initially they issued the traders with *firmans*, grants, leases or *zamindaris* for trading privileges, rather than concluding treaties with them.

The inability of the ordinary European mind to understand and appreciate the Oriental institutions finds expression in Warren Hastings' critique of the overarching legal powers of the dying Mughal Empire. Hastings wrote to

London: "The King Shah Alam can scarcely be of propriety mentioned among the powers of India. Yet his name and family subsist with the latent rights inherent in them".[59] He was obviously unable to understand that allegiance and loyalty, rather than brute force, were the real source of the sustaining power and authority of an Oriental suzerain.

Alexandrowicz highlights the interesting case of the Raja of Banares who was grossly mistreated by the notorious Warren Hastings, the first Governor-General of the English East India Company 1779-1781. Edmund Burke, speaking in support of the Indictment of Hastings at Westminster, explained that Banares was originally a vassal of the Mughal Empire and now a vassal of the company under treaty, that it had its own degree of sovereignty which could not be disregarded by the company, and that the company's treaty with the Raja of Banares could not be breached by Hastings through his raising an expansive and yet false argument that the Raja was only a *zamindar.* Burke invoked both Indian customary law as well as international customary law to establish that the Raja was entitled to his own place in the traditional hierarchy of sovereigns in India.[60]

"There was no doubt", asserts Alexandrowicz, who has done pioneering research into the history of international law in the Orient, "that the European Powers (companies), on their arrival in India, had to deal with organized political bodies whose legal conceptions facilitated the immediate establishment of mutual relations Far from finding themselves in an area of lawlessness, they were confronted with the existence of a *sui generis* Family of Nations all over Asia. Its public and private law might have differed from that prevailed in Europe, but it was based on the same principles of justice. The law of nations applied to the relations between East and West in the XVI century and later was law of reciprocity which accepted the sovereignty of Indian and Asian rulers and communities … It is only after the establishment of the colonial rule in Asia (whether by conquest or treaty) that [the Western] writers of International Law[61] started denying Sovereignty to these rulers and communities … The classic law on the matter has been clear beyond doubt."[62]

The expansion of the British colonialism in India took place through numerous interventions, wars and treaties. The British concluded treaties with fully sovereign states, vassal states and states brought under varying degrees of their protection. In other words, beyond the territories directly ruled by the British, there were "Indian States," so designated by the British, with

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[59] Nawaz, *op. cit.*, n. 56 at 151.

[60] C.H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries)* (Oxford, 1967) 21-23.

[61] *E.g.,* M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (New York, 1926), cited in footnote by C.H. Alexandrowicz, "Grotius and India", III *Indian Yearbook of International Affairs* (1954) 357-67 at 367.

[62] Alexandrowicz. *op. cit.*, n. 60 at 366-67.

varying degrees of external independence. In fact, Queen Victoria's Proclamation of 1858, issued upon the take-over of British India by the British Government, assured "The native princes of India" that

> (1) "All treaties and engagements made with them by or under the authorities of the East India Company are by us accepted, and will be scrupulously maintained".
> (2) "We desire no extension of our present territorial possessions and we shall sanction no encroachment on those of others", and
> (3) "We shall respect the rights, dignity and honour of native princes as our own."[63]

In practice, however, each of these promises was soon to be broken into shreds. The Act of 1876, whereby the Queen became the Empress of India with effect from 1 January 1877, provided "legal" support for breaches of the above undertaking as well as of treaties and traditional rights of the Indian states. From 1877 onward, the Queen was the Paramount Ruler and the Indian states her "subordinate sovereigns".

The new concept of paramountcy of the British Crown gave rise to serious problems of the integration of the Indian states with the newly independent India or Pakistan in 1947. The British Government took the position that upon Independence, the British paramountcy would elapse and that the rights historically surrendered by the 610 Indian states would revert to them. The Indian National Congress could not "admit the right of any state in India to declare its independence and to live in isolation with the rest of India." "Such a declaration was tantamount to a declaration of war against the free millions of India", declared Mahatma Gandhi; B.R. Ambedkar argued that states could only be sovereign "to the extent they are, but they cannot be independent States so long as they remain under the suzerainty, as they must be, either of the Crown, if India remains a Dominion, or of the successor State, if India becomes independent."[64] Ambedkar's view was probably correct in terms of the contemporaneous traditional international law whereby peacefully achieved succession was automatic.

### 3.3. Use of force, interventionism and colonial expansion

Even as the classical international law accepted the use of force as a legitimate mode of acquisition of territory, it was practised with great abandon and in its most wanton and virulent forms by the European colonialists.

One of the very few peaceful acquisitions made by the British in India was that of Bombay. Bombay was first a Portuguese colony, following Goa, Daman, Diu, Salsette, and Bassein. It was gifted to Charles II of England as part of the dowry of Catherine of Braganza under a treaty of 1661. The

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[63] Majumdar, *op. cit.*, n. 2 at 844.
[64] *Ibid.* 998-999.

king transferred it to the English East India Company in 1668 at an annual rent of ten Pounds. The classical international law did not insist on people's consent for such transfers to be valid, as the principle of self-determination had not then taken root.

Leases, the right to fortify trading centres and factories, *zamindari* and the right to collect revenue were some of the other means of acquisition of colonial territories at least at the beginning of the colonial era. The Indian rulers granted these to the East India Company as they also granted the Company the reduction of or exemption from customs duties.

After 1657, however, the company was prompted both by its masters in London and the British Government to seek an aggressive colonial expansion and it ceased to be a trading company. This change produced ruthless, heartless, barbaric, and downright dishonest British Governors-General/Viceroys such as Warren Hastings, Dalhousie, and Wellesly. Open and wanton use of force even in violation of treaties was the order of the day. The British administration also evolved more 'sophisticated' ways of intervention to intimidate and subjugate the local rulers. Two of these methods were the Subsidiary System and the Doctrine of Lapse. Under the Subsidiary System, the local rulers were forced to enter into treaty relations with the British whereby the British offered protection to them by stationing British forces for their protection, the costs of which would of course have to be borne by the rulers. The Doctrine of Lapse meant that when a local ruler died leaving behind no natural heir, the sovereign power of the ruler lapsed and merged with the British paramountcy. While the Indian customary law permitted adoption as a traditionally acceptable method of appointing an heir, the British Doctrine banned such a practice.[65]

It may be recalled that Section 34 of the Pitt India Act 1784 explicitly prohibited the company from following a policy of non-intervention in the affairs of the Indian States. Also, the Victorian Proclamation of 1858 assured the Indian princes that treaties would be "scrupulously maintained," that the British Government "desire no extension of our present territorial possessions" and that it would "respect the rights, dignity and honour of native princes." Above all, it expressed the desire that the people of India "should enjoy that prosperity and social advancement which can only be secured by internal peace and good governments."[66]

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[65] Indeed, after the Queen Victoria's assumption of the title of the "Empress of India" in 1876, this doctrine was revised as reflected in the Instrument of Transfer of Mysore State, 1881. As explained by the British government in 1884, "The succession to a Native States is invalid until it receives in some form the sanction of the British authorities. This was reiterated from time to time." *See*, Majumdar, *op. cit.,* n. 2 at 845. The Indian customary law required "recognition" of adoption of a child as heir by the sovereign, and the sovereign had never objected to any adoption, as that was the customary practice. The above British policy constituted a rank violation of customary law and practice in India, but abundantly served the colonial interests.

[66] Majumdar, *op. cit.*, n. 2 at 844.

Numerous interventions and annexations made by the British in India went without any justification. However, for many others, the British offered at least six excuses for intervention.

### *3.3.1. Maladministration*

For example, Governor-General William Bentinck took over the administration of Mysore in 1831 on ground of mal-administration. However, the 'mal-administration' was the direct result of the heavy financial burden imposed on the state by the Subsidiary System. In 1856 the British annexed Oudh on the same ground, despite the existence of an 1837 treaty that should have prevented this.

### *3.3.2. Vacant throne*

A large number of states were annexed by the British under the Doctrine of Lapse. Included in the long list were the kingdoms of Nawab of Carnatic (1853), Tanjore (1855), Jhansi (1854), Sambalpur (1850), Udaipur (1852), and Nagpur (1853).[67]

### *3.3.3. Cruelty against the subjects*

In 1834, the British falsely charged King Veeraraja of Coorg, a small principality near Mysore, of cruelties against his subjects and of conspiring against the British and annexed his territory without troubling to prove these allegations.

### *3.3.4. Enforcement of treaty obligations*

In 1774 Warren Hastings, at the request of the Nawab of Oudh, sent British forces to help the Nawab to enforce a treaty he had with the Ruhelas whereby the latter had promised to pay the Nawab Rupees four million in the event that he helped them in repulsing a Maratha invasion. In the campaign against the Ruhelas, the chief of the Ruhelas was killed, and over 20,000 Ruhelas were expelled from their own territory, later annexed to Oudh, a vassal of the British. Burke, Macaulay, Mill and others castigated Hastings for having "deliberately sold the lives and liberties of a free people and condoned horrible atrocities" against them.[68]

The case of the Begams of Oudh was another standing testimony of shame. In 1782, the British not only intervened to enforce payments far in excess of the amount stipulated in a treaty, against the mother and grand-

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[67] More on this *see ibid.* 767-771.

[68] *Ibid.* 692-693.

mother of the Nawab, but also ill-treated and imprisoned them and snatched away perforce their entire private treasury.[69]

### *3.3.5. Disaffection and hostility against the British*

The classic case of annexation under this excuse was that of the annexation of the Sind in 1843: The Sind had been used as a base in the British-Afghan wars since 1843. Governor-General Edenborough falsely charged the Amirs of Sind of disaffection and hostility against the British government. As it happened, in reality the Amirs were known for their steadfast loyalty to the British and their scrupulous observance of treaties. The new Resident at Hyderabad (Sind), Charles Napier deliberately acted on the wrong assumption of the Amir's guilt, used force, and annexed the Sind.[70]

### *3.3.6. Protection of British traders*

The British merchants settled in Rangoon complained to the British Indian Government, of oppression at the hands of the local Burmese governor. Dalhousie sent a frigate under Commodore Lambert from Calcutta to Pagan, to demand compensation for the losses suffered by the merchants, and to secure the immediate removal of the governor. The Burmese King replaced the governor. Lambert went to meet the new governor at a time when he was asleep and he could not meet him. Angered, Lambert blockaded the Rangoon port, seized a royal vessel, and paved the way for the Second Anglo-Burmese War of 1852, which ended with the annexation of lower Burma by the British.

That the British colonial government also failed to fulfil the Victorian promise of internal peace and good government is generally accepted. In fact, writing in 1945, Jawaharlal Nehru said: "A significant part that stands out is that those parts of India which have been longest under British rule are the poorest today".[71] The British colonialism destroyed the Indian industry and with it also destroyed the economy and the ancient village institutions. The adverse impact of British colonialism has been all-pervasive.

## 3.4. Law of the sea[72]

As already pointed out, when the Portuguese arrived in India in 1498, there was already an independent state system with well developed rules of

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[69] *Ibid.* 695-696.

[70] *Ibid.* 761-762. NAPIER admitted in his Diary: "We have no right to seize Sind, yet we shall do so, and a very advantageous, useful, humane piece of rascality it will be". *Ibid* 763. The company condemned his action, and at the same time appointed him as the first Governor of Sind.

[71] Nehru, *op. cit.*, n.13 at 244.

[72] *See* generally, Alexandrowicz, *op. cit.*, n.59 at 41-82; R.P. Anand, *Origin and Development of the Law of the Sea: History of International Law Revisited* (The Hague, 1983); R.P. Anand, "Mari

inter-state conduct "based on traditions which were more ancient than their own and in no way inferior to notions of European civilisation".[73]

Asians had already been engaged in free navigation and maritime trade in the Indian Ocean and the Arabian Sea. From the first century AD there was commerce between India and Rome. As already seen, the sea-borne trade contributed to the rise of Indian colonial empires in South East Asia.Until the sixteenth century, "there is no doubt about the freedom of navigation and commercial shipping which was exercised by various countries and peoples in the eastern seas, and which led to the development of a number of entrepots and trade centres"".[74]

The weakening of the Sri Vijaya Empire encouraged Sumatran pirates to disrupt the trade at sea. Kublai Khan's naval expeditions to suppress the pirates in 1292 led to the suppression of piracy and restoration of order. The Ming dynasty also sent similar expeditions in 1405 and 1431.

The hundred years of conflict between the Chola Empire of South India and the Sri Vijaya Empire led to the weakening of both and the Arabs emerged as the leaders of the sea-borne trade in the region. Yet there was never interference with the traditional freedom of navigation and commerce. Although the rules of the sea-borne trade were largely customary in character, there were at least two instances of codification. Towards the end of the fifteenth century, Sultan Mahmud Shah authorised a maritime code in Malacca and a similar maritime Code of Macassar also emerged around the same time. Resisting the Dutch attempts at prohibition of all non-Dutch trade with the Spice Islands, the ruler of Macassar proclaimed in 1615:

> "God has made the earth and the sea, has divided the earth among mankind and given the sea in common. It is a thing unheard of that anyone should be forbidden to sail the seas".[75]

Thus it is clear that by the time the European colonialists appeared on the Asian scene, the Asians (including the Arabs) had already established and were consistently practising among themselves the principle of the freedom of the seas, the rules of flag state jurisdiction on the seas, superior coastal jurisdiction over all ships while near the coast, prohibition of piracy, rules of charter-party, customs and tolls, permits of entry and departure, and even some rules relating to contraband.

While this generally well-developed maritime practice existed in the Asian region, the situation in Europe was anarchic, states frequently following the

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time Practice in South-East Asia until 1600 AD and the Modern Law of the Sea", in his *International Law and the Developing Countries* (New Delhi, 1986) 53-71.

[73] C.H. Alexandrowicz, "Afro-Asian World and the Law of Nations (Historical Aspects)," 123 *Recueil des Cours* (Hague Academy of International Law) (1968-69) 117-124 at 124.

[74] Anand, "Maritime Practice in South-East Asia….", *op. cit.*, n. 72 at 57.

[75] Quoted, *ibid.* 59.

doctrine of *mare clausum*.[76] Acting under the Papal Bull of 1454, Vasco da Gama and Pedro Alvarez Cabral asserted Portuguese supremacy over the eastern seas, by depriving the merchants of other nations of their traditional right to maritime trade, and by looting and plundering their ships.[77] When Alfonso De Albuquerque arrived on the Malayan coast in the early seventeenth century, he had noticed Arab, Hindu and Chinese traders competing openly in the markets of that area.[78] The Portuguese, however, did not respect the maritime customary law of the East.[79]

As the Dutch came to challenge the Portuguese supremacy in the eastern seas, their rivalry produced Hugo Grotius to advocate the doctrine of the freedom of the seas in favour of the Dutch.[80] As an assertion of their claim of sovereignty over the Eastern Seas, the Portuguese also introduced a system of *cartazes* (safe-conduct passes) forcing foreign ships to seek from Portuguese authorities safe conduct, on pain of search, seizure and confiscation at sea.[81] Subsequently, however, when some of the Indian states (for instance, the Marathas) too started issuing *cartazes*, these became merely certificates of clearances, perhaps relevant to determination by a coastal state of the innocence of the passage of a foreign vessel.[82]

The effect of colonialism over the Eastern Seas has been the general erosion of the earlier customary maritime practice based on the doctrine of *mare liberum.*

## 3.5. Treaties[83]

At least seven aspects of treaty practice of this era may be highlighted. They relate to secularisation of treaty law, the concept of unequal treaties,

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[76] *Ibid.* 60.

[77] Majumdar, *op. cit.*, n. 2 at 631-32. Panikkar cites an example of special Portuguese cruelty to the Muslims, from *Lendas da India.*During his second voyage to India, Vasco da Gama captured an unarmed vessel returning from Mecca. After looting it, he prohibited all 'Moors' (Muslims) from escaping from the vessel and set it afire. *See* Panikkar, *op. cit.*, n. 50 at 35.

[78] Panikkar, *op. cit.*, n. 5 at 30.

[79] As Panikkar quotes Barroes, a Portuguese historian:-

"It is true that there does exist a common right of all to navigate the seas and in Europe we recognize the rights which others hold against us; but the right does not extend beyond Europe and therefore the Portuguese as Lords of the Sea are justified in confiscating the goods of all those who navigate the seas without their permission".

*Ibid*. 35. Barroes' blatant statement comes in justification of plunder and massacre of a ship returning from Mecca, referred to in n. 77 above.

[80] For more on this, *see* Alexandrowicz, *op. cit*., n. 60 at 61-82.

[81] *See ibid*. 71-71.

[82] Alexandrowicz considers the *cartazes* to be a forerunner of the navicert in practice during war, introduced by the British. *See ibid*. 73.

[83] *See* generally, Alexandrowicz, *op. cit*., n. 60 at 83-97, 158-184.

personal treaties, authority to conclude treaties, treaty law as evidenced by the *Right of Passage* case, capitulatory treaties, and treaties with discriminatory clauses in respect of trade.

### *3.5.1. Secularisation of treaty law*

The advent of the Europeans in the Orient also highlighted the diverse treaty practices. To begin with, there was a novelty for the Christian states of Europe to conclude treaties with non-Christian powers as such. When Francis I of France entered into a treaty with Suleiman the Magnificent of the Ottoman Empire in 1535, he had to send a letter of apology to the Pope.[84] From the Islamic point of view, too, to establish treaty relations with non-Islamic countries was revolutionary, since the Islamic legal theory divided the world into *Dar-al-Islam* (where Islam prevailed) and *Dar-al-Harb* (the rest of the world). Subsequently, a third region (i.e., *Dar-al-Ahd),* consisting of countries with permanent agreements with Islamic countries, was added.[85] Slowly, however, the treaty law was secularised. The Ottoman and the Persian empires developed treaty relations with non-Muslim countries. The Mughals stood apart. According to Alexandrowicz, the "Mughal reluctance to conclude treaties had little to do with religious motives derived from Islamic doctrine. It was simply a manifestation of imperial superiority and perhaps a sign of caution similar to that advocated the Kautilyan school of thought".[86] This was the reason why Thomas Roe failed to conclude a commercial treaty with Jahangir. Yet the English and the French East India companies were granted trade privileges through *firmans* or conferment of the status of vassals. However, the Europeans could eventually establish a network of treaty relations with various other Indian rulers (including Muslim rulers).[87]

### *3.5.2. Equal and unequal treaties*

Most of the early treaties concluded between the European companies and the Indian rulers had been treaties of commerce. Alexandrowicz quotes G.F. De Martens' remark that the commencement and carrying on of com-

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[84] Francis I wrote the letter of apology to Pope Paul III with this concluding sentence: "Differences of religion and cultural tradition cannot destroy the natural association of mankind". *See* Alexandrowicz, *op. cit*., n. 73, 117-214 at 127-128.

[85] *Ibid.* 90. Abyssinia was an example.

[86] Alexandrowicz, *op. cit*., .n. 60 at 93. The Kautilyan counsel of caution to preserve the freedom of action of a ruler by not concluding a treaty, could apply to many East Indian rulers of that time. *See ibid.* 149.

[87] In Alexandrowicz's view, "treaty practice with East Indies contributed significantly to the secularisation of the law of nations". *Ibid.* 94.

merce between the Europeans and the Indian nations were only possible if the latter "are willing to admit it".[88]

The treaty practice in India after the arrival of the European colonialists produced both equal and unequal treaties. The initial treaties of commerce and grant of special privileges (including jurisdiction over foreigners) were by and large equal treaties. As the activities of each of the European companies started focusing less and less on trade and more on the establishment of a colonial empire in India by conspiracy and policies of intervention, annexation and subjugation, the treaties they concluded or forced upon the local rulers came to be unequal. These included treaties of subsidiary alliances,[89] treaties of cession, many boundary treaties, and treaties of peace coupled with one-sided war claims compensation. Treaties subjected to wanton violation by the British in India were a legion. The case of annexation of the Sind has already been discussed. The Marquis of Hastings seems to hold the distinction of converting a large number of treaties "of reciprocity and mutuality" into one of "subordinate co-operation" in order to establish British paramountcy over the India rulers.[90]

### *3.5.3. Personal treaties*

The British at times found it convenient not to recognise certain treaties as binding on both Britain and the relevant Indian state on a permanent basis, but to require them to be re-negotiated upon the succession of a new ruler. In other words, depending on the respective situations, they regarded certain treaties to be "personal treaties" ceasing to be effective on the death of a ruler. The new ruler was required to re-negotiate them.[91]

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[88] G.F. De Martens, *Compendium of the Law of Nations* (W. Corbett, trans., 1802) at 152, cited in Alexandrowicz, *op. cit.*, n. 60 at 153.

[89] The Treaty of Bassein of 31 December 1802 is an example of a subsidiary alliance between the British and the Peshwa of Persia. The Peshwa applied to Wellesley for protection against the Bhonsle and the Sciendia. Under the treaty, the British agreed to station 6000 British troops in the Peshwa's territory "in perpetuity". For their maintenance, territories yielding Rs. 2.6 million per annum were surrendered to the British. The Peshwa also agreed not to entertain any European power inimical to the British, and subjected his relations with others to the control of the British. *See* Majumdar, *op. cit.*, n. 2 at 700-701.

[90] Majumdar, *ibid.* 764.

[91] Thus, when the old Afghan Amir died in September 1901, Lord Curzon insisted that the new ruler renew a previous friendship treaty. The ruler argued that that treaty subsisted in force, being one between the two countries. Curzon asserted that it was a personal treaty whose validity did not survive the deceased ruler. Finally, another treaty had to be negotiated in 1905. *See* Majumdar, *ibid*. 904.

### *3.5.4. Authority to conclude treaties*

Ordinarily, it was taken for granted that the governors of the British Presidencies had the authority to conclude treaties on behalf of the British Company. However, on occasion, considerations of political expediency led to the countermanding of the governor's authority. Thus, in 1775 when the Bombay governor concluded a treaty (the Treaty of Surat) with the Peshwas, although Warren Hastings was not opposed to it, the Supreme Council of the company at Calcutta condemned the governor's action as being "impolite, dangerous, unauthorized and unjust", and instead authorized with the opponents of the Peshwas on 1 March 1776 the conclusion of another treaty, which also annulled the Treaty of Surat.[92]

### *3.5.5. The* Right of Passage *case and the treaty law*

In those days, while negotiating a treaty between a European power and an Indian ruler, it was usual for the European party to prepare its draft in its own language and send it across to the Indian ruler who would get it translated into his language, examine it, and return it with necessary amendments or revision. Finally the treaty evolved in two languages, each party executing its own language text. Such a practice led to India's contention in the *Right of Passage* case that there existed no Treaty of Poona of 1779, since there existed no single mutually accepted and binding text of the treaty. India also pointed to the divergence between the Portuguese and the Marathi texts of the treaty. Rejecting the Indian objections, the International Court of Justice held: -

> "The Court does not consider it necessary to deal with these and other objections raised by India to the form of the Treaty and the procedure by means of which agreement upon its terms was reached. It is sufficient to state that the validity of a treaty concluded as long ago as the last quarter of the eighteenth century, in the conditions then prevailing in the Indian Peninsula, should not be judged upon the basis of practices and procedures which have since developed only gradually. The Marathas themselves regarded the Treaty of 1779 as valid and binding upon them, and gave effect to its provisions".[93]

The Court's pronouncement bears out a number of implications for international law. Firstly, for the first time the International Court held that a 1779 agreement between an Indian (i.e., Oriental) ruler and a European power to be a valid treaty under international law. Secondly, this means that the competence of both parties to conclude a treaty was never doubted. The Court thus rejected the European doctrinal perception of international law that it

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[92] *Ibid*. 677.

[93] *Rights of Passage over Indian Territory* case (Portugal *v*. India), ICJ Rep. 1960: 6 at 37.

was a system of law applicable to the European or Christian nations only, and not to others. Thirdly, the Court recognised the validity of established treaty practice of the countries of the Orient, and held that, according to the doctrine of inter-temporal law, the circumstances of conclusion of a treaty, the validity of treaty practices, the validity of the treaty itself, and even the interpretation of the treaty: all must depend on the intrinsic and extrinsic contemporaneous evidence.

On the question whether Article 17 of the Treaty of 1779 constituted a cession of territory, the Court ruled thus:

> "From the examination of the various texts of that article placed before it, the Court is unable to conclude that the language employed therein was intended to transfer sovereignty over the villages to the Portuguese. There are several instances on the record of treaties concluded by the Marathas which show that, where a transfer of sovereignty was intended, appropriate and adequate expressions like *cession* 'in perpetuity' or 'in perpetual sovereignty' were used."[94]

On an analysis of the contemporaneous practice of states in India (at a time when the Mughal Empire was in ferment, when even the person of the Emperor was under the control of the Marathas, the myth of *de jure* paramountcy of the Emperor still ruled over the subcontinent), the Court further concluded that "what was granted [by the Marathas] to the Portuguese was only a revenue tenure," commonly described as a grant of *jagir* (the Mughal law) or a *saranjam* (the Marathi practice).[95]

Finally, the Court appears to have assumed the competence of the Portuguese East India Company to conclude such treaties with Oriental sovereigns. It did not separately consider this issue. Possibly, perhaps, it thought that, in terms of the then prevalent Indian practice (and the practice of the European powers, recognized in the *Island of Palmas* case), the question did not arise.

Be that as it may, the cumulative effect of the Court's judgment is to demonstrate that the international law of the 18th century was not confined to the Christian nations of the West, but that the universality of international

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[94] *Ibid.* 38.

[95] *Id.* The Portuguese – Maratha Treaty of 1779 between Dom Jose Pedro da Camara, Governor of Goa and Madhav Rao Pandit Pradhan, Peshwa of Poona, is an amazing document. It deals with the freedom of the high seas for each other's ships, duties of mutual assistance at sea, freedom of trade, assistance in the return of each other's escapee slaves, foreclosure of past disputes, settlement of future disputes through good faith negotiations, safety of each other's vessels, mutual assistance in battle at sea, prevention of treasonable activities in either party's territory against the other, denial of assistance to each other's enemies, mutual non-aggression, return of fugitives, Portuguese duty not to fortify any further territories in Maratha territory, return of Portuguese trading vessels found in Maratha jurisdiction, grant of a jagir to the Portuguese towards Daman and compensation for damage to a Portuguese frigate since returned to the Portuguese. For the text of the treaty, *see* ICJ Pleadings in the *Right of Passage* case, Vol. III: 336-367.

law transcended the Christian frontiers, and that contemporaneous practice of inter-state conduct was critical for the determination of the existence, nature and content of an international law rule. Very clearly, that which the Court held in respect of the Marathas would apply *mutatis mutandis* in relation to all Oriental and African sovereigns of that time.

### *3.5.6. Capitulatory treaties*

Treaties whereby a sovereign usually conceded to foreign sovereigns criminal jurisdiction over their nationals within the territory of the former were probably introduced by the colonial powers. As already seen, the French-Ottoman Treaty of 1535 was the first capitulatory treaty between a European power and a non-European (Asian) power. One of the early capitulatory treaties concluded between an Indian ruler and a European colonialist was the Treaty of 1663 concluded by the Dutch Company and the ruler of Cochin, the southern neighbour of *Zamorin*. This treaty contained a number of jurisdictional clauses. It clarified that if a Hindu committed a crime, the ruler would have the territorial jurisdiction over it, whereas if it were committed by a Christian, judges appointed by the Dutch Company would have jurisdiction. However, with regard to a dispute between the subjects of both parties, each party would exercise jurisdiction over its subject.[96]

In Alexandrowicz's view, there are important differences between the Ottoman capitulatory treaties with the European powers, on the one hand, and those between the Indian rulers and the European companies on the other. Initially, most Indian capitulatory treaties had a constitutive effect in the sense that they granted to the European companies jurisdictional powers, which did not exist but for the specific treaty (or *firman*). Subsequently, however, when capitulatory treaties were concluded between the Indian rulers and the European powers under whom the former became dependent (after the spread of the colonial empire), these were merely declaratory of the jurisdictional powers of the European colonial governments, since most Indian rulers had already become vassals of these governments.[97] Yet there were also a few special treaties that sought to settle the jurisdictional problems between the European merchants residing in the territory of the English company and merchants residing in the territory of a neighbouring Indian Ruler, by providing for "presentation of cases through the diplomatic channel to the highest executive authority on one or the other side and it was the latter's duty to have the case assigned to the proper judicial agency".[98]

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[96] C.H. Alexandrowicz, "Treaty and Diplomatic Relations between European and South Asian Powers in the Seventeenth and Eighteenth Centuries," 100 *Recueil des cours* (1960-II) 203-320 at 253.

[97] Alexandrowicz, *op. cit.*, n. 60 at 111-112.

[98] *Ibid.* 113-114. Alexandrowicz cites Article XIV of the Treaty of 1788 concluded between the English East India Company and the Vizier of Oudh.

Initially, the capitulatory treaties must have evolved based on a concern for affording justice to foreigners through a system of law with which they were comfortable.[99] Subsequently, however, they became an effective tool of imperialism, finally to be replaced altogether by the law and the legal system of the colonial power to govern the entire colony.

### *3.5.7. Treaties with discriminatory clauses*

European companies also introduced in India the practice of treaties, which provided for inter-European discrimination, even if inconsistent with the principle of freedom of trade.[100] This was due chiefly to the export to the Orient of intra-European rivalries. Each European company sought to establish its monopoly over the spice trade in the territory of an Indian ruler to the exclusion of other European companies. These attempts at monopoly later expanded to cover trade in all commodities. Slowly but surely, the granting by an Indian ruler of a commercial monopoly to one European company to the exclusion of others led to the Indian ruler's isolation and a position of inequality, and finally to his subjugation. Commercial monopoly was soon replaced by European control of foreign policy of the Indian ruler, and this was further replaced by subsidiarity and total loss of independence.

The Treaty of 1604 between the *Zamorin* of Kozhikode and the Dutch East India Company expressed the common policy of the parties to eliminate the Portuguese from the whole of India. The Treaty of 1612 between the Vijayanagara Empire and the Dutch stipulated that the king should prohibit the Portuguese from residing and trading at Pullicat, where only the Dutch should be allowed in. It also provided that "the king shall … not be permitted to allow any European nation (to) traffic here", except those licensed by the Dutch Prince.[101] By a Treaty of 1792, the Nawab of Carnatic agreed with the English company not to negotiate or correspond with any European power "without the consent" of English company.

The 1759 treaty between the English company and Hyderabad (Deccan) was specifically anti-French. Under a further treaty of 1798, the Nizam of Hyderabad surrendered to the English his right to negotiate with other states. The treaty of 1800 truly converted him to a subordinate position in relation to the English.

The Marathas too concluded the treaty of 1782 with the English, undertaking not to allow any other Europeans than the English and the Portuguese into their territories and not to have intercourse with any other European nations. In return, the English company undertook not to assist any Indian nation that was in a state of enmity with the Marathas. The treaties of 1902

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[99] Alexandrowicz refers to the Dutch-Persian Treaty of 1631 evidencing a prior grant of capitulatory jurisdiction by the Dutch in favour of a Persian merchant community in Amsterdam. *See ibid.* 19.

[100] *See* generally, Alexandrowicz, *ibid.* 128-148.

[101] *Ibid.* 132.

and 1803 imposed on the Marathas an obligation to dispense with all non-British Europeans in their service. The Treaty of 1817 between the Peshwa and the English reiterated this and also obligated the Peshwa not to send or receive embassies or to communicate with other nations, except through the English Resident (the resident political representative of the company). This was the end of the Maratha sovereignty.

### 3.6. War and humanitarian laws of armed conflict

During the colonial era, the concept of war roughly represented the wanton use of force by the British against the local rulers. For instance, the main justification for the final and savage British assault on the sovereignty of Mysore in 1799 was offered by Governor-General Lord Wellesley in the following words: "The act of Tippoo's ambassadors (seeking alliances), ratified by himself, and accompanied by the landing of a French force in his country is a public, unqualified and unambiguous declaration of war; aggravated by an avowal, that the object of the war is neither expansion, reparation, nor security, but the total destruction of the British Government in India."[102]

All wars all through the ages have violated the humanitarian laws applicable in armed conflict. However, colonialism in particular was founded literally on the blood of Asians and Africans. Indian historians cite a number of instances in which the European colonialists provoked war or resorted to unprovoked war with Indian rulers. Portrayed here are some random examples.

Majumdar and associates record that in December 1688, the English blocked Bombay and the Mughal ports on the west coast of India, seized many Mughal ships, and also sent a captain to the Red Sea and the Persian Gulf "to arrest the pilgrim traffic to Mecca". The English were defeated by the might of the Mughal Empire and had to sue for pardon and peace before Aurangzeb. In February 1690, the Emperor granted pardon and restored the English licence to trade, when the English agreed to return all the captured vessels and pay Rs. 150,000 as compensation.[103]

The 1857 uprising had its own share of wanton killings on both sides. The British finally succeeded in quelling the uprising at great human cost. The last Mughal emperor was taken prisoner and deported for life to Rangoon. His sons and grandson were killed on the spot, after being taken prisoner, on a mere allegation of having murdered some Englishmen.[104] The scene at Delhi, upon entry of the British troops in September 1857, was described by the British-run Bombay Reporter as follows: "All the city people found

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[102] Majumdar, *op. cit.*, n. 2 at 712.

[103] *Ibid.* 639.

[104] In the words of Malleson, an English historian, "a more brutal or a more unnecessary outrage was never committed. It was a blunder as well as a crime." Quoted, *ibid.* 778.

within the walls our troops entered were bayoneted on the spot; and the number was considerable, as you may suppose when I tell you that in some houses forty or fifty persons were hiding".[105]

As Jawaharlal Nehru recounts the horror of the British retaliation to the revolt based on the accounts of some of the British historians, "the days of Timur and Nadir Shah were remembered; but their exploits were eclipsed by the new terror, both in extent and length of time it lasted. Looting was officially allowed for a week, but actually lasted for a month, and it was accompanied by wholesale massacre". In several cities like Allahabad, Kanpur, and Lucknow "bloody assizes" were held by British soldiers and civilians and they, with or without any assizes at all, massacred Indians regardless of age or sex. Even volunteer parties went into districts with amateur executioners.[106]

The standard of compliance with humanitarian laws by the Indian rulers was by and large better than that of the British, although many Indian rulers too recognised no limits on the use of force or on the mistreatment of subjugated people, and plunder and siege of cities. A few rulers were known for their exemplary conduct in this regard. Krishnadeva Raya of Vijayanagara Empire in a war with King Gajapti Prataparudra of Orissa in 1514, captured his fortress of Udayagiri and took the latter's uncle and aunt as prisoners of war, but treated them with due honour.[107]

Chhatrapati Shivaji, the most powerful of the Marathas in the early seventeenth century, was known to have respected women, mosques, and noncombatants, did not permit the slaughter of humans after battle, and released with honour the captured enemy officers and men. "[T]hese are surely no light virtues", says British historian H.G. Rowlinson.[108]

## 4. THE MODERN ERA

Two aspects of modern India's perception of and attitude towards international law are considered here: (a) the Nehruvian perception of international law, and (b) India's contribution to the normative development of modern international law.

### 4.1. The Nehruvian perception of international law

The independent India's attitude and policy on international law began unfolding through the independence movement particularly in the late 1920s

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[105] *Ibid*. 777.
[106] Nehru, *op. cit*., .n. 1 at 270.
[107] Majumdar, *op. cit*., n. 2 at 369.
[108] *Ibid*. 522.

and 1930s. That India participated in the San Francisco Conference of 1945 which brought into being the UN Charter, is of little significance, because it was still a British colony; the Indian delegation was appointed by the British Government; *en route* to San Francisco, it was briefed in London, and it played a subordinate role to London at the conference. India had, therefore, to wait until 1947 to claim its rightful place in the comity of nations.

The independent India's foreign policy and attitude towards international law have been based on its keenness to stay clear of the power politics of rival alliances of states; establish peace, harmony and co-operation, and protect fiercely its own independence such that the destiny of its people be pursued by them in their own way. The colonial experiences have taught India the values of independence and national unity, respect for the independence of other peoples, and international co-operation. In his first radio broadcast, as the Vice-President of the Interim Government of India, Jawaharlal Nehru, the architect of the independent India's foreign policy, said on 7 September 1946:

> "We propose, as far as possible, to keep away from the power politics of groups, aligned against one another, which have led in the past to world wars and which may again lead to disaster of an even vaster scale. We believe that peace and freedom are indivisible and the denial of freedom anywhere must endanger freedom elsewhere and lead to conflict and war. We are particularly interested in the emancipation of colonial and dependent territories and peoples and in the recognition in theory and practice of equal opportunities for all peoples…. We seek no domination over others and we claim no privileged position over other peoples…. The world, in spite of its rivalries and hatreds and inner conflicts, moves inevitably towards closer co-operation and the building up of a world commonwealth. It is for this one world free India will work, a world in which there is free co-operation of free peoples and no class or group exploits another".[109]

Nehru's interest "in the theory and practice of equal opportunities for all peoples" presented a point of confluence of both vision and pragmatism. Indeed, it was part of his world view – a view of peaceful co-existence of states, and of an equitable world order in which countries, both large and small, developed and developing, co-operate with one another. Pursuant to this world vision, Article 51 of the Indian Constitution 1950 enjoins the state to "endeavour to – (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organized people with

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[109] Jawaharlal Nehru's broadcast speech on the All India Radio, 7 September 1946, reproduced *in extenso* in *The Hindustan Times* (New Delhi) and *The Hindu* (Madras), of 8 and 9 September 1946, respectively.

one another, and encourage settlement of international disputes by arbitration."[110]

Nehru's views of international order, international organisation and international law received expression in his numerous public statements. Specifically on international law, Nehru on two occasions, in 1959 and 1963, addressed the Indian Society of International Law, in the establishment of which he along with his Defence Minister, V.K. Krishna Menon, had played an important role. He rejected the claim that international law originated in the West and that "there was no such thing in the countries of Asia or elsewhere". There was indeed some kind of international law in ancient India, China and elsewhere, he asserted.[111] While most of the ancient ideas might be out of line with modern life, he viewed the ethical content of these ideas to be of perennial significance. On a philosophical plane, he reduced most great problems of the day to two "major facts" behind them, namely (a) the immense and continuous advance in science and technology which was changing human life and gave increasing power to humanity, and (b) the possible misuse of this great power. "This has resulted in an atmosphere of fear in many parts of the world leading to stultified thought and frightened action".[112] The reason for this, according to Nehru, was that the scientific and technological developments had far outstripped the cultural development of man, which latter alone could have placed restraints on the misuse of power. Immense power without ethical restraints underlay the great problems of the modern world. Added to this were the new challenges, posed to the world community by the scientific and technological developments. From this point of view, the political boundaries of states became irrelevant.

Against such a scenario, Nehru envisaged a role for modern international law in dealing with modern problems. These problems include those of "autonomy" between international and national entities (which "is being sought to be resolved in the present day attempts at international organisation"),[113] impact of scientific and technological advance on the international order,[114] disarmament (where international law, along with other forces, could influence action), and the elimination of nuclear weapons and nuclear tests.

An important objective of international law, according to Nehru, was to promote "understanding of peace between nations", which include "good relations" among nations, elimination of war, peaceful settlement of disputes

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[110] For a study of this provision, *see* P. Chandrasekhara Rao, *The Indian Constitution and International Law* (New Delhi, 1993) 7.

[111] Address by Prime Minister Nehru inaugurating the Indian society of International Law in 1959, *op. cit.,* n. 1 at 6.

[112] *Ibid.* 8.

[113] *Ibid.* 6.

[114] "It may be said that international organisation and international law have not kept pace with this advance which is posing so many problems before us", said Nehru, *id.*

and international co-operation.[115] He was concerned that while international law had considerably expanded, its effectiveness had not done so in equal measure. The latter was a function of commitment to and acceptance of the law by all nations, big and small, predicated upon the capability of the law to help them tackle modern problems. It was a function of disarmament and an acceptable international order and international authority.[116] "There is not much of a choice left between some international order, international authority, and the ever present danger of a major war between nations", said Nehru.[117]

The United Nations, in Nehru's perception, reflected "a very noble attempt to bring the world into some scheme of international law. The Charter of the United Nations is a very fine and inspiring document – I mean the objectives and ideals that it sets before itself."[118] Noting the criticism that the UN had not lived up to its ideals, he said: "That criticism is both justified and unjustified – justified because it is true and unjustified because the United Nations has only to function in the world as it is. It cannot function in some rarefied atmosphere, which is away from the world … Nevertheless, here is something which keeps this ideal of some kind of world order, the international law applied to the world before us. It is true that in practice it is not applied, in the opinion of many, as justly and as equitably as it ought to be. Great interests pull the United Nations, this way or that … Groups of nations pull it in various directions. It may be so, but the ideal is there and that itself is a great gain".[119]

Nehru was aware of the Euro-centric character of the traditional international law, which evolved at a time when most part of Asia and Africa was on the periphery of the European sovereign state system. Hence his support for the establishment of the Indian Society of International Law and the Asian-African Consultative Committee (now, Organisation), the former to evolve an Indian viewpoint on aspects of international law, and the latter to forge a common front amongst the Asian and African nations on the great contemporary issues of relevance to international law.

## 4.2. India's contribution to international law making

In view of the limitations of space, the present paper confines itself to identifying eight areas of international law wherein India's normative contribution has been widely acknowledged, namely, the Declaration on Friendly

[115] *Id.*
[116] *Proceedings of the Annual Conference of the Indian Society of International Law*, 1963, 4-6 at 4-5.
[117] *Ibid.* 5.
[118] *Op. cit.*, n. 1 at 7.
[119] *Ibid.* 8.

Relations of 1970, the law of the sea, the law of outer space, equity in international economic relations, human rights and decolonisation, international terrorism, the law of the environment, and the law of disarmament.

### *4.2.1. The Declaration on friendly relations, 1970*

The expression "friendly relations and co-operation among States in accordance with the Charter of the United Nations" is the United Nations euphemy for the phrase "peaceful co-existence", and was evolved on the basis of Article 1 of the UN Charter, in view of the Western misgivings about the latter. However, peaceful co-existence has had a specific meaning in the terminology of the Non-alignment, its legal content deriving from the *Panchsheel*, first embodied in the Sino-Indian Treaty of 1954.

The UN General Assembly decided in 1961 to launch upon negotiating the formulation of the Declaration, in response to a concerted move by the 'Third World' countries, often supported by the Soviet bloc. The end of the Second World War had brought with it momentous changes in international relations. The "old order" gave way to a "new order" dominated by two superpowers, with each presiding over its own bloc of countries, and each promoting political and ideological confrontation and proxy-wars against the other. Hiroshima and Nagasaki proclaimed the arrival of the nuclear weapons, which triggered a nuclear arms race between the two power blocs. While colonialism started disappearing, it needed a push to hasten its end.

The large-scale emancipation of the countries of Asia and Africa from the yoke of colonialism brought about a sea change in "the geography of international law," in the words of Judge Radha Binod Pal. While these countries shared the experiences of colonialism and exploitation, they also wanted to build upon this shared history, a framework of co-operation. To them, the condition of international peace and security was essential for marshalling all available sources for their economic development, for the reconstruction of the internal political, economic and social systems from the rubble of the erstwhile colonial devastation.

Thus, these countries of Asia and Africa wanted to redefine, refine and reorient the normative foundations of international law. The traditional international law has been a product of Euro-centric international relations since the Middle Ages. Much of that law served the interests of Western states, and operated to the detriment of the "new" states. The latter had, furthermore, played no part in the making of the traditional international law. Hence their demand to redefine, refine and re-orient the international normative order to the needs of the contemporary international community and to participate in the new consensus underlying this lawmaking process.

Finally, the decade-long intense negotiations between the West, the East and the Third World culminated in the consensual adoption of the Friendly Relations Declaration in 1970. The Declaration embodies formulations of the seven principles of modern international law, namely, prohibition of the

use of force, non-intervention, peaceful settlement of international disputes, international co-operation, equal rights and self-determination, sovereign equality, and fulfilment in good faith of international obligations.

The Indian delegation, under the leadership of K. Krishna Rao, the then Legal Adviser in the Ministry of External Affairs, Government of India, played a seminal role in the evolution of the declaration. India's contributions to the formulations of the prohibition of force, of non-intervention, self-determination and international co-operation have been particularly noteworthy. The balancing of the right of self-determination of peoples with the territorial integrity of an already independent State is especially important in that the territorial integrity of a state with a representative government in compliance with the principle of self-determination may assume itself to be protected from claims of secession.[120]

### *4.2.2. The law of the sea*

The traditional law of the sea, including the Geneva Conventions of 1958, by and large, provided for a free-for-all regime of the high seas. The freedom of the seas doctrine, from the viewpoint of the exploitation of resources of the sea favoured the powerful and technologically more advanced countries, rather than the developing coastal states.[121]

Ever since the Third Conference of Heads of State or Government of the Non-aligned countries in Lusaka 1970, the Non-Aligned Movement consistently highlighted its special interest in the process and success of the law of the sea negotiations that had commenced at the United Nations in 1967.[122] It was conscious of the special linkage that existed between its demand for a New International Economic Order (NIEO) and the law of the sea, on the one hand, and the potential of the latter to contribute to the economic development of the Third World, as borne out by Article 29 of the Charter of Economic Rights and Duties of States, 1974, on the other.[123]

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[120] For more on the drafting history of the Friendly Relations Declaration, *see* V.S.Mani, *Basic Principles of Modern International Law: A Study of the United Nations Debates on Principles of International Law Concerning Friendly Relations* (New Delhi: Lancers, 1993). The ICJ in its Nicaragua ruling recognised the jural character of the formulations of the Friendly Relations Declaration, *see* ICJ Rep. 1996: 14 at 100.

[121] *See* R.P. Anand, "Tyranny of the Freedom of the Seas Doctrine", *International Studies* (New Delhi) (1973) 416-429.

[122] *See* the Ministry of External Affairs, Government of India, *Two Decades of Non-Alignment: Documents of the Gatherings of the Non-Aligned Countries, 1961-1982, and Final Documents, 7th Conference of Heads of State or government of the Non-Aligned Countries,* (New Delhi, March 1993) 28-129, 138-139.

[123] The Fourth NAM, Algiers, 1973, reaffirmed "the vital importance of a rational utilisation of the resources of the seas and oceans for the economic development and promotion of welfare of the peoples". *See* Ministry of External Affairs, *op. cit.*, n. 122 at 8. *See* also *ibid.* 98, 117, 135-6, 143. For an Indian perception of the economic aspects of the International Seabed area *see* Vathsala

At least six principal factors underlie the Third UN Law of the Sea negotiations 1967-1994, namely, (1) the unrepresentative character of the 1958 law of the sea regime, (2) the emergence of a large number of Third World countries as new participants in international relations, (3) the trends in over-exploitation of ocean fishery resources by the technologically developed nations, and the response of the developing coastal states in establishing coastal marine resource regimes as an expression of economic self-determination of these countries, (4) a vast increase in super-power military presence in the world oceans, (5) developments in marine technology pointing to the resource potential of the international seabed area and equally to the possibilities of seabed resource grabbing by the developed countries on the traditional first-come-first take rule (*res communis)*, and (6) the increasing concern for the preservation of marine environment.[124] The Third World responses to these factors took the shape of coastal resource zones such as the Exclusive Economic Zone,[125] and the Continental Shelf, as well as the concept of Common Heritage of Mankind (CHM) in respect of the international seabed area. India, along with many other developing coastal states, played an important role in the articulation and development of these new concepts, while keeping in view its own special interests in ensuring freedom of navigation for its ships through international straits and archipelagic waters.

The currents and cross-currents of international political and economic relations since 1980 played havoc with the fate of CHM, highlighted by a high drama of United States withdrawal from the 'gentlemen's agreement on a consensual "package deal" on the basis of which the Convention of 1982 had been evolved, and its subsequent return to the negotiating table, with a compromise formula struck in 1994[126] (which in fact comprised the entire operationality of CHM and hence its linkage with NIEO). This has, it is submitted, left the International Seabed Area bereft of all but the label of Common Heritage of Mankind.[127]

Yet the cumulative achievements of the UNCLOS III are principally four-fold: (a) a functional approach to law of the sea problems, (b) a normative orientation towards equity in the law, (c) the emergence of a legal concept

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Mani, "Exploitation of Deep-Sea-Bed Minerals: Some Economic Issues," *India Quarterly* (1979) 52-66.

[124] For an elaboration of these factors, *see* V.S. Mani, "The United Nations, Law of the Sea and the Developing Countries," in M.S. Rajan, V.S. Mani, and C.S.R. Murthy (eds.), *The Non-Aligned and the United Nations* (New Delhi, 1987) 56-79.

[125] *See* Rahmatullah Khan, "On the Fairer and Equitable Sharing of the Fishery Resources of the Oceans", 13 IJIL (1973) 87 and his "The Fisheries Regime of the Executive Economic Zone", 16 IJIL (1976) 169-186; and "Some Reflections on the Legal Implications of Exclusive Fishery Zones", 21 IJIL (1981) 34-545.

[126] *See* R.P. Anand, "UN Convention on the Law of the Sea and the United States", 24 IJIL (1984) 153-99.

[127] R.P. Anand, "Common Heritage of Mankind – Mutilation of an Ideal", 37 IJIL (1997) 118 ff.

of Common Heritage of Mankind to apply to international areas, and (d) a focused international concern for the protection of the marine environment.

### *4.2.3. The law of outer space*

The emergence of the law of outer space since 1957 has been triggered and influenced mainly by two factors: one, the need to insulate outer space from the super power arms race, and two, the need to make the benefits of peaceful uses of outer space accessible to all states. These, indeed, have been the factors that underscore India's participation in the evolution of the various treaties and the UN General Assembly resolutions in respect of outer space. As a country, which has developed largely indigenous space technology and used it for the national development activities, India's contribution to the work of the UN Committee on the Peaceful Uses of Outer Space has been substantial. Although the United Nations has not been able to prevent military uses of outer space, its contribution towards forging international co-operation in respect of peaceful uses of the space has not been insignificant.[128]

In regard to outer space, India's perception has been clear since the 1960's. In the words of Vikram Sarabhai, the Father of India's space programme:

> "We do not have the fantasy of competing with the economically advanced nations in the exploration of the Moon or the planets or manned space flights. But we are convinced that if we are to play a meaningful role nationally, and in the community of nations, we must be second to none in the application of the advanced technologies to the real problems of man and society, which we find in our country".[129]

India's pursuit of the peaceful uses of outer space has convincingly demonstrated that it is in the process of "unleashing of the vast and unlimited potential benefits of space technology … virtually touching every facet of human endeavour".[130]

India's contribution to the evolution of the space science, technology and law at the United Nations has been and continues to be substantial.

### *4.2.4. Equity in international economic relations*

As a developing country, India has stressed the need for an equitable international economic order. In the context of the international setting of norms, India played an important part in the evolution of the concept of

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[128] *See* V.S. Mani, S. Bhatt and V. Balakista Reddy (eds.), *Recent Trends in International Space Law and Policy* (New Delhi: Lancers, 1996)

[129] Quoted in K. Kasturirangan, "Realizing the Dreams of Dr. Vikram Sarabhai", *Countdown* (July-October 1994) 171-176, cited in V. Balakista Reddy, "Space Law and Policy in India", in Mani, *op. cit.*, n. 128, 15-139, at 115.

[130] U R. Rao, "Space for Sustainable Development", in *op. cit.*, n. 128 at 27-54.

permanent sovereignty over natural resources, the first normative response of the Third World to the economic imperialism of the big powers. The establishment of the United Nations Conference on Trade and Development in 1963, the call for a New International Economic Order and adoption of the Charter of Economic Rights and Duties in 1974, the emergence of the concept of the common heritage of mankind in respect of international areas of outer space and the oceans since 1963, and the endeavours for the protection of the global commons from further degradation: all these have been on the initiation of or facilitated by the active participation of the Third World countries, including India.

Since 1994, however, there seems to be a feeling generally shared by many developing countries, including India, that the new World Trade Organisation has so far failed to usher in an equitable international trade regime.

### *4.2.5. Human rights and self-determination*

India's attitude towards human rights may be examined at two levels, namely, at the normative level, and at the level of international politics. At the normative level, India's freedom struggle underscored the importance of normative assertion of human rights. As noted already, Jawaharlal Nehru has stressed the need for establishment of freedom and democracy in all countries. Yet, India gives more importance to group rights such as self-determination (both political and economic), and a proper balance of emphasis between economic, social and cultural rights, on the one hand, and civil and political rights on the other. Its national statutory institutions such as the Judiciary and the National Human Rights Commission have contributed substantially in the internal implementation of human rights. India also played an important role in the negotiations leading to the adoption of the international covenants on human rights 1966,[131] and the Convention on Elimination on All Forms of Discrimination, 1965.

India has played an active role in the UN decolonisation process, at both normative and operational levels. V.K. Krishna Menon's initiatives in expanding the scope of Article 73 (e) of the UN Charter, broadening the reporting obligation of the Administering Powers to encompass furnishing of all information in full on the colonial territories, and in the General Assembly's adoption of the 1960 Declaration on Decolonisation are still proudly recalled at least in the Indian academic circles.

India's action in liberating Goa in 1961 has been vehemently criticised in Western circles. Despite the unfortunate "Charter-or-no-Charter" speech of C.S. Jha, the then Indian Ambassador to the United Nations, it was an action taken as a last resort to liberate from Portuguese colonialism what was

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[131] *See*, K.P. Saksena, "International Covenants on Human Rights," 15-16 *Indian Year Book of International Affairs* (1966-1967) 96-613.

historically, culturally and demographically Indian territory; it represented a right and duty of India to assist the struggle for self-determination of the Indians who inhabited these colonies. K. Krishna Rao declared later, during the Friendly Relations debates of the sixties, that colonialism was "permanent aggression" against which the victim peoples had a right of self-defence.[132]

While the Indo-Pakistan war of 1971 involved the general background of relations between the two countries and issues of the legality of the use of force, the question of self-determination also loomed large. It was a case of colonialism in a non-traditional setting. India's action, much criticised in both the Security Council and the General Assembly, was defensible under both the principles of non-use of force and self-determination.[133]

One of the core problems of implementation of human rights at the international level has been the politics of human rights. States take political advantage of international human rights machinery. Precisely for this reason, India opposes international intervention on human rights issues, unless there is a case of gross and persistent violation of human rights such as in South Africa under the *apartheid* regime. The politics of human rights makes it impossible for any international machinery to function in conformity with the principles of consistency, impartiality and uniform application of substantive and procedural standards, including principles of natural justice. Eclecticism remains the hallmark of international politics, hence of international organisation.

#### *4.2.6. Legal controls of international terrorism*

The independent India initially saw international terrorism either as part of the Cold War scenario (in which case it was condemnable), or as part of the national liberation movements (in which case any value judgement would depend on which side of the 'war' one supported). However, India's attitude underwent a sea change by the mid-nineteen-seventies when it started to bear the brunt of cross-border terrorism in the Punjab and Jammu and Kashmir, and in its north-eastern states. Since then it has become a party to many anti-terrorism conventions. It actively sponsored the SAARC Convention on International Terrorism, 1987, and negotiated terrorism-specific extradition treaties and bilateral treaties of mutual assistance with Britain, Canada, Germany, the former Soviet Union, the UAE, and the US. India is currently pursuing at the United Nations General Assembly negotiation of a compre-

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[132] Krishna Rao also said: "Recourse to arms if the colonial powers insisted on opposing natural aspirations of the people was legitimate….", UN Doc. A/AC. 125/SR. 64, at 5, quoted in Mani, *op. cit*., n. 120 at 44.

[133] For more on this, *see* V.S. Mani, "The 1971 War on the Indian Subcontinent and International Law, 12 IJIL (1972) 83-99. *See* also M. K. Nawaz, "Bangladesh and International Law", 11 IJIL (1971) 251.

hensive convention to combat international terrorism,[134] which has received top priority in multilateral negotiations at the UN, thanks to the developments since the 11 September 2001 terrorist attacks on the US.

*4.2.7. The emerging law of the environment*

While the world woke up to the urgent need to prevent further deterioration of the global environment and restore its quality in 1972, India's Prime Minister, Indira Gandhi, gave a forceful presentation of the case for the developing countries at Stockholm; she argued that the measures of pollution abatement could not be at the cost of development so critically important for these countries, as "poverty is the greatest polluter".

By the Rio Summit in 1992, the international community had started appreciating the link between environment and development, as represented by the new slogan of "sustainable development". The establishment of the Global Environmental Facility resulted from the demand of India and other developing countries for a global fund to assist them in meeting environmental obligations.[135]

The role being played by the Indian judiciary in the implementation of international environmental obligations in the domestic arena deserves special mention.[136]

*4.2.8. Disarmament*

India has consistently supported genuine efforts towards the evolution of global obligations towards general and complete disarmament. Its approach to nuclear disarmament has undergone some changes, although it pledges its unqualified support for the cause of the complete elimination of nuclear weapons on the international plane. Since the famous Nehru initiative of 1954, India has strenuously endeavoured to achieve a total ban on all nuclear tests. In 1974 it decided to test a 'peaceful nuclear explosion.' Subsequently, it proclaimed in the 1980s that it kept its nuclear option open. Since the nuclear weapon tests of 11 and 13 May 1998, however, India now considers itself to be a nuclear weapon state, even as it has reaffirmed its commitment to the total elimination of nuclear weapons at the global level. The reason given in support of the 1998 tests are the change in the security scenario on the

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[134] *See* UN Doc. A/C.6/55/1 of 28 August 2000.

[135] *See* Rahmatullah Khan, "Legal and Institutional Issues Arising out of the Proposed Framework Convention on Climate change," *Indo-British Symposium on Global Change*, 15-17 January 1992, New Delhi.

[136] *See* Bharat Desai, "Enforcement of Rights to Environment Protection through Public Interest Litigation in India", 33 IJIL (1993) 27-20; Rajakumar Deepak Singh, "Response of Indian Judiciary to Environment Protection: Some Reflections, 39 IJIL (1999) 55-63; P. Leelakrishnan, *Environmental Law in India* (New Delhi, 1999).

subcontinent, the discriminatory character of the existing international nuclear non-proliferation and transfer of high technology regime, and the need for India to demonstrate its determination to break the global nuclear *apartheid*. This change in India's nuclear policy has its protagonists as well as critics.[137]

## 5. CONCLUDING REMARKS

This essay reflects an attempt to survey the history of international law through the looking glass of the history of the evolution of the Indian polity from the cradle of an ancient civilisation through the interfaces of its contacts and interactions with other civilisations at divers cross-roads in the passage of time. Quite possibly, the study reveals a typical Oriental civilisation responding to the need to evolve an equitable and peaceful international regime of relations between organised peoples, built on the time-honoured principles of equity, peaceful co-existence, tolerance and human welfare. The journey has not been easy; the road has not been well laid: it was full of treacherous potholes and conceited culverts. Yet, the Indian civilisation seems by now to have consolidated its position in the international arena, and has come to terms with its post-independence role to be a master of its own destiny. Many of the principles of modern international law can indeed be related to a range of the ancient principles of high morality with which the Indian polity has been familiar since time immemorial. Surely, one lesson that comes out of this study is that the tradition of international law was certainly not something that was brought to this ancient land by the European colonialists. In fact, it was ingrained in the political and religious thought that evolved on this land over time. Its doctrinal content was probably more humane and more equitable than its contemporaneous European counterpart.

Quite possibly similar studies in the history of international law must be undertaken in respect of every ancient civilisation. Such a retrospective assessment is likely to have at least one beneficent impact – it will, it is hoped, facilitate the implementation of international law, by providing the necessary ambience to inform the state polity of the cultural imperatives of a co-operative and equitable international regime of relations between organised peoples, readily available in each national society.

While this essay has taken efforts to capture, albeit in a nutshell, some of the positive normative contributions of the Indian polity and the civilisation on which they are founded, it does not claim to portray any neat balance-sheet of India's state practice as such., each important instance of state practice will need to be subjected to a critical contextual examination for that purpose,

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[137] *See*, *e.g.,* V.S. Mani, "Symposium on India's Nuclear Tests 1998: Policy and Legal Implications", 38 IJIL (1978) 218-226.

and that exercise is decidedly too ambitious to be undertaken within the scope of the present endeavour.

# IDEALISM AND REALISM IN THE POST-WAR FOREIGN POLICY DEBATE IN JAPAN*

Sakai Tetsuya**

## 1. INTRODUCTION

In the post-Second World War discourse on foreign policy, the most frequently used style of debate was the juxtaposing of idealism and realism and pitting them one against the other. The two opposing positions also characterized the debate on Japan's foreign policy – idealism rooted in pacifism as espoused by the post-war Constitution, and realism drawing upon arguments within the context of the US-Japan Security Treaty. The controversy was engendered by the Cold War and the peace treaty debate, and intensified during the discussion on constitutional reform in the late 1950s.[1]

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[1] After the conclusion of the San Francisco Treaty, political conflict broke out in Japan between the opposition partiesthat, drawing upon the war-renouncing provision of Article 9 of the Japanese Constitution, espoused pacifism, and the conservative parties which dismissed pacifism as unrealistic and attempted to promote foreign policies in line with the US-Japan Security Treaty. The conservative camp attempted to revise Article 9 of the Constitution, but met strong resistance from the opposition parties and the intellectuals. The move to revise and renew the US-Japan Security Treaty by the cabinet of prime minister Nobusuke Kishi in 1960 triggered a massive resistance movement. Kishi's background as a central figure in the pro-constitution revision movement and having been a defendant in the Tokyo Trial for war criminals particularly excited the opposition. Kishi's move was thus perceived as a threat to democracy. His cabinet managed to renew the treaty but was forced to step down immediately after. After this incident, the conservatives gave up on upholding constitutional revision as one of their banner policies, but the conservative-progressive conflict left a lasting impact on Japan's foreign policy debate. The post-war debate on Japan's foreign policy came to be characterized as the conflict between the idealists-progressives, and the realists-conservatives.

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Although the security treaty issue of the 1960s led the conservatives practically to give up their call for constitutional revision, the confrontation between the two positions deepened and was further intensified by the realists with their arguments, which were derived from the realist theory of international relations in the United States. Irrespective of the specific positions taken, the idealist-realist dichotomy came to serve as the parameter of the debate on post-war Japanese foreign policy.[2]

Without doubt this pattern of debate closely reflected actual political processes and the corresponding political positions of the discussants. The surprising thing is that attempts to examine thoroughly the controversy in a broader context of political thought theory have been sorely lacking. Paradoxically, this may prove that the participants in the debate shared a common understanding to the effect that the debate was in fact predicated upon a peculiar set of premises and circumstances.

Should we look at the ideas developed by the Japanese post-war foreign policy theorists as an isolated product of thinking, secluded from developments in other parts of the world, or were they inspired and influenced by contemporary theories of foreign policy elsewhere? If they were, what then was the exact influence, and what was that intellectual legacy? The pursuit of these issues seems an indispensable exercise when we discuss the intellectual basis of the post-war foreign policy debate in Japan and reflect on the philosophical bases of that policy.

Against this background, the following chapters will examine the course of the Japanese debate on foreign policy with due attention to its intellectual background. First, a review is given of the theories on international politics in the inter-war period in order to determine the basic elements of the idealist and realist schools. This will be followed by a discussion of how the post-war debate absorbed and adopted, and further developed, these inter-war theories.

## 2. THE INTER-WAR PERIOD AS THE SEMINAL YEARS FOR THE IDEALIST AND REALIST MODELS OF POLITICAL THOUGHT

A fundamental distinction between the various political theories is based on a different understanding of human nature, and the idealist-realist dichotomy reflects this difference. The idealist school tends to start from the innate goodness of human nature, asserting that human beings strive towards perfection by drawing upon their inborn sociability and through enlightenment.

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[2] For an exploration of the lines of thought behind Japanese foreign policy since the Meiji Restoration in terms of conflict between government realism and opposition idealism, see Iriye Akira, *Nihon no gaiko* [Japan's foreign policy] (Chuo Koron-sha, 1966). For an overview of the post-war foreign policy debate cf., *inter alia*, Shin'ichi Kitaoka, "Sengo nihon no gaiko shiso" [Thoughts on post-war Japanese foreign policy], in Shin'ichi Kitaoka (ed.), *Sengo nihon gaikoron-shu* [Essays on post-war Japanese foreign policy] (Chuo Koron-sha, 1995).

The realist school, on the other hand, leans towards the idea that human nature is fundamentally bad, stressing as they do the ubiquitous human desire to dominate and to hold power. From this perspective, the idealist-realist antithesis has been an ever-present component of the political theory debate, reflecting different perceptions of human nature. One could argue that as such the conflict is of an a-historical nature.[3]

In order to determine the place of the idealist and realist positions in the history of political thought of the twentieth century it is necessary to review the discourse of the inter-war period. It was from this discourse that the basic pattern of the debate emerged. It is to be noted, in addition, that the experience of the First World War in fact deprived the Western state system of its most typical feature: the principle of the balance of power that up to that time had served as the fundament of international politics.

Emerging around the end of the First World War, Wilsonianism and Leninism contributed to an increasing weight of ideology as a component of international politics, and thus accelerated changes in the latter's structure. At the same time, they gave a boost to the anti-imperialist movement in non-Western countries which hoisted the slogan of national self-determination. Evidently, these changes had their impact on the theory of international politics. The prevalent studies on diplomatic history and traditional international law in the time prior to World War I were premised on a society of sovereign nation states. This gave way to a newly dominant universalist doctrine of international politics and law, inspired by newly established international organizations. Idealism thus emerged by way of theory with its birth closely related to the appearance of the post-war universalist views.

After the war the new debate spilt over into Japan. The theory of international politics espoused by Sakuzo Yoshino, an ideologue of Taisho democracy,[4] serves as a chief example.[5] He applied the "free and equal" principle, hitherto known only among individuals, to international relations, thus attributing a new characteristic to international politics. Yoshino called the change a transition from "Imperialism" to "International Democracy".

The approach to peace-making also underwent a change as it evolved from that focusing on the adjustment of interests among belligerent states to the kind proposed by the United States and the Soviet Union: peace settlement based on abstract principles such as non-assimilation, non-compensation, and

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[3] For a historical background of idealism and realism, see David Long and Peter Wilson (eds.), *Thinkers of twenty years' crisis: inter-war idealism reassessed* (Oxford, 1995); Michael Joseph Smith, *Realist thought from Weber to Kissinger* (Louisiana State U.P., 1986)

[4] *Taisho* Democracy is a term that refers generally to the democratic movement that emerged during the pre-WWII period. The period in which this movement occurred generally corresponds to the era in which Emperor Taisho reigned (1912-1926), hence the name of the movement.

[5] Sakai Tetsuya,"Yoshino Sakuzo no kokusai minshushugi-ron" [Yoshino Sakuzo's theory on international democracy], in *Yoshino Sakuzo senshuu, dai-rokkan kaisetsu* [Selected works of Yoshino Sakuzo] Vol.6 (Iwanami Shoten, 1996)

self-determination. It was a harbinger of the trend to come, one in which post-war international relations would be built upon universal principles of freedom and equality.

From this angle, Yoshino attempted to demonstrate the imperative nature of *Minponshugi*, his rendition of democracy,[6] and called for the fulfilment by Japan of the various requirements of international democracy. This understanding of international politics provided the soil in which Yoshino's support of the Washington regime[7] and his deep sympathy towards Chinese nationalism had their roots. In assessing Yoshino's argumentation it is interesting to know that he was heavily influenced by the legalist peace theory that was prevailing in the Anglo-American countries. From the perspective of international justice Yoshino assigned significance to the League of Nations because of its international law enforcement mechanism. The idea of such an organization had up to that time been heard only as thefeeble cries of small states. The increasing mutual dependence in the international society had gradually placed its constituent members under a common norm. That, in turn, meant that an integrated system of sanctions would penetrate the international society, as had been the case in the domestic society. It was the evolution of the community of international law that caused the League of Nations to become the realization of a body that would ensure international sanction. Previously, Yoshino had seen the US's participation in the war against Germany as a form of execution of international sanction, and strongly endorsed it.

In later years Yoshino retreated from commenting on contemporary issues and turned to what is known as "*Meiji Bunka Kenkyu*", or studies of the history, politics and culture of the Meiji period. Yet, his interest in theories of international politics persisted. In "Emergence of political awareness in modern Japanese history",[8] the culmination of his studies on Meiji-period history, Yoshino addressed the concept of "*Kodo*" or the formulation of a perception of universalist normativity. It is easy to recognize that the thesis, which characteristically discussed Japan's adoption of universal public international law around the end of the Edo period, is in line with Yoshino's post-war interest in international law to which he was converted.

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[6] *Minponshugi* was a translation for "democracy" and was adopted by intellectuals in the pre-war period such as Yoshino Sakuzo. The word signified that politics is to reflect people's will but it conveniently obscured the question of where sovereignty lies. It thus permitted the user of the term to deflect the potential dilemma between the emperor system and democracy. In order to promote democracy in the Japanese political context, Yoshino and others used this term as an equivalent of the word democracy.

[7] The international framework for peace and security in the Asia-Pacific region that comprised several international treaties concluded at conferences held in Washington from 1921 to 1922. They included the Four Power Pact on the security of the pacific, Five Power Treaty on naval arms reduction and Nine Power Treaty on territorial integrity and the open door commercial status of China.

[8] *Op. cit.*, n. 5, Vol.11: *Yoshino Sakuzo senshuu daijyuuikkan* (1995) 223-290.

The occurrence of the Manchurian Incident posed a clear challenge to the universalist approach of international relations had put forth by Yoshino as a foundation of *Taisho* democracy. The Manchurian crisis and the subsequent departure of Japan from the League of Nations exposed the flaw of the collective security system as applied by a universal international organization. The Japanese government justified the actions of the local military forces as an act of self-defence. It structured its legal argument in such a way as to avert the application of the Kellogg-Briand Pact and yet to maintain consistency with the existing international legal framework. These efforts, however, were merely an attempt to disguise the real events.

Yokota Kisaburo was one of the few other Japanese intellectuals who were overtly critical of the Manchurian Incident. He was a normativist international legal scholar under the influence of Hans Kelsen's teachings. The Manchurian Incident had, of course, a wrenching impact on the existing international legal order. With the universalist approach smarting under itseffects, the Japanese intellectuals were faced with the task of presenting an alternative view on international relations. They found that alternative in a regional variety of the international order. The idea of a system of generally applicable international norms premised on a society of sovereign states, as was the case in the West, was not adequate in East Asia, where nation states were still at an early stage of development. Therefore, a special international system for Asia was in order. Initially, the argument averted a direct clash with the prevailing international order by treating the Asian situation after the Manchurian Incident as an exceptional development. As the Sino-Japanese War dragged on, however, the Japanese ideas developed into a critique in principle of the existing international order as epitomized by the Nine-Power Treaty.

The result was a theory on a new order for the Greater East Asia region. On the one hand it manifested as a regionalist theory, influenced by the "*Grossraum*" – extensive space – principle, and critical of both universal international organization and the idea of an atomistic co-existence of individual states. On the other hand, it was posited as an alternative to overcome the existing order dominated by the imperialist Anglo-American powers.

The theory even captured the attention of some Marxists.[9] These aspects mirrored the distorted reaction of the Japanese intellectuals to the post-war universalist view of international relations. It is generally held that the policymakers grew increasingly ideologist in the 1930s, in contradistinction to their previous, mainly realist, approach to foreign policy.[10] The ideological twist, paradoxically, underscored the significance of the challenge of both Wilsonianism and Leninism as faced by the Japanese policy makers and intellectuals.

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[9] On the rise of the regionalist view after the Manchurian affair, see Mitani Taichiro, "Kokusai kankyo no hendo to nihon no chishikijin" [Tectonic shift in the international milieu and the Japanese intellectuals], in *Taisho demokurashii-ron* [Taisho democracy] (old edn., Chuo Koron-sha, 1974)

[10] Iriye, *op. cit.*, n. 2 at 135.

The increasing role of ideology was thus a product of the prevailing intellectual mood in the world after the first World War when the Western state system had lost its self-evidence.

It follows from the foregoing that the criticism of the universalist theory of international politics by Japanese intellectuals crystallized into a regionalist theory. However, that was not a matter of necessity, since criticism of universalism could burst and branch into a variety of theories. In fact, the realist theory dominating the post-World War II international discourse also had its seeds in the inter-war debate.

Hans Morgenthau, known as the progenitor of realist international political thought, was a student of international law before he sought asylum in the United States. He was academically educated in German political science or "*Staatslehre*" of the inter-war period, in an atmosphere of anti-Kelsenism. Morgenthau's first-born book, *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen* [The international administration of justice, its nature and its limits][11] which was published in 1929, examined the question of the exclusion of political disputes from international adjudication, meticulously drawing on legal theoretical considerations. The book purported to subject the normative school of international law, which advocated the realization of international peace by referring all international disputes to judicial settlement, to an immanent criticism.

Morgenthau then proceeded to examine the legal philosophy of the Neo-Kantians which provided the epistemological basis for the pure theory of law advocated by Kelsen. He explored, *inter alia,* the reality of norms. The book of that title,[12] published five years after the publication of his first book, questioned the reality of the legal norm, an issue that was left outside the scope of the pure theory of law. He analyzed both the relationship between legal norms and other customary and moral norms, and that between legal norms and non-normative social forces. The book, which has a highly complex structure, can hardly be considered a masterpiece. Nonetheless, it clearly affirms Morgenthau's interest in exploring a methodology for the establishment of a functionalist international law. This is done by questioning the reality of norms while being inspired by Kelsen's endeavour to establish a unified perception of legal phenomena.

Morgenthau was concerned, at a basic intellectual level, with the reconsideration and the reconstruction of the normative structure of international society by making the actual basis of the legal norm, previously left out of the pure theory of law, the very object of his study. In so doing, he introduced into the realm of international law the methods of the more political versions

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[11] Leipzig, 1929.

[12] *La réalité des normes, en particulier des normes du droit international* [The reality of norms, particularly the norms of international law] (Paris, 1934). Under the influence of Kelsen, *see ibid.* at 1-9.

of government studies, as developed by Carl Schmitt and Hermann Heller during the Weimar Republic era.

After his emigration to the United States, Morgenthau's theory of international politics was further stripped of its legalist component as he ushered in a sociological construction revolving around the concept of power politics. Morgenthau's change in methodology stemmed from his involvement in a debate on the legalist world government theory, which had deep-rooted proponents in the US academic world. One can easily identify Morgenthau's concerns when reading his texts with his intellectual legacy in mind. His leading work, *Politics among nations*,[13] most clearly illuminates this point. The book's opening assertion, that power relations are omnipresent, often leads readers to draw the conclusion that the book in fact purports to argue the imperative nature of Hobbesian anarchism and power politics in international society. However, in view of the pattern and history of Morgenthau's intellectual development one could well argue that the book was not really written in the order of chapters as composed.

Morgenthau's earlier thoughts correspond with (the often overlooked) Chapters 13 and 16 of his book, on "Ethics, mores, and law as restraints on power", and "The main problems of international law" respectively. His theoretical endeavours had begun with questions on the reality of norms of international law as treated in these chapters. His analysis of norms and non-normative social forces then expanded into his famous analysis on power politics. With these sociological analyses at hand, Morgenthau proceeded to the question of how the community of international law could be developed and promoted.

Contrary to his real inclination Morgenthau has often been dismissed as a student of Machiavellism. His polemical expressions and style aside, such a mistaken notion appears to have arisen primarily from the fact that American readers, uninformed of Morgenthau's intellectual background in German political science (*Staatslehre*), somehow failed to appreciate the significance of his Kelsenian dilemma in the evolution of his thoughts on politics.

E.H. Carr encountered the same issues out of a socialist concern the same way as Morgenthau arrived at realist international theory from a conservative interest. Due to his pointed criticism of the utopian peace theory, Carr's *Twenty Years' Crisis* has been given a place in academe as a classic on realist theory. Nevertheless, as in the case of Morgenthau, it appears that relatively few efforts have been made immanently to analyze the intellectual context from which Carr's international theory emerged and to assess what kind of sense of history it involved. To put it plainly, Carr's theory is a projection of his criticism of *laissez-faire* principles onto the international plane from a socialist standpoint.

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[13] New York, 1948.

Carr's image of Wilsonianism might be termed "belated Benthamism". He argued that the distinguishing characteristic of Wilsonianism lies in Wilson's application of the myth of the *laissez-faire* principle and the self-adjusting nature of economic interests, a dilemma Carr believed was being overcome in post-war Europe, to the arena of international politics which had until then been relatively free from the application of the liberal concepts. Carr cited, quite symbolically, as the most proximate example of peaceful change in international society, the institutionalization of the labour-management cooperative framework.[14]

It must be remembered that Carr's realism was inseparably linked to his ideological criticism of the international order led by the "have" nations in both methodology and subject. How does Carr lay out the path to his version of socialism in his international theory? Characteristically, Carr demonstrated a strong interest in the impact of social change brought about by a total war. The experience of a controlled economy introduced during the First World War inevitably caused modification of the *laissez-faire* ideal. However, the post-war world order designed by Britain and the United States was a conservative one intended to impede an immutable process, Carr argued. It was the Soviet Union and the later Axis powers rather that proposed an alternative to the stalled order based on the classical liberal doctrine. The fascination of the alternative order in the context of the turbulent 1930s lay in this key respect. How the West responded to the proposed "new order" envisaged by the Axis powers and the Soviet Union would help determine the tide of the second World War. To answer them properly, it was imperative for the West to present a framework to accommodate the social changes brought about by the war.

Carr proposed that the wartime planned economy and full-employment be maintained after the war. Accordingly he argued against reversion to the gold standard and the free trade system; rather, the establishment of a new economic regime was imperative, one that was based on regional economic cooperation cutting through the boundaries of the nation states.[15] In *Twenty Years' Crisis* Carr stressed the complementary nature of realism and utopianism, and he did not mean it in a merely abstract sense. Carr's version of utopia envisioned the construction of socialism based on a wartime planned economy and regionalism, this being the other side of the coin of his realist criticism of the liberal order that was by that time in ruins.

Morgenthau and Carr closely shared their criticism of the idealist international theory of the 1920s that was buttressed by the emergence of universal international organizations, but differed markedly in their underlying concerns

[14] E.H. Carr, *Twenty Years' Crisis* (Jap. transl. by Inoue Shigeru, Iwanami Shoten, 1952, at 279-282).

[15] For Carr's views on total war and the post-war design, see E.H. Carr, *Conditions of peace* (New York, 1943). *See* also Mitani Taichiro, "The war-time regime and the post-war regime", in *Iwanami Koza: Kindai nihon to shokuminchi, daihakkan* [Iwanami lecture series: Modern Japan and its colonies, Vol.8] (Iwanami Shoten, 1993) at 315-318.

and values. Consequently, the two thinkers are by no means identical. Remarkably, however, their concerns correspond very closely to those of contemporary Japanese scholars. This becomes obvious when their intellectual contexts are compared and examined.

Carr's interest in the wartime-planned economy fundamentally coincides with the arguments put forth by Ohkohchi Kazuo who defended the planned economy of the Sino-Japanese War on social policy grounds. Besides, the ideological criticism of the international order of the 1920s and its characterization as Anglo-American-centric pacifism was most congenial to the thinking of Japanese intellectuals during the Sino-Japanese war. At the same time, Morgenthau's scholarly work had captured the attention of up and coming Japanese international law scholars as a new academic development, indicative of the arrival of the post-Kelsenian era.[16]

With the normative approach of international law facing a major crisis in the 1930s, Morgenthau's functionalist approach appealed strongly to those in search of a new model. There are aspects of Morgenthau's and Carr's theories that share a common intellectual ground with Japanese theories of the 1930s in that neo-Kantianism, which had served as a philosophical foundation for the *Taisho* democracy, had come under attack as the social and political reality of norms were called into question. Proponents of the attack leveraged arguments of Karl Marx and Carl Schmitt. In this key respect, the Japanese intellectual world proved a fertile ground for the realist international theory, as was the Western world. We shall now see how this intellectual heritage was passed on to the foreign policy debate in the post-war world.

## 3. FORMULATION OF THE POST-WAR FOREIGN POLICY DISCOURSE

After the Second World War, the leading intellectual agenda of the Japanese scholars was the construction of a post-war constitutional regime. As

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[16] See Tabata Shigejiro, "Kokusai saiban ni okeru seijiteki funso no jogai ni tsuite: Sono genjitsuteki imi no kosatsu" [On the exclusion of political disputes from international adjudication: assessment of its realistic implications], in *Hogaku ronso*, Vol.33, No.5 (1935) 114-123; Yasui Kaoru, "Kokusai hogaku ni okeru jisshoshugi to kinoshugi – Mogenso no kokusaihogaku hohoron no kento" [Positivism and functionalism in international law: examination of Morgenthau's methodology in international law], in *Hogaku Kyokai zasshi*, Vol.61 (1943), No.2.5, later republished in Yasui Kaoru, *Kokusai hogaku to bensho-ho* [Studies of international law and its dialectic] (Hosei U.P., 1970). On a post-Second World War reflection on Morgenthau, *see* Tabata Shigejiro, *Kokusai shakai no atarashii nagare no nakade – Ichi kokusaihogakuto no kiseki* [In the new current of international society: the footsteps of an international legal scholar] (Toshindo, 1988) at 23.

already pointed out in previous studies,[17] the arguments rolled out repeated parts of the political and economic debates of the war period. The concept of a "cultural state" [*bunka kokka ron*], put forth by Watsuji tetsuro and Abe Yoshishige, was an attempt to lend legitimacy to the post-war system of a symbolic emperor while carrying on the notion of "national community" [*kokumin kyodotai-ron*] envisioned during the war.[18] On the other hand, left-wing intellectuals shared extensively the idea that the very experience of the war-time planned economy would serve as the foundation of the post-war economic reconstruction. Initiatives for post-war economic revival, including the priority production system introduced by the Katayama Tetsu government, were without doubt the result of that school of thought.[19] The disintegration of the Japanese intellectual world of the immediate post-war years into a conservative and a socialist camp as a result of various social upheavals resulted in each of the camps in fact inheriting each of the two opposing positions that had already existed under the Konoe government during the war.[20]

The burgeoning constitutional debate focused on two issues: the status of the emperor, and the socio-economic problems, reflecting the concerns of the intellectuals of the time. What theories did these intellectuals propound in the course of the drafting of the constitution? Contrary to what one might expect, there were few commentaries on international politics or peace theories at the time, perhaps reflecting the conditions prevailing under the US occupation. However, Yokota Kisaburo constituted an exception.

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[17] Yonetani Masafumi, "Shocho tenno-sei no shisoteki kosatsu" [Examination of the ideas concerning the symbolic emperor system], in *Jokyo*, Dec.1990; Mitani Taichiro, "Sengo nihon ni okeru yato ideorogii toshiteno jiyuushugi" [Liberalism as the ideology of the opposition forces in post-war Japan], in Indo Kazuo, Yamaguchi Yasushi, Baba Yasuo and Takahashi Susumu (eds.), *Sengo demokurashii no seiritsu* [Establishment of post-war democracy] (Iwanami Shoten, 1988)

[18] The cultural state argument sought the foundation for a nation state in the commonality of culture and is one of the leading state theories in modern Germany. Many Japanese intellectuals discussed how nation states ought to be formed with this concept in mind. It differed from the individualistic state theory in that it saw cultural identity as the foundation for nation states. And it shared much in common with the national community theory which saw the nation state as one organic community. After the war, philosophers Watsuji Tetsuro and ABE Yoshishige positioned the emperor as the symbol of Japan's cultural identity and attempted to defend the emperor system by marking a contrast between the "cultural state" based on the symbolic emperor and the pre-war militarism.

[19] Economic policy aimed at promoting Japan's post-war economic reconstruction. It attempted to raise productivity by allocating goods, labor and capital to priority industries. The policy was adopted by the cabinet of Katayama Tetsu, who was the president of the Socialist Party, to overcome the economic crisis of the post-war Japan.

[20] During the Sino-Japanese War under the cabinet of Konoe Fumimaro, "unity of the people" was stressed to carry out the war effectively. But the definition of unity varied among discussants. Many leftist intellectuals saw an opportunity to bring socialization to Japan in the planned economy implemented under an all-out war and attempted to restrain the profit motives of the industrialists under the name of public interest. Intellectuals from the conservative camp on the other hand were cautious of these leftists' moves.

Yokota perceived the new constitutional provision on the renunciation of war as part of the tendency, already existing since the first World War, toward characterizing war as unlawful, and endorsed it in the context of a collective security system, which he had been advocating. He purported to demonstrate that the pacifism as envisioned in the new constitution was brought on by "the revolution of international law". Yokota, whose criticism of the Manchurian incident had left him a minute minority in the world of opinion makers, thus saw his reputation restored after the war. The international theory to which he resorted closely resembled the idealist theory on world government as put forth by Emery Reves in *The Anatomy of Peace*.[21] Idealist theories such as this occupied a legitimate place in Japanese academia in the immediate post-war years. Yet Yokota's theory seems to have left a trace of awkward feeling among contemporary scholars, although this was not directly articulated at the time.

The school of thought that actually interceded between the pre-war and post-war theories came from the other side of the line in the dual intellectual heritage. The arguments of Tabata Shigejiro who took a critical stance towards Yokota's normative view of international law is one manifestation of this development. Tabata's *Kokka byodo kan-nen no tenkan* [Conversion of the concept of equality of states],[22] published in 1946, is a classic on the history of international law written under the suppression of sentiments during the war, and is rich with suggestions for the reconstruction of an international society according to post-war standards. Tabata traced the development of the concept of equality of states in international law, and thereby called into question the prevailing view that Hugo Grotius established the basic principles of modern international law. He argued that Grotius' universalism is founded on an Aristotelian-scholastic view of man, which presupposes man to be born sociable. He also argued that Grotius' natural law theory, which postulates objective and transcendental norms with validity in and of itself, beyond man's and God's wisdom, is redolent of medieval residue. It should be noted that Tabata's qualification of Grotius as being "pre-modern" connotes his criticism of the post-World War I resurgence of Grotius by the universalist school of international law.

Instead of Grotius, Tabata credits and praises Samuel von Pufendorf for having spawned modern concepts of international law. The concept of the equality of states was born when Pufendorf applied, by analogy, the concept of equality among men in their natural state to the international society. As did Hobbes, Pufendorf conceived the atomist structure of the international society consisting of personified, individual, states, following the disintegration

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[21] Yokota Kisaburo, *Sekai kokka no mondai* [Problems of world government] (Dobunsha, 1948) at 13. For Yokota's peace theory immediately after the war, see Takenaka Yoshihiko, *Nihon seijishi no nakano chishiki-jin, gekan* [Intellectuals in Japanese political history, Vol.2] (Bokutakusha, 1995) 501-526.

[22] Akitaya, 1946.

of medieval universal society. However, unlike Hobbes, Pufendorf's version of the natural state theory is not one in which individuals, driven by the impulse of self-preservation, are engaged in a constant struggle with one another. Pufendorf's recognition of the natural equality of men entails normative duties – such as "thou shalt not hurt others". It is not like the Hobbesian idea that presupposes equal power among individuals.

Thus Pufendorf's view of state equality presupposes both recognition of the natural freedom of individuals, and duties arising from natural law. However, these do not necessarily match with each other. In fact, the delicate balance between freedom and duty, maintained by the optimism of the enlightenment era, collapsed, and as international law took an increasingly positive form, the concept of state equality began to converge into what was in fact a "nominal" equality of states which mostly just spelled out their liberty and independence.

Tabata ascribes this dilution to the failure of the natural law theory to provide a framework capable of capturing the dynamism of the international society. This failure materialized as the theory, during the enlightenment period, wrongly presented the international society in an abstract way, calling it "states in general", which was a most unhistorical and unsocial proposition. Tabata here reveals his long-standing intellectual trait of valuing the social and historical significance of the norm. Yet, Tabata did not rule out all aspects of the natural law-based concept of state equality. After publishing his above-mentioned book, Tabata expanded his horizon of study and proposed to re-evaluate the merits of Emmerich de Vattel, who had been criticized for the arguments advanced in the founding of an atomist theory of international law, including the principle of absolute sovereignty for individual states. Tabata contended that branding de Vattel as the chief advocate of the theory of absolute sovereignty allowing no superior norm over individual states would be tantamount to projecting the image of a post-Hegel *Staatslehre* upon him. With de Vattel sovereignty had a progressive meaning. He in fact emphasized that the states' autonomy *vis à vis* other states shields them from interference by absolutist states which would hamper the formation of nation-states based on the sovereign rights of the people. De Vattel did not argue in favour of sovereignty for sovereignty's sake. Exercise of sovereignty is allowed so far as it does not hurt the rights of other nations, and abuse was thus strictly forbidden. Depending on the sovereignty holder's qualities the concept can play a progressive role against the abusive dominance of a super-power even today.[23]

Tabata's arguments are well disciplined academically, making his views all the more interesting if we approach them, and other theories like his, from the perspective of the way of thinking of their authors. On the basis of his criticism of the abstract norm for its ignoring of the reality of international

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[23] Tabata Shigejiro, *Kokka shuken to kokusaiho* [State sovereignty and international law] (Nihon-hyoronshinsha, 1950) 24-33.

society, Tabata reveals a strong scepticism towards the universalist international view. This scepticism found expression in an argument re-assessing the efficacy of the concept of sovereignty and in a counter-argument against universalism. It shows that Tabata follows the inter-war criticism of universalism and thus coincides with the realist international theory in content and heritage.

Another significant point is that the revival of the concept of sovereignty is also linked to the concerns of a civil society by way of the "bearer-of sovereignty" argument. There would indeed be a big difference between re-evaluating de Vattel and classifying him as the initiator of the concept of indiscriminate war, on the one hand, and positioning him as the international legal theorist basing himself on the theory of people's sovereignty on the other. The post-World War II interest in democracy was thus linked to the revival of the sovereignty concept. Finally, the sovereignty concept was also taken as an argument against the dominance of the super-powers and thus as a device for the promotion of solidarity with the Asian and African countries that were seeking de-colonization.

Tabata's way of posing questions such as his proposing the re-evaluation of the substantive equality of states, at a time when the atomist theory of international relations was under pressure of the war-time idea of a Greater East Asia Co-prosperity Sphere, undoubtedly contained an element of criticism of regionalism as an important tool of super-powers. It should be noted that the device was also congenial to the Marxist-inspired anti-imperialism. In fact, the concept of international law for the transitional period as proposed by the Soviet school of international law in the inter-war period, which is linked to the name of Pashukanis, aimed at resuscitating the concept of sovereignty in the face of the overwhelming tide of Western scholarship in international law at the time.[24]

At the time when Yokota dominated the peace theory debate in the immediate post-war years many intellectuals happened to be quite susceptible to this approach of Tabata, and the worsening of the Cold War further revealed this latent conflict. Earlier, Yokota had already propounded the notion that the intensifying US-Soviet conflict made it impossible to forge amicable relationships with China and the Soviet Union. He criticized the idea of a comprehensive peace treaty with the Allied Powers that included the socialist states. When the Korean War broke out he showed his unwavering support for the United Nations sanctions against the Democratic People's Republic of Korea, drawing on his conventional argument of a collective security

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[24] *See* Yasui Kaoru, "Marukusu-shugi kokusaihogaku no joron: Korovin no *Katokikokusaiho* no kento" [Introduction to Marxist international law theory: examination of Korovin's *Transitional International Law*], in *Hogaku Kyokai zasshi* [Journalof the Jurisprudence Association of the University of Tokyo] Vol.51 (1993), No.4, republished in *Kokusai hogaku to bensho-ho* [Studies of international law and its dialectic], *op. cit.*, n. 16.

system, and he denounced the neutralism implied in the comprehensive peace proposal.[25]

As the Cold War intensified, the initiative in the peace debate began to shift to Yokota's critics. The publication of Tabata's article "The legal basis of the Tokyo trial" in the June 1949 issue of the journal *Sekai* was somewhat emblematic of this development. *Heiwa mondai danwa-kai* [Discussion Circle for Peace Problems], the leading group in favour of a comprehensive peace treaty, comprised a wide range of intellectuals from different generations, and could, therefore, not easily be generalized as belonging to one specific faction. It could be surmised that scepticism towards Yokota and his collective security concept had permeated the atmosphere among the leading members of the Circle. The well-known statement issued by the Circle in December 1950, entitled "On peace for the third time", could not be understood fully with all its nuances without knowledge of its intellectual background. Written by political scientist Maruyama Masao, constitutional scholar Ukai Nobushige, and economist Tsuru Shigeto, the statement reveals different tones and emphases in different sections, reflecting the diverse concerns and areas of specialization of the authors. One aspect, however, deserves notice in the present context.[26]

The best-known section of the statement, written by Maruyama, connoted criticism of Yokota's collective security theory. The sense of crisis permeating Maruyama's argument was the fear that the United Nations' involvement in a regional military conflict might escalate into sanctions against a major power and ultimately lead to the outbreak of a Third World War.[27] Maruyama's instinctive rejection of the argument to limit the right of veto and to let the majority principle function mechanically[28] has as its background his concern that the United Nations might function as an anti-communist crusade led by the General Assembly, as happened in the case of the "Uniting for Peace" resolution. Maruyama pointed out the fundamental problem of the linkage between the collective security system and the idea of just war. The intensification of the Cold War prompted the integration of the following movements: anti-universalism, the civil society argument, and anti-imperialism,

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[25] Takenaka, *op. cit*., n. 21 at 567-594.

[26] When conclusion of the peace treaty rose to the top of the agenda, part of the opposition camp and intellectuals opposed the government position of signing a treaty that excludes the socialist states. They demanded that the peace treaty be a comprehensive one that includes countries like the Soviet Union and the People's Republic of China. Of this opposition movement, *Heiwa mondai danwa- kai* was a gathering of intellectuals representing a wide range of professions united under calls for a comprehensive peace treaty. The statement the group issued, "On Peace for the third time," elaborated on the need and the significance to maintain peace amid intensifying East-West conflict and has been widely acclaimed and respected as a manifesto of peace theory in Japan.

[27] Maruyama Masao,"Sanfuranshisuko kowa, Chosen senso, Rokujyuu-nen anpo"[The San Francisco peace treaty, the Korean War and the 1960 security treaty], in *Sekai* (Nov. 1995) 38-41.

[28] "On peace for the third time", statement of the Discussion Circle for Peace Problems, in *Sekai* (Dec. 1950) 38.

with the idea of sovereignty, buttressed by nationalism, acting as a catalyst. The post-war foreign policy discourse was thus born, with the idealistic peace theory that emerged from it in fact springing from the sentiments of a generation who had their youth in the 1930s, the era when the Wilsonian ideals became deeply frustrated.

## 4. CONCLUSION

As the preceding arguments suggest, the conventional portrayal of the post-war foreign policy debate in terms of the dichotomy of idealism and realism can no longer be sustained. The debate in fact resulted from the involvement of elements that are far more complex in composition than had hitherto been contemplated. The significance of it becomes evident when the disputation is examined scrupulously on the basis of its intellectual roots and the reasoning patterns rather than just as a policy controversy. It should thereby be kept in mind that the theory of international politics in post-war Japan has developed from arguments from the inter-war period when Japan was under the strong influence of intellectual movements in Europe, particularly Germany.

The conventional studies ignored these aspects because, being unfamiliar with the inter-war intellectual context, they simply covered up the complexity of the post-war debates by projecting their image of the highly political security treaty dispute of the 1960s back to its formation period immediately after the war. This trend even accelerated after the 1960s when the American school of international politics, as the leader of post-war international studies, shed its philosophical component of the early years and developed into a much simpler form as a positivist theory of international politics.

Because of the European influence referred to earlier, humanist realism, requiring a continental European way of posing the issues and having been transplanted to the US by an exiled intellectual, was more congenial to Japanese intellectuals than were the American approaches, as far as the core intellectual issues were concerned. The arguments of the realists, who made a sensational début into the world of opinion in Japan and who were noted for their introduction of the American approach to the theory of international politics, may in fact have their roots in this intellectual tradition. Both idealism and realism posed the crucial question on the relation between political power and ethics in the 20th century international relations when the system of sovereign nation states lost its self-evidence. To describe the conflict of the two positions as a fruitless debate without regard to their intellectual background is in fact equivalent to the marginalization of both as specific schools of thought.

Both idealism and realism in the inter-war period had a keen awareness of the historical character of the Western state system, the latter even more so than the former in view of its criticism of continental European civilization.

Both Morgenthau and Carr clearly reveal their sensibility in this respect through their criticism of the nation states. The end of the era of nation states as being at the core of Carr's international theory is visible in his arguments presented during World War II.[29] The same applies to Morgenthau, who is often regarded as having attributed an absolute character to sovereign nation states. In fact, for a theoretical foundation he relied on an alleged moral bondage of the West that had enabled a sustainable coherence of the Western state system, and as a result he needed to distance himself from the atomist view of the international order. Greater attention should thereby be paid to the negative view of nationalism that pervades his argument throughout.[30] It should be noted, in passing, that the views of the two scholars later coalesced in devising the concept of a European community. Thus, various modes of criticism of Western civilization in the inter-war period can be seen to have converged into international theory, envisioning a revival of the Western spirit that would lead to the creation of a European community.

Any difference between Japanese and Western scholars would refer to the assessment of nationalism rather than to adherence to power politics among Japanese intellectuals. The difference could be viewed as a topological one with the Western perception of the transition of the Western state system as seen from within, as opposed to the use of the same concepts by Japanese intellectuals in a non-Western society.

Carr's blueprint for a post-war regime reveals a typically Western-centric viewpoint. While admitting that national self-determination after the first World War was unjustly applied to Europe only, he went as far as to express the opinion that cutting the political and military ties between a country like India, lacking the capability for an autonomous existence, and its metropolitan country, would amount to a reactionary measure.[31] If Carr, being fully conversant with Marxism, could adhere to such a position, it is not surprising that Japanese intellectuals became engrossed in anti-imperialist nationalism in Asia.

The post-war discourse has undeniably been buttressed by this, novel, Asian nationalism. We are facing a rather grim history of the past fifty years filled with issues of nationalism in various forms in Asian countries. Since the disintegration of the imperial order, the construction of a regional order based on a society of equal sovereign states has only just begun. Seen from this perspective, the principle of the equality of states, which has been inter-

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[29] *Twenty Years' Crisis*, *op. cit.*, n. 14 at 302-303; *Conditions of Peace*, *op. cit.*, n. 15 at 39-70. *See* also his post-war work, such as *Nationalism and after* (1945).

[30] *Politics among Nations* at 184-196.

[31] *Op. cit.*, n. 29 at 68. Carr later cited Joseph Needham, *What is History?*, as pointing to the new potential of historiography while criticizing the Western-centric bias of British historians. *See* E.H. Carr, *What is history?* (transl. into Japanese by Shimizu Ikutaro, 1962, at 227). It could be interpreted as self-criticism.

nalized by constituent members of the new order,[32] is now being discussed anew, with the idealist-realist dichotomy as a potential framework of discussion.

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[32] Tabata, *op. cit.*, n. 22 at 325-328.

# OBJECTIVE REGIMES REVISITED

Richard A. Barnes*

## 1. INTRODUCTION

International law is faced with increasing difficulties in regulating areas of common concern. This is particularly so in respect of the global environment and areas beyond respective national jurisdictions. Principally, the difficulties stem from the consensual nature of international law and the implication that States are bound only by that to which they have consented, and it is further compounded by the inability of States to reach agreement on matters of public interest.[1] The severe consequences of this cannot be overstated, as Shelton has observed with regard to the problem of fishing:

> 'If time is taken to achieve unanimity through drafting, adopting, and enforcing a treaty or developing a norm of customary international law, the fish will long have disappeared'.[2]

The purpose of this article is to consider a possible alternative to the confines of the traditional law-making paradigm by making use of the untapped potential of objective regimes.[3]

The concept of the objective regime has been at the periphery of mainstream international legal doctrine for a long time without its potential having been fully explored. This is due mainly to the existence of the principle of *pacta tertiis nec nocent nec prosunt*: that treaties may only create rights and

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1 A recent example of this is the difficulties in agreeing climate control measures at the Hague Conference Nov. 2000.

2 D. Shelton, in J. Delbruck (ed.), *New Trends in International Law Making: International 'Legislation' in the Public Interest* (1997), 121.

3 An objective regime may be defined as a situation of law created by the parties to an agreement, which purports to have directly applicable legal effects on third parties.

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obligations binding on the parties to the treaty.[4] This principle in turn flows from the notion of sovereignty. Given that article 34 of the Vienna Convention on the Law of Treaties, which embodies the *pacta tertiis* rule, provides that 'a treaty does not create either obligation or rights for a third State without its consent', it would appear that the concept of objective regimes is redundant.[5] The present article suggests that this should not be assumed automatically, and that due recognition must be given to the changing nature of international law and the changing nature of sovereignty, with all the implications this has for the prescriptive process.

Part I focuses on the role of objective regimes in international law, exploring how objective regimes arise from deficiencies in the international prescriptive process, principally the absence of a supra-national institution capable of regulation in the international public interest. This will be followed, in Part II, by an examination of the evidence supporting objective regimes, and their existence as a legitimate exception to the *pacta tertiis* rule. It will be argued that a legitimate basis for an objective regime can be derived from the notion of general interests, as these have been recognised and consolidated by international practice and jurisprudence: general interests being those interests so essential and fundamental to international public policy as to provide States with a normative basis for the creation of objective regimes opposable to third parties.[6] In the final part, the possible criteria for a normative category of objective regimes under customary international law will be outlined.

## 2. THE ROLE OF OBJECTIVE REGIMES

Objective regimes have received little attention in academic literature and as a result the concept occupies a rather ambiguous position within international law. The paucity of opinion reflects upon the controversial and uncertain status of the concept, and belies its potential importance. What opinion there is has focused on a number of potential bases, ranging from distinctions in categories of treaties to variants on the form of third party consent, without providing any one satisfactory and cohesive explanation.[7]

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[4] Hereinafter referred to as the *pacta tertiis* principle. The position is generally accepted. Thus SIR I. SINCLAIR notes that the 'maxim ... is supported both by general legal principle and by common sense', *The Vienna Convention on the Law of Treaties*, 2nd ed. (1984), 98; *See* also I. Brownlie, *Principles of Public International Law*, 4th ed. (1990), 622; Sir A. McNair, *Law of Treaties* (1961); R.F. Roxburgh, *International Conventions and Third States* (1917).

[5] 1155 *UNTS* 331; *UKTS* 58 (1980), Cmnd. 7964; (1969) 8 *ILM* 679.

[6] The most sophisticated consideration of this is by E. Klein, *Statusverträge im Völkerrecht* (1980).

[7] For a proponent of the former opinion *see* McNair, *op. cit.*, chap. XIV. Also C. ROUSSEAU, *Principes Generaux du Droit International Public*, vol. 2, 481, translated and cited by Fitzmaurice, [1960] YILC, vol. II, 92. For a proponent of the latter, *see*, for example, Fitzmaurice, who suggests

More recently, some writers such as Klein, Chinkin and Subedi[8] have acknowledged the potential of the concept and contributed towards the realisation of its utility by giving it a more defined content. A common element in most of the supporting doctrine is that the concept flows from structural weaknesses inherent in the international law-making process. More precisely, it derives from the absence of an objective form of law making capable of developing and prescribing the international public interest. It is insightfully put by McNair:

> 'When it is remembered that international society has at present no legislature, the treaty is the only instrument available for doing many of the things which an individual State would do by means of its legislature; and the making of rules of law is not the only function of a legislature. It is therefore not surprising that from time to time groups of States should have assumed the responsibility of leadership and used the instrument of a treaty to make certain territorial or other arrangements required, or which they consider to be required, in the interest of this or that particular part of the world.'[9]

However, despite such limitations in the prescriptive process it still appears, at least according to prevailing doctrinal opinion, that consent is critical to the prescriptive process.[10] Such strict orthodoxy should be modified and it should be accepted that consent is no longer as pivotal to the prescriptive process as it once was.[11] The *pacta tertiis* rule is eroded,

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there exists a general duty of States to respect and recognise the lawful international acts of other States, *ibid.* 96-100.

[8] Klein, *op. cit.*, n. 6 ; C. Chinkin, *Third Parties in International Law* (1993); S.P. Subedi, *Land and Maritime Zones of Peace in International Law* (1996).

[9] McNair, *op. cit.*, n. 3, at 259.

[10] I. Brownlie, *op. cit.*, n. 4, 287; G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*: I, 3rd ed. (1957), 458 ff.

[11] The consensual approach was famously stated in the *Lotus* case, when the PCIJ ruled that: 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law… Restrictions upon the independence of States cannot therefore be presumed.' (France v. Turkey), 1927 PCIJ, Ser. A, No. 10, at 18. There has been a definite move from this position, which can be seen in the debates on the persistent objector rule and has been called the 'acid test of custom's voluntarist nature'. P. Weil, 'Towards Relative Normativity?', (1983) 77 AJIL 413. However, the exact quality of the rule is subject to some debate. Contrast T.L. Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law' (1985) *Harvard International Law Journal* 457 and J.I. Charney, 'The Persistent Objector and the Development of Customary International Law' (1985) 56 BYIL 1. The ICJ ruling, in the *Legality of the Threat or Use of Nuclear Weapons* case, ICJ Rep. 1996, at 226 indicates that States have no difficulty in maintaining their objection to a rule of custom when it conflicts with perceived vital interests. A. Steinfeld takes up this point in, 'Nuclear Objections: The Persistent Objector and the Legality of the Use of Nuclear Weapons', (1996) 62 *Brooklyn Law Review* 1635, at 1666-7. However, such a position must rely on the recognition of

thus objective regimes can realise their potential to perform a surrogate legislative role in the absence of any formal institutionalised process. This proposition is not an isolated one, and can be associated with the growing corpus of law and opinion that supports a move away from a purely bilateral, voluntarist conception of the international legal system towards one that can accommodate a wider range of community and global interests.[12]

The critiques of bilateralism are a reflection of the dislocation of international law from international reality: that international law as a process is incapable of meeting the changing demands of international society. There are several strands to such critiques, which may be summarised as follows. Firstly, the interdependence of States has reached the point where it is impossible to define State interests in purely bilateral terms. Often the nature of interests at stake is independent of any single State's concern and requires a degree of co-operation that the traditional prescriptive process has difficulty in sustaining.[13] This occurred in respect of the 1982 Law of the Sea Convention, with its complex interface of rights and obligations, interests and policies, which required a different approach to the traditional process of treaty negotiation.[14] International environmental law is similarly affected, with effective regimes requiring a high degree of co-operation in order to succeed.[15] Even modest arrangements between States will have some effect on third party States.

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the relativity of State interests. Thus, the durability of the persistent objector rule was cast into doubt following the failure of the USA, the UK and Japan to withstand the move towards the 200-mile exclusive fishing zone. As the quality of interest at stake in any given situation affects the application of the persistent objector rule, this surely detracts from the seemingly critical element of consent. C. Tomuschat makes the point that the elucidation of the rule in practice and jurisprudence of the ICJ points away from the requirement of express or tacit consent to rules of custom. 'Obligations Arising for States Without or Against Their Will', (1997) 241 RdC 195 at 284-90.

[12] *See* generally Chinkin, *op. cit.*, n. 8; Also B. Simma, 'From Bilateralism to Community Interest', (1994 – VI) 250 RdC 217. Philip Allott voices similar concerns, arguing that the bilateral forms of international law have impeded the articulation of true social objectives, '*Mare Nostrum*: A New Law of the Sea' (1992) 86 AJIL 764. Eli Lauterpacht considers this in respect to the submission of States to judicial redress, and the process of erosion that the principle of consent is undergoing, in *Aspects of the Administration of International Justice* (1991), 23 – 57. *Cf.* P. Weil, *ibid.*

[13] Despite consent's other virtues, it is axiomatic that specific agreement on matters of global concern is difficult to achieve. As the number of parties and issues under discussion are increased, so gaining consent becomes more difficult. *See* Mancur Olson, *The Logic of Collective Action: Public Goods and Theory of Groups* (1965), 53-65. Another related concern is 'cost of consent'. The transaction cost of reaching agreement rises in line with the expanded scope of the subject matter and participants, acting as a further disincentive to agreement. *See* J.M. Buchanan and G. Tulloch, *The Calculus of Consent* (1962), 112.

[14] B. Buzan, 'Negotiating by consensus: developments in technique at the United Nations Conference on the Law of the Sea', (1981) 75 AJIL 324; H. Caminos and M. Molitar, 'Progressive development of international law and the package deal', (1985) 79 BYIL 871.

[15] *See* G. Palmer, 'New ways to make international environmental law', (1992) 86 AJIL 259.

Secondly, international regulation has expanded into areas previously outside the traditional scope of international law, such as human rights and environmental law. This expansion poses a number of questions for the traditional bilateral system. It is axiomatic that certain concerns of the environment transcend those of individual States, for example, the global climate, the atmosphere, or even genetic diversity and integrity. Environmental law must also concern itself with the allocation and protection of resources beyond national jurisdiction.[16] The bilateral system is not always the best means of dealing with environmental problems as it cannot easily or directly take account of non-State interests or interests transcending individual States. The concerns of international environmental law often exist in opposition to the economic and political interests of States and have no independent voice. A particularly important development is the notion that we are trustees for the environment. As Judge Weeramantry notes:

> 'Natural resources are not individually, but collectively, owned, and a principle of their use is that they should be used for the maximum service of people.'[17]

Unless the law-creating process can take account of this, then such concerns will remain at the periphery of international law or as unresolved issues.

Thirdly, there is a growing need to accommodate the interests of a wider range of subjects into the prescriptive process than those permitted by the bilateral modal of international law.[18] The rights and duties of sub-State entities, international organisations, individuals and trans-national corporations need to be taken into account. Fourthly, the fora for the creation of international law are typically multiparty in their nature, and this in turn exacerbates the strains on the system. The massive time and effort that were necessary to facilitate and create the LOSC is a prominent example. Similarly, it is now not uncommon for third-party States to intervene into judicial proceedings, so straining the judicial process.[19] This tendency towards

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[16] *See* for example Part XI of the United Nations Convention on the Law of the Sea 1982, (1982) 21 ILM 1261, hereinafter LOSC. Also the Antarctic Treaty 1959 402 UNTS 71, UKTS 97 (1961), Cmnd. 1535, (1960) 54 AJIL 477, and the Outer Space Treaty, UKTS 10 (1968) Cmnd, 3519, 610 UNTS 205.

[17] Judge Weeramantry in the *Gabčikovo-Nagymaros* case, ICJ Rep. 1997, 1

[18] As A.S. Burley notes, international law 'has to take into account increasing evidence of the importance and impact of so many factors excluded from the reigning model: individuals, corporations, non-governmental organisations of every stripe, political and economic ideology, ideas, interests, identities and interdependence.', 'International Law and International Relations Theory: A Dual Agenda', (1993) 87 AJIL 202, at 227.

[19] The intervention of Malta in the *Case Concerning the Continental Shelf (Tunisia/Libya)*, Application to Intervene, ICJ Rep. 1981, 3; Italy's intervention in the *Case Concerning the Continental Shelf (Libya/Malta)*, Application to Intervene, ICJ Rep. 1984, 3; Nicaragua's intervention in the *Land, Maritime and Frontier Boundary Dispute* (El Salvador/Honduras), Application by Nicaragua for Permission to Intervene, ICJ Rep. 1990, 92; C*ase Concerning the Land and Maritime Boundary*

multiparty law creation inevitably incorporates a wider range of interests into legal instruments, and can only compound the interrelationship of State interests. A final strand in this trend can be discerned in the changing objectives of international law. Classical international law has been principally concerned with allocating decision-making competence between States, and so the goal of international law is generally State-orientated. Allot argues that during the sixteenth and seventeenth centuries there occurred a disaggregation of interests, whereby the State, then meant to represent the collective interests of a particular society, became the primary objective of international law.[20] Only recently is this approach being challenged, with the emergence of human rights, and the projection of individual and human objectives as the true goals of international law. Growing recognition that human goals, and not State goals, should be the principal objective of international law is challenging the notion of sovereignty and thus voluntarist modes of law making.

Cumulatively, these changes are working to undermine the traditional bilateral model of international law, forcing us to reconsider our preconceived ideas of the law creation process. As Chinkin remarks in conclusion to her comprehensive study on third parties in international law:

> '[T]he problems these present cannot be satisfactorily determined either by formalistic application of the traditional rules which were formulated in a bilateral context, by rejection of new modalities for change in international law, or by a continued emphasis on bilateralism in proceedings before international adjudicative arenas'.[21]

If the traditional model is unrepresentative of international reality then we need to redefine its particular modes of operation to take account of such changes. The *pacta tertiis* rule is derived from a strong bilateral model based on an anachronistic conception of sovereignty. If sovereignty is rejected or redefined, it follows that the *pacta tertiis* rule must also be rejected or redefined. The rejection of bilateralism is not a recent phenomenon, but is part of the on-going process of the reconceptualising of international law, and in particular the notion of sovereignty and its close lieutenant, consent. Several eminent publicists have fuelled this discourse. Waldock, for example, adopted a limited view of sovereignty:

> 'It expresses the fact that the international legal order operates on the general basis of the co-ordinate and equal authority of the States whose relations it primarily regulates. The doctrine becomes pernicious only when it is distorted so as to imply that sovereignty is a quality inherent in all States which makes it impossible for them

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*Between Cameroon and Nigeria* (Cameroon v. Nigeria), Application by Equatorial Guinea for Permission to Intervene, ICJ Rep. 1999, 3 (Order 21 October 1999).

[20] Allott, *op. cit.*, n. 12, at 775.

[21] Chinkin, *op. cit.*, n. 8, at 356.

> to be fully subordinated either to the rule of law or to control by any international authority'.[22]

Indeed, a restrictive understanding of sovereignty is now generally accepted as consistent with State practice and the decisions of the International Court of Justice.[23] As Judge Anzilotti stated:

> 'The sovereignty of the State consists of its competence as defined and limited by international law and is not a discretionary power which overrides the law'.[24]

Similarly, Lauterpacht notes:

> 'There is no room in a developing international society for a rigid application of the principle according to which the rights and duties of a State can never be determined by a will other than its own'.[25]

Any allusions to extensive notions of sovereignty can only relate to the internal affairs of States within the boundaries determined by international law.[26] Sovereignty is understood to mean the relative position of States *vis à vis* each other subject to the system of international law. Accordingly, Wildhaber reasons that 'it (sovereignty) certainly does not qualify as *ius cogens'*.[27] A principle of *ius cogens* is a rule of substance, and is not relative to other rules of law; sovereignty is not non-derogable. In any case, the creation of a particular objective regime should not be regarded as the sub-ordinating of one group of States to the will of another group of States, but rather the subordinating of all States concerned to a particular and legitimate rule of law.

## 3. EXCEPTIONS TO THE *PACTA TERTIIS* RULE

Treaties are the favoured vehicles of States for codifying and developing international law because they are derived from a deliberative process and are capable of imposing precise and binding rules. More importantly, they

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[22] H. Waldock, 'General Course on Public International Law', (1962-ii) 106 RdC 1, at 157. *See* also Lauterpacht, *The Development of International Law by the International Court* (1958), 297-400; G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law', (1931) 30 BYIL 1, at 8-18.

[23] *See* the *Corfu Channel* case (Merits), ICJ Rep. 1949, 4 at 29-30. Also the *Reservations to the Convention on Genocide*, Advisory Opinion, ICJ Rep. 1951, 15 at 24.

[24] *Austro-German Customs Union* case, 1931 PCIJ Ser. A/B, No. 41, 3.

[25] Lauterpacht, *op. cit*., n. 22, at 180-181.

[26] *See* generally the *Island of Palmas* case (Netherlands v. U.S.) (1928) 2 RIAA 829.

[27] L. Wildhaber, 'Sovereignty and International Law', in R. St. MacDonald and D. M. Johnston (ed.) *The Structure and Process of International Law* (1986).

are underpinned by the fundamental principles of State sovereignty and equality as reflected in the *pacta tertiis* rule and framed by article 34 of the Vienna Convention.[28] Although this general rule is widely regarded as fundamental to treaty law, there is a degree of uncertainty as to the extent to which the rule has been modified to take account of the changing demands of international political reality, and whether exceptions to it exist. Even within the Vienna Convention the need for flexibility is acknowledged and accounted for, with articles 35 and 36 providing that rights and obligations may be created for third parties where it is so intended and where the third parties consent to the rights and obligations.[29] Furthermore, article 38 provides that 'nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognised as such'. The inclusion of these provisions demonstrates that a purely contractual scope for treaties would be unduly restrictive for States and their desire to create norms of general application.[30] Although these qualifications are more apparent than real, in that they merely amount to a restatement of the need for consent, they imply that an absolutist approach to the *pacta tertiis* rule and third parties is unacceptable.

To confine ourselves to the narrow approach of the Vienna Convention to the *pacta tertiis* rule would be misleading, especially as the convention is not intended as a definitive code.[31] During the draft stages of the convention a wider range of issues was discussed; these failed to become part of the final draft. Of particular importance are the reports of Special Rapporteurs Fitzmaurice and Waldock, both of whom supported the inclusion of articles providing for objective regimes.[32] Such provisions were excluded from the

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[28] The *pacta tertiis* rule is widely regarded as fundamental. *See* article 18 of the Harvard Research Draft Convention on Treaties (1935) 29 AJIL Supplement; B. Cheng, 'Custom: The Future of General State Practice In a Divided World' in R. St. MacDonald and D. M. Johnson (ed.), *op. cit.*; Roxburgh, *op. cit.*, n. 4, at 29; Sinclair, *op. cit.*, n. 4 at 98; Brownlie, *op. cit.*, n. 4, at 622; McNair, *op. cit.*, n. 4, at 309.

[29] Article 35 states: 'An obligation arises for a third State from the provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing'. Article 36 states: 'A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.'

[30] Prosper Weil has pointed out that the distinction between treaty norms and customary norms (and indeed between hard and soft law) is becoming increasingly blurred. *Op. cit.* n. 12 at 438-440.

[31] The preamble to the convention notes that 'the rules of customary international law will continue to govern questions not regulated by the provisions of this convention'. Thus, customary rules may emerge to supplement those enshrined in the Vienna Convention.

[32] Waldock's report to the ILC contained a draft article on treaties providing for objective regimes, and a comprehensive commentary. Article 63(1) states: 'A treaty establishes an objective regime when it appears from its terms and from the circumstances of its conclusion that the intention of the parties is to create in the general interest general obligations and rights relating to a particular

conventions only so as to encourage States to participate in the convention. The majority opinion was that the controversial nature of the provisions would impair the potential success of the treaty rather than having no basis in law.[33] Indeed, Fitzmaurice felt able to conclude that such exceptions 'constitute in the aggregate a considerable gloss on the *pacta tertiis* rule.'[34]

In any case it is widely accepted that the provisions of the Vienna Convention do not cover every eventuality.[35] Important developments have taken place beyond the Vienna Convention, and there is a substantial body of practice, jurisprudence and academic opinion that amount to more than just a 'gloss' on the *pacta tertiis* rule.[36] These provide evidence of a range of exceptions to the *pacta tertiis* rule and of the existence of objective regimes. State practice in support of objective regimes is evident in a number of areas. These include international settlements,[37] boundary agreements,[38] and internationalised territories.[39] The binding *erga omnes* character of such arrangements is generally accepted, and, as they have been reviewed elsewhere, I wish to concentrate on how the category of objective regimes has

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region, State, territory, locality, river, waterway, or to a particular area of the sea, sea-bed, or air-space; provided that the parties include among their number any State having territorial competence with reference to the subject matter of the treaty, or that any such State has consented to the provision in question.', [1964] YILC, vol. II, 26ff.

[33] *See* generally, the 738th, 739th, and 740th meetings of the ILC, [1964] YILC, vol. I, 96ff.

[34] [1960] YILC, vol. II, 73.

[35] The present discussion raises an interesting point as regards the application of the Vienna Convention. Article 1 states that 'the present Convention applies to treaties between States'. Under article 305 of the LOSC and article 2 of the 1995 Agreement non-State entities may participate in the agreements. Strictly speaking, this precludes the application of the rigid treaty rules incorporated in the Vienna Convention from the those agreements. However, it must be noted that this does not preclude the application of the underlying rules of international law. It remains to be seen whether these exactly mirror those of the Vienna Convention.

[36] The recent works of Chinkin and Subedi are illustrative of this decline in practice of the rigid application of the principle, *op. cit.*, n. 8. *See* also Subedi, 'The Doctrine of Objective Regimes in International Law and the Competence of the United Nations to Impose Territorial or Peace Settlements on States', (1994) 37 *German Yearbook of International Law* 162; P. Birnie, *infra* n. 50, at 243-249. *Cf.* C.L. Rozakis, 'Treaties and Third States: a Study in the Reinforcement of the Consensual Standards in International Law', (1975) 37 *ZaöRV* 1.

[37] The Treaty of Utrecht 1713 in respect of certain territories including Gibraltar, the Congress of Vienna, establishing the permanent neutrality of Switzerland and the Treaty of Versailles 1919, in respect of Germany. The demilitarisation of certain Iraqi territory under Security Council Resolution 687 (1991) may be regarded as a recent example of an international settlement. *See* also the Treaty on the German Re-unification, (1990) 29 ILM 1187.

[38] Articles 11 and 12 of the Vienna Convention on Succession of States in Respect of Treaties reaffirms this by maintaining the legitimacy of boundary agreements *vis à vis* a succession of States. *See* generally [1974] YILC, vol. II, 196 ff.

[39] *See* generally, the mandate system as established under the League of Nations. The objective character of such regimes was reaffirmed in the *International Status of South West Africa Advisory Opinion*, ICJ Rep. 1950, 132. In particular, McNair's separate opinion, at 153-155.

expanded.[40] It is notable that certain regimes have proved viable because they have been crucial to the maintenance of international public order or peace and security; they are perceived as being in the general interest of the international community. It is reasonable to assume that as the range of general interests expands from encompassing simply peace and security, to including the protection of the environment and conservation and management of resources, so too does the potential for the creation of objective regimes. The following review of practice, jurisprudence, and doctrine considers extra-territorial regimes, environmental protection zones, and demilitarised zones, showing how the potential of the concept has developed.

## 3.1. Extra-territorial regimes

International law recognises the competence of States to regulate areas beyond national jurisdiction. The principal areas that have been subject to regulatory regimes are Antarctica, Outer Space, the Deep-sea Bed, the High Seas, and 'Zones of Peace'.[41]

### *3.1.1. The Antarctic*[42]

The Antarctic Treaty of 1959 was concluded by the 'Antarctic Club' group of States and is regarded as establishing a regime for the peaceful use of Antarctica.[43] As the preamble states:

> 'It is in the interest of all mankind that Antarctica shall continue for ever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord.'

It then goes on to align the treaty regime with the purposes and principles embodied in the United Nations Charter. Individual provisions develop this purpose and establish a particular status for Antarctica, which, implicitly, has

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[40] Fitzmaurice, *op. cit.*, n. 77; McNair, *op. cit.*, n. 4; Greig, *infra* n. 172172; Crawford, *infra* n. 171; *See* also *The SS Wimbledon* case, 1930 PCIJ Ser. A, No. 1, 15 at 28.

[41] Zones of Peace shall be considered under the heading of "3.3. Neutrality and demilitarisation".

[42] Antarctica is regulated by a number of treaties, collectively known as the Antarctic Treaty System, hereinafter referred to as the ATS.

[43] The 'Antarctic Club' is comprised of the original claimants to territory: Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom, along with Belgium, Japan, South Africa, the USSR and the United States. The parties to the treaty regime have since expanded beyond this limited group. For a more rounded discussion *see* J. Crawford and D. R. Rothwell, 'Legal Issues Confronting Australia's Antarctica', (1992) 13 *Australian Yearbook of International Law* 62; B. Simma, 'The Antarctic Treaty as a Treaty Providing for an Objective Regime', (1986) 19 *Cornell International Law Journal* 189

objective effects. Article I prohibits military activities in the region,[44] and article V prohibits certain nuclear activities in region.[45] Article IV(2) prohibits claims to sovereignty over Antarctica.[46] Article X, which requires the Contracting Parties to 'exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity in Antarctica contrary to the principles or purposes of the present treaty', clearly evidences an intention for the regime to have objective effects.[47] The 1959 Treaty has been supplemented by other instruments, which may also provide rights or obligations for third States. The Convention on the Conservation of Antarctic Marine Living Resources provides numerous benefits, such as the right to participate in harvesting and research.[48] This is bolstered by a duty to facilitate research and studies, and from the data to be provided. Third parties also benefit from the conservation of resources and the measures established to this end. The Convention on the Regulation of Antarctic Mineral Resource Activities provided for similar benefits to accrue.[49] Although there may be problems in enforcing obligations against third States these are not insurmountable, and for the most part this would depend on how far the contracting States would be prepared to go in enforcing the provisions of the treaty regime.

The opinion of writers on the nature of the ATS is quite divided.[50] How-

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[44] Article I: 'Antarctica shall be used for peaceful purposes only. There shall be prohibited, *inter alia*, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military manoeuvres, as well as the testing of any type of weapons.'

[45] Article V(1): 'Any nuclear explosions in Antarctica and the disposal there of radioactive waste material shall be prohibited.'

[46] Article IV(2): 'No acts or activities taking place while the present treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty shall be asserted while the present treaty is in force.'

[47] *See* also article XXII(1) of CCAMLR, (1980) 19 ILM 841.

[48] *Ibid.*

[49] (1988) 27 ILM 868. This regime has since been superseded by the Madrid Protocol on Environmental Protection, which designates Antarctic as a 'natural reserve, devoted to peace and science' and places an indefinite ban on any mineral activities other than for scientific purposes. (1991) 30 *ILM* 1455.

[50] The divided opinions on whether the 1959 Antarctic Treaty establishes an objective regime demonstrate this. *See* generally Sir Arthur Watts, *International Law and the Antarctic Treaty* 1992. In favour of such a regime are: R. D. Hayton, 'The Antarctic Settlement of 1959', (1960) 54 AJIL 349; P. Birnie, 'The Antarctic Regime and Third States' in R. Wolfrüm, (ed.) *Antarctic Challenge II* (1986). However, she notes that there are problems with this in relation to the expanding nature of the Antarctic regime. Boczek notes that a majority of Soviet writers support the conclusion that the 1959 Treaty establishes an objective regime, 'The Soviet Union and the Antarctic Regime', (1984) 78 AJIL 834, at 856. Those writers opposed to such a notion include: J.N. Barnes, ' The Emerging Antarctic Living Resources Convention' [1979] ASIL proc. 272; I. Brownlie, 'Legal Status of Natural Resources', (1979-I) 162 RdC 245; J. Hanessian, 'The Antarctic Treaty 1959', (1960) 9 ICLQ 436. M. W. Mouton suggests that the treaty may be considered objective law if it is

ever, the inadequate depth of reasoning in most instances makes it difficult to assess the value of such assertions. Opinions swing heavily within the interpretation of the key provisions, which are by their nature ambiguous and inconclusive. Some illumination can be drawn from precedent in other areas. Thus the Permanent Court in the *Wimbledon* case[51] considered that provisions of the Versailles Treaty, concerning the Kiel Canal, evidenced an intention to create an international regime. There is a clear parallel in the case of Antarctica. Elsewhere, negative provisions, such as demilitarisation, have also been upheld as objective, suggesting that the corresponding provisions of the Antarctic Treaty could be regarded in the same light.[52] The clear intention of the parties to establish objective rights and duties, combined with the general interest of all States in the objectives set out in the treaty, led Waldock to consider the Antarctic Treaty as an objective regime.[53] More recently, Birnie followed this approach, but noted that the whole system is unlikely to represent an objective regime as a consequence of third States' dissatisfaction with the special role of the original contracting States.[54] Thus, political objections, rather than legal considerations, critically affect the status of the Antarctic as an objective regime. Political concessions have not been forthcoming so as to enhance the objective status of the regime, and were it not for these political obstacles then the practice of States might be more conclusive on the matter of whether or not the regime is truly objective.

It may be argued that the ATS has been overtaken by customary rules to the same effect and some points should be made in response. Firstly, the existence of customary rules does not render the objective character of the ATS moot, for there are numerous instances of parallel rules of treaty and custom co-existing, each with different implications.[55] It is also debatable whether all of the provisions of the ATS satisfy the criterion for a customary rule as set out in the *North Sea Continental Shelf cases*.[56] Secondly, certain provisions of the Antarctic Treaty are of an institutional nature and it is doubtful whether these could be sustained under a rule of customary law.[57] As such there is still a considerable value in conceiving of the ATS as an objective regime.

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recognised as representing general international law, and thus enforceable *erga omnes*, 'The International Regime of the Polar Regions', (1962-III) 107 RdC 174, 258.

[51] *Supra* n. 40, at 28.

[52] *The Aaland Islands* case, *League of Nation Official Journal*, Special Supplement No. 3, (October 1920), 16.

[53] *Op. cit*., n. 32, at 30.

[54] *Op. cit*., n. 50, at 260.

[55] *See* generally, the *Nicaragua* case (Merits) (Nicaragua v United States), ICJ Rep. 1986, 14, para 175ff.

[56] ICJ Rep. 1969, 3.

[57] For example, article IX provides for periodic meetings of the consultative parties, which have led to numerous recommendations purporting to regulate a variety of activities from scientific activity to the exploitation of living and non-living resources.

### *3.1.2. Outer space*

The regime created by the Outer Space Treaty 1967[58] is another candidate for an objective regime, although the discussion is necessarily constrained by the practical and technical limits presently inherent in the use of outer space. As in the Antarctic Treaty, the preamble refers to the 'common interest' and 'the benefit of all peoples', and this is backed up by two provisions purporting to establish rules of general application. Article 1 states that the 'exploration and use of outer space … shall be carried out for the benefit and in the interests of all countries … and shall be the province of all mankind'. It continues to provide for a freedom of exploration and access, and of scientific information. Article 2 then provides that outer space, including celestial bodies, shall be free from appropriation by claims of sovereignty. Although the remaining provisions are addressed towards States Parties only, it is evident that the treaty purports to establish limited rights and obligations of an objective or general nature, and the question remains to what extent these provisions have any impact on third parties.

The permissive nature of article 1 means that it is politically unobjectionable, in much the same way as is the freedom of the seas. This freedom is reinforced by article 2, which takes the regulation of outer space beyond the competence of any single state, and renders its regulation the concern of all. The acceptability of these rules is reflected in the wide participation of over 60 States in the treaty, and arguably, its provisions are now enshrined in customary law.[59] This, combined with the fact that, apart from the use of space for satellites, space is subject to very little actual practice, means that the question of the opposability of the regime is unlikely to be tested. However, it is arguable that given the lack of practice in this area the position of third States is likely to be derived to some extent from the rights and obligations set out in that treaty. Thus, the objective nature of the Outer Space Treaty is likely to remain a matter of speculation for the foreseeable future, unless space for satellites becomes critical, or energy and mineral resource exploitation become a realistic possibility.

However, one can derive some illumination from outer space regime. Despite the treaty's having a predominantly contractualnature, its evolution reflects the very same process we are considering in respect of objective regimes, namely, the existence of principles and rules articulating a general interest of international society and its actualisation in a treaty with objective

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[58] The Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, UKTS 10 (1968) Cmnd. 3519; 610 UNTS 205.

[59] It should be pointed out that through the customary process certain technically advanced developed States would have a distinct influence on the development of customary norms. This raises in respect of customary rules issues of legitimacy and authority that are not so acute as when the law is formulated through the treaty-making process.

potential. Thus, the general interests in the regime of outer space, as articulated in General Assembly Resolutions 1962(XVII) and 1721(XVI), evolved into a treaty regime, the Outer Space Treaty, with objective potential. A leading author on space law has described these instruments as 'forming part of an international *ordre public,* to which States should strive to make their policies conform.'[60] The Outer Space Treaty realises these interests in a more substantial form, rendering them opposable by other States. Undoubtedly, parts of the regime under the Outer Space Treaty are framed in terms of general obligations and so have an impact on the respective positions of non-parties.

Presently, the regime for Outer Space is relatively uncontroversial and thus has garnered a good degree of support and acquiescence. Yet once the potential for resource exploitation becomes feasible then this situation is likely to change and States will have to confront those concerns that are currently being addressed in respect of the Deep Sea-bed or other shared resource regimes. Once this occurs then treaty law will have to define more precisely a State's rights and obligations, and thus merit a reconsideration of the regime as a whole, along with its implications for third parties.

### *3.1.3. The deep sea-bed* [61]

By definition the international sea-bed falls beyond national jurisdiction and as such the regulation of the area is a matter for international co-operation.[62] As a territorial regime beyond the limits of national jurisdiction, the deep sea-bed merits consideration as an objective regime because co-ordinated regulation will inevitably have an impact on third States. Although its status as an objective regime is generally rejected, it is useful to reconsider such arguments as they illustrate the interplay of legal issues relevant to the present discussion.[63] In particular it illustrates the importance of general interests and competence to the doctrine of objective regimes.

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[60] J. Fawcett, *International Law and the Uses of Outer Space* (1968), 16.

[61] 1970 Common Heritage Declaration on the Deep Sea-bed, UN GA Res. 2749 (XXV). The 1971 Treaty on the Demilitarisation of the Seabed, UKTS 13 (1973), Cmnd. 5266; 955 UNTS 115. Part XI of LOSC; 1994 Agreement Relating to the Implementation of Part XI of LOSC, (1994) 33 ILM 1309.

[62] Article 1 of the LOSC defines it as the 'seabed and ocean floor and subsoil thereof beyond national jurisdiction'. Article 137(2) provides that 'All rights and resources of the Area are vested in mankind as a whole …'.

[63] *See* S. Vasciannie, 'Part XI of the Law of the Sea Convention and Third States: Some General Observations', (1989) 48 *Cambridge Law Review* 85; D. Arrow, 'Seabeds, Sovereignty and Objective Regimes', (1984) 7 *Fordham Journal of International Law* 169; E. Brown, *Seabed Energy and Mineral Resources and the Law of the Sea. Vol. ii. The Area Beyond the Limits of National Jurisdiction* (1986), at II.3 14.

The key question is whether or not Part XI of the LOSC creates obligations for States and other entities not party to it. During the plenary meetings of UNCLOS Mr Perisič of Yugoslavia raised exactly this point:

> 'The question is to what extent the principle *pacta tertiis nec nocent nec prosunt* could be applied in the matter of the common heritage of mankind. The convention would merely define more precisely the method of exploitation of the area and resources which according to the 1970 Declaration belonged to all States. Account must also be taken of the possibility that States not parties to the convention might also participate in the exploitation of the resources of the seabed beyond the limits of national jurisdiction. The participation of third States was provided for in several international treaties or conventions.'[64]

The suggestion is that the regime does have an impact on third parties, and third parties should at the very least respect conventional obligations in that these are merely a manifestation, in a more specific form, of a general rule relating to the common heritage of mankind.

Arguably, the LOSC intends to create objective rights and a literal interpretation of Part XI appears to support such a position, as it clearly distinguishes between rights and obligations for States Parties, and the rights and obligations for States generally. More particularly, article 136 of the LOSC defines the juridical status of the Area and its resources as the common heritage of mankind', with article 137 stating:

> 'No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights shall be recognised.'

Article 140 requires that activities in the area must be carried out for the benefit of all States.

Articles 139, 143, 144(2) and 156, which specifically outline obligations for States Parties, are in stark contrast and this suggests differentiated levels of obligations. This interpretation of Part XI has its opponents, with some authors strongly disputing that it has objective effects. From the *travaux préparatoires*, Lee highlights statements by State representatives, which suggest that no such intention to create an objective regime existed.[65] Yet the LOSC is commonly referred to as a constitution for the oceans, and the practical distinction between such a legal order and an objective regime appears slight. Arrow argues that certain provisions of the LOSC are conclusive evidence of the lack of intention to create an objective regime. He cites articles 306 and 317, which open up the treaty to ratification and de-

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[64] Plenary Meeting, 5 May 1978, UNCLOS III Off. Rec., vol. IX, 31.

[65] L.T. Lee, 'The Law of the Sea Convention and Third States' (1983) 77 AJIL 541, at 548.

nunciation, and article 311, which provides that the convention 'shall prevail, *as between States Parties*, over the Geneva Convention' as evidence that the LOSC applies only to the parties.[66] However, these are simply standard clauses that are inserted into most treaties, and in any should be understood merely as defining the relationship between LOSC and the 1958 Convention. It is equally possible to cite other provisions that can be held up to support the view that differentiated obligations exist, such as article 2(1), which expressly defines and so distinguishes States Parties from States. The preamble stresses the aim to create a global order for the oceans in the interests of the international community as a whole. It seems trite to note that the opportunity for non-parties to exploit freely the deep sea-bed contrary to the provisions of Part XI, or beyond the institutional provisions of that regime, is inimical to the whole purpose of creating a global regime. Despite this critical concern it appears that an unequivocal intention to create objective obligations cannot be established and this weakens the case for the Area as an objective regime. Although it may be certain that the regime will have an impact on non-parties, and that this was certainly in the mind of the drafts(wo)men, it is doubtful that this is sufficient to rebut the presumption that a treaty has effect *res inter alios acta*.

Even if sufficient intention can be inferred from the terms of the LOSC, and from the statements of the parties, we must further consider another key prerequisite for an objective regime: the existence of general interest in the regime for the deep sea-bed. To what extent does Part XI of the LOSC legislate in the general interests of the international community? On first reading, such an interest seems to be manifest in the concept of the common heritage of mankind. At the conference some parties argued that this notion was fundamental and that it should be given the status of *ius cogens*.[67] However, given the then ambiguous status of the Common Heritage of Mankind, this proved to be overly ambitious, and the outcome of the discussion on the nature of the concept was article 311(6), which provides:

> 'States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be a party to any agreement in derogation thereof.'

On the one hand this provision obliges parties to the convention merely to respect the common heritage principle, suggesting that it is something less than fundamental, but on the other categorises it as a 'basic principle'. In any case, Part XI was riven by disagreement, which necessitated further treaty negotiations, suggesting that even if the parties had realised that a general interest in the exploitation and regulation of the Deep Sea-bed existed, no

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[66] *Op. cit.*, n. 63, at 227.

[67] *See* the Informal Proposal by Chile to include a provision to this effect, Eighth Session, Part II, FC/14, 20 August 1979.

one could agree on its substantive content.[68] This of course poses a serious impediment to the suggestion that the Area is an objective regime. The difficulty in identifying a general interest is compounded by the character of the LOSC as a package deal. This involved a trade-off of interests, a bartering process for the inclusion of certain substantive provisions, the inclusion of which does not necessarily rely on their normative content, but instead on their political acceptability. This element of political expediency, which is systemic in the LOSC, further undermines the argument in favour of an objective regime as it suggests that many provisions will not reflect true legal consensus on matters of general interest. The absence of anything more than an abstract general interest in the Area serves to weaken its candidature for consideration as an objective regime. Even if such an interest could be ascertained, the treaty must then be able to articulate rights and obligations that correspond to it. A failure to achieve this is critical in respect of the Deep Sea-bed.

A further objection is raised by Vasciannie who argues that, even if the doctrine of objective regimes could withstand scrutiny, it would be inapplicable to the Area by virtue of the lack of treaty making competence over the territory by any of the parties.[69] He reasons that since the Deep Sea-bed is

> '*[P]er definitionem*, not subject to the special competence of any State, it cannot become the subject of an objective regime in the classical sense'.[70]

He adopts the position of Waldock, Special Rapporteur to the ILC during the drafting of the Vienna Convention on the Law of Treaties, in arguing that one or more of the parties must have in respect of the territory a particular treaty-making competence which other States do not have.[71] However, such a position effectively rules out the existence of objective regimes in areas beyond national jurisdiction, and as a consequence seriously limits the practical scope for objective regimes.

The first point to make in response to this view is that the juridical nature of the Deep Sea-bed does not absolutely prohibit States' legislative competence. The Area is generally categorised as *res communis*, which permits its use by any State while prohibiting claims to exclusive title. States may assert prescriptive competence over the Area to the extent that it does not amount to a claim of exclusive title, or to a lesser extent, an unjust inter-

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[68] Common Heritage of Mankind has three facets: demilitarisation of the sea-bed, the prohibition of claims to sovereignty over the sea-bed, and the establishment of an equitable regime for exploration and exploitation. Of these the last two are intricately related and give rise to a highly developed concept of trusteeship, yet they are also the most controversial aspects of the notion.

[69] *Op. cit.*, n. 63, 90.

[70] *Ibid.*

[71] Waldock, [1964] YILC, vol. ii, 26 at 31.

ference with the rights of other States. Secondly, as was pointed out earlier, a restrictive view of competence, limited to territorial competence, relies upon historically prevalent notions of State sovereignty and pays little heed to contemporary conceptions of States' authority or interests. As seen in part I, there is clear evidence of some erosion of the traditional position adopted by Waldock. Moreover, a restrictive competence would result in unacceptable regulatory lacunae in many international areas: lacunae that States are continually seeking to address. A pertinent example of this was the 'Reciprocating States Regime' under which several States, the Federal Republic of Germany,[72] France,[73] the UK,[74] the USA,[75] the USSR,[76] Japan[77] and Italy,[78] legislated for activities beyond national jurisdiction prior to the finalisation of the LOSC. Then in 1982 France, Germany, the UK and the US published an agreement regulating their claims *inter se*.[79] The aim of these arrangements was to facilitate the exploitation of the mineral resources of the sea-bed outside of the LOSC regime, which looked unduly restrictive and unlikely to enter into force in the near future. These States argued that the regulation was merely a legitimate exercise of authority over their own nationals on the high seas, and that it did not create over the sea-bed exclusive rights enforceable against third States. States outside the regime regarded it otherwise, and argued that it amounted to a disposition of parts of the sea-bed.[80] In practice, once a State exploits the resources of the Area those resources are effectively removed from the '*res communis* pot' which, if not *de jure* occupation and exploitation, is certainly *de facto* occupation and exploitation.[81] It is clear that the jurisdictional distinction that the reciprocating States identified is artificial in practice. It is notable also that that Part XI of the LOSC recognises a category of 'privileged' States in respect

[72] Act of Interim Regulation of Deep Seabed Mining, (1981) 20 ILM 393.

[73] Law on the Exploration and Exploitation of Mineral Resources of the Deep Seabed, (1982) 21 ILM 808.

[74] Deep Sea Mining (Temporary Provisions) Act 1981 (1981) 20 ILM 1219.

[75] Deep Sea-bed Hard Mineral Resources Act, (1980) 19 ILM 1003.

[76] Edict on Provisional Measures to Regulate Soviet Enterprises for the Exploration and Exploitation of Mineral Resources, (1982) 20 ILM 551.

[77] Law on Interim Measures for Deep Seabed Mining, (1983) 22 ILM 102.

[78] Law on the Exploration and Exploitation of Mineral Resources of the Deep Seabed, (1985) 24 ILM 983.

[79] The Agreement concerning Interim Arrangements relating to Polymetallic Nodules of the Deep Seabed, (1982) 21 ILM 950.

[80] *See* statements made by the Group of 77 in (1985) 6 LOSB 71, 85-6, and (1986) 8 LOSB 36.

[81] The legality of the regime was never tested despite the intractability of the protagonists. Churchill and Lowe note that the international Court of Justice could have decided the matter either way. *The Law of the Sea*, 3rd ed. (1999) 235.

of the Area, further weakening the rejection of differentiated treaty making competence in respect of the Area.[82]

It is clear that the Area cannot be unequivocally regarded as an objective regime, yet neither can it be said that the regime established does not purport to have some objective effects. The LOSC regime does identify certain general interests of the international community and it attempts to regulate activities in a geographic area in accordance with these. However, the specific implementation of these interests has proved to be highly divisive. It is the specific application of these principles that cast the legitimacy of the regime into doubt. The matter of competence to establish a regime with objective effects is also of importance, and it is apparent that much turns on whether a restrictive or liberal interpretation of competence is adopted.

### *3.1.4. High seas fishing*

The 1995 Straddling Stocks Agreement is the most recent in a series of efforts designed to address the problem of over-fishing on the high seas, and its impact on the already fragile state of the world's fisheries.[83] Traditionally, high seas fisheries have been characterised as a common property resource, meaning that States are free to exploit them subject to only limited constraints, and this has led to well documented problems with attempts to regulate such resources.[84] The 1995 Agreement goes beyond the general rights and duties

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[82] These include States having mineral deposits that straddle the Area and their continental shelf (article 142), developing and geographically disadvantaged States (article 148), and States having objects of archaeological or cultural importance lying in the Area (article 149). One should also consider those States who have a privileged position in The Council of the International Sea-Bed Authority, which includes States investing in sea-bed technologies and major exporters of equivalent land based minerals (article 161 of the LOSC and section 3, para. 15 of the 1994 Agreement).

[83] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea 1982 Relating to Straddling Fish Stock and Highly Migratory Fish Stocks, Doc. A/CONF. 164/38, reproduced in (1996) 34 ILM 876. Hereinafter referred to as the '1995 Agreement'.

[84] In the 'Estai dispute' which arose in respect of Grand Banks fishery, when Canada enacted domestic legislation giving them extraterritorial jurisdiction over foreign vessels in order to protect certain fisheries that straddled the High Seas. Under this legislation a Spanish fishing vessel, the "Estai", was arrested in international waters for breach of the Canadian legislation. This led to diplomatic representations, a call for sanctions and the filing of proceedings against Canada at the International Court of Justice. For more details of the incident see P.G.G. Davies, 'The EC/Canadian Fisheries Dispute in the Northwest Atlantic', (1995) 44 ICLQ 927; D. Freestone, 'Canada and the EU Reach Agreement to Settle the *Estai* Dispute', (1995) IJMCL 397. Similar problems have arisen in the Behring Sea, the Sea of Okhotsk and regarding the Chilean Mar Presencial. *See* generally, J.L. Canfield, 'Recent developments in Behring Sea fisheries conservation and management', (1993) 24 ODIL 257; W. T. Burke, 'Fishing in the Behring Sea donut: straddling stocks and the new international law of fisheries', (1989) 16 *Ecology Law Quarterly* 285; E.L. Miles and D. L. Fluharty, 'US interests in the north Pacific', (1991) 22 *ODIL* 315; N. S. Miroviskaya and J. C. Haney, 'Fisheries exploitation as a threat to environmental security: the North Pacific Ocean', (1992) 16 *Marine Policy* 243; Oude Elferink, 'Fisheries in the Sea of Okhotsk high sea enclave – the Russian

set out in the LOSC, by setting out a framework under which regional fisheries organisations are to exercise authority over the certain fish stocks on the high seas. Given the clear mandate to regulate an area beyond national jurisdiction, traditionally subject to flag State jurisdiction only, the question arises to what extent such developments can be imposed on third parties.[85]

There are a number of provisions in the 1995 Agreement that merit attention, given their direct impact on third parties. Thus, article 8(4) states that:

> '[O]nly those States which are members of such an organisation or participants in such an arrangement, or which agree to apply the conservation and management measures established by such organisation or arrangement, shall have access to the fishery resources to which those measure apply'.

This provision clearly intends to affect the rights of third States, by removing their freedom to fish in high seas areas subject to a conservation and management arrangement in which these States do not participate. This goes further than previous provisions on high seas fishing, which fall short of making the right to fish absolutely contingent on specific standards of conservation and management.[86] Mirroring this approach, article 17(1) states that:

> 'A State which is not a member of a subregional or regional fisheries management organization or is not a participant in a subregional or regional fisheries management arrangement, and which does not otherwise agree to apply the conservation and management measures established by such organisation or arrangement is not discharged from the obligation to co-operate, in accordance with the Convention and

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Federation's attempts at coastal state control', (1995) 10 IJMCL 1; C. J. Joyner and P. N. De Cola, 'Chile's Presencial Sea proposal: Implications for Straddling Stocks and the International law of Fisheries', (1993) 24 ODIL 99; J. G. Dalton, 'The Chilean Mar Presencial: A Harmless Concept or a Dangerous Precedent', (1993) 8 IJMCL 397.

[85] Article 3(1) of the 1995 Agreement expressly states that it applies to areas beyond national jurisdiction.

[86] E. de Lone maintains that this provision effectively puts an end to the free rider problem caused by the freedom of the high seas. 'Improving the Management of the Atlantic Tuna: The Duty to Strengthen the ICCAT in Light of the 1995 Straddling Stocks Agreement', (1998) 6 *New York University Environmental Law Journal* 656, at 663-4. *Cf.* D. Freestone and Z. Makuch, who argue that the obligation is only binding on the parties to the agreement, *inter se.* 'The New International Environmental Law of Fisheries: The 1995 United Nations Straddling Stocks Agreement', (1996) 7 *Yearbook of International Environmental Law* 3, at 34. Also E. Franckx, who further argues that as this provision is neither objective nor customary: it is ineffective. '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 & Management of Straddling Fish Stocks and Highly Migratory Fish Stocks', *FAO Legal Papers Online #8*, July 2000, at http://www.fao.org/legal/Prs-OL/franckx.pdf.

> this Agreement, in the conservation and management of the relevant straddling fish stocks and highly migratory fish stocks.'

Article 17(2) prohibits non-party States from authorising vessels that are flying their respective flags from engaging in fishing activities in fisheries covered by any regional arrangements. This approach, which implicitly and explicitly creates objective rules, is reinforced by the terminology used throughout the 1995 Agreement. Although article 2(a) specifically defines 'States Parties' the 1995 Agreement often refers to 'States', 'coastal States' or 'flag States', giving the whole agreement a declaratory aspect, rather than simply establishing inter-party rules. Article 5 states that the general principles of conservation and management apply to 'coastal States and States fishing on the high seas', as opposed to merely States parties. This can be taken to suggest that the specific provisions on conservation and management are of general application. A similar interpretation of the enforcement provisions leads to the conclusion that enforcement action may be taken against the vessels of non-party States. Article 18 obligates 'flag States' to uphold the measures established under the 1995 Agreement, and article 33(1) obliges States parties to encourage non-parties to the 1995 Agreement to become parties thereto and to adopt laws and regulations consistent with its provisions. Finally, article 33(2) provides that 'States Parties shall take measures consistent with this Agreement and international law to deter the activities of vessels flying the flag of non-parties which undermine the effective implementation of this Agreement'. Thus, it is possible for contracting States to enforce conservation and management obligations against non-parties as long as this is done in consistency with international law.

Although not explicitly mentioning objective effects, it is implicit that the 1995 Agreement is intended to affect the rights and obligations of third States in a manner consistent with international law. A literal and contextual reading of the provisions suggest that the *ratione personae* is not limited to States parties, or at the very least there may be a presumption that the 1995 Agreement is intended to have effect beyond the contracting parties.[87]

As article 2 provides, conservation and management is the key objective of the 1995 Agreement:

> 'The objective of the Agreement is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through the effective implementation of the relevant provisions of the Convention.'[88]

[87] This is borne out by statements in the *travaux préparatoires*. *See* the statements on behalf of Australia and the EU, which support measures against vessels acting contrary to regional arrangement, as long as this is consistent with international law. A/CONF.164/L.19 and 20, respectively. *See* also the Background Paper 8 July 1993, paragraph 109 of which suggests an increased role for regional arrangements in the supervision and enforcement of standards. A/CONF. 164/INF/6.

[88] *See* also articles 1(b), 5, 6 and 7.

Undoubtedly, there is considerable evidence of the general interest of the international community in the conservation and management of the living resources of the sea.[89] This interest may be just one facet of the more general interest in the conservation and protection of the environment, or it may be an agglomeration of more particular interest in the marine environment, such as the principle of optimum utilisation and the precautionary principle.[90] Since the *Behring Fur Seals Case*, conservation of the living resources of the ocean has been one of the primary concerns of the international community. Clearly, there is a long-term interest in providing a sustainable food supply from the oceans and a short-term interest in preventing conflicts arising from competition for limited resources. This interest, framed in terms of the general duty to conserve and manage the living resources of the oceans, is widely recognised as the principal objective of fisheries regulation in numerous legal instruments.[91] It should also be evaluated in light of the ICJ's suggestion, in the *Gabčikovo-Nagymaros Project case,* that norms of international environmental law may amount to fundamental norms.[92] Much of the legitimacy of the 1995 Agreements more radical proposals is predicated on the need to ensure this fundamental objective.

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[89] A possible parallel to the regimes established under the 1995 Agreement are the Whaling Sanctuaries established under the International Convention for the Regulation of Whaling 1946, 161 UNTS 72. Under article V, 'The Commission may … [adopt]… regulations with respect to the conservation and utilisation of whale resources by fixing … (c) … open and closed waters, including the designation of sanctuary areas. In 1980 the Indian Ocean Sanctuary was established, covering areas of the high seas. *See The Report of the International Whaling Commission* (1980), vol. 30, 27. In 1995 the Southern Ocean Sanctuary was established. The amendment to the schedule to the 1946 Convention is reprinted in the *Chairman's Report of the 46th Meeting* (1995), vol. 45, 28.

[90] In the *Southern Bluefin Tuna* case, the International Tribunal for the Law of the Sea held that 'the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment'. Order of 27 August 1999, *Southern Bluefin Tuna* case (New Zealand v. Japan; Australia v. Japan), Requests for Provisional Measures, (1999) 38 ILM 1624, para. 70. The tribunal linked the interest to wider environmental concerns, confirming both its jurisprudential importance and its place in the intricate hierarchy of environmental concerns.

[91] Article 1(2) of 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, 559 *UNTS* 285. The 1982 LOSC makes numerous references to it in articles. *See* preambular paragraph 4, and articles 21(1)(d), 56(1)(a), 61-67, 78(1), 117,118, 119, 123(a), and 277(a). FAO, *Code of Conduct for Responsible Fisheries* (1995). It is axiomatic that conservation and other environmental concerns, such as sustainability and the precautionary principle, are central to Agenda 21 as adopted at the Rio Conference. United Nations Conference on Environment and Development, Agenda 21: Programme of Action for Sustainable Development. U.N. Doc. A/CONF. 151/26. Available online at http://www.un.org/esa/sustdev/documents/agenda21/index.htm The 1992 Cancun Declaration stressed the need to address factors that undermine the effectiveness of international conservation and management measures, leading to the FAO Code of Conduct for Responsible Fisheries. U.N. Doc. A/CONF.164/INF2/8 (1992). Articles 1, 2 and 6 place conservation at the centre of responsible fishery management regimes.

[92] *Op. cit*., n. 17.

The most useful test of the status of the regime is to be found in the practice of States, and their support of or objection to the 1995 Agreement. Unfortunately, there is at present insufficient data to attempt this.[93] There are, however, other indicators as to the status and future prospects of the 1995 Agreement. Firstly, the 1995 Agreement is part of a systematic approach to fisheries regulation; it is an incremental advance on the policy and laws established under the LOSC, and is articulated in the intervening conferences. As Davies and Redgwell conclude:

> 'The future law of high seas fisheries will be governed by three levels of largely mutually compatible and reinforcing treaty obligations, ranging from the general provisions of the LOSC through the SSA [1995 Agreement] to the RFOs [Regional Fisheries Organisations]. In practice these will not operate as three separate and conflicting sources of treaty law, since the principles contained at each level may be viewed as simply steps in the concretization of general norms of conservation, management and enforcement.'[94]

Most States have participated in its evolution, and throughout there has been a high level of support for the rules and standards so formulated, suggesting a positive outlook. Secondly, the 1995 Agreement is strongly advocated by international organisations with a particular interest and influence in fishing matters, such as the FAO, UNCED, and the UN General Assembly. It has also received widespread approval among publicists, suggesting that it is consistent with internationally recognised standards.[95] Finally, there is as yet no direct opposition to the rules and provisions of the 1995 Agreement and this would seem to imply that the provisions are generally acceptable. Although the burden lies on the party that is asserting that the regime facilitates the general interest, this should not be problematic in respect of the 1995 Agreement.

Clearly, the arrangements to be established under the 1995 Agreement are intended to have some objective effect, and the issue is rather how such

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[93] There is a possibility that such a regime will be tested in the Pacific Ocean. The Implementation of the 1995 Agreement under the Draft Convention and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean is likely to be among the first of the regional arrangements set up in accordance with the 1995 Agreement. Reprinted in (2000) 15 IJMCL 121.

[94] P.G.G. Davies and C. Redgwell, 'The International Regulation of Straddling Fish Stocks' (1996) 67 BYIL 199, at 272.

[95] *See* M. Hayashi, 'The 1995 Agreement on the conservation and management of straddling and highly migratory fish stocks: significance for the Law of the Sea Convention', (1995) 29 *Ocean and Coastal Management* 51; D.A. Balton, 'Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks' (1996) 27 ODIL 125; A. Tahindro, 'Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks' (1997) 28 ODIL 1; L. Juda, 'The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A Critique' (1997) 28 ODIL 147.

effects are to be accounted for.[96] One explanation is that the regulations of a regional fisheries arrangement can be upheld as obligations undertaken by States parties to the 1995 Agreement. However, this accounts only for States parties to the 1995 Agreement. A second explanation is that third States are bound by rules of customary international law having the same effect. Yet this assumes that the terms of the 1995 Agreement, or a regional arrangement, have parallels in customary international law. This is quite unlikely, in that it assumes that new rules of customary international law in respect of high seas fisheries have emerged in such a short period of time and without a consistent or widespread practice. It may be countered that conservation and management simply amount to a customary obligation, binding upon all States, regardless of its particular form. Although this may be the case, it does not preclude the fact that conservation and management hold the status of a general interest, in the same way that articles 2(3) and (4) of the United Nations Charter do not reduce the general interest in international peace and security to a mere customary norm. In any case, it is unlikely that the principle of conservation and management can be reduced to a customary norm.[97] The obligations to conserve and manage are by their nature general; they require implementation by more specific norms.[98] Thus, the 1995 Agreement establishes new norms and standards of behaviour, that are consistent with the existing general interest, and which are opposable to non-contracting States.[99]

The 1995 Agreement is an important development in the regulation of fisheries. It operates as an effective incentive to States to participate in regional fisheries organisations or arrangements. Traditionally, the State who opposes change, whilst other States are pushing for a modification of the

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[96] The Tribunal on the Law of the Sea has recently issued a judgement on a matter bearing important similarities to the present issue. In *The Southern Bluefin Tuna cases* the tribunal was requested to decide upon the validity of certain actions under a regional fisheries treaty, *supra* n. 90. Japan had challenged the jurisdiction of the tribunal on the grounds that the dispute was based on the interpretation of the 1993 Convention for the Preservation of Southern Bluefin Tuna rather than on the LOSC. However, the tribunal held that the conduct of the parties under the 1993 Convention was relevant to an evaluation of their compliance with their obligations under the LOSC. Implicit in this decision is that it is impossible to limit the applicability of the fisheries regime of the LOSC. Wolfrum argues that this flows from the tribunal 'qualifying the Convention on the Law of the Sea as a constitution for the law of the sea matters having priority over international agreements covering certain aspect thereof'. 'The Role of the International Tribunal for the Law of the Sea'; Presentation given at the 23rd Annual Conference, the Centre for Oceans Law and Policy and the UN Food and Agriculture Organisation, Rome, 15th-17th March 2000. Despite the virtue of this ruling the tribunal gives no indication of its reasoning for such a position or the process whereby it could be reached. There is also an important distinction: Japan had voluntarily entered into a regional arrangement, whereas the aim of objective regimes is to hold recalcitrant States to account.

[97] *See* F. Orrego Vicuña, *The Exclusive Economic Zone* (1989) 244-6.

[98] This view is shared by Churchill and Lowe, *op. cit.*, n. 81, at 290.

[99] For example, the provisions on the precautionary principle in article 6 go much further than pre-existing obligations.

*status quo*, finds itself in a stronger negotiating position. Thus, the State resisting the change has much to gain by resisting. If the other States were to fail to secure the agreement of the opposing State, then they run the risk of placing themselves in a disadvantageous position *vis à vis* that State. Article 8(4) operates to remove this tactical negotiating burden from those States seeking to establish a regulatory regime for sustainable fisheries. Seen in this light, the principal effect of article 8(4) is strategic in that it persuades non-parties to come within the regime, for to do otherwise might result in a greater loss.

## 3.2. Environmental protection regimes

Many environmental issues are transboundary or global concerns, and during the latter part of this century there has been a growing recognition of the fact that States cannot tackle pollution and other environmentally harmful activities individually. The global or transboundary nature of many environmental problems requires a high degree of international co-operation to achieve workable solutions. Customary international law has a limited capacity for creating standards of environmental behaviour because it is incapable of establishing detailed scientific benchmarks, it is usually slow to evolve, and it is often ambiguous in its content. A further problem arises when institutional provisions are desired, such as the establishment of a supervisory or enforcement authority, as custom is ill-suited to such matters. In this respect, treaties are essential to the creation of specific pollution targets and for establishing institutional mechanisms. The need for States to define, implement and enforce transboundary and global standards of environmental protection, which tackle the problem of non-conformity, means that environmental treaty regimes are leading candidates for objective regimes.

### *3.2.1. Marine pollution regimes*

Regional pollution arrangements may have objective effects in two circumstances: firstly, where they provide for wider rights for coastal States and impose greater obligations on third parties than does general international law, and secondly, where they extend the geographic competence of coastal States beyond the limits of general international law.[100]

Do any of the regional arrangements provide coastal States with greater jurisdiction than does general international law? The Helsinki Convention for the Baltic Sea of 1974 was the first regional arrangement aimed at regulating all aspects of pollution within a particular marine environment and was

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[100] General treaties for addressing pollution concerns are not considered; they seek to establish general obligations, as opposed to geographically or territorially distinct regimes.

a model for subsequent other similar arrangements.[101] Under UNEP's Regional Seas Programme arrangements have been put in place for the Mediterranean,[102] the Persian Gulf and Gulf of Oman,[103] West and Central Africa,[104] the Red Sea and Gulf of Aden,[105] the Caribbean,[106] East Africa,[107] and the Black Sea.[108] The geographical scope of these arrangements is generally limited to the jurisdictional waters of the contracting States, either through express provision or by virtue of the limits of the waters involved. The regimes define and harmonise the prescriptive power of the contracting States, and in laying down the powers of the contracting States no greater powers are provided for than are accepted under general international law. The objective impact of these conventions can best be explained by reference to the general obligations inherent in the LOSC,[109] other international conventions,[110] or customary international law, and to this extent they are of little value as evidence of objective regimes. If greater powers were to be provided under the regional arrangements then the objective effects of these would have to be considered. This possibility is certainly alive, as the provisions for protection of special areas demonstrates.

Provision is made under article 194(5) of LOSC for the protection and preservation of 'rare and fragile' ecosystems. The notion of such special areas was taken a stage further by the IMO who developed the notion of the Particularly Sensitive Sea Area (PSSA). A PSSA may be defined as:

> 'An area that needs special protection through action by IMO members because of its significance for ecological or socio-economic or scientific reasons and which may be vulnerable to environmental damage by marine traffic.'[111]

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[101] The Convention on the Protection of the Marine Environment of the Baltic Sea 1974, (1974) 13 ILM 544, at 546.

[102] The Convention for the Protection of the Mediterranean Sea against Pollution 1976, 1102 UNTS 27.

[103] The Kuwait Convention for Co-operation on the Protection of the marine Environment from Pollution 1978, 1140 UNTS 133.

[104] The Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region 1981, (1981) 20 ILM 746.

[105] The Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment 1982, (1982) 9 EPL 56.

[106] The Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region 1983, 1988 UKTS 38.

[107] The Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region 1985, OJEC C.253 (1986) 10.

[108] The Convention for the Protection of the Black Sea against Pollution 1992, (1993) 22 LOSB 54.

[109] *See* Part XII, and in particular articles 192, 194, 210, 211, 212, 220 and 221.

[110] For example, MARPOL 73/78, 1340 UNTS 101.

[111] Guidelines for the Designation of Special Areas and the Identification of Particularly Sensitive Sea Areas, IMO Assembly Resolution A. 720(17), 6th Nov. 1991, para. 3.1.2.

Under international law coastal States may take only measures consistent with generally accepted international rules or standards, although after consultation with the competent international organisation (IMO) further measures may be taken.[112] PSSAs have been put into practice only by Australia in respect of the Great Barrier Reef National Park and by Cuba around the Sabana-Camaguey peninsula. In the former, tolls were mooted, raising the spectre of measures far stricter than international standards, and would have begged the question of whether or not such measures could be enforced against third States. One should also consider whether areas straddling the high seas could be subject to stricter regulation than the high seas generally. It has been noted elsewhere that the concept of the PSSA could provide a means of facilitating protective measures necessary to ensure the comprehensive protection of a sensitive area lying beyond unilateral coastal State competence.[113] The UNEP Regional Seas Conventions offer further support for zones of special protection. In 1995 the Protocol concerning Specially Protected Areas and Biological Diversity was adopted, providing for the establishment of Specially Protected Areas of Mediterranean Importance (SPAMIs).[114] SPAMIs may be created both within national jurisdiction and on the high seas raising the issue of how such measures would affect the position of third parties and their existing right in the high seas. As are other mechanisms, such measures to enforce the SPAMI provisions are to be in accordance with international law.

The question of regional arrangements encroaching on the high seas arises in two of the regional arrangements, the South East Pacific Convention[115] and the South Pacific Convention.[116] These two conventions purport to allow the parties to regulate matters in areas of the high seas, so extending pollution control competence beyond coastal waters. Article 1 of the South East Pacific Convention states that the geographic scope of the agreement includes 'the high seas up to a distance within which pollution of the high sea may affect that area', and article 2(a) of the South Pacific Convention applies to 'enclosed' high seas. Thus measures taken in such areas would clearly affect third parties by permitting the coastal State to impose and enforce more rigorous pollution controls on the high seas than is permitted under general international law. Under article 221 of the LOSC coastal States may take

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[112] *See* articles 21(2) and 211(6) of LOSC.

[113] Report of the International Meeting of Experts on Particularly Sensitive Sea Areas, at the University of Hull 20-21 July 1992, (1992) 26 *Marine Pollution Bulletin* 9. *See* also K. Gjerde and D. Freestone, 'Particularly Sensitive Sea Areas – An Important Environmental Concept at a Turning Point' (1994) 9 IJMCL 431, 433.

[114] (1995) 6 YbIEL 887.

[115] The Convention for the Protection of the Marine Environment and Coastal Area of the South East Pacific 1981, reproduced in Lay, Welch, Churchill and Simmonds, *New Directions in the Law of the Sea* (1974 – ), Doc. J. 18.

[116] The Convention for the Protection of the Natural Resources and Environment of the South Pacific Region 1986, (1987) 26 ILM 41. In force 22 August 1990.

action to counter a maritime pollution incident in the high seas where it threatens the interests of the coastal State. This does not go as far as permitting the legislation and enforcement of rules of a more routine nature, which the two conventions appear to permit.[117] For example, article 4 of the South East Pacific Convention provides for preventative measures to be taken by the contracting parties, such as rules on dumping, collision prevention, discharges, and operational requirements, *at least* to internationally accepted standards. Accordingly, there is a potential conflict with the provisions of article 94 of the LOSC and this raises a question of interpretation. A declaration of material jurisdiction over the high seas would be untenable and inconsistent with the limited aims of the conventions. A more reasonable understanding is that the contracting parties are seeking to ensure that the general and particular regional interest in cleaner oceans and safer shipping is maintained in a coherent and consistent manner in the face of jurisdictional inconsistencies. These regimes thus manifest, to some degree, the features of an objective regime, and there are strong parallels with the issue of fisheries regulation considered above.

Regional pollution control regimes suggest a balanced approach to the creation of other objective regimes. They are characterised by the degree of localised or territorial interest at stake in the regime, which in part underpins the authority of coastal States to act in the creation of objective law. This is in accordance with pollution control and environmental protection objectives, which are issues of global concern. Thus regional arrangements correspond with a general interest of the international community, which reinforces the authority of regional States to act.[118] Despite these 'objective' features, it is arguable that the impact of such regimes might best be explained by reference to other norms of international law, rather than the nature of treaty regime itself.[119] This demonstrates the vital importance of distinguishing between true objective regimes and other 'objective' treaties that are explained by reference to parallel customary rules or complementary treaty

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[117] This provision reflects the law since the *Torrey Canyon* incident of 1967, and the international community's general acceptance of the legitimacy of the United Kingdom's action. Other than this exception only flag jurisdiction is permitted in respect of the high seas (Article 92 of the LOSC)

[118] A general interest may be derived from specific pollution treaties, such as MARPOL, as well as general environmental instruments such as the Convention on Biological Diversity 1992 and the 1995 Jakarta Mandate on Marine and Coastal Biological Diversity.

[119] The International Law Association Committee on Coastal State Jurisdiction relating to Marine Pollution put forward an explanation for the 'objective 'effects of certain marine pollution measures at the London Conference. Their approach relies on the notion of rules of reference in framework treaties that point to the further implementation of generally accepted international rules and standards. States can then implement such measures in accordance with the GAIRS, and this can be made opposable to third States that have consented to the original rules of reference. Article 211 of the LOSC is cited as one such rule of reference. See *the Final Report of Committee on Coastal State Jurisdiction relating to Marine Pollution* (London, ILA, 2000). This approach seems to reflect the same concerns that underpin objective regimes.

provisions. Of course, where treaty provisions differ from custom or other treaties, and this is a distinct possibility in areas which require stricter pollution control regimes, then these provisions must be explained in some other way. Objective regimes would offer a possible basis for this.

### *3.2.2. Driftnet fishing*

In July 1989, the South Pacific Forum adopted the Tarawa Declaration in response to the depletion of albacore tuna stocks.[120] The declaration stated that the use of driftnets in the fishery was 'not consistent with international requirements in relation to rights and obligations of high sea fisheries conservation and management and environmental principles'. It further called for a convention to create a zone free of driftnet fishing, and was soon followed by the Wellington Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific.[121] According to article 1(a) the Convention applies to the coastal waters and high seas within a specified geographic area of the South Pacific, with subsequent provisions seeking to ban the use of driftnets therein. Clearly, the scope of the convention is internal to and beyond coastal State jurisdiction, which has implications for the effectiveness and enforceability of its substantive rules against non-parties, whose nationals fish in areas of the high seas subject to the regime.[122] Article 3(2) contains a number of provisions that potentially affect the rights of third parties, including preventing the landing of illegal catches, restricting port access to illegal fishing vessels, and the imposition of trade restrictions on States participating in illegal catches. Article 3(3) permits the use of measures against driftnet fishing that are stricter than those required by the convention, thus allowing measures beyond those provided for in article 3(2). These provisions are supplemented by article 4, which requires that 'each party shall take appropriate measures to ensure the application of this Convention'.

Cumulatively, these provisions appear to curtail the rights of third States where they are acting contrary to the aims and objectives of the regime. However, such an interpretation is tenuous because the obligations are singularly directed at contracting parties. This view is reinforced by article 5, which provides for a consultation process with non-parties in order to draw them into the regime. Two additional protocols were concluded specifically to draw in non-parties, suggesting definite limits to the regime. The regime did not seek to affect the status of the South Pacific, but merely to prevent drift-net fishing therein.

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[120] (1989) 14 LOSB 29. See also the 'Castries Declaration' by the Organisation of Eastern Caribbean States, at 28.

[121] (1990) 29 ILM 1454.

[122] Notably vessels from non-party States, Japan, the Republic of Korea and Taiwan were apprehended fishing in contravention of the Convention. *See* the Report of the Secretary General, UN GAOR, 47th session, UN Doc. A/47/487 (1992), at 4 and 9.

However, almost immediately the regime was reinvigorated by UN General Assembly Resolution 45/225 (1990), which recommended the cessation of large-scale pelagic driftnet fishing in the South Pacific by 1 July 1991 unless conservation and management measures were implemented to prevent the harmful impact of such fishing.[123] This resolution was reaffirmed in Resolutions 45/197 (1990) and 26/215 (1991), resulting in an end to driftnet fishing.[124] Indeed, it is notable that, although no States permitting the use of driftnets are a party to the Convention or Protocols, driftnet fishing for tuna has ceased in the zone.[125] This begs the question – under what obligations are non-parties acting? Hewison suggests that customary rules explain the cease of driftnet fishing, which accounts for the fact that the General Assembly Resolutions are not binding.[126] However, it is also possible that collectively the Convention and subsequent resolutions have established an objective regime.[127] Thus Burke *et al* emphasise, 'nothing in them [the resolutions] mandates that non-compliance is to be sanctioned by terminating the fishery',[128] highlighting the far-reaching nature of the prohibition on driftnets.

An objective regime has certain inherent advantages in that as a treaty regime it can provide a more comprehensive structure for regulating a complex issue. A major criticism of the prohibition on driftnet fishing is that it is a crude means of dealing with the problem, and that it does not account for actual variations in practice. It does not provide mechanisms for implementing change and for supervising the same. As Burke *et al* stress, there exists a 'need for an effective governance process that will satisfy general community objectives'.[129] Such a process simply cannot be provided by a series of resolutions, but instead requires an effective and systematic treaty framework. Although neither custom nor objective regimes are free from criticism, the objective regime approach does at least present certain practical advantages in this respect.

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[123] (1990) 15 LOSB 154.

[124] *See* (1991) 17 LOSB 7, and (1992) 20 LOSB 14 respectively.

[125] A. Bergin, 'Political and legal control over marine living resources – recent developments in South Pacific distant water fishing', (1994) 9 IJMCL 289, at p. 301.

[126] G.J. Hewison, 'The legally binding nature of the moratorium on large-scale high seas driftnet fishing', (1994) 25 JMLC 557.

[127] In either case it would be difficult to ascertain with which norms a State is complying, be it customary norm or an objective treaty regime. If a customary rule exists then it would have to account for its apparent conflict with existing norms in respect of high sea fishery resources. *See* the *Asylum* case, ICJ Rep. 1950, 266 at 276-77.

[128] W.T. Burke, M. Freeberg and E.L. Miles, 'United Nations resolutions on driftnet fishing: an unsustainable precedent for high seas and coastal fisheries management', (1994) 25 ODIL 127, at 172.

[129] *Ibid.* 170.

### *3.2.3. Ozone depletion*

The principal instrument regulating activities harmful to the ozone layer is the Montreal Protocol on Substances that deplete the Ozone Layer.[130] It regulates an area of common concern to all States, the protection of which is in the general interests of all States. Such an interest incorporates a variety of concerns both environmental and relating to human health. At an early stage it was realised that the failure of the regime to achieve widespread ratification would lead to economic disparities between parties and non-parties, thus undermining the objectives of the regime, so steps were taken to try and address the problem of recalcitrant States, free riders and the problem of 'hold-outs'. Unless non-parties were addressed, the convention would simply result in the reallocation of CFC production from States parties to non-parties. This would further deter potential signatories from acceding to the protocol because it would result in their being placed at an economic disadvantage *vis à vis* non-parties.

The Montreal Protocol attempts to deal with these problems by utilising trade sanctions. Article 4(1) places parties under an obligation to 'ban the import of controlled substances from any State not party to this Protocol' within one year of entry into force of the Protocol, and article 4(2) contains a similar control in relation to exports. Article 4(5) places a duty on States to 'discourage' trade in technology for producing and utilising controlled substances, while article 4(6) controls the granting of aid if such aid would lead to the production of controlled substances. Cumulatively, these provisions may have an affect on third parties, for although they do not directly impose obligations on third parties they do have considerable indirect effects. Quite clearly, this does not amount to the level of obligation that an objective regime would seek to effect, but it must be remembered that the success of such a regime is commensurate with the degree of support that it can attract, and with the articulation of a general interest. Palmer describes the approach to the atmosphere as 'slicing the salami thinly', i.e., the use of small incremental measures to ensure widespread support.[131] This reflects the acutely sensitive nature of the interests that would be affected by a regime protecting the atmosphere since stronger measures would simply have pitted the protection of the atmosphere against the commercial interests and freedoms of States. The protection of the atmosphere may in the future evolve into an objective regime if such political issues can be resolved, and if the increasing perils of inaction are recognised.

The Protocol is the genesis of a new approach to environmental protection at the international level. It has already made inroads into consent by adopting procedural rules based on majority, rather than unanimous, decision-making. This has been reinforced by the Hague Declaration, which calls for a 'new

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[130] (1987) 26 ILM 1550.

[131] Palmer, *op. cit.*, n. 15, at 274.

institutional authority … responsible for combating further global warming', again operating beyond the rule calling for unanimous agreement.[132] Palmer identifies three challenges for global environmental problems: setting rules, monitoring and verifying compliance, and settling disputes in an authoritative and binding manner.[133] These problems can be addressed adequately only in the form of a treaty; a treaty which will invariably establish obligations *erga omnes*. Although the ozone regime is not yet truly objective, if it and other areas of the environment develop in a way that effectively protects the environment, then they may certainly require evaluation as objective regimes in the future.

### 3.3. Neutrality and demilitarisation

In this area, perhaps more than any other, there is clear support for the notion of objective regimes. Under the Congress of Vienna, Belgium had certain obligations as a frontier fortresses imposed on it by Great Britain, Austria, France and Russia.[134] Subsequently, in 1831 the Treaty of London imposed neutrality on Belgium.[135] In 1856 France, Great Britain and Russia adopted the Aaland Islands Convention, which provided that 'the Aaland Islands shall not be fortified, and that no military or naval base shall be maintained or created there'.[136] The objective character of this provision was recognised by the League of Nation's Committee of Jurists in the *Aaland Islands Case*.[137] Elsewhere, Switzerland was subjected to permanent neutrality, a status that has not since been contested.[138] The neutrality of Austria is another example in point, which has entered the *ordre public* of Europe.[139] Mention has already been made of the Antarctic Treaty. In 1962, the Declaration on the Neutrality of Laos was issued and has been effective since.[140] Similarly, the Cambodian Settlement has been respected.[141] Apart from agreement on the general status of States, specific regimes have been provided for international waterways such as the Kiel Canal[142] and Panama

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[132] The Hague Declaration on the Environment, (1989) 28 ILM 1308, at 1310.
[133] Palmer, *op. cit.*, n. 15, 283.
[134] *See* [1964] YILC vol. II, 30.
[135] *Ibid.*
[136] BFSP (1855-1856), London 1865, 24.
[137] *Supra* n. 52.
[138] *Ibid.*
[139] *See* J. Kunz, 'Austria's Permanent Neutrality' (1956) 50 AJIL 418.
[140] 456 UNTS 301.
[141] (1992) 31 ILM 180.
[142] Under the Treaty of Versailles the Kiel Canal shall be 'maintained free and open to the vessels of commerce and war of all nations at peace with Germany'.

Canal.[143] All of these arrangements provide a core of evidence for objective regimes.

Where such arrangements are within the boundaries of a particular State, they may be explained according to principles of sovereignty, territorial integrity and political independence of States, respect for which would support a status of neutrality. However, other States, as in the case of the Aaland Islands or Belgium, often impose such arrangements, and so this explanation fails. More recently, the Security Council of the United Nations has imposed safe havens, enclaves and demilitarised zones on Iraq, which again cannot be explained on the basis of sovereignty.[144] In such cases, the instrument creating the territorial arrangement will invariably have objective effects, certainly against the State subject to the arrangement, and arguably against States not party to the arrangement. The objective effect of these arrangements can be explained according to the theory of objective regimes.

Neutrality and demilitarised zones are also valid when established in extra-territorial areas. This is evidenced by the general acceptance of the Antarctic and Outer Space regimes. The Tlateloco Treaty of 1967[145] and Treaty of Raratonga of 1985[146] establish nuclear free zones in the Pacific and Atlantic oceans off Latin America and in South Pacific respectively. The Indian Ocean Zone of Peace Declaration 1971 establishes a more comprehensive demilitarised zone.[147] A Second Zone of Peace, for the South Atlantic, followed suit in 1986.[148] By providing for demilitarisation in areas including the high seas such agreements will inevitably affect the freedom of third parties as provided for under general international law. Although not every State respects such arrangements, and some uncertainty as to whether specific provisions of the Zone of Peace are *de lege ferenda* rather than *lex lata,* the establishment of such zones is beyond doubt. Moreover, a majority of States would appear to support the existence of such zones.[149]

Doctrinal support for objective regimes is quite unanimous in this area, with writers from McNair[150] to Subedi[151] categorically supporting their existence. Waldock was quite certain about the objective status of such arrangements during the ILC's discussion of the subject:

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[143] Article 2 of the Panama Canal Treaty provides for the Canal being 'open to peaceful transit by the vessels of all nations', (1977) 16 ILM 1022

[144] *See* generally, Subedi, *op. cit.*, n. 36.

[145] 634 UNTS 281.

[146] (1985) 6 LOSB 24.

[147] General Assembly Resolution 2832 (XXVI) of 1971.

[148] Declaration on the South Atlantic as a Zone of Peace and Co-operation, General Assembly Resolution 41/11 of 1986.

[149] At the 1983 Summit Conference of the Non-aligned Countries, a declaration was issued stating that military presence in the zone constitutes a violation of the Indian Ocean Zone of Peace. *See* UN Doc. A/AC.159/L.55/Add. 1.

[150] *Op. cit.*, n. 4, at 255.

[151] *Op. cit.*, n. 8.

> 'It may freely be conceded that certain kinds of treaties, e.g. treaties creating territorial settlements or regimes of neutralisation or demilitarisation, treaties of cession and boundary treaties, either have or acquire an objective character'.[152]

Even Roxburgh, who argues that treaties cannot by their inherent nature be objective, concedes that neutrality settlements should be respected by non-party States.[153]

Quite clearly State practice and doctrine support objective regimes that facilitate international peace and security. The widespread acceptance of this type of objective regime suggests a direct correlation between the universal acceptance of peace and security as a keystone of international society, on the one hand, and the legitimacy of the particular regimes that facilitate this on the other. In the past this has justified the intervention of 'Great Powers' in the affairs of lesser States in Europe to maintain order and stability. The same interest has, more recently, justified the exercise of a similar power by the United Nations. In each case the intention that the regime has effect beyond the parties to it was unequivocal, and respect for the regimes has been forthcoming. This is despite the difficulties in attributing competence to the acting parties, and the manifest conflict with the *pacta tertiis* rule. Presumably, this can only be countenanced by according a higher normative weight to the general interest, which would then appear to outweigh the countervailing considerations of sovereignty and consent.

### 3.4. Conclusion

Objective regimes are undeniably the product of a need to adapt the law-making process to accommodate changing social, political and environmental demands. The concept is supported by lucid and persuasive arguments that conceptualise international law in a new light, away from the restrictive trappings of absolute sovereignty, consent and bilateralism. Such perspectives are not merely rhetoric or aspiration, but are supported by State practice and by the decisions of international tribunals. A dogmatic rejection of the role of objective regimes prioritises the misplaced concerns and values of our international system.

In the area of neutrality and demilitarisation there is strong evidence of the existence of objective regimes. The Antarctic, Deep Sea-Bed and Outer Space all manifest some objective characteristics and are arguably objective regimes. Finally, there are a number of environmental regimes that manifest objective characteristics, and although they may be only tenuously hailed as objective regimes, it is likely that objective environmental regulation will continue to develop in this direction. As has been shown the practice arises

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[152] [1964] YILC, vol. II, 26.

[153] Roxburgh, *op. cit.*, n.4, at 58.

in three principal areas: areas that require a high degree of international co-operation to achieve effective regulation, areas requiring a high degree of stability, such as boundaries or rights of communication, and in areas of common interest, such as the environment. The regulation of such areas has been consistently hampered by limitations in customary law and a contractual approach to treaties. It requires a new way of law making; objective regimes offer just such an opportunity.

## 4. CRITERIA FOR AN OBJECTIVE REGIME

If objective regimes are to make the transition from *de lege ferenda* to *lex lata*, or to gain wider acceptance, then it is necessary to make sense of this body of practice, and remove any doubt as to the nature, scope and utility of objective regimes. Some parameters must be established for the concept. From the above review of practice, the following factors have been identified. There must be an intention by the parties to create such a regime, the regime must be territorial, the parties must have a competence in respect of the territory or an interest in the creation of the regime, and the regime must be in the general interest of the international community.[154] These will be examined in turn.

### 4.1. Intention to create such a regime

The requirement of an intention to create an objective regime is axiomatic, for without such intention there should be no question of the treaty having anything other than incidental effects on third parties. As the Permanent Court noted in the *Free Zones case*, 'stipulations *pour autrui* are not to be lightly presumed'.[155] Thus intention serves to weaken the presumption in favour of the *pacta tertiis* rule.[156] As the *pacta tertiis* rule is fundamental, and objective regimes are an exception to it, intention of the parties is an important indicator of the inapplicability of the *pacta tertiis* rule in particular circumstances. It is also important in order to distinguish objective regimes from treaties that only incidentally affect third States interests.

As has been shown above, an intention to establish an objective regime could be made out in the Antarctic Treaty, the Outer Space Treaty, the 1995 Agreement, and the Zones of Peace, but was less clear in regimes such as the deep sea-bed and the environmental regimes. Such an intention is often

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[154] Similar criteria are adopted by Mosler and Klein. H. Mosler, 'The International Society as a Legal Community' (1974-IV) 150 RdC 11, at 235. Klein, *op. cit*., n. 6.

[155] 1932 PCIJ Ser. A/B, No 4, at 147-8. *See* also the *North Sea Continental Shelf* cases, ICJ Rep. 1969, 3 at 25-6.

[156] Such an approach was adopted by Fitzmaurice, [1960] YILC, vol. II, 77.

disputed and so it is not the requirement for intention that is problematic, but rather the matter of identifying its existence in any given situation. As objective regimes are treaties, the question of whether or not the parties to an agreement intend it to have objective effect is a matter of treaty interpretation.[157] Accordingly, a number of factors, including the actual language and emphasis of the agreement, the practice of the parties, and the object and purpose of the agreement, are to be taken into account in order to determine the proper interpretation of the instrument. The result of such investigation must reveal a clear and unambiguous intention to create a regime that has *erga omnes* effect and also that is in the general interest.

The requirement of intention has a good deal of currency in the academic literature in support of objective regimes. Klein argues that it is essential that the parties to the treaty demonstrate an intention to create a treaty with *erga omnes* effect,[158] and Waldock makes it a key requirement in his draft article on treaties.[159] Subedi argues that intention is of crucial importance, stating that:

> '[T]he intention of the parties to create legal relations, rather than the form in which such intention is expressed, is important. If such intention can be established, no matter what form may be adopted in expressing that intention, the form used can be regarded as being capable of creating legal relations between States.'

He continues to argue that such an intention to create a territorial settlement could be expressed by resolutions of the UN Security Council, for example Resolution 687 (1991).[160] However, intention alone cannot be the sole criterion for an objective regime, for it reflects a contractual approach to treaties and such an approach is quite inimical to objective regimes. Although it is a necessary element in identifying the nature of the regime, and provides the motive force behind the emergence of the regime, it must be accompanied by other criteria.

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[157] Arguably, treaties are not the only means of establishing an objective regime. Subedi makes out a strong argument in favour of other instruments such as General Assembly and Security Council resolutions as being capable of establishing objective regime. *Supra* n. 8, 218-222. Such canons of construction are to apply as far as possible to declarations or resolutions of international organisations where they precipitate an objective regime.

[158] Klein, *op. cit.*, n. 6, at 352.

[159] He states that 'a treaty establishes an objective regime when it appears from its terms and from the circumstances of its conclusion that the intention of the parties is to create in the general interest general obligations and rights relating to a particular region ...', [1964] YILC, vol. II, 26 ff.

[160] *Op. cit.*, n. 36, 194 – 195.

## 4.2. The regime must regulate the status of the territory

A review of practice and doctrinal opinion quite clearly demonstrate the requirement that the regime must be territorial. Apart from trite definitional issues as to 'territory' with which the earlier considerations of the Antarctic, the Deep Sea-bed, Outer Space, the High Seas, and the Global Atmosphere presented us, the territorial nature of objective regimes in State practice is unequivocal. International Settlements, such as the Aaland Islands Convention[161] and German Reunification[162] are objective territorial regimes; similarly, there are internationalised territories, such as Danzig[163] and Berlin.[164] Equally, boundary treaties have been upheld by the PCIJ[165] and the ICJ[166] as territorial regimes with objective effects. This practice is clearly supported by doctrine. McNair,[167] Kunz,[168] Mosler,[169] Klein,[170] Crawford,[171] and Greig[172] have all highlighted, or laid emphasis on, the requirement of a territorial factor within the regime.

Requiring the objective regime to be a territorial regime means that it can be distinguished from general law-making treaties. To abandon the territorial element would suggest that States could produce law-making treaties regulating the general conduct of States, which is clearly an untenable claim. Territoriality places a necessary and functional limitation on the prescriptive powers of States. In practice, this distinction might be a subtle one. If the Tlateloco Treaty is contrasted with the Moscow Test Ban Treaty[173] this becomes apparent. Whilst the former is an undertaking not to use nuclear weapons in a specific geographic zone, the latter merely establishes general

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[161] The Committee of Jurists established by the League of Nations considered that 'the convention in reality has a much more extended bearing', *op. cit.*, n. 52, at 17.

[162] The Treaty on the Final Settlement with respect to Germany, (1990) 29 ILM 1187.

[163] *Free City of Danzig and the ILO Advisory Opinion*, 1930 PCIJ Ser. B, No. 18. *See* also *International Status of South West Africa Advisory Opinion*, *supra* n. 39.

[164] The internationalisation of Berlin after WWII remained effective until German reunification in 1990.

[165] *See* the *Free Zones of Upper Savoy and the District of Gex* case,1932 PCIJ, Ser. A/B, No. 24 and No. 46.

[166] *See* the *Temple of Preah Vihear* case, ICJ Rep. 1962, 6.

[167] McNair was principally concerned with dispositive or real treaties. *Op. cit.*, n. 4, at 255 *et seq.*

[168] Kunz considered that the permanent neutrality of Austria created 'a legal situation valid *erga omnes*', *op. cit.*, n. 139.

[169] *Op. cit.*, n. 154.

[170] *Op. cit.*, n. 6.

[171] '[M]ultilateral territorial settlements may well possess certain special features as a matter of general international law', J. Crawford, *The Creation of States in International Law* (1979), 318.

[172] '[I]t has long been accepted that a treaty (often termed a 'dispositive treaty') can create a special territorial regime which goes beyond a purely contractual relationship', D. W. Greig, *International Law* 2nd ed. (1976).

[173] The Nuclear Test Ban Treaty, 480 UNTS 43.

obligations not to test weapons on the high seas. This is of crucial importance in practice.

Territory also distinguishes the objective regime from treaties of an institutional nature, such as the United Nations Charter. Klein considers that it is important to do this, although he concedes that this approach seems somewhat artificial.[174] The objective status of the UN is usually treated as a question of legal personality, and dealt with according to a functional test, which demands that the UN has such powers as are necessary to carry out its given mandate.[175] Although the objective status of the UN can best be explained by reference to theories of recognition or tacit acceptance, it is interesting to note that the objective status of the United Nations cannot derive from customary law, given the institutional nature of the Charter. The objective personality of the UN must derive from some quality of its constitutional nature, and so has strong parallels with the concept of objective regimes. It is also notable that a functional test could be applied equally readily to objective regimes. Thus, if such territorial treaties were not to exert objective effects then their purpose would be frustrated. The objective force of the regime is arguably a necessary and functional extension of its purpose.

It must be noted that the territorial element does not require that third parties are actively using the territory in order to come under the scope of the regime. Fitzmaurice used this 'active' or 'automatic entailment' approach as it seemed to provide logical support for 'effects *in detrimentum*'; that if a third party enjoys the use of some territory, then it must conform to any conditions that were laid down in respect of such use.[176] However, such a distinction appears artificial in light of actual State practice. Waldock, as the subsequent Special Rapporteur, rejected this approach, denying that any active element is necessary for the existence of third party rights or obligations. He used the example of the Antarctic Treaty to illustrate his point:

> 'The Antarctic Treaty, for example, provides in article 2 for a right of use for scientific investigation; but in article 1 it also provides for a demilitarisation regime which goes beyond, and is independent of, the use of Antarctica for scientific purposes.'[177]

Waldock's view is more persuasive given the practical problems that are presented by the use of areas such outer space or the deep-sea bed. Also, in

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[174] 'It is, however, interesting to note that the doctrinal deliberations made by the International Court of Justice in the Advisory Opinion Reparations for Injuries Suffered in the Service of the United Nations have parallels in the literature on status treaties'. Klein, *op. cit*., n. 6, at 352.

[175] *See* Brownlie, *op. cit*., n. 4, chapter XX.

[176] Draft article 14, [1960] YILC, vol. II, 79, and the accompanying commentary at 92 *et seq.*

[177] *Ibid.* 29. He also refers to the Suez Canal Convention and the Montreux Convention in which the nature of obligations is distinct from the use of the territory.

respect of other areas such as the ozone layer or the atmosphere, individual use is difficult, and perhaps impossible, to establish and quantify.

Finally, it is important to note that one can distinguish between two broad types of territorial regime. On the one hand there are territorial regimes falling under the exclusive control of States, and on the other there are those territorial regimes which relate to international areas, or areas subject to the interest of all States. Such a distinction does not affect the essential quality of the regime as an objective territorial regime, but it does affect how States' competence to act in respect of the area is assessed. In those areas subject to exclusive control, the question of objective regimes may be superfluous, for the principle of territorial sovereignty establishes that the competent State has over matters within its geographic jurisdiction absolute discretion, which other States must respect. This issue becomes acute only when the international community regards a use of some 'domestic' territory as a vital privilege and desires to protect the privilege.[178] Extra-territorial regimes raise even more acute questions because no exclusivity of interest can be asserted beyond States' borders. In such areas a relative parity exists between States, although matters such as proximity, economic, social, political, and even ethical concerns may affect this; neither will interests always be complementary. In such situations those States establishing the objective regime must be capable of demonstrating some special authority or competence for their action, and it is to this question that we now turn.

## 4.3. The States Parties must have some competence to act or an interest in the regime

There is a fundamental connection between the States parties to an objective regime and the legitimacy of that regime. If the regime is to be effective then the parties must demonstrate some competence to act, or at least some particular interest in the creation of the regime. Competence to act is a persistent, if somewhat ambiguous, feature of State practice, and it is generally required in doctrinal considerations of the issue. As is the territorial requirement, it is an important functional limitation on the parties ability to prescribe rules with *erga omnes* effect. Competence to act has been defined in a number of ways. Firstly, it has been defined in terms of strict territorial competence, thus the contracting parties must have the territorial competent State among their number. Secondly, there is the 'Great Powers' theory, which provides competence to a group of influential States, capable of imposing their will on other States. Finally, there is the liberal approach to competence, which turns on the manifestation of actual State interest rather than the formalistic requirement of territorial competence.

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[178] Such situations may arise in respect of international waterways, international straits, rights of transit to the sea and rights of air passage.

Strict territorial competence has been the most commonly relied upon basis for competence to create an objective regime. State practice, such as Austria's unilateral declaration of neutrality,[179] or the Lateran Treaty establishing the neutrality of the Vatican City reflect this approach.[180] Accordingly, Klein requires that parties must have a territorial competence with regards to the subject matter of the treaty that non-party States do not have.[181] This reflects Waldock's draft article 63, which provides that:

> 'A treaty shall establish an objective regime ... provided that the parties include among their number any State having territorial competence with reference to the subject matter of the treaty'.[182]

Arguably, this reliance on territorial competence flows from a narrow conception of objective regimes as merely dispositive treaties, which in turn reflects traditional notions of sovereignty.[183] Such a preoccupation with territorial competence is something of an anachronism given that developments in international law have demonstrated States' interests, or rights and obligations, are no longer concomitant with their territorial limits. Accordingly, one must take account of such developments when considering the issue of States capacity to create regimes that settle matters *erga omnes*. Klein's approach results in his having to distinguish treaties in respect of *res nullius* (high seas, outer space), a distinction that seems to ignore the criterion of general interests and runs counter to his argument that the existence of a general interest is decisive.[184] This failing suggests that we must consider the other approaches to competence.

Another way of ascribing competence to act is the 'Great Powers' theory, whereby certain powerful nations were attributed with authority to act in the interests of all nations. There is considerable early State practice in support of this approach, for example, the Peace of Westphalia, the Treaty of Utrecht, and the Treaty of Versailles. It was also recognised in the *Aaland Islands case*, where the Committee of Jurists stated that:

> 'An examination of the political conditions in which this agreement was entered into shows that the convention in reality has a much more extended bearing … the

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[179] Kunz, *op. cit.*, n. 139.

[180] (1958) 78 *Acta Apostolicae Sedis* 522.

[181] *Op. cit.*, n. 6, at 21 *et seq.*

[182] *Op. cit.*, n. 32.

[183] In *the Island of Palmas* case, Judge Huber stated 'the exclusive competence of the State in regard to its own territory ... (is made)... the point of departure in settling most questions that concern international relations.' (1928) 2 UNRIAA 829, at 838. In the *North Atlantic Coast Fisheries* case the tribunal stated that 'one of the essential elements of sovereignty is that it is to be exercised within territorial limits', (1910) 11 UNRIAA 167, at 180. *See* also the *Corfu Channel* case (Merits), ICJ Rep. 1949, 4 at 35

[184] Klein, *op. cit.*, n. 6, at 352.

> provisions settled upon in Paris between the Powers and Russia went beyond the limit of purely Swedish interests'.[185]

More recently, McNair took time to elaborate on the position of the 'Great Powers' in his separate opinion in the *South West Africa Advisory Opinion*:

> 'From time to time it happens that a group of great Powers, or a large number of States both great and small, assume a power to create by a multi-partite treaty some new international regime or status, which soon acquires a degree of acceptance and durability extending beyond the limits of the actual contracting parties, and giving it an objective existence. This power is used when some public interest is involved, and its exercise often occurs in the course of the peace settlement at the end of a great war.'[186]

Such practice leads De Visscher to conclude that a treaty between the 'Great Powers', concerning the preservation of peace, could create a legal situation not confined to the contracting parties.[187]

Despite such apparent support the 'Great Powers' theory has some critical defects. It appears only to pertain to periods of great upheaval, such as the aftermath of a war when the need for political stability is paramount, and so does not properly account for other instances of objective regimes during peace time; nor has it been used to explain State practice in the period since the end of World War II, suggesting that it may be obsolete. It also fails to account for regional action by 'lesser States', or the open participation of States in extra-territorial regimes, such as the Zones of Peace or Antarctica. Finally, and most crucially it is quite incompatible with the fundamental notion of the equality of all States, a fundamental precept of contemporary international law. Subedi has recently argued that such an authority may now rest with the United Nations.[188] This is an interesting approach given the apparent monopoly held by the UN over such collective action; any group of powerful States making such permanent settlements in the future would be highly controversial. Of course, this has been cast into doubt by the recent invasion of Iraq, which was mounted outside of the UN Charter mechanisms.

The liberal approach is adopted by Mosler, who describes an international regime as:

> '[A] treaty between States which does not create an international organisation but rather regulates the position of a territory or an object of common use such as water

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[185] *Op. cit.*, n. 52, at 17

[186] ICJ Rep. 1950, 132.

[187] C. de Visscher, *Theory and Reality in Public International Law* (1957), 258-63. (translated by P.E. Corbett)

[188] *Op. cit.*, n. 36.

(including the high seas and seabed), air and outer space, or means of communication.'[189]

No restrictions are placed on the competence of the parties, and instead he emphasises the importance of the regime for international society as a whole, and that it should be respected for that reason.[190] The focus is on a territory, or object of common use, and it thus reflects actual interests, rather than abstract jurisdictional notions or arbitrary accounts of *de facto* power. Most importantly, this account of competence is in accordance with the vagaries of State practice. The 'Great Powers' theory might be regarded as a primitive account of this approach. It also proves to be quite compatible with Subedi's thesis.

The competence to act thus must correspond to the acting States' interests and, more importantly, to the interests of the international community. Such a coincidence of localised and community interests will typically arise in respect of regional arrangements, suggesting that they might be the most appropriate candidates for objective regimes. This is not to say that global regimes could not become objective regimes, but only that it will be more difficult to establish a particular competence or authority to act in such instances. This perhaps accounts for the difficulties in establishing regimes for the protection of the global atmosphere. To some extent the number and importance of participants in the regime might remedy such difficulties, because these factors have a patent bearing on the political legitimacy of the regime. Thus, the participation of those States with territorial claims, or active interests in Antarctica was essential. Similarly, the participation of pioneer investors, exporters of certain minerals, developing and disadvantaged States, along with relevant coastal States would be necessary for the Deep Seabed regime to have legitimacy.[191] There need not be universal participation. The issue is relative and each case should be assessed on its own merits. Thus, where the regime has a purely regional scope, then the participation of those parties in the region is determinative, as is the case in respect of Zones of Peace.

An interesting approach to the issue of competence arises in the 1995 Agreement, where competence to prescribe for high seas fisheries appears to be based on the tripartite grounds of territorial competence, preferential rights,[192] and the 'compatibility principle.'[193] The role of regional fisheries

[189] H. Mosler, *op. cit.*, n. 154154.

[190] *Ibid.*

[191] Such States enjoy a privileged position by virtue of the LOSC and the 1994 Agreement. *See*, for example, articles 140, 142, 148 149 and 150 of LOSC.

[192] The idea of preferential interests was controversially put forward by the ICJ in the *Fisheries Jurisdiction* case, ICJ Rep. 1973, 3. More recently, certain States have advocated such interests. Orrego VicuÑa notes that Chile and the United States have put forward such claims when fish stocks are at risk, *The Changing International Law of High Seas Fisheries* (1999), 121. Canada and the

arrangements in facilitating co-operation in respect of high seas fisheries is also generally recognised. This suggests a pragmatic approach to competence that takes account not only of legal factors, but also of key socio-economic and political concerns. In areas where the degree of competence is ambiguous, shared or practically indivisible, a flexible approach to competence has patent advantages.

There is a need to supply States with a competence to create objective rights. Historically, territorial competence determined the scope of a States' capacity to make territorial settlements with objective effect, with the exception of settlements made by the 'Great Powers'. However, contemporary international law regulates many areas where strict, or exclusive, territorial competence does not exist, expanding the range of matters in which States may enjoy legal privileges or interests. These interests tend to relate to use rights rather than to exclusive legal title, for which must be accounted in the prescriptive process. If we are to recognise them and thus to avoid lacunae or conflicts, then it is advisable to apply a more liberal definition of competence. With such an approach there is no hard and fast rule that determines the level of the authority necessary to establish an objective regime. There exists between absolute territorial competence, at the one end, and negligible legal interest at the other a spectrum along which most States rights are positioned. It is suggested that as a State tends towards the latter, the more difficult it will be to establish a legitimate objective regime, whereas the former makes the establishment of an objective regime more likely; each case should be assessed on its merits. Finally, in any given case, a variety of circumstances must be taken into account, including the number of States participating in the regime, the interest they have in the regime, the existing regulatory structure, the impact on third States, and the general interest in the regime. Of these factors the last has critical importance.

## 4.4. The regime must serve a general interest of the international community

Although both the absence of an international legislature and the consequent demand for some form of coherent global prescriptive process are persuasive reasons for an exception to the *pacta tertiis* rule, they provide a

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Russian Federation adopted a similar position during the negotiation of the 1995 Agreement. *See* the Letter dated 27 July from the alternative chairman of the Russian Federation, A/CONF.164/L.27, and the List of Issues of 4th June 1993, A/CONF. 164/L. 5 respectively.

[193] According to this principle the resources in areas under national jurisdiction and the high seas should be regulated in a consistent manner. Thus article 7(2) of the 1995 Agreement states that: 'Conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be *compatible* in order to ensure the conservation and management of straddling fish stocks and highly migratory fish stocks in their entirety'. (Emphasis added)

weak conceptual and juridical basis for objective regimes. The fundamental nature of the *pacta tertiis* rule demands that a coherent explanation of objective regimes have both a conceptual and legal basis. The common thread running through the above examples of objective regimes is that they all purport to serve the general interests of the international community. It is this core concept of 'general interests' that provides the legitimacy and legal basis for objective regimes.

State practice shows that, as in the case of the protection of the ozone layer or the deep sea-bed, uncertainty as to the general interest is critical. Emphasising this point, Klein states that the:

> '*[D]ecisive* criterion for establishing whether an objective regime valid *erga omnes* exists, is whether or not a general interest is served.'[194]

Of course, the authority of this proposition depends on whether international law recognises a category of general interests. Klein affirms that such a category does exist, and argues that international law already recognises the concept of general interests in the form of *ius cogens* and *ordre public*.[195] His is not an isolated claim, and there is further support for it in academic literature. Lauterpacht argued that:

> '[A]s international society is transformed into an integrated community, departure from the accepted principle (*pacta tertiis*) becomes unavoidable, in particular in the sphere of international peace and security.'[196]

He cites both Article XXVII of the League Covenant and Article 2(6) of the United Nations Charter in support of this trend, and continues:

> 'Both the Covenant of the League of Nations and the Charter of the United Nations, must therefore be regarded as having set a limit, determined by the *general interest* of the international community, to the rule that a treaty cannot impose obligations upon States which are not parties to it.'[197]

Phillimore writes of treaties which incorporate 'by the common consent, express or tacit, of all States concerned in its assertion and maintenance a great public *principle* into the International Code'.[198] Westlake refers to treaties that are 'a part of the permanent system of Europe, only liable to be

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[194] Klein, *op. cit.*, n. 6, at 352. (Emphasis added)
[195] *Ibid.* 353.
[196] H. Lauterpacht, *Oppenheim's International Law*, Vol. I, 8th ed. (1955), 528.
[197] *Ibid.* 529. (Emphasis added) This process was acknowledged in the *Reparations for Injuries Suffered in the Service of the United Nations* case, where the Court confirmed the objective legal personality of the United Nations. ICJ Rep. 1949, 174.
[198] *International Law*, vol. iii (3rd ed.), 796.

affected by one of those great revolutions which disturb that system at long intervals.'[199] McNair goes even further: noting the practical consequences which flow from the recognition of this principle, he refers to the 'tendency for them (constituent agreements) to produce exceptions to the rule that a treaty cannot confer benefits or impose burdens upon third parties'.[200] More recently, Brownlie has accepted such a position, noting that an exception to the *pacta tertiis* rule

> 'rests on the special character of the United Nations as an organisation concerned primarily with the maintenance of peace and security in the world and including in its membership the great powers as well as the vast majority of states'.[201]

Although it may be that Brownlie views the UN as a *sui generis* case by virtue of its special position, the reasoning used to explain the exception to the *pacta tertiis* rule strongly parallels the rationale for objective regimes.

Since the founding of the UN, the international law has expanded this category of 'fundamental norms' beyond the sphere of peace and security, and the existence of such legal norms is generally accepted, despite the conceptual difficulties they present or particular disputes over their individual status.[202] In this respect objective regimes, and the notion of general interests in particular, relate closely to the category of *ius cogens*, and may be affected by the same conceptual problems. The crux of the issue is the primitive process that creates and identifies such peremptory norms. In the absence of an international legislature, or institutional mechanism for creating such fundamental rules, the formulation of such rules appears to rely on a process of historical consolidation, which makes their existence difficult to ascertain, or at least open to equivocation. This is, of course, attributable to the bilateral structure or the international system that we have inherited. However, this should not be viewed as critical, for as the ILC has stated:

> 'It is not the form of a general rule of international law but the particular nature of the subject matter with which it deals that may … give it the character of *ius cogens.*'[203]

We can, therefore, look beyond these structural problems and to the substance of the rule in order to gauge its normativity. Thus, the problem is not whether a category of general interest justifies an exception to the *pacta tertiis* rule, but rather the quest to identify the interests that are included

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[199] *International Law,* 2nd. ed., vol. i, Peace, 30.

[200] *Op. cit.*, n. 4, at 750.

[201] Brownlie, *op. cit.*, n. 4, at 694.

[202] Articles 53 and 64 of the Vienna Convention on the Law of Treaties. *See* generally, G. Danilenko, 'International *Jus Cogens*: Issues of Law Making', (1991) 2 EJIL 42.

[203] Report of the International Law Commission, [1966] YILC vol. II, 248.

within this category, and subsequently whether or not a particular objective regime furthers this general interest.

Undoubtedly, there exists a general interest in international peace and security as enshrined in the United Nations Charter and, more particularly, in the prohibition on the unlawful use of force. This has underpinned numerous demilitarisation and neutrality regimes,[204] and served to legitimate the so-called Zones of Peace. Equally certain is the general interest in political stability, as embodied in those regimes regulating the status of territories such as the mandate territories or internationalised territories.[205] The special character of boundary treaties reflects this interest,[206] and certain fluvial rights have also been held to be in the general interest, hinting at a general interest in the form of a *ius communicationis*. Arguably, this same interest underpins rights of navigation, over-flight, transit and innocent passage, and which the Permanent Court recognised in the *Wimbledon* case when stating that:

> '[The] canal has ceased to be an internal and national navigable waterway, the use of which by the vessels of States other than the riparian State is left entirely to the discretion of that State, and that it has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world'.[207]

As was seen in Part II, certain other general interests exist, but are less certain. With regard to the Antarctic, demilitarisation and peaceful use of the territory are generally accepted, but resource exploitation regimes have proved to be problematic. The common heritage of mankind regime for the Area is similarly affected by difficulties in agreeing a resources regime, although a moratorium on territorial claims has been successful. Similar problems may face us if outer space were to become commercially exploitable.

Arguably, a general interest may exist in respect of the protection of the environment, as manifest in principles such as the polluter pays principle,[208]

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[204] The Committee of Jurists reasoned that the Treaty of Paris 1856, which placed the Aaland Islands under a regime of permanent neutrality was laid down in European interests. They constituted a special international status, relating to military considerations, for the Aaland Islands. It follows that until these provisions are duly replaced by others, every State has the right to insist upon compliance with them. It also follows that any State in possession of the Islands must conform to the obligations binding upon it, arising out of the system of demilitarisation established by these provisions.' *Op. cit*., n. 161, at 18.

[205] *International Status of South West Africa Advisory Opinion, supra* n. 39. Also the *Certain Phosphate Lands in Nauru* (Nauru v. Australia) (Preliminary Objection), ICJ Rep. 1992, 240, 251-253.

[206] *See* the *Free Zones* case and the *Temple of Preah Vihear case, op. cit.*

[207] 1923 PCIJ Sser. A, No. 1, at 22.

[208] P. Birnie and A.E. Boyle, *International Law and the Environment* (1992), 109-111.

the precautionary principle,[209] the *sic utere* principle and prohibition on transboundary harm,[210] and the notion of equal access and non-discrimination.[211] The notion of trusteeship is rapidly gaining credence and might be perceived as another expression of the general interest.[212] Indeed, the status of such principles was recently boosted by the decision of the ICJ in *Gabčikovo-Nagymaros Project case* where the Court, in the context of article 64 of the Vienna Convention 1969, pointed out:

> '[T]hat newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan'.[213]

The conservation and management of living resources of the seas is another such interest, as is evident in the context of the LOSC, the 1995 Agreement, and other fisheries instruments.

This brief review suggests that the validity of a particular objective regime bears a symbiotic relationship to the general interest it purports to serve. The greater the degree of acceptance of the general interest it serves, the more likely the acceptance of the objective regime. For example, the objective status of neutrality and demilitarisation agreements has attracted a stronger level of support from States given the universality and greater acceptance of the general interest in the restriction on the use of force as a tool of international relations. This may be contrasted with environmental regimes, which have developed more recently, and are not yet as deeply entrenched in the collective international psyche.

At the same time one must also consider whether the treaty actually facilitates the general interest in question. Whether or not this happens again turns on the particular circumstances of each case. A bald assertion that the treaty is in the general interests is insufficient in this respect. The existence of a general interest is independent of the assertions of the States parties and requires an analysis of the legal context of the objective regime. This operates as a safeguard against a group of States exercising an illegitimate legislative power, and prevents possibility of a group of States making a subjective

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[209] *Ibid*. 95-98

[210] *Trail Smelter* case, (1939) 33 AJIL 182, and (1941) 35 AJIL 684.

[211] *Op. cit*., n. 208, at 111-112.

[212] *See* Lowe, 'Some reflections on the Water. Changing Conceptions of Property Rights in the Law of the Sea', (1986) 1 IJECL 1. Also Allott, *op. cit*., n. 12.

[213] *Op. cit*., n. 17, para. 112. *See* R. Wolfrum, 'International Environmental Law' (1998) 272 RdC 9, 102.

determination of what constitutes a general interest. The legitimacy of a particular regime might be evidenced by the decision of an international tribunal, or by acquiescence to it from third States, or by tacit acceptance. It is, however, important to note that the basis of any obligation flows from the norm articulated in the treaty, and not from the manifestation of consent. As the treaty regime articulates a general interest (*ius cogens* or *ordre public*) in a particular form, the opposability of which is considered not to rely on consent, it would be artificial to make the opposability of it in the specific form of an objective regime dependent on consent.

The unifying thread common to all examples of objective regimes is the notion of general interests. This common thread not only determines the validity of each regime, but provides legitimacy to the entire concept. As a normative process, objective regimes make a general interest opposable to third States in a specific form; they define the general interest in sufficient detail to make it opposable as a specific legal obligation. In other words, objective regimes derive their force by tapping in to the fundamental principles of international law and actualising them in a particular manner. Accordingly, any evaluation of an objective regime requires a thorough consideration of the general interest it claims to facilitate.

## 5. CONCLUSION

In the face of growing problems in prescribing for urgent matters of international public interest and common global concern, objective regimes offer an alternative approach to international law making. Ordinary treaties are ill-suited to deal with the problem of the free rider or the reluctant State, whereas custom is often difficult to evaluate, slow to emerge, and is inherently incapable of establishing precise standards of behaviour and institutional measures. With the emergence of the international law of human rights and international environmental law we are witnessing a paradigmatic shift in perceptions of the purpose of international law, and of the structure and make up of the system. Accordingly, the demands on the prescriptive process are changing, becoming more urgent and unsustainable. Objective regimes should be given greater attention, and not be rejected out of hand as anomalies, for they are well suited to addressing the concerns outlined.

Objective regimes are justified by a rejection of a linear and bilateral conception of international law and offer themselves up as a surrogate for a general legislative power absent from contemporary international society. However, the risks inherent in such a power require that objective regimes be sufficiently defined and regulated in order to avoid abuses that might result from a group of powerful States' attempting to legislate for the international community contrary to this group's interests. There is a substantial amount of State practice supporting the existence of a category of objective territorial arrangements, contrary to or as an exception to the *pacta tertiis* rule. Tradi-

tionally, such arrangements have been confined to arrangements necessary to secure order after a period of political upheaval and instability, although more recently there is evidence of objective regimes being established to further environmental considerations or to establish nuclear-weapon-free zones, e.g., Antarctica or Zones of Peace. From an investigation of State practice and doctrine certain parameters to objective regimes were discerned. There must be an intention that the treaty have objective effect, the regime must be a territorial regime, the parties to the treaty must have a particular competence or interest in the regime, and there must be a general interest of the international community in the objectives of the regime.

Of these factors, two appear to be of fundamental importance: the existence of a general interest, and the particular competence of a group of States to accommodate the general interest within the particular instance. There is no hard and fast rule of thumb that sets out the minimum criteria for an objective regime, and each case must be assessed on its own merits. The validity of a regime will depend on a number of factors, including the quantity and quality of the contracting parties, the nature and scope of the rights and obligations established, the identity and quality of the general interest, and the reaction of other States to the regime. In addition, it must be remembered that the burden of establishing a regime is onerous. As the Permanent Court stated in the *Free Zones* case, 'it cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour.'[214] The burden thus lies on those seeking to establish that such rights and obligations exist. The ICJ reiterated this in the *North Sea Continental Shelf* cases:

> '[W]hen a number of States … have drawn up a convention specifically providing for a particular method by which the intention to become bound … is to be manifested … it is not lightly to be presumed that a State which has not carried out these formalities … has nevertheless somehow become bound in another way'.[215]

Unfortunately, the legitimacy of an objective regime has not been tested directly by an international tribunal. As such, their status lies in limbo: in that grey space in between *de lege ferenda* and *lex lata*. Reference to the objective effects of treaties is likely to become an increasingly salient feature of doctrine, given the changing demands being placed on international law. As the need for new initiatives to tackle environmental and resource problems becomes more apparent, this can only be in our general interest.

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[214] *Op. cit.*, n. 155.
[215] ICJ Rep. 1969, 4 at 25-6.

# SOME REFLECTIONS ON THE RELATIONSHIP BETWEEN THE PRINCIPLE OF *EQUITABLE UTILIZATION* OF INTERNATIONAL WATERCOURSES AND THE OBLIGATION *NOT TO CAUSE TRANSFRONTIER POLLUTION HARM*[*]

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## 1. INTRODUCTION

Under customary international law, States have the obligation to prevent, with *due diligence*, the occurrence of a *serious* level harm by pollution [hereinafter, pollution harm] in other States caused by activities within its own territory. By violating this obligation they bear responsibility for an international wrongful act.[1]

This obligation of prevention seems to be equally applicable[2] in the case

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[1] *See* the *Trail Smelter* case (Final Decision), *The United States/Canada,* (Arbitration, 11 March 1941), 3 RIAA 1907 at 1965; Ian Brownlie, *System of the law of nations: state responsibility*, part I (Oxford: Clarendon Pr., 1983) 182. For this matter, *see* this author, "Territorial sovereignty and transfrontier pollution by a nuclear accident: a legal analysis of the *Chernobyl* accident" (in two2 parts, in Japanese), 131 *Hogaku Ronso* [*Kyoto Law Review*] no. 2 (1992) 97, 133 *Hogaku Ronso* no. 2 (1993) 63.

[2] *See* Nisuke Ando, "The law of pollution prevention in international rivers and lakes", in Ralph Zacklin & Lucius Caflisch (eds.), *The legal regime of international rivers and lakes* (The Hague: Nijhoff, 1981) 331 at 333-337; Lucius Caflisch, "Régles générales du droit des cours d'eau internationaux", in 219 RdC (1989) 9 at 167; Johan G. Lammers, *Pollution of international watercourses* (Boston: Nijhoff, 1984), at 583; Stephan C. McCaffrey, *Fourth report on the law of the non-navigational uses of international watercourses* [hereinafter, *Fourth Report*], YILC, 1988, Vol. II, Part One, 205, at 217-245; Jörg G. Polakiewicz, "La responsabilité de l'État en matiére de pollution des eaux fluviales ou souterraines internationales", 118 *Journal de Droit International* (1991) 283 at 300-301; Kurao Tsukikawa, "The prevention of pollution in international drainage basins" (in Japanese), 77 *Kokusaiho Gaiko Zassi* [*The Journal of International Law and Diplomacy*] (1979) 594 at 626.

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of pollution of international watercourses.[3] For example, the *Lake Lanoux* arbitral award[4] of 1957 affirmed the possibility of the occurrence of injury, by pollution, to rights of Spain, a downstream State of an international watercourse.[5] In addition, the Strasbourg Administrative Tribunal in France and the District Court of Rotterdam in the Netherlands held in 1983 in the *Mines de Potasse d'Alsace* case[6] as follows:

> [L]'administration doit veiller a ne pas permettre des activites pouvant avoir hors du territoire national des consequences *nuisibles*, *graves* et *anormales*. ... il resulte ... de facon generale des principes consacres par le droit international ... que, lorsqu'elle envisage d'autoriser des rejets susceptibles d'alterer de facon notable la qualite des eaux hors des limites du territoire national, l'administration doit ... rechercher de facon precise les effets a l'etranger des deversements en cause....[7]

Another principle of international law provides that no State has the right to cause *serious* injury to the territory of another State or to its inhabitants.

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[3] Article 2 of the Convention on the Law of the Non-navigational Uses of International Watercourses (adopted by the United Nations General Assembly in 1997, hereinafter "1997 Watercourses Convention"), defines "international watercourse" as follows: "(a) 'Watercourse' means a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus; (b) 'International watercourse' means a watercourse, parts of which are situated in different States. 36 ILM (1997) 704. Therefore, waters of international watercourses include surface waters and groundwaters of rivers, lakes, aquifers, glaciers, reservoirs and canals. *See Report of the International Law Commission on the work of its forty-sixth session (2 May - 22 July 1994)* [hereinafter, *1994 ILC Report*], UN Doc., GAOR, Forty-Ninth Session, Supp. No. 10 (A/49/10), at 200.

[4] The *Lac Lanoux* case, *Spain / France* (Arbitration, 16 November 1957), 12 RIAA 281.

[5] *Id.*, at 303. Although the Additional Act to the Treaty of Bayonne contains no special provision for pollution, Article 12 of that Act prescribes the prohibition of a change in the natural condition of the waters. *See id.*, at 289. Therefore, the Court apparently held that a violation of the provision in question would take place if pollution occurs. Gunther Handl, "Balancing of interests and international liability for the pollution of international watercourses: customary principles of law revisited", 13 *Canadian Yearbook of International Law* [hereinafter, CYIL] (1975) 156 at 169-170.

[6] In this case, gardeners in the Netherlands were injured by salt dumping into the Rhine river carried out by the mine in question located in France. *See* Lammers, *op. cit.* n. 2, at 196-206; Polakiewicz, *op. cit.* n. 2, at 321-325.

[7] *La Province de la Hollande septentrionale et autres c. Etat-Ministre de l'Environnement [Commissaire de la Republique du Haut-Rhin]* (Le Tribunal Administratif de Strasboug, 27 July 1983), 44 ZaoRV (1984) 342 at 344. While in this suit it was disputed whether the order issued by a prefectural governor of France authorizing the salt dumping by the said mine was null and void, in this judgment it was so declared. *See id.*, at 345. The Conseil d'Etat, to which this case was appealed, supported the previous decision of the lower court because of the violation of domestic procedures without calling into question the violation of international law. Conseil d'Etat, *Recueil des Decisions du Conseil d'Etat, 3 Mars - 30 Avril 1986* (18 avril 1986) at 116-118.

... This principle ... is applicable ... similarly to the pollution of international rivers.[8]

However, if the pollutants in question come from developing countries which have only recently begun with activities causing pollution, and are introduced into components of the ecosystem that are already more or less affected by pollutants from developed countries, the strict application of the obligation *not to cause transfrontier pollution harm* [hereinafter, the *no pollution harm* principle][9] would generate inequitable results. The developing countries would necessarily be deemed to have caused pollution harm and would bear responsibility for it. Therefore, some scholars[10] who support the doctrine of *equitable utilization* of "shared natural resources"[11] allege

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[8] *Handelskwekerij G.J. v. Mines de Potasse d'Alsace S.A.*, (District Court of Rotterdam, 16 December 1983), 15 *Netherlands Yearbook of International Law* [hereinafter, NYIL] (1984) 471 at 480. Although in this decision the existence of a delict under Dutch municipal law was found out because of the absence of *due diligence* of the said mine, it was stated that application of the unwritten rules of international law did not lead to a conclusion different from the aforementioned. *See id.*, at 479, 481. Later, decisions concerning this case were held by the Court of Appeal of The Hague in 1986 and the Supreme Court of the Netherlands in 1988, both of which recognized the liability of the said mine, without calling into question the violation of international law. Court of Appeal of The Hague, 10 September 1986, 19 NYIL (1988) at 496-503; Supreme Court, 23 September 1988, 21 NYIL (1990) at 434-440.

[9] When we use the term "the obligation *not to cause transfrontier (pollution) harm*" ("the *no (pollution) harm* principle") in this paper, we do not intend to give any connotation to this term in respect of whether this obligation includes the concept of *due diligence*, nor how much is the level of harm to be prevented.

[10] *See* Article 3 of ILA Montreal Rules of International Law Applicable to Transfrontier Pollution (1982), cited in Experts Group on Environmental Law of the World Commission on Environment and Development, *Environmental protection and sustainable development* (London: Graham & Trotman, 1987), at 187; Article 9 of Legal Principles for Environmental Protection and Sustainable Development (1986), *id.*, at 72-75. *See* also Handl, "Principle of 'equitable use' as applied to internationally shared natural resources: its role in resolving potential international disputes over transfrontier pollution", 14 *Revue Belge de Droit International* (1978-1979) 40 at 45-46; Atsuko Kanehara, "The significance of the 'pledge and review' procedure in growing international environmental law " (in Japanese), 38 *Rikkyo Hogaku* [*St. Paul's Review of Law and Politics*] (1994) 46 at 48-55.

[11] In the view of Schwebel, the Special Rapporteur of the ILC on Watercourses, the concept of "shared natural resources" had, despite the absence of the definition thereof, been widely accepted and the water of an international watercourse was its archetype. Stephen M. Schwebel, *Second Report*, YILC, 1980, Vol. II, Part One, at 180, paras. 140-141, at 187, para. 174. However, there was also much objection to that concept, mainly because of its uncertainty and possible injury to the permanent sovereignty over natural resources. Consequently, that term has been unused since Evensen's second report. *See 1983 ILC Report,* YILC, 1983, Vol. II, Part Two, at 70-71, paras. 236-241; *1984 ILC Report*, YILC, 1984, Vol. II, Part Two, at 93, para. 315. In this paper, we understand this concept as components of the ecosystem situated between two or more States, especially focusing on the five examples below given by the United Nations Environment Program (UNEP): (a)An international water system, including both surface and ground waters; (b)An air-shed or air mass above the territories of a limited number of States; (c)Enclosed or semi-enclosed seas

that, even if the pollution harm would normally be regarded as unlawful in the light of the *no pollution harm* principle, a situation could occur where the State of origin would not incur responsibility because the minimum level of harm that has to be prevented is raised by the said doctrine.[12] However, since the minimum level of harm to be prevented would have to be decided on the basis of the various circumstances of the State of origin, such as the economic needs for the activity in question, the pollution prevention standard would become quite ambiguous.[13] Therefore, it is considered that the "relaxation" of the *no pollution harm* principle by the said doctrine constitutes a dangerous proposition. This paper will attempt to prove that the *no pollution harm* principle is not, in principle, eased by the principle of *equitable utilization* of international watercourses [hereinafter, the *equitable utilization* principle]. The conclusion to be drawn from this analysis should be instructive also in considering the relationship between the *no pollution harm* principle and the doctrine of *equitable utilization* of "shared natural resources" other than international watercourses.

Let us start by determining our objects of consideration and our premises. The objects of consideration in this paper are limited to the following two items. First, among many kinds of transfrontier harm caused by the use of international watercourses, the focus is on *pollution harm*. Therefore, this paper does not intend to suggest an extension of its conclusions to other cases, such as those where the harm in another State is caused by the decrease of the amount of water of the international watercourse as a result of the diversion of the water. Secondly, we have limited our object to transfrontier pollution which derives from one State's territory and reaches another State's territory.[14] Therefore, the following problems are not considered: the pollution of water flowing from a State's territory to areas beyond the limits of national jurisdiction such as the high seas; and the pollution of water flowing from areas beyond the limits of national jurisdiction into a State's territory. Next, this article rests on the following two premises: first, the existence of two levels of harm, that is, a lower level (*appreciable=significant*)

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and adjacent coastal waters; (d)Migratory species which move between the waters or territories of several States; (e)A special ecosystem spanning the frontiers between two or more States, such as a series of mountains, forests or areas of special conservation nature. *Co-operation in the field of the environment concerning natural resources shared by two or more states*, UNEP/GC/44 (20 February 1975), at 40-41.

[12] *See* Handl, "National uses of transboundary air resources: the international entitlement issue reconsidered", 26 *Natural Resources Journal* (hereinafter, NRJ) (1986) 405 at 415-416; Magraw *et al.*, *Fourth report of the international committee on legal aspects of long-distance air pollution* [hereinafter, *Fourth Report on LDAP*], ILA, *Report of the sixty-fifth conference held at Cairo* (1992) at 26, para. 91; André Nollkaemper, *The legal regime for transboundary water pollution: between discretion and constraint* (Dordrecht: Nijhoff, 1993), at 66-69.

[13] Lammers, "Balancing the equities in international environmental law", in René-Jean Dupuy (éd.), *L'avenir du droit international de l'environnement* (The Hague: Nijhoff, 1985), at 162-163.

[14] *See* Article 2 of ILA Montreal Rules, *op. cit.* n. 10.

and a higher level (*serious*), in accordance with the understanding of the International Law Commission [hereinafter, ILC][15]; secondly, the understanding that the "relaxation" of the *no* (*pollution*) *harm* principle by the *equitable utilization* principle means the raising of the level of harm to be prevented.

## 2. PRELIMINARY CONSIDERATIONS

### 2.1. The essence of the *No Pollution Harm* principle and the *Equitable Utilization* principle

#### *2.1.1. The essence of the* no pollution harm *principle: prevention of factual harm*

To begin with, we should make it clear that the *no pollution harm* principle is substantively different from the *equitable utilization* principle. This is necessary because, depending on our understanding of the *no pollution harm* principle, the two principles may have the same substance. This has already been suggested in McCaffrey's second report on international watercourses to the ILC.[16]

While McCaffrey recognized the obligation not to cause *appreciable* harm to other watercourse States, he emphasized that the prohibition refers to conduct by which one State deprived another State of its equitable share of the uses and benefits of the watercourse. According to him, the focus was on the duty not to cause "legal injury" (by making a non-equitable use) rather than on the duty not to cause "factual harm". In this way, he tried to evade a conflict between the *equitable utilization* principle and the *sic utere tuo* principle by arguing that, within the range of an equitable use, the legal

[15] According to the commentary to Article 7 of the Provisional Draft, *appreciable* harm means the harm which, involving a real impairment of use, is capable of being established by objective evidence, and which, though not insignificant or barely detectable, need not rise to the level of being *substantial* or *serious*. *See 1987 ILC Report*, YILC, 1987, Vol. II, Part Two, at 29, para. (16); *1988 ILC Report*, YILC, 1988, Vol. II, Part Two, at 36, para. (5). Since Rosenstock's First Report of 1993, the adjective "*significant*" has been used instead of that of "*appreciable*" in the ILC on the understanding that both adjectives have the same meaning. *See* Robert Rosenstock, *First Report*, UN Doc., A/CN.4/451 (20 April 1993), at 6, para. 12; *1994 ILC Report*, *op. cit.* n. 3, at 211-212, paras. (13)-(15); 36 ILM (1997) 719. We follow in this paper the understanding of the ILC as to the levels of harm as indicated by these adjectives. However, since the adjective "*substantial*" tends to be differently understood depending on authors, we use this adjective only for direct citations from decisions, treaties, resolutions or writings, etc., and only use the adjective "*serious*" as indicating "considerable size or amount". When we use the term "*serious*", we regard the understanding of the *Trail Smelter* arbitral award as providing *prima facie* criteria thereof: that is, the harm of such a "size or amount" as causing "economic harm derived from physical harm" amounting to 78,000 dollars in the year of 1938. *See* this author, *op. cit.* n. 1, Part 2, at 75-76.

[16] McCaffrey, *Second Report*, YILC, 1986, Vol. II, Part One, at 133-134, paras. 179-184.

interests of other States are not injured even if an *appreciable* level of "factual harm" has occurred. As a consequence of distinguishing between "factual harm" and "legal injury", Article 7 and Article 21, paragraph 2, of the Provisional Draft, providing for the *no (pollution) harm* principle, uses the term "harm", which has only factual connotations, rather than the term "injury", which has legal as well as factual connotations.[17]

Just as seen in the ILC's discussions, the existence of an obligation to prevent "factual harm" rather than "legal injury" is generally accepted in judicial precedents. For example, in the *Trail Smelter* case, the Arbitral Tribunal decided that the harm which had occurred or was likely to occur in the United States was *serious* or *material* and ordered compensation or the adoption of a prevention regime for the harm, not in respect of the harm that exceeded an equitable use by Canada, but in respect of the objective nature of the harm.[18] Moreover, the final decision of the District Court of Rotterdam in the *Mines de Potasse d'Alsace* case did not consider whether or not an equitable use was exceeded, in deciding upon the occurrence of *serious* or *substantial* harm, and in holding that the *due diligence* obligation of States to prevent *serious* or *substantial* harm was derived from the general principles of law recognized by civilized nations.[19]

In view of the foregoing, the essence of the *no pollution harm* principle shall be understood to be the obligation to prevent "factual harm".

### *2.1.2. The essence of the* equitable utilization *principle: balancing of interests*

In seeking the essence of the *equitable utilization* principle, it is useful to examine both the commentary on the ILC Final Draft and the provisions of the 1997 Watercourses Convention.

From the commentary on Article 5 of the Final Draft on "equitable and reasonable utilization and participation", it can be concluded that the *equitable utilization* principle is required to realize the fundamental principle of "equality of rights" among watercourse States.[20] This was also affirmed by the Permanent Court of International Justice (PCIJ) in its decision in the *River Oder* case of 1929,[21] which declared "perfect equality of all riparian

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[17] *See 1988 ILC Report*, *op. cit.* n. 15, at 27, para. 138. The term "harm" is maintained in Article 7 of the 1994 Final Draft as well as of the 1997 Watercourses Convention. *See 1994 ILC Report*, *op. cit.* n. 3, at 236; 36 ILM (1997) 706.

[18] *See* 3 RIAA, at 1920-1933, 1966-1980. *See* also this author, *op. cit.* n. 1, Part 2, at 75-76.

[19] *See* 15 NYIL (1984) at 480-481.

[20] *1994 ILC Report*, *op. cit.* n. 3, at 221, para. (8).

[21] *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder, The United Kingdom, Czechoslovakia, Denmark, France, Germany, Sweden/Poland* (PCIJ, 10 September 1929), PCIJ Ser. A, No. 23.

States".[22] As to the concrete substance of the *equitable utilization* principle, Article 5, paragraph 1, of the 1997 Watercourses Convention provides as follows:

> Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.

Although cast in terms of an obligation, the provision also expresses the correlative entitlement, namely, the right of a watercourse State, within its territory, to a reasonable and equitable share, or portion, of the uses and benefits of an international watercourse.[23] Therefore, the ILC regards the *equitable utilization* principle as the set of rights and obligations to use an international watercourse in an equitable and reasonable manner aiming at optimal and sustainable utilization thereof.[24] The equitable utilization principle in this sense is supported overwhelmingly as a general rule of law for the determination of the rights and obligations of States in the field of non--navigational uses of international watercourses.[25] This is also quite evident

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[22] *See id.*, at 26-27. The Court's view on "international fluvial law in general" seems to be sufficiently true of non-navigational uses which were not at issue in this case. *See* McCaffrey, *Second Report*, *op. cit.* n. 16, at 113-114; Jerome Lipper, "Equitable utilization", in Albert H. Garretson *et al.* (eds.), *The law of international drainage basins* (New York: Oceana Pub., 1967) 15 at 29. We should, however, remember that non-navigational uses are different from navigational uses in the following two respects: *first*, each riparian State can use the waters of an international watercourse only within the limits of its own territory; *secondly*, it is possible that the use of the waters of an international watercourse may change the quantity or quality of the waters in question. Lammers, *op. cit.* n. 2, at 507.

[23] *1994 ILC Report*, *op. cit.* n. 3, at 218, para. (2).

[24] In order to realize such an "equitable use", the principle of "equitable participation" is provided for in Article 5, paragraph 2, of the 1997 Watercourses Convention. The concept of the *right* of "equitable participation" had already been stated by the Court of Cassation of Italy in the 1939 *River Roja* case. *See Societe Energie Electrique du Littoral Mediterraneen v. Compagnia Imprese Elettriche Liguri* (Italy, Court of Cassation, 13 February 1939), 9 Annual Digest 120 at 121. On the other hand, as to the "*obligation* of participation", some members of the ILC expressed their concern about recognizing such a concept. *See* the Statement of Mr. Koroma, YILC, 1987, Vol. I, at 239, para. 35; Mr. Graefrath, *id.*, at 240, para. 42; Mr. Barsegov, *id.*, at 240, para. 44.

[25] *See* the *Case Concerning the Gabcíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment of the ICJ of 25 September 1997 [hereinafter, the Judgment], ICJ Rep. 1997, at 54, para. 78, at 56, para. 85; *1987 ILC Report*, *op. cit.* n. 15, at 33, para. (10); Kurao Tsukikawa, "Some problems on the utilization of the waters of international rivers: with emphasis on diversion" (in Japanese), in *International law in transition: essays in memory of Professor Shigejiro Tabata for his sixtieth birthday* (in Japanese) (Tokyo: Yushindo, 1973) 103 at 126-131.

in the observations of governments[26] on the Provisional Draft submitted to the Secretary-General of the United Nations.[27]

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[26] Governments were requested to submit their observations on the Provisional Draft to the Secretary-General by 1 January 1993. *See* UN Doc., A/CN.4/447 (3 March 1993), at 3, para. 1. To this author's knowledge, at least twenty-one States submitted their own observations. *See id.* and its Add.1 (15 April 1993), Add.2 (18 May 1993), Add.3 (14 June 1993). Five States, that is, Denmark, Finland, Iceland, Norway and Sweden, submitted one observation as Nordic Countries. In order to clarify the situations of these States, we make the following classification. [1] [International Watercourse States] (a) Upper Riparian States: none. (b) Middle Riparian States: Nordic Countries, Costa Rica, Germany, Greece, Spain, Syrian Arab Republic, Turkey, The United States, Argentina, Canada, Chad, Hungary, The Netherlands, Switzerland <Non-UN Member State>, (Finland, Norway). (c) Lower Riparian States: Iraq, Poland, (Sweden). [2][Non International Watercourse States]: (Denmark, Iceland). Here we have classified as middle riparian States those falling into any of three categories below: i) those riparian States other than the uppermost or the lowest when the watercourse in question is situated among more than two States; ii) those riparian States becoming upper or lower according to different watercourses; iii) those riparian States of international lakes having no distinction between upper and lower. Moreover, when a State is to be classified as a middle riparian State as regards a certain watercourse, that State shall be so classified irrespective of being upper or lower as regards other watercourses. However, even if a State should be classified as a middle riparian State, that State is, out of respect for its own will, classified as an upper or a lower riparian State when it explicitly so claims. Consequently, Poland is classified as a lower riparian State though it should be classified as a middle riparian State. *See* A/CN.4/447/Add.1, at 10. Nordic Countries are classified as middle riparian States because there are middle riparian States among them. In order to classify upper, middle and lower riparian States of international watercourses as well as non-international watercourse States, we referred to the following. *List of first order river basins shared by two or more countries*, in *Technical and economic aspects of international river basin development: report of the Secretary-General*, UN Doc., E/C.7/35 (27 October 1972), Annex I, at 1-12. According to this, only one sixth of the States of the world are non-international watercourse States. *Id.*, at 9.

[27] *See* for Germany, UN Doc., A/CN.4/447, at 20; Greece, *id.*, at 23; The United States, *id.*, at 40; Switzerland, *id.*, at 46; Canada, A/CN.4/447/Add.1, at 4; Poland, *id.*, at 10; Hungary, A/CN.4/447 /Add.2, at 5. Moreover, if we review the remarks of the States in the sixth committee of the General Assembly of the United Nations in the year 1987, when Articles 5 and 6 (Articles 6 and 7 at that time) of the Provisional Draft concerning the *equitable utilization* principle were adopted, we can confirm wide support for that principle. Besides the twenty-one States listed in the above note, there are at least following nineteen States clearly supporting that principle: [1][International Watercourse States] (a) Upper Riparian States: none. (b) Middle Riparian States: Mexico, Ireland, Israel, Venezuela, United Republic of Tanzania, Sudan, Chile, Austria, Ghana, Zambia, India. *See* for Mexico, A/C.6/42/SR.36, at 2, para. 3; Ireland, SR.38, at 14, para. 64; Israel, SR.45, at 17, para. 75; Venezuela, SR.46, at 4, para. 10; United Republic of Tanzania, *id.*, at 17, paras. 86-87; Sudan, SR. 47, at 11, para. 58; Chile, *id.*,at 21, para. 104; Austria, SR.48, at 6, para. 23; Ghana, SR. 49, at 3, para. 8; Zambia, *id.*, at 5, para. 17; India, *id.*, at 6, para. 22. (c) Lower Riparian States: Italy, Egypt, Bangladesh, Jordan. *See* for Italy, SR.38, at 8, para. 34; Egypt, SR.40, at 4, para. 14; Bangladesh, *id.*, at 8, para. 40; Jordan, SR. 44, at 4, paras. 12-13. [2][Non International Watercourse States]: Qatar, Jamaica, New Zealand, Bahrain. *See* for Qatar, SR.35, at 16, para. 59; Jamaica, SR.41, at 8, para.28; New Zealand, SR.43, at 23, para. 105; Bahrain, SR.47, at 9, para. 42. However, the German Democratic Republic, France and the Lao People's Democratic Republic, all middle riparian States, were sceptical about that principle. Brazil was concerned about the increase of harm by the application of that principle; other three States worried that the concept of "shared natural resources"

All other States that did not directly support the *equitable utilization* principle made their observations on the premise that the principle in question existed.[28] Reflecting the support of States for the principle, Articles 5 and 6 of the Provisional Draft were submitted to the Drafting Committee without modification in the second reading at the session of 1993, and were adopted in that Committee at the same session.[29]

What, then, is the essence of the *equitable utilization* principle? Considering that "factors relevant to equitable and reasonable utilization" are listed in Article 6, paragraph 1, of the 1997 Watercourses Convention,[30] and that the question as to whether or not an *equitable utilization* be achieved is decided by balancing these factors, the essence of the principle is thought to be in the *balancing of interests*.[31] In fact, the decisions of international courts and tribunals as well as domestic courts, which are said to have referred to the principle, have held that such *balancing of interests* should be made. For example, in the *River Oder* case the PCIJ referred to the need to fulfil "the requirements of justice and the considerations of utility".[32] In the *Lake Lanoux* case of 1957, the Arbitral Tribunal held that there existed "the obligation to take into consideration the interests" of other States in the light of "current international practice" and "the rules of good faith".[33] Moreover, in the *Donauversinkung* case, the Constitutional Court of Germany (*Staatsgerichtshof*) held in 1927 that the interests of riparian States of an international river had to "be weighed in an equitable manner against one another", and that also to be considered was "not only the absolute injury caused to the

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underlying that principle would derogate from their own sovereignty. Nevertheless, Brazil, the German Democratic Republic and France suggested that they were ready to accept that principle if such fear could be wiped away. *See* for Brazil, SR.36, at 6-7, paras. 22-24; the German Democratic Republic, SR.43, at 3, para.7; France, SR.45, at 6, para. 22-24; the Lao People's Democratic Republic, SR.46, at 9, para. 33.

[28] *See* UN Doc., A/CN/4/447, and its Add.1-3.

[29] *1993 ILC Report*, UN Doc., GAOR, Forty-Eighth Session, Supp. No. 10 (A/48/10), at 217. The Final Draft and the 1997 Watercourses Convention see no fundamental change. *See 1994 ILC Report*, *op. cit.* n. 3, at 218, 231; 36 ILM (1997) 705-706.

[30] The factors listed in Article 6, paragraph 1, of the 1997 Watercourses Convention are as follows: (a)geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character; (b)the social and economic needs of the watercourse States concerned; (c)the population dependent on the watercourse in each watercourse State; (d)the effects of the use or uses of the watercourses in one watercourse State on other watercourse States; (e)existing and potential uses of the watercourse; (f)conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect; (g)the availability of alternatives, of corresponding value, to a particular planned or existing use. 36 ILM 706 (1997). These factors are not exhaustive but indicative, and no priority or weight is assigned to them. *1994 ILC Report*, *op. cit.* n. 3, at 232, para. (3).

[31] *See* Handl, *op. cit.* n. 5, at 188-189, 194.

[32] PCIJ Ser. A, No. 23, at 27.

[33] 12 RIAA, at 315.

neighbouring State, but also the relation of the advantage gained by one to the injury caused to the other".[34]

## 2.2. The relationship between the *Equitable Utilization* principle and the *No Pollution Harm principle* highlighted

It is said that the *equitable utilization* principle, the essence of which lies in the *balancing of interests,* originated as a principle on the use of water that involves the change of its quantity.[35] Therefore, the question must be asked whether that principle also governs the use of water containing pollutants. If the answer to that question is negative, there will be no room to call into question the relationship between the *equitable utilization* principle and the *no pollution harm* principle.

The International Law Association has adopted the position that the *equitable utilization* principle also deals with water use where pollution is involved. Article IV of the "Helsinki Rules on the Use of the Waters of International Rivers" of 1966[36] stipulates that the *equitable utilization* principle is a fundamental principle governing the use of water of international rivers. In addition, the obligation to prevent pollution causing *substantial* injury, i.e., a higher level of harm,[37] to another co-basin State, stipulated in Article X of the said Rules, is meant to be consistent with the *equitable utilization* principle. The commentary on Article X states that "uses of the waters by a basin State that cause pollution resulting in injury in a co-basin State must be considered from the overall perspective of what constitutes an equitable utilization".[38]

Similarly, Article 1 of the "Montreal Rules on Water Pollution in an International Drainage Basin" of 1982[39] lays down the obligation to prevent pollution causing *substantial* injury to another State, "consistent with the Helsinki Rules on the equitable utilization of the waters on an international

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[34] The *Donauversinkung* case, *Wurttemberg and Prussia v. Baden* (German Staatsgerichtshof, 18 June 1927), 4 Annual Digest 128 at 131.

[35] Robert D. Hayton, "The present state of research carried out by the English-speaking section of the Centre for Studies and Research", in Centre for Studies and Research in International Law and International Relations of the Hague Academy of International Law, *Rights and duties of riparian states of international rivers* (Dordrecht: Nijhoff, 1991) 59 at 70. Both the *Lake Lanoux* and the *Donauversinkung* cases are concerned with the water use involving the change of water quantity.

[36] ILA, *Report of the fifty-second conference held at Helsinki* (1966) at 486.

[37] Generally, an injury is considered "*substantial*" if it materially interferes with or prevents a reasonable use of water. *Id.*, at 500.

[38] *Id.*, at 499.

[39] ILA, *Report of the sixtieth conference held at Montreal* (1982) at 535 [hereinafter, 1982 *Montreal Report*]. *See* also Article 1 of Draft Articles on the Relationship between Water, Other Natural Resources and the Environment, ILA, *Report of the fifty-ninth conference held at Belgrade* (1980) at 374-375.

drainage basin". The commentary on Article 1 of the Montreal Rules lists the reasons of the *equitable utilization* principle being regarded as covering also the water use involving pollution, as follows: (1) "the activity that produces water pollution is itself a utilization of the water resource that may be reasonable and equitable in the particular circumstances"; (2) "the *equitable utilization* principle provides a desirable flexibility in the disposition of disputes concerning the complex questions raised in cases of water pollution".[40]

The Institut de droit international (Institute of International Law) [hereinafter, the Institut] does not exclude *a priori* the possibility of the *equitable utilization* principle governing water use involving pollution, as is shown by the reference to "equitable utilization" in the preamble of the resolution on "Pollution of Rivers and Lakes and International Law" [hereinafter, the Athens Resolution].[41]

Finally, we shall examine the discussions in the ILC on the topic of international watercourses. Between Schwebel and Evensen, the second and third Special Rapporteurs on this topic, there was no difference of opinion on the argument that the *equitable utilization* principle also governs the water use involving pollution. For example, in draft Article 7, paragraph 1, sub-paragraphs (a)(vii) and (b), of Schwebel's third report[42] as well as in draft Article 8, paragraph 1, sub-paragraphs (g) and (h), of the first report,[43] and draft Article 8, paragraph 1, sub-paragraphs (h) and (i), of the second report[44] of Evensen, "pollution" and "adverse effects" were included in the factors to determine "equitable use". In addition, in draft Article 10, paragraph 3, of Schwebel's third report (as well as in draft Article 23, paragraph 1, of the first and second reports of Evensen), the reference to "equitable use" was made in relation to the obligation to prevent pollution causing *appreciable* harm. Moreover, in draft Article 10, paragraph 4, of Schwebel's third report (as well as in draft Article 23, paragraph 2, of the first and second reports of Evensen) the obligation to prevent pollution causing harm on a less than *appreciable* level was stipulated on condition that the affected State defrays a part of the costs necessary to abate pollution;[45] there was the consideration of the *equitable utilization* principle in the background whenever such a condition was introduced.[46]

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[40] ILA, 1982 *Montreal Report*, *id.*, at 536.

[41] 58 Annuaire Part 2 (1979) at 196-203.

[42] Schwebel, *Third Report*, YILC, 1982, Vol. II, Part One, at 65.

[43] Jens Evensen, *First Report*, YILC, 1983, Vol. II, Part One, at 155.

[44] Evensen, *Second Report*, YILC, 1984, Vol. II, Part One, at 101.

[45] In Evensen's Draft, however, the watercourse States concerned are only obliged to consult for the defrayment of the cost for pollution abatement.

[46] Schwebel, *Third Report*, *op. cit.* n. 42, at 149, paras. 324-325.

However, in draft Article 16, paragraph 2, of McCaffrey's fourth report,[47] stipulating the obligation to prevent pollution causing *appreciable* harm, there was no reference to "equitable use"; nor was there a reference to "equitable use" either in the Drafting Committee's draft Article 23, paragraph 2,[48] or in Article 21, paragraph 2, of the Provisional Draft, both of which found their origin in the paragraph proposed by McCaffrey. Besides, the obligation to prevent harm on a less than *appreciable* level did not figure as an independent article in McCaffrey's fourth report[49] nor in the 1997 Watercourses Convention. Consequently, there was no clear description in that report of the idea that the affected State would defray part of the costs to abate the pollution. Moreover, in the Drafting Committee's draft Article 7,[50] elaborated on the basis of draft Article 8 of Evensen's second report, "pollution" and "adverse effects" were deleted from the factors to determine "equitable use", and that position was also followed in Article 6 of the Provisional and Final Drafts, as well as in the 1997 Watercourses Convention.[51]

The above-mentioned facts seem to deny the *equitable utilization* principle a role in the matter of water use involving pollution. However, in McCaffrey's fourth report[52] it was clearly recognized that the principle did govern the topic. In fact, draft Article 17, paragraph 2, of that report, dealing with the protection of the marine environment,[53] provided that watercourse States should take measures to protect the marine environment "on an equitable basis". In Article 23 of the Provisional and Final Drafts, based on the aforementioned paragraph, this phrase was deleted for the purpose of simplification,[54] but the commentary emphasizes that "joint, cooperative action"

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[47] McCaffrey, *Fourth Report, op. cit.* n. 2, at 205.

[48] YILC, 1990, Vol. I, at 282, para. 26.

[49] However, draft Article 17, paragraph 1, of McCaffrey's fourth report, Article 22 of the Drafting Committee's Draft and Article 20 of the Provisional and Final Drafts, all concerning protection of the environment of international watercourse[s] [systems], seem to include such an obligation. *See 1990 ILC Report*, UN Doc., GAOR Forty-Fifth Session, Supp. No. 10 (A/45/10), at 163, para. (6); *1994 ILC Report*, *op. cit.* n. 3, at 293, para. (6); 36 ILM 710 (1997).

[50] YILC, 1987, Vol. I, at 206, para. 1.

[51] Professor Caflisch thinks that the deletion, from the Drafting Committee's Draft and the Provisional Draft, of factors such as "pollution" and "adverse effect", formerly included among the factors to determine "equitable use", is the logical consequence of the subordination of *equitable utilization* principle to the obligation not to cause *appreciable* (pollution) harm. Lucius Caflisch, "Sic utere tuo ut alienum non laedas: regle prioritaire ou element servant a mesurer le droit de participation equitable et raisonnable a l'utilisation d'un cours d'eau international?", in Alexander von Ziegler & Thomas Burckhardt (eds.), *Internationales Recht auf See und Binnengewassern, Festschrift fur Walter Müller* (Zurich: Schulthess, 1993) 27 at 36.

[52] *Op. cit.* n. 2, at 238, para. 5, at 241-242, paras. 12-16.

[53] The paragraph in question had been elaborated especially for pollution. *See* YILC, 1988, Vol. II, Part One, at 244, para. (4).

[54] The term in question had been deleted at the stage of the elaboration of Article 25 of the Drafting Committee's Draft. *See* YILC, 1990, Vol. I, at 288, para. 7.

should be taken "on an equitable basis".[55] In addition, the commentary on Article 20 concerning "protection and preservation of ecosystems" and that on the aforementioned Article 21, paragraph 2 of the Provisional and Final Drafts emphasize the same meaning.[56] Moreover, while there were some arguments about how to consider the relationship between the *equitable utilization* principle and the obligation not to cause *appreciable* (pollution) harm, the members of the ILC[57] as well as the governments[58] started from the premise that the *equitable utilization* principle also applied to water use entailing pollution.

The above examination thus leads us to the conclusion that the relevance of the *equitable utilization* principle for the use of water entailing pollution is now generally recognized. Such a conclusion can also be drawn from the *Trail Smelter* arbitral award,[59] which is an outstanding precedent in the field of transfrontier pollution.[60] In its final decision of 1941 the Arbitral Tribunal carried out the *balancing of interests* by considering the "equitable use" by the Parties, while admitting the liability of Canada for having violated the obligation, under international law, to prevent, with *due diligence*, *serious* transfrontier pollution harm.[61] It did so during the process of arriving at the above-mentioned conclusion[62] as well as when it subsequently ordered a

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[55] *1990 ILC Report*, *op. cit.* n. 49, at 170-171, para. (3); *1994 ILC Report*, *op. cit.* n. 3, at 299, para. (3).

[56] *1990 ILC Report*, *op. cit.* n. 49, at 150, para. (4), 162, para. (5); *1994 ILC Report*, *op. cit.* n. 3, at 282, para. (4), at 292-293, para. (5). These commentaries see the obligation to "prevent, reduce and control pollution jointly" and the obligation to "take steps to harmonize...policies" within the sphere of the *equitable utilization* principle.

[57] *See* the Statement of Mr. Calero Rodrigues, YILC, 1988, Vol. I, at 127, para. 5; Mr. Beesley, *id.*, at 128, para. 15; Mr. Bennouna, *id.*, at 134, para. 6; Mr. Mahiou, *id.*, at 139, para. 2; Mr. Shi, *id.*, at 141, para. 17; Mr. Al-Khasawnhe, *id.*, at 147, para. 18; Mr. Sreenivasa Rao, *id.*, at 151, para. 46; Mr. Al-Qaysi, *id.*, at 158, para. 32.

[58] *See* the Comments from Nordic Countries, UN Doc., A/CN.4/ 447, at 27; from the United States, *id.*, at 40; from Switzerland, *id.*, at 51, 53; from Canada, A/CN.4/447/Add.1, at 5; from Poland, *id.*, at 10; from the Netherlands, A/CN.4/447/Add.3, at 9. *See* also the Statement of Mr. Crawford (Australia), A/C.6/43/SR.30, at 4, para. 10; Mr. Park (Republic of Korea), SR.31, at 24, para. 109.

[59] 3 RIAA, at 1907.

[60] *See* Robert Q. Quentin-Baxter, *Second report on international liability for injurious consequences arising out of acts not prohibited by international law* [hereinafter, *Second Report on Liability*], YILC, 1981, Vol. II, Part One, 103, at 110, para. 27; *Third Report on Liability*, YILC, 1982, Vol. II, Part One, 51, at 54, para. 14.

[61] *See* 3 RIAA, at 1965-1966.

[62] *First*, the Tribunal emphasized "an equal interest" between two States. *See id.*, at 1938. *Secondly*, the Tribunal referred to the need for "just solution" balancing the interests of Canadian industry and the United States agriculture, and also referred to the characteristic of the regime for it. *See id.*, at 1939. *Thirdly*, the Tribunal pointed out that "equity" was also taken into account in the decisions of the United States Supreme Court concerning pollution, which were invoked to show the existence of the *no pollution harm* principle under international law. *See id.*, at 1965.

prevention régime.[63] It should be admitted that the decision was somehow influenced by Article 4 of the *compromis* between the parties, providing that "the Tribunal shall give consideration to the desire of the high contracting parties to reach a solution just to all parties concerned".[64] Yet the judgment is certainly relevant for the case of pollution of international watercourses in view of the similarity between the cases of water pollution and of air pollution.[65]

On the other hand, it is widely accepted that "the activity that produces water pollution is itself a utilization of the water resource". The ILA has already pointed this out. From a theoretical point of view there is, consequently, no reason to exclude, *a priori*, the applicability of the *equitable utilization* principle to the matter of water use entailing pollution, even though one might suppose that the principle would be subject to some restrictions.

As discussed earlier, if the applicability of the *equitable utilization* principle to the issue of water use entailing pollution be assumed, the riparian States would have the obligation to "share equitably" when taking measures to prevent pollution. This would easily be recognized, since the ILC employs the *equitable utilization* principle when emphasizing the obligation of "equitable participation".[66] This requires States to take joint, co-operative measures to prevent pollution. In addition, as is shown by the *Trail Smelter* case, it is necessary to consider the various circumstances of the States concerned when deciding on the regime to prevent or rescind the harm, as far as the prohibited level of pollution harm has not been reached. It is, of course, controversial whether or not the *equitable utilization* principle includes the determination of that level of pollution harm. In relevant cases the activities are to a large extent economically or socially important for the watercourse State in question (Article 6, paragraph 1(b), of the 1997 Watercourses Convention). Alternatively, the activities may generate benefits that exceed the costs of conservation measures (Article 6, paragraph 1(f), thereof). In such cases it may be feasible that, on the basis of the *balancing of interests*, the occurrence of a certain level of "factual harm" is allowed by the *equitable utilization* principle, without any conditions or, at the most, conditions on the payment of compensation.[67] In such a situation, the relationship between

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[63] *First*, the Tribunal excluded a very strict prevention régime suggested by the United States, by which a prefixed sum would be due whenever the concentrations recorded would exceed a certain intensity. *See id.*, at 1974. *Secondly*, the Tribunal ordered Canada to implement a régime which would "probably remove the causes of the present controversy and ... probably result in preventing any damage of a material nature occurring in the State of Washington in the future." *See id.*, at 1980. *Thirdly*, the Tribunal admitted Canada's liability for such damage as occurring notwithstanding the maintenance of the regime in question. *See id.*

[64] *See id.*, at 1908.

[65] *Id.*, at 1963; Ando, *op. cit.* n. 2, at 334; Tsukikawa, *op. cit.* n. 2, at 613.

[66] *See op. cit.* n. 24.

[67] *See* Article 5 paragraph 2 (j) of the ILA Helsinki Rules.

the *equitable utilization* principle and the *no pollution harm* principle becomes highlighted.

There are some scholars, such as Lammers,[68] who deny *a priori* the determination of the level of pollution harm to be prevented by the *equitable utilization* principle. He points out that if such a determination is allowed, the standard adopted would become ambiguous because of the need to take into account a great number of factors.[69] However, it is possible to envisage the activity in question to be prohibited because it exceeds the "equitable use", even in the case of pollution causing harm below the level of "harm to be prevented".[70] The problem thus lies in whether or not the *no pollution harm* principle is "relaxed" by the *equitable utilization* principle. The fact that the Institut, although referring to the *equitable utilization* principle in the preamble of its Athens Resolution, evaded any reference to the said principle in the operative articles of the resolution[71] could be seen as a manifestation of its concern about such "relaxation". On the other hand, there are

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[68] Lammers, *op. cit.* n. 13, at 162-163.

[69] "The mitigated-no-substantial-harm principle" supported by Dr. Lammers also takes *equity* into account by considering the following three elements: 1) the protection to be given to exceptionally sensitive interests; 2) the nature of the obligation of States to prevent or abate transfrontier pollution, this obligation being a *due care* or *due diligence* obligation; 3) the fact that in exceptional cases the obligation to prevent or abate transfrontier pollution causing *substantial* harm to other States is to be replaced by an obligation to pay compensation for the harm caused, viz., when there clearly exists a high disproportion between, on the one hand, the technical or socio-economic costs involved in preventing or abating the pollution and, on the other hand, the *substantial* harm caused to other States or the benefit gained by those States if the pollution were to be reduced to an *insignificant* level. *Id.*, at 156. However, it should be remembered that this principle is, according to him, different from the principle of *equitable utilization* of "shared natural resources" in that the interests to be considered in the former principle are limited while the latter principle allows unlimited *balancing of interests*. *Id.*, at 162. Moreover, it should also be remembered that he uses the term "*substantial* harm" as indicating a relatively lower level of harm, namely *appreciable* (=*significant*) harm as used in the ILC. *See* Lammers, *op. cit.* n. 2, at 381.

[70] In such a case, it will be a matter of "equitable apportionment" of the pollution emission limit. *See* Magraw *et al.*, *Fourth Report on LDAP*, *op. cit.* n. 12, at 29-36. However, it should be remembered that even here the obligation to prevent pollution contained in Article 20 of the Provisional and Final Drafts as well as in Article 20 of the 1997 Watercourses Convention still remains to be operative. *See op. cit.* n. 49.

[71] Although Article 2 of the Athens Resolution provides for the obligation to prevent pollution of international watercourses, there is no reference to the *equitable utilization* principle in contrast with the ILA resolutions. Moreover, the Athens Resolution has no separate article providing for the *equitable utilization* principle, unlike Article 3 of the Institut's Resolution on the Use of International Non-Maritime Waters of 1961 (the Salzburg Resolution) emphasizing the settlement "on the basis of equity". *See* 49 Annuaire Part 2 (1961) at 370-373. The reference to the *equitable utilization* principle in the preamble of the Athens Resolution merely intended to suggest the relativity of the concept of pollution. *See* 58 Annuaire Part 2 (1979) at 110, Part 1 (1979) at 334-335. Article 2 of the Athens Resolution says nothing about the level of pollution harm to be prevented. This is because, in the view of the Institut, the factual tolerance of a certain degree of pollution was due to mere acquiescence, not due to right. *Id*, at 343-344.

also strong arguments in support of such "relaxation", as will be seen in the next Part of this paper.

## 3. ARGUMENTS FOR THE "RELAXATION" OF THE *NO POLLUTION HARM* PRINCIPLE BY THE *EQUITABLE UTILIZATION* PRINCIPLE

### 3.1. A survey of academic views

As has already been seen, the ILA has consistently taken the position that the *equitable utilization* principle also applies to water use entailing pollution. To be noted is that the ILA recognizes that a higher level of harm to be prevented, namely "*substantial injury*", is raised even further by the *equitable utilization* principle. This can be concluded from Article 1 of the "Complementary Rules Applicable to International Water Resources",[72] which prescribes the obligation to prevent "*substantial* injury" to other States, "provided that the application of the principle of *equitable utilization* ... does not justify an exception in a particular case".[73]

Caflisch is among those scholars who also advocate the "relaxation" of the *no pollution harm* principle. In order to understand his arguments, it will be useful to examine his criticism to McCaffrey's view which supports the position of the Provisional Draft and rejects such "relaxation". The Provisional Draft does not admit, unless there is a watercourse agreement prescribing otherwise, any "relaxation" by the *equitable utilization* principle and demands strict application of the obligation not to cause *appreciable* harm of any kind, i.e., not restricted to pollution. Professor McCaffrey supports this approach for the following three reasons: *first*, the ILC's approach affords a measure of protection to a weaker State that has suffered harm; *secondly*, it is far simpler to determine whether the *no (pollution) harm* rule has been breached than to determine a breach of the obligation of *equitable utilization*; *thirdly*, the *no harm* rule is preferable in cases involving pollution and other threats to the environment.[74] With regard to these arguments, Professor Caflisch makes the following criticisms: as regards the first point, the ILC's approach is apt to concede privileges to developed countries which are existent users; in respect of the second point, notions such as "*serious*" or "*appreciable*" harm are much more ambiguous than the "*equitable utilization*" principle; concerning the third point, certain circumstances may require toleration of *appreciable* harm in order to achieve the optimal use of a watercourse. In addition, Caflisch criticizes the approach of the Provisional Draft for the

[72] ILA, *Report of the sixty-second conference held at Seoul* (1986) at 275.
[73] *Id.*, at 281-282.
[74] McCaffrey, "The law of international watercourses: some recent developments and unanswered questions", 17 *Den. J. Int'l L. & Pol'y* (1989) 505 at 510.

following four reasons: *first*, the approach deviates from contemporary State practice; *secondly*, the approach results in the protection of existent activities to a much larger extent than new activities; *thirdly*, it is not really something for a framework treaty to prescribe the *no pollution harm* principle; and *lastly*, the approach blocks new activities. Especially with a view to the protection of the environment he proposes the following two solutions: relinquishment of "relaxation" of the *no pollution harm* principle only in case of pollution that is [in French] "*importante*" or "*massive*"; and the adoption of the "mitigated no-substantial-harm principle"[75] supported by Lammers. However, Caflisch rejects the first solution despite the advantage of its simplicity, because of the ambiguity of notions like "*importante*" and "*massive*" as well as because of its incompatibility with the *equitable utilization* principle: this principle takes into account all pertinent factors while the proposed solution takes up the degree of harm as the sole object of consideration. In conclusion, Caflisch proposes the application of the *no harm* principle as an independent provision only with regard to environmental protection, and making the principle subject to the *equitable utilization* principle by adopting the "mitigated no-substantial-harm principle".[76]

It follows from the foregoing that Caflisch advocates a reversion to a position that allows the "relaxation" of the *no (pollution) harm* principle by application of the *equitable utilization* principle, mainly on the basis of the following arguments: *first*, the approach of the Provisional Draft not only implies a privileged position for developed countries (existent users) but also deviates from the contemporary State practice; *secondly*, the determination of a threshold of harm to be prevented by such notions as "*importante*" or "*massive*" are ambiguous.[77] Meanwhile, he would allow activities involving transfrontier harm within the range of "equitable use", taking into consideration various factors, among which is the fact of whether or not the *no pollution harm* principle is being observed.[78] It is true that he, too, admits, from the point of view of environmental protection, that a stricter standard, that is, the "mitigated no-substantial-harm principle", should be applied in the case of environmental harm, but that would not change the applicability of the *equitable utilization* principle in determining the level of harm to be prevented. The "mitigated no-substantial-harm principle" would in fact remain

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[75] *See op. cit.* n. 69.

[76] Caflisch, *op. cit.* n. 51, at 42-47. While the observation of Switzerland to the Provisional Draft adopts Caflisch's view, it does not exclude the first solution he proposed. *See* UN Doc., A/CN.4/447, at 51-53.

[77] Caflisch also argues that it is necessary to consider the requirement of "the optimal use of a watercourse" as well as the inadequacy to insert the *no (pollution) harm* principle into a framework treaty. However, these arguments are not persuasive because the former requirement might conversely need the rejection of the "relaxation" of the *no (pollution) harm* principle, and because the latter seems to be a matter of policy consideration.

[78] Caflisch, *op. cit.* n. 51, at 47.

subordinated to the *equitable utilization* principle.[79] This is contrary to Lammers's reasoning when he proposed the "mitigated no-substantial-harm principle" in order to avoid a determination by applying the *equitable utilization* principle. However, if, as Caflisch argues, the "mitigated no-substantial-harm principle" is regarded as perfectly compatible with the *equitable utilization* principle in the sense that the former principle conciliates economic needs with ecological imperatives,[80] we would have to question the very validity of the approach by which the determination of the level of harm to be prevented in case of pollution harm takes place by using the "mitigated no-substantial-harm principle".

### 3.2. The background of the arguments: protection of the interests of upper riparian developing countries as beginning users

In arguing in favour of "relaxation" of the *no (pollution) harm* principle by the application of the *equitable utilization* principle as composed of various factors, the factor most emphasized by Caflisch is the need to protect the interests of developing countries as beginning users. One may suspect that, in the background of his suggestion to adopt the "mitigated no-substantial-harm principle" instead of bluntly rejecting "relaxation", even in the case of pollution harm, there is the consideration of alleviating the burden for developing countries by an obligation to pay compensation. This is allowed under the principle in question in case of a high disproportion between the costs to reduce pollution and the benefits gained by that reduction.[81]

It may be emphasized that resort is made to the *equitable utilization* principle in order to remedy inequitable consequences of the *no (pollution) harm* principle such as the fact that developed countries (usually lower riparian States), being existent users, are put into a more favourable position because developing countries (usually upper riparian States), being new users, inevitably cause harm.[82] As a result, the desire to "relax" the *no (pollution) harm* principle by the *equitable utilization* principle would seem to be quite natural.

However, from the beginning there has been much opposition against the admission of a "double standard", which differentiates the pollution prevention standard between upper riparian developing countries and lower riparian developed countries by allowing such "relaxation". This became apparent during the drafting process of the 1979 Athens Resolution of the Institut.

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[79] *Id.*, at 45, 47.

[80] *Id*, at 45.

[81] *Loc. cit.*

[82] *Id.*, at 42; McCaffrey, "The International Law Commission and its efforts to codify the international law of waterways", 47 ASDI (1990) 32 at 49-50; The Statement of Mr. McCaffrey, YILC, 1984, Vol. I, at 245, paras. 32, 34-35. The following States clearly supported such "relaxation" in their governmental observations to the 1994 Final Draft: Ethiopia, UN Doc., A/51/275, at 33-34;

First, the Special Rapporteur, Professor Salmon, avoided a specification of the grounds in favour of the prohibition of environmental harm. He held the view that these grounds, including the *equitable utilization* principle, are not contrary to each other and could be harmonized.[83] Many members of the Institut, however, were against recognizing the principle in question as a substantive principle because of the ensuing risk of [in French] "double pollution" or "légalisation de la pollution".[84] Secondly, the Special Rapporteur regarded the obligation to prevent pollution of international watercourses as a *due diligence* obligation,[85] and suggested that the *equitable utilization* principle should be applied in judging the reasonableness of the *due diligence* in question.[86] Consequently, the sentence "La vigilance doit étre adaptée aux circonstances et, en particulier, à l'état de développement des États en cause" was included in Article 3, paragraph 2, of the Draft Resolution.[87]

In the course of the deliberations, much criticism was aimed at the idea of taking account of the stage of development of a State. For example, Judge Oda expressed his concern over establishing a "principle of the double standard of norms"[88]; Professor Suy emphasized the necessity to submit all States to the same rules,[89] and Professor Yasseen warned that the natural environment of developing countries would sooner or later also be exposed to real danger resulting from a double standard.[90] Because of these critical observations, the reference to the state of development of a State was finally

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Spain, *id.*, at 45; Turkey, *id.*, at 45; Switzerland, *id.*, at 47. The following States clearly objected to it: Hungary, *id.*, at 34, 43; Greece, A/51/275/Add.2, at 7. The following States regretted the insufficient recognition of the "relaxation" by the 1997 Watercourses Convention when it was adopted at the United Nations General Assembly: Turkey, A/51/PV.99, at 5; Czech Republic, *id.*, at 6; Slovakia, *id.*, at 7; France, *id.*, at 8; Ethiopia, *id.*, at 9-10; Spain, *id.*, at 12. Thus we can confirm that the States supporting the "relaxation" are, except for France, those which are situated on relatively upper positions of international watercourses and are economically less developed than lower riparian States.

[83] 58 Annuaire Part 2 (1979) at 107.

[84] 58 Annuaire Part 1 (1979) at 207-208, where it is stated as follows: "La théorie de l'utilisation équitable et son corollaire d'équilibre raisonnable des intérêts ont pour effet de considérer la pollution comme le résultat d'un usage du fleuve considéré sinon comme légitime du moins comme souhaitable … . En mettant en balance les intérêts de l'Etat d'aval et ceux d'amont on risque souvent d'aboutir à une double pollution et en tout cas à une légalisation de la pollution."

[85] *Id.*, at 217. Articles 1 and 2 of the Athens Draft Resolution expressly prescribed the term "une diligence raisonnable". *Id.*, at 358-359. However, Article 2 of the Athens Resolution shows that this term was finally deleted. This deletion was carried out for harmonizing with the expression of Principle 21 of the Stockholm Declaration. Therefore, it does not mean that the concept of "*due diligence*" was denied. 58 Annuaire Part 2 (1979) at 121.

[86] 58 Annuiare Part 1(1979) at 288.

[87] *Id.*, at 359.

[88] 58 Annuiare Part 2 (1979) at 127-128.

[89] *Id.*, at 131.

[90] *Id.*, at 133.

deleted,[91] and Article 3, paragraph 1, of the Athens Resolution in the end reads as follows: "States shall take and adapt to the circumstances all measures...." As we have seen, the Institut in fact rejected the *equitable utilization* principle as a means to raise the minimum level of harm to be prevented, and took a very negative stand regarding its invocation when judging the reasonableness of *due diligence*. However, since considerations of "equity" are already inherent in the concept of *due diligence*,[92] and since the extent of actual presence of *due diligence* is determined by weighing various factors, it could be said that there was really no need to examine separately the question of a "double standard" of *due diligence* in assessing the impact of the *equitable utilization* principle on the *no pollution harm* principle. Actually, it may be said that a "double standard" is always applied in so far as the state of development of a State is taken into account when examining if the necessary resources and means were available in judging the absence or presence of *due diligence.* Therefore, the risk that pollution emanating from developing countries will increase is indeed becoming greater. The pollution prevention standard could nonetheless be decided in advance and objectively because it is necessary for the State of origin to exercise *due diligence* in accordance with at least its own national standard.[93] On the contrary, if we allow a "double standard" in determining the level of harm to be prevented, it would become impossible to assess that level in advance and objectively, because of the need to consider the various circumstances on the part of the State of origin, such as the economic need for the activity in question. From this perspective the "relaxation" of the *no pollution harm* principle by the *equitable utilization* principle, including the argument of the "mitigated no-substantial-harm principle", is dangerous. If we give priority to "pollution prevention", we would be led strictly to apply the *no pollution harm* principle, which focuses merely on the "factual harm" suffered in the affected State. The issue of whether this is in accord with the positive law will be examined in the following Parts of this paper.

## 4. DELIBERATIONS IN THE INTERNATIONAL LAW COMMISSION AND THE OBSERVATIONS OF GOVERNMENTS

The rejection of the "relaxation" of the *no pollution harm* principle by the *equitable utilization* principle received wide support among the members of the ILC as well as from the governments during the deliberations on the Draft Articles.

The second Special Rapporteur, Schwebel, admitted that the level of harm to be prevented, that is, *appreciable* harm, was increased by the *equitable*

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[91] *Id.*, at 134.

[92] *See* McCaffrey, *Fourth Report*, op. cit. n. 2, at 241, paras. (14).

[93] *See* this author, *op. cit.* n. 1, Part 2, at 64-72.

*utilization* principle.[94] Later, however, the ILC consistently supported the very strict position of not allowing such a rise subject to a contrary agreement at least so far as harm by pollution is concerned. The typical position was that taken by the third Special Rapporteur Evensen: in draft Article 9 of his first and second reports,[95] which contained the obligation to prevent *appreciable* harm, the exception based on the *equitable utilization* principle had been deleted; in draft Article 23, paragraph 1, the phrase that pollution shall be prevented "consistent with the *equitable utilization* principle" had also been deleted. No longer could any activity causing *appreciable* harm be regarded as "equitable use".[96] Opinions varied on this stand among other members of the ILC.[97]

The fourth Special Rapporteur, McCaffrey, while admitting that the level of harm to be prevented, namely *appreciable* harm, may indeed be raised by the *equitable utilization* principle in the case of harm by causes other than pollution, did not allow such a rise in the case of harm by pollution. In the case of harm other than by pollution,[98] he proposed three ways to harmonize the obligation to prevent *appreciable* harm with the *equitable utilization* principle.[99] Irrespective of the means chosen, however, he allowed the occurrence of *appreciable* harm provided it falls within the range of "an equitable use". There were opinions for and against this approach among the members of the ILC.[100]

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[94] *See* Schwebel, *Third Report*, *op. cit.* n. 42, at 148, para. 323. It seems that he regarded the obligation not to cause *appreciable* harm as a *due diligence* obligation. *See id.*, at 95, para. 118, at 101, para. 144.

[95] Evensen, *First Report*, *op. cit.* n. 43, at 155; *Second Report*, *op. cit.* n. 44, at 101.

[96] *1983 ILC Report*, YILC, 1983, Vol. II, Part Two, at 72, para. 246.

[97] *See* Caflisch, *op. cit.* n. 51, at 33-35. Mr. Barboza was in favour. *See* YILC, 1983, Vol. I, at 228, para. 25. Mr. Quentin- Baxter, Mr. Lacleta Munoz and Mr. McCaffrey were against. *See* YILC, 1984, Vol. I, at 251, para. 25; at 269, para. 34; at 245, para. 32.

[98] *See* McCaffrey, *Second Report*, *op. cit.* n. 16, at 133-134, paras. 179-184. McCaffrey seemingly regarded the obligation not to cause *appreciable* harm prescribed in draft Article 9 of Evensen's second report as a *due diligence* obligation. *See* McCaffrey, *Fourth Report*, *op. cit.* n. 2, at 241, para. (14), footnote 238.

[99] One way is to replace the words "appreciable harm to the rights or interests of [other watercourse States]" in the text of Article 9 of Evensen's second report by "injuries to". A second way is to replace the reference to causing *appreciable* harm by a reference to a State exceeding its equitable share, or depriving another State of its equitable share. A third way is to make express reference to the duty to refrain from causing harm, but to make it clear that, even if a State's utilization of a watercourse does cause harm, the duty is not violated so long as the utilization is an equitable one vis-à-vis the other State(s). McCaffrey himself believed the third alternative to be the best because it is more precise than the other two.

[100] *See* Caflisch, *op. cit.* n. 51, at 35. *First*, Mr. Calero Rodriguez and Mr. Barboza insisted on rejecting McCaffrey's proposal and maintaining the provision of draft Article 9 of Evensen's second report. However, between these two some difference can be found. Calero Rodriguez did not admit that the level of harm to be prevented, namely *appreciable* harm, was raised by the *equitable utilization* principle. This is shown by his remarks that "equitable use" is a use that causes no harm.

As to pollution harm, McCaffrey's line of reasoning was as follows. There are strong arguments in favour of treating the effects of pollution differently from other kinds of harm. In the light of the need to protect the environment so as to enable sustainable development and to preserve the earth for future generations, water uses that cause *appreciable* pollution harm to other watercourse States and to the environment could be regarded as being inequitable and unreasonable *per se*. In the case of pollution the ILC should adopt a rule of "*no appreciable pollution harm*" that is not qualified by the principle of *equitable and reasonable utilization*, without prejudice to any decision the ILC may take with regard to whether there should be an equitable-use exception to the general rule of "*no appreciable harm*" contained in draft Article 9. Even if such a rule of "*no appreciable harm*" were adopted, at least in relation to the pollution of international watercourses, it would still be mitigated to some extent by the manner in which States apply the principle of "*due diligence*". In so far as this element introduces considerations of "equity" when applying the rule of "*no appreciable harm*", the outcome could be the same as subjecting the rule to the doctrine of *equitable utilization*.[101] Reflecting this reasoning, draft Article 16, paragraph 2, of his fourth report[102] did not contain a limitation by the *equitable utilization* principle; nor was the relaxing role of *due diligence* specified in the proposed article. It was to be referred to only in the comment on the article.[103]

As no one uttered a rejection of McCaffrey's opinion that the ILC should, at least so far as pollution is concerned, reject the raising of the level of harm to be prevented, namely *appreciable* harm, by the *equitable utilization* principle,[104] it seems that the approach had received wide support from among the other members of the ILC. Yet there were those who, as did Mr. Calero

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To the contrary, Barboza, like McCaffrey, allowed such a rise. This is shown by his remarks that if the use in question falls within the equitable share of uses, it is impossible to speak of harm. He simply objected to using the term "harm" in speaking of "equitable use", because "harm" had a negative connotation. *See* YILC, 1986, Vol. I, at 224-225, paras. 8-10; at 226, para. 24. *Secondly*, Mr. Malek, reserved his position in this respect. However, he does not seem to have allowed such a rise because he stated that any use, however equitable, that caused or was likely to cause *appreciable* harm to another State would be regarded as wrongful. *See id.*, at 237, para. 9, at 238, paras. 16-17. *Thirdly*, some supported any one of the ways proposed by McCaffrey: for a supporter of either the first or second ways, *see* the Statement of Mr. Roucounas, *id.*, at 234, para. 35; for supporters of the third way, *see* the Statement of Mr. Flitan, *id.*, at 222, para. 6; Mr. Mahiou, *id.*, at 223, paras. 15- 16; Mr. El Rasheed Mohamed Ahmed, *id.*, at 229, para. 42; Mr. Balanda, *id.*, at 232, para. 13; Mr. Yankov, *id.*, at 239, para. 23.

[101] *See* McCaffrey, *Fourth Report*, *op. cit.* n. 2, at 241, paras. (12)-(14).

[102] *Loc. cit.*

[103] *Id.*, at 238-241, paras. (6)-(11).

[104] *See* the Statement of Mr. McCaffrey, YILC, 1988, Vol. I, at 164, para. 56. Many members expressly supported his opinion. *See* the Statement of Mr. Mahiou, *id.*, at 139, para. 2; Mr. Shi, *id.*, at 141, para. 17; Mr. Al-Khasawnhe, *id.*, at 147, para. 18; Mr. Sreenivasa Rao, *id.*, at 151, para. 46; Mr. Al-Qaysi, *id.*, at 158, para. 32.

Rodriguez, Mr. Beesley and Mr. Bennouna, opposed the different approach to pollution harm and to other kinds of harm, and who defended the thesis that the ILC should not allow a raising of the prohibited level for any kind of harm.[105] As to the classification of the obligation not to cause *appreciable* pollution harm to other watercourse States as an obligation of *due diligence*, opinions varied.[106] Draft Article 16 concerning pollution, though provoking various arguments among the ILC members, was finally submitted to the Drafting Committee without modification.[107]

At the stage of the Drafting Committee and the Provisional Draft, the dichotomy of pollution harm and harm from other causes advocated by McCaffrey was not adopted; instead Evensen's position was followed, not allowing a raising of the level of harm from whatever source to be prevented, namely *appreciable* harm, by the *equitable utilization* principle, unless a watercourse agreement provides otherwise. The ILC thus adopted the position that utilization of an international watercourse was not equitable – *prima facie*,

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[105] *See* the Statement of Mr. Calero Rodrigues, *id*., at 127, para. 5; Mr. Beesley, *id*., at 128, para. 15; Mr. Bennouna, *id*., at 134, para. 6.

[106] For supporters, *see* the Statement of Mr. Barboza, *id*., at 124, paras. 27-28, at 136, paras. 19-20; Mr. Ogiso, *id*., at 135, para. 15; Mr. Mahiou, *id*., at 139, para. 5; Mr. Arangio-Ruiz, *id*., at 141, para. 21; Mr. Beesley, *id*., at 156, para. 15. For objectors, *see* the Statement of Mr. Calero Rodrigues, *id*., at 127, paras. 4-5; Mr. Bennouna, *id*., at 134, paras. 5, 7; Mr. Koroma, *id*., at 153, para. 72; Mr. Thiam, *id*., at 159, para. 7, at 165, para. 69. For those showing some hesitation, *see* the Statement of Mr. Barsegov, *id*., at 145, para. 46; Mr. Shi, *id*., at 140, para. 13; Mr. Tomuschat, *id*., at 146, para. 8; Mr. Roucounas, *id*., at 152, para. 61. Those who expressed objection or hesitation were concerned about the increase of pollution as a result of the introduction of such an ambiguous concept as *due diligence*. However, Mr. Barsegov was afraid that the stipulation of too peremptory a prohibition could have an adverse impact on economic activity notwithstanding the introduction of the concept of *due diligence*. *See* the Statement of Mr. Barsegov, *id*., at 145, para. 46. While opinions of governments also varied, there were at least the following twelve States that clearly supported the concept of *due diligence*. [International Watercourse States] (b) Middle Riparian States: Canada, Hungary, Federal Republic of Germany, Austria, Ethiopia, the United States, the Netherlands. *See* for Canada, UN Doc., A/C.6/43/SR.29, at 4. para. 11; Hungary, SR.30, at 11, para. 37; Federal Republic of Germany, SR.31, at 3, para. 6; Austria, *id*., at 22, para. 102; Ethiopia, SR.32, at 4, paras. 15-17; the United States, A/CN.4/447, at 42; the Netherlands, A/CN.4/447/Add.3, at 5-6. (c) Lower Riparian States: Jordan. *See* SR.39, at 9, para. 39. [Non International Watercourse States] Japan, Jamaica, Bahrain, Bahamas. *See* for Japan, SR.31, at 5, para. 15; Jamaica, SR.35, at 13, para. 58; Bahrain, SR.37, at 11, para. 52; Bahamas, SR.39, at 23, para. 108. Those States which either supported strict liability or criticized the concept of *due diligence* were, to this author's knowledge, limited to five middle riparian States, namely, Venezuela, USSR, Greece, Ukranian SSR and Pakistan. *See* for Venezuela, SR.29, at 7, para. 29; USSR, SR.30, at 15, para. 56; Greece, SR.31, at 14, para. 58; Ukranian SSR, *id*., at 15, para. 66; Pakistan, SR.35, at 3-4, para. 9. Morocco, a middle riparian State, thought that it depended on circumstances in which the standard of *due diligence* obligation or strict liability, would apply. *See* SR. 31, at 19-20, para. 89.

[107] YILC, 1988, Vol. I, at 168, para. 4; *1989 ILC Report*, YILC, 1989, Vol. II, Part Two, at 123, para. 630.

at least – as soon as it causes other watercourse States *appreciable* harm.[108] This is shown in the following articles: Article 8 of the Drafting Committee's Draft[109] and Article 7 of the Provisional Draft, providing for the obligation to prevent *appreciable* harm; Article 23, paragraph 2, of the Drafting Committee's Draft[110] and Article 21, paragraph 2, of the Provisional Draft as to pollution prevention. On the other hand, it was not clarified at that stage whether the obligation to prevent *appreciable* (pollution) harm to other States was one to be based on *due diligence,* which would have a relaxing impact.[111]

Having thus reviewed the ILC discussions, the observations submitted by the various governments will now be examined. There were three kinds of positions: the first position supported the reasoning embodied in the Provisional Draft. It was the position taken by the Republic of Korea, a lower riparian State, as well as the United Kingdom and Germany, both middle riparian States. These latter two States suggested that the adjective "*apprecia-*

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108 *See 1988 ILC Report*, *op. cit.* n. 15, at 36, paras. (2)-(3); YILC, 1988, Vol. I, at 180, para. 35. This position was unclear as to Article 23, paragraph 2, of the Drafting Committee's Draft and Article 21 paragraph 2 of the Provisional Draft concerning the obligation to prevent pollution. However, it should be noted that this obligation was said to be a specific application of the general obligation contained in Article 7 of the Provisional Draft not to cause *appreciable* harm to other watercourse States. *1990 ILC Report*, *op. cit.* n. 49, at 161, para. (3). Moreover, it should also be noted that, during the debate on Article 16, paragraph 2, of McCaffrey's Draft, there was no objection among other members against taking such a strict position at least in the case of pollution.

109 YILC, 1988, Vol. I, at 180, para. 34.

110 YILC, 1990, Vol. I, at 282, para. 26.

111 The Drafting Committee itself seems to have understood that its draft Article 8 was a provision concerning responsibility for wrongful acts, not one concerning so-called "liability for lawful acts". It is because, in para. (8) of the commentary attached to this article, there initially existed the first sentence saying that "[a] breach of Article 8 would engage the international responsibility of the watercourse State in question". *See* the Statement of Mr. Calero Rodrigues, YILC, 1988, Vol. I, at 333, para. 61. However, certain members reserved their positions with regard to Article 8 and the commentary thereon by reason of the unclearness of the nature of the international responsibility in question. *See 1988 ILC Report*, *op. cit.* n. 15, at 35, footnote 111. *See* also the Statement of Mr. Graefrath, YILC, 1988, Vol. I, at 332, paras. 56-58; Mr. Barsegov, *id.*, at 332, para. 59. Moreover, a member objected to that sentence since the ILC had not yet considered the nature of international responsibility in question in sufficient depth. *See* the Statement of Mr. Calero Rodriguez, *id.*, at 333, para. 61. As a consequence, para. (8) of the commentary was deleted. *Id.*, at 333, para. 64. McCaffrey regarded Article 7 of the Provisional Draft adopted against this background as stipulating an obligation, which would lead to responsibility for wrongful acts but was an "obligation of result" that does not need the requirement of *due diligence*. *See* McCaffrey, *op. cit.* n. 74, at 519-525. There was no discussion about the nature of the obligation during the deliberations on Article 23, paragraph 2, and the commentary of the Drafting Committee's Draft concerning the obligation to prevent pollution. *See* YILC, 1990, Vol. I, at 282-285, paras. 26-63, at 364-365, paras 6-32; YILC, 1991, Vol. I, at 164, para. 59. Nevertheless, the adopted commentary, saying that *due diligence* shall be exercised in reducing the pollution, suggests that the obligation is one of *due diligence*. *See 1990 ILC Report*, *op. cit.* n. 49, at 162, para. (4).

*ble*" should be replaced by the adjective "*significant*".[112] The second position argued that the ILC should avoid the level of harm to be prevented, viz. *appreciable* harm, from being raised by the *equitable utilization* principle in case of pollution, while allowing such a rise in case of harm by other causes. The Nordic countries, Switzerland, Canada and the Netherlands, all middle riparian States, took this position. In addition, Switzerland suggested that the adjective "*appreciable*" be replaced by another one, like "*significant*", "*major*", "*substantial*" or "*serious*", which reflected more faithfully the *status quo* in customary law.[113] Finally, under the third position a raising was allowed in principle except in some cases, though not specified as those of pollution, where such a rise cannot be allowed. The United States, a middle riparian State, as well as Australia, a non-riparian State, were supporters of this view. Nevertheless, both States seem to have had in mind especially the case of pollution as a typical one where such a rise cannot be allowed. Besides, the United States was concerned that the adjective "*appreciable*" would set too low a threshold, and suggested that the adjective in question should be replaced by such adjectives as "*significant*", "*substantial*" or "*serious*".[114]

In view of the foregoing, at least the following two points can be made concerning pollution harm: first, if the level of harm to be prevented is set at a higher level, viz. *serious* harm, States seem to have generally accepted that such a level should not be raised any further by the *equitable utilization* principle subject to contrary treaty law; secondly, in so far as the adjective "*appreciable*" is understood to have the same meaning as "*significant*", many States seem to have accepted the strict position of the Provisional Draft as it sets the level in question at a lower level, viz. *appreciable* harm, and does not admit a raising by the *equitable utilization* principle of even that lower level, although this is as always subject to contrary treaty law. By way of argument supporting this second observation, it may be noted that draft Article 7 of Rosenstock's first report of 1993 provides that "a use which causes *significant* harm in the form of pollution shall be presumed to be an inequitable and unreasonable use" barring certain circumstances.[115] It is true that Article 7 of the 1994 Final Draft merely provides that the State of origin shall

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[112] *See* for the Republic of Korea, UN Doc.,A/C.6/43/SR.31, at 24, para, 109; Germany, A/CN.4/447, at 20; the United Kingdom, *id.*, at 35.

[113] *See* for Nordic Countries, *id.*, at 27; Switzerland, *id.*, at 47-48, 51, 53; Canada, UN Doc., A/CN.4/447/Add.1, at 4-5; the Netherlands, A/CN.4/447/ Add.3, at 9.

[114] *See* for the United States, UN Doc., A/CN.4/447, at 39-41; Australia, A/C.6/43/ SR. 30, at 4, para. 10. Poland, too, claimed to delete the "*appreciable* harm" threshold. However, it is because Poland, a lower riparian State, was afraid that the adoption of that threshold which lacks objective criteria might cause the increase of pollution, not because it regarded that threshold as too low. *See* A/CN.4/447/Add.1, at 10.

[115] Rosenstock, *First Report*, *op. cit.* n. 15, at 10-11, para. 25. The said circumstances are as follows: (a) a clear showing of special circumstances indicating a compelling need for *ad hoc* adjustment; and (b) the absence of any imminent threat to human health and safety. *Loc. cit.*

consult with the affected State over a higher level of harm to be prevented as a result of the *equitable utilization* principle, without making a distinction between pollution harm and other kinds of harm.[116] The purport of Rosenstock's Draft is specified in the commentary thereon.[117] However, it may be that the "second point" referred to above has not been accepted by those States, such as Switzerland and the United States, which insist on setting a higher level, viz. *serious* harm. However, it should also be borne in mind that the observations of the governments were submitted at the time when it was still unclear whether the obligation not to cause *appreciable* (pollution) harm would be one of *due diligence*, which would relax the strict position of the Provisional Draft. If this were the case, the number of States in support of a strict position would certainly become higher.[118]

Thus, the 1994 ILC Final Draft was elaborated, on the basis of which the 1997 Watercourses Convention[119] was drafted. As the positions of the Final Draft and the Convention are very similar, we shall focus on the Convention, mentioning the Final Draft for reference only.

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[116] *See 1994 ILC Report*, *op. cit.* n. 3, at 236. Professor Bourne regards the 1994 Final Draft as sustaining "the priority of the principle of *equitable utilization* over *no significant harm* rule". It is because "the Article [Article 7] does not prohibit a use that is equitable and reasonable and done with *due diligence*, even though the use causes *significant* harm to other watercourse States." Charles B. Bourne, "The primacy of the principle of equitable utilization in the 1997 watercourses convention", 35 CYIL (1997) 215 at 224.

[117] *See 1994 ILC Report*, *op. cit.* n. 3, at 241-242. McCaffrey thinks that "[t]he final version of the draft [the 1994 Final Draft] does not completely reverse the primacy of the *no-harm* rule but softens the regime considerably". The reason is that "[t]he change from prohibition [of *significant* harm as stipulated in the Provisional Draft] to process [aimed at avoiding *significant* harm as far as possible while reaching an equitable result in each concrete case as stipulated in the Final Draft] is a major one indeed." McCaffrey, "An assessment of the work of the International Law Commission", 36 NRJ (1996) 297 at 309. Likewise, Dr. Wouters regards the Final Draft as maintaining "the *no significant harm* rule as the governing rule of watercourse law", though in her view this position is not in conformity with State practice recognizing the primacy of the *equitable utilization* principle. Patricia K. Wouters, "An assessment of recent developments in international watercourse law through the prism of the substantive rules governing use allocation", 36 NRJ (1996) 417 at 424, 436-439. Interestingly, Professor Utton proposed that there should be a distinction in the Final Draft between water quantity matters where the *equitable utilization* principle should prevail and water quality matters where the "*no significant harm*" rule should prevail. Albert E. Utton, "Which rule should prevail in international water disputes: that of reasonableness or that of no harm?", 36 NRJ (1996) 635 at 639-641.

[118] In Article 7 of the Final Draft, the term "*due diligence*" is specified. *See id*., at 236. Article 7 of the 1997 Watercourses Convention, too, contains the concept of *due diligence*, as will be seen in the next Part.

[119] *See* 36 ILM (1997) 700.

## 5. THE POSITION OF THE 1997 WATERCOURSES CONVENTION

The relationship between the *No pollution harm* and the *Equitable utilization* principles was a contentious issue until the last minute of the discussions in the working group of the Sixth Committee of the United Nations General Assembly. The final solution was reached on 4 April 1997, the last day of the session, by treating Articles 5, 6 and 7 as one package, as proposed by the Chairman Chusei Yamada.[120] In the end, the relationship was dealt with in Article 7, which reads as follows:

> 1. Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of *significant* harm to other watercourse States.
> 2. Where *significant* harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.[121] (emphasis added)

Article 7 thus contains prescriptions on, on the one hand, *ex ante* prevention of harm in paragraph 1, and, on the other hand, *ex post* remedial measures[122] (elimination or mitigation of harm and discussion on the question of compensation) in paragraph 2. This two-faceted regulation followed the formulation of the Final Draft.[123]

The text of the article shows that no distinction is made between harm from pollution and harm by other causes. This position conformed to that taken by the Final Draft. Against this background one would suspect the existence of some influence of the following considerations: Article 7 deals with transfrontier harm in general, separate from Article 21 concerning prevention of harm caused by pollution;[124] and different treatment between

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[120] UN Doc., A/C.6/51/NUW/WG/CRP.94; A/C.6/51/SR.61,62,62/Add.1.

[121] 36 ILM (1997) 706.

[122] According to the 1992 decision by the ILC on the topic of the International Liability, those measures designed for mitigation or elimination of harm are classified not as prevention but as remedial measures. *See* UN Doc., A/47/10, at 128.

[123] *See 1994 ILC Report*, *op. cit.* n. 3, at 236.

[124] *See* the following statement of Mr. Bennouna: "What was most important was the relationship between Articles 5 and 7, which lay at the very heart of the topic. The new wording proposed for Article 7 was not clear, however, and also had the drawback of introducing the problem of pollution, which was already covered by Article 21, without establishing any connection with that article. In reducing harm to cases of pollution, the Special Rapporteur was really gong too far." YILC, 1993, Vol. I, at 99, para. 25.

pollution harm and harm other than pollution would be cumbersome for the statement of a general principle.[125]

By way of a second comment on Article 7 attention should be drawn to the fact that both paragraphs 1 and 2 contain the obligation to take "all appropriate measures". This expression was adopted instead of "exercise due diligence" as appeared in Article 7 of the Final Draft, without intention of modifying its substance. This means that the said obligation is meant to be a "*due diligence*" obligation.[126] According to the explanation of Chairman Yamada, the change in formulation was intended to stress the obligation of the State of origin while limiting the scope of that obligation without abandoning the element of "*due diligence*".[127]

### 5.1. *Ex ante* prevention of harm (Article 7, paragraph 1): rejection of "relaxation"

There is no reference to the *equitable utilization* principle in paragraph 1, and consequently there is no room for the "relaxation" of the obligation of *ex ante* prevention of harm. The State of origin is thus not allowed to justify *ab initio* the occurrence of harm beyond the "*significant*" level by arguing its "equitable use" of the watercourse.

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[125] Mr. Yankov stated as follows: "Commenting on article 7, relating to the obligation not to cause appreciable (or significant) harm, …the revised text proposed by the Special Rapporteur was unnecessarily cumbersome for the statement of a general principle. (…) …the presumption relating to pollution and the modalities and limits of that presumption, would not contribute to the general improvement of that article." YILC, 1993, Vol. I, at 100, para. 40. Similar statements were made by Mr. Razafindralambo. YILC, 1994, Vol. I, at 48, para. 30.

[126] The obligation to prevent environmental harm (Articles 21, 22 and 23) is clearly stated as a "*due diligence*" obligation. *See* 36 ILM (1997) 720.

[127] A letter dated 6 April 1998 from Mr. Yamada. According to him, this alteration of expression was a compromise with the request for the deletion of "*due diligence*" made by such environmentalist States as European States and the United States, as well as by some of the downstream States. There was also a criticism that the expression of "*due diligence*" confused questions of liability with the preventive duties. *See* the Comments by Finland, UN Doc., A/51/275, at 42. As regards the expression "take all appropriate measures", it was adopted in Article 2, paragraph 1, of the 1992 Convention on the Protection and Use of Transboundary Watercourses and Lakes [hereinafter, the Transboundary Watercourses Convention] (17 March 1992, Helsinki), 31 ILM (1992) 1312. This Convention is mentioned by the commentary on Article 7 of the 1994 Final Draft as an example applying the "*due diligence*" standard. *See* A/49/10, at 239.

### 5.2. *Ex post* remedial measures [elimination or mitigation of harm and discussion on the question of compensation] (Article 7, paragraph 2)

Contrary to paragraph 1, paragraph 2 does refer to the *equitable utilization* principle stipulated in Articles 5 and 6. However, it should be noted that paragraph 2 covers the case where *significant* harm occurs notwithstanding the effort to prevent it with "*due diligence*". If such harm occurs as a result of a lack of "*due diligence*", however, there would be an occurrence of a breach as foreseen in paragraph 1, with the consequent obligation to stop and undo the (unlawful) act immediately; that is, by eliminating the harm and by making reparation, without considering an eventual "equitable use".

#### *5.2.1. The situation where "relaxation" can be argued: reduction of continuous pollution (*ex post *prevention of harm)*

It should be examined whether the "relaxation" of the *no pollution harm* principle can be argued in the phase of *ex post* remedial measures, as covered by paragraph 2.

Although harm prevention and *ex post* remedial measures might look contradictory, when continuous harm occurs, its elimination or mitigation by way of *ex post* remedial measures may be achieved by preventing additional harm.[128] Since the *no pollution harm* principle operates in this situation, the "relaxation" of this principle could be considered.

On the other hand, when the elimination or mitigation of harm refers to pollution which has already reached other States, or when compensation is paid for harm which has already occurred in other States, the *no pollution harm* principle does not operate; the measures required here concern the restoration of the original situation, and not *ex post* prevention of harm. Therefore, there is no place for any "relaxation" of the *no pollution harm* principle.[129]

#### *5.2.2. A negative attitude toward "relaxation"*

Article 7, paragraph 2, shows the negative attitude toward "relaxation", especially in the case of pollution harm. First, the expression "having due regard to" the *equitable utilization* principle in paragraph 2 is the result of

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[128] This played a role in the *Trail Smelter* case.

[129] There are some arguments on the nature of the obligation to eliminate or mitigate the harm that has already occurred notwithstanding the effort to prevent it with "*due diligence*", as well as on the nature of the obligation to compensate for the harm thus caused. Barboza thinks these obligations as reflecting the concept of "liability for lawful acts". *See* YILC, 1994, Vol. I, at 177, para. 55.

the rejection of other expressions such as "consistent with"[130] or "without prejudice to",[131] as proposed by those States which strongly asserted the element of "relaxation".[132]

Secondly, it is to be noted that the commentary on Article 7 of the Final Draft states that "[t]he burden of proof for establishing that a particular use is equitable and reasonable lies with the State whose use of the watercourse is causing *significant* harm".[133]

Thirdly, the same commentary points out that a use that causes "*significant* harm to human health and safety" or "any other form of extreme harm" should be regarded as "inequitable and unreasonable".[134] This appears to imply a rejection of the "relaxation" of the obligation to prevent *irreparable* or *serious* harm, especially in the case of pollution, even in the phase of *ex post* prevention of harm.

## 5.3. Summing-up

From the above inquiry we can summarize the position of the 1997 Watercourses Convention towards transfrontier pollution harm as follows: first, in the phase of *ex ante* prevention of harm, it does not allow the level of harm to be prevented (=*significant* harm) to be raised by the *equitable utilization* principle; secondly, in the phase of *ex post* prevention of harm, it allows such a rise, but puts the burden of proof for establishing the equitableness and reasonableness of the use on the State of origin; and, finally, even in the phase of *ex post* prevention of harm, the Convention does not allow a rise to such an extent that *irreparable* or *serious* harm would occur.

Meanwhile, as Professor Bourne insists, "it would seem to be impossible to argue successfully that the provisions of this Convention are accepted as customary law by international community".[135] Yet we would suggest that

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[130] *See* Revised Text of Article 7 Proposed by Austria, Canada, Portugal, Switzerland and Venezuela, UN Doc., A/C.6/51/NUW/WG/CRP.72.

[131] For example, Rumania, UN Doc., A/C.6/51/NUW/WG/CRP.23; Turkey, /CRP.24; Ethiopia/ CRP.51.

[132] Those States which strongly asserted the "relaxation" expressed their regret in this respect at the United Nations General Assembly where the 1997 Watercourses Convention was adopted. *See op. cit.* n. 82. However, the expression "having due regard to" was adopted in place of the expression "taking into account", which means that some considerations were given to those States. *See* UN Doc., A/C.6/51/NUW/WG/CRP.94.

[133] *1994 ILC Report*, *op. cit.* n. 3, at 241-242, para. 14. The Commentary to the 1994 Final Draft was also referred to when the 1997 Watercourses Convention was drafted. *See* UN Doc., A/51/869, at 6.

[134] *1994 ILC Report*, *op. cit.* n. 3, at 242, para. 14.

[135] Bourne, *op. cit.* n. 116, at 231. In the Working Group of the sixth Committee of the United Nations General Assembly, Articles 5, 6 and 7 as a package were adopted by 38 votes to 4, with 22 abstentions, and the Convention as a whole was adopted by 42 votes to 3, with 19 abstentions.

the majority of the international community does not want the *no pollution harm* principle to be relaxed too easily through application of the *equitable utilization* principle.[136]

## 6. AN EXAMINATION OF SOME JUDICIAL PRECEDENTS AND STATE PRACTICE

The position against the "relaxation" of the *no pollution harm* principle by the *equitable utilization* principle is compatible with judicial precedents and State practice. However, though the obligation to prevent at least a *serious* level of pollution harm is well established under customary international law, it is still uncertain whether that is equally the case with the obligation to prevent an *appreciable* (=*significant*), viz. less than *serious*, level of pollution harm.[137] Therefore, in analysing current customary international law, we shall limit our examination to the question whether the level of pollution harm to be prevented may be raised further from the *serious* level by the *equitable utilization* principle. With regard to the issue of the *appreciable* (=*significant*) level of harm, we shall confine ourselves to indicating recent tendencies of State practice.

As to international courts and tribunals,[138] reference should be made to the *Trail Smelter* case, where the decision was made based on the analogy between water pollution and air pollution, and where the consideration of

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UN Doc., A/C.6/51/ SR.62, at 3, para.8; SR.62/Add.1, at 2, para. 3. In the 99th plenary meeting of the United Nations General Assembly, the Convention was adopted by 103 votes to 3, with 27 abstentions. A/51/PV.99, at 8.

[136] Bourne is ready to accept the proposition that an act which causes *significant* harm is presumed to be necessarily unreasonable and inequitable if this presumption is rebuttable. Bourne, *op. cit.* n. 116, at 227. Therefore, there might be little contradiction between his and our positions; we have no intention to allege that this presumption is irrebuttable. We allege, however, that *irreparable* or *serious* harm caused by pollution should be *regarded* (not *presumed*) as inequitable and unreasonable, therefore, without allowing for any rebuttal.

[137] An author points out that the level of pollution harm to be prevented under customary international law recently becomes lowered from the *serious* level to the *significant* level. K. Sachariew, "The definition of thresholds of tolerance for transboundary environmental injury under international law: development and present status", 37 NILR (1990) 193 at 205-206. Moreover, in the Sixth Committee of the United Nations General Assembly in 1988, some representatives of the governments explicitly objected to replacing the adjective *appreciable* by that of *substantial* or *serious* during the deliberations on draft Article 16, paragraph 2, of McCafrrey's fourth report prescribing the obligation to prevent pollution. *See* the Statement of the Representative of Qatar, UN Doc., A/C.6/43/SR.30, at 2, para. 3; Australia, *id.*, at 4, para. 10. But, to the contrary, other representatives supported such a replacement. *See* the Statement of the Representative of France, SR.26, at 5-6, para. 19; German Democratic Republic, SR.31, at 4, para. 10; Bahrain, SR.37, at 11, para. 52; Thailand, SR.39, at 5, para. 18.

[138] As regards this question, it seems that no suggestion can be obtained from the *Lake Lanoux* arbitral award of 1957. Professor Handl regards the award as admitting the application of the

"equitable use" was included in the obligation to prevent, with *due diligence*, *serious* transfrontier pollution harm.[139] Consequently, the Tribunal did not accept the "relaxation" of the obligation not to cause *serious* pollution harm.[140]

Turning to decisions of domestic courts with reference to the rules of international law concerning pollution of international watercourses, the District Court of Rotterdam in its final decision on the *Mines de Potasse d'Alsace* case of 1983 held that there did not exist "any rule of international law" which justified the derogation from the State obligation not to cause *substantial* injury.[141] Therefore, this decision, too, can be regarded as denying the "relaxation" of the obligation not to cause *serious* pollution harm.[142]

Thirdly, we shall examine decisions on pollution matters of the Supreme Court of the United States, which dealt with the quasi-sovereign rights of the States of the Union and which were also invoked in the *Trail Smelter* arbitral award.[143]

In *State of Missouri v. State of Illinois*, of 1906, concerning sewage pollution of the Illinois river, the Court stated, "Before this court ought to

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*balancing of interests* concerning pollution. It is because in his view the tribunal and the government of Spain understood that Article 12 of the Additional Act to the Treaty of Bayonne, on the basis of which the tribunal seemed to have judged the case, was subject to the *principle of good neighbourliness*. Handl, *op. cit.* n. 5, at 180. It is true that in some authors' views the essence of the *principle of good neighbourliness* lies in the *balancing of interests*. Others, however, think that it lies in the mere tolerance of a certain degree of harm. *See* Lammers, *op. cit.* n. 2, at 568-569. Therefore, it seems rather unreasonable to understand the award as Handl does, paying sole attention to the application of the *principle of good neighbourliness*. Moreover, it should also be noted that the argument of Spain referring to the *principle of good neighbourliness* was not limited to pollution but related to water utilization in general. *See* 12 RIAA, at 304.

[139] *See* Bourne, "International law and pollution of international rivers and lakes", 6 *Univ. of British Columbia Law Review* (1971) 115 at 131.

[140] This can also be understood by the fact that the arbitral tribunal ordered in its award the implementation of a rather strict prevention régime which would, in its opinion, "probably result in preventing any damage of a material nature". *See* 3 RIAA, at 1980.

[141] 15 NYIL (1984) at 481.

[142] This judgment often referred to "*balancing of interests*" in applying Dutch delictual law which is seen, in the view of the court, as compatible with international law. But this "*balancing of interests*" was used as a criterion to decide whether or not *due diligence* under Dutch delictual law was absent, not as a doctrine to raise the level of harm to be prevented. *See id.*, at 474-479.

[143] The Arbitral Tribunal held as follows: "...the law followed in the United States in dealing with the *quasi-sovereign rights* of the States of the Union, in the matter of air pollution, whilst more definite, is *in conformity with the general rules of international law.* " 3 RIAA, at 1963. "*...it is reasonable to follow by analogy, in international cases*, precedents established by that court [the Supreme Court of the United States] in dealing with controversies between States of the Union or with other *controversies concerning the quasi-sovereign rights of such States*, where no contrary rule prevails in international law and no reason for rejecting such precedents can be adduced from the limitations of sovereignty inherent in the Constitution of the United States [*emphasis added*]." *Id.*, at 1964.

intervene, the case should be of *serious* magnitude, clearly and fully proved", and dismissed without prejudice the claim for an injunction by the complainant because of insufficient proof of the causal relationship between the sewage pollution and the harm.[144] In *People of the State of New York v. State of New Jersey*, of 1921, concerning sewage pollution of New York bay, the complainant's claim for an injunction was also dismissed without prejudice, for the same reason.[145] In neither of these decisions was the dismissal of the claim based on the allowance of the "relaxation" of the obligation not to cause *serious* pollution harm.

In *New Jersey v. City of New York*, of 1931, the claim for an injunction against dumping of noxious materials into the ocean was allowed. In this judgment a "reasonable time" was accorded to the City of New York before the injunction should be issued. This indicates the consideration of "equitable use". However, because the dumping itself was prohibited completely,[146] the decision cannot be regarded either as allowing the "relaxation" of the obligation not to cause *serious* pollution harm.

The next case that comes to mind is *State of Georgia v. Tennessee Copper Company*, of 1907 and 1915, concerning air pollution by sulphur dioxide.[147] In its decision of 1907, the Court did not exclude "the considerations that equity always takes into account".[148] Nevertheless, the Court rejected the defendant's argument, holding, "we cannot give the weight that was given them [the considerations that equity always takes into account] in argument to a comparison between the damage threatened to the plaintiff and the calamity of a possible stop to the defendant's business, the question of health, the character of the forests as a first or second growth, the commercial possibility or impossibility of reducing the fumes to sulphuric acid, the special adaptation of the business to the place".[149] Consequently, the Court held, "[i]t is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas... ."[150] In its decision of 1915, the Court issued a decree to reduce partially the amount of discharge of the sulphur contained in the fumes,[151] which was to "diminish materially the present probability of damage to its [the State of Georgia's] citizens".[152] As a result these two decisions can

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[144] *State of Missouri v. State of Illinois and the Sanitary District of Chicago*, 200 US (1906) 496 at 521-526.

[145] *People of the State of New York v. State of New Jersey and Passaic Valley Sewerage Commissioners*, 256 US (1921) 296 at 312-314.

[146] *State of New Jersey v. City of New York*, 283 US (1931) 473 at 483.

[147] *State of Georgia v. Tennessee Copper Company and Ducktown Sulphur, Copper, & Iron Company*, 206 US (1907) 230, 237 US (1915) 474.

[148] 206 US 238.

[149] *Loc. cit.*

[150] *Loc. cit.*

[151] 237 US 478.

[152] *Id.*, at 477.

be regarded as denying the "relaxation" of the obligation not to cause *serious* pollution harm.

Lastly, we have examined *New Jersey v. New York*, of 1931, concerning the diversion of water from the Delaware River, which also dealt with the quasi-sovereign rights of the States of the Union, but which was not invoked in the *Trail Smelter* arbitral award.[153] In this case, the plaintiff had argued, as one of the reasons for demanding an injunction against the diversion intended by the defendant, the possibility that injury to the oyster industry would occur because of chloride pollution derived from that diversion.[154] Although the Court did emphasize the principles of "equitable apportionment" and "equitable division",[155] such emphasis on the *equitable utilization* principle can be regarded as quite natural because the main issue of the case rested on the problem of diversion.[156] Moreover, although the Court did not admit a full-scale injunction, it prohibited the diversion of water in excess of 440 million gallons daily,[157] after having confirmed that "the taking of 600 millions of gallons daily will [would] not materially affect the River or its sanitary condition..."[158] Therefore, this decision, too, cannot be regarded as allowing the "relaxation" of the obligation not to cause *serious* pollution harm.[159]

Most of the US judicial precedents examined here dealt with conflicts between a State (or company) that had newly started industrial activities involving pollution and a State (or people) trying to protect its (their) acquired interests, viz. a clean environment. Despite these specific contexts, the analysis leads us to the following conclusion: under customary international law, a higher minimum level of the harm to be prevented, viz. *serious* harm, is not to be raised further by the *equitable utilization* principle unless so prescribed by agreement. This conclusion holds true of *ex ante* as well as *ex post* prevention of harm, as is shown by the *Trail Smelter* and the *State of Georgia v. Tennessee Copper Company* cases. Moreover, the conclusion seems to be supported by the analysis of treaties[160] and other State practice.[161] For

[153] *New Jersey v. New York et al.*, 283 US (1931) 336.

[154] *Id.*, at 343.

[155] *Id.*, at 343-344.

[156] This may explain the non-invocation of the decision by the *Trail Smelter* arbitral award.

[157] *Id.*, at 346.

[158] *Id.*, at 345.

[159] *Contra* Bourne, *op. cit.* n. 139, at 131.

[160] Although there are many treaties providing for the *equitable utilization* principle, few among them include provisions on pollution. *See* McCaffrey, *Second Report*, *op. cit.* n. 16, at 134-138. There are also many treaties providing for the obligation to prevent pollution of international watercourses, but most of them merely stipulate that a certain kind or degree of pollution harm shall be prevented, or co-operation to this end shall be made. *See* Lammers, *op. cit.* n. 2, at 115-123; Nollkaemper, *op. cit.* n. 12, at 68. This fact could be invoked for the argument that the "relaxation" of the obligation not to cause *serious* pollution harm cannot be allowed. Several treaties referring to the *equitable utilization* principle in the context of the obligation to prevent pollution do not make

example, in the *Poplar River Project* incident[162] the United States, taking account of the *equitable utilization* principle, had tolerated the occurrence of some aggravation of the water quality caused by the pollution originated from a Canadian coal-fired power plant.[163] Canada expressed its intention to adopt measures to reduce pollution, in accordance with international law, whereupon the United States expressed its satisfaction.[164]

The agreement between Finland and Sweden concerning frontier rivers of 1971[165] allows "*balancing of interests*" in respect of pollution (Chapter 6, Article 6) and even allows those operations likely to cause "*substantial* inconvenience" "if special reasons exist for so doing" (the first half of Chapter

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their positions clear in this respect. For example, *see* Article 4, paragraph 10, of the Indus Waters Treaty Concluded between India and Pakistan (19 September 1960, Karachi), *Legislative texts and treaty provisions concerning the utilization of international rivers for other purposes than navigation* [hereinafter, *Legislative Texts*], UN Doc., ST/LEG/ SER.B/12, at 300, No. 98.

[161] An example can be shown by the *Sandoz* blaze of 1986 where the Rhine river was polluted by the flow of chemicals run from a factory in Switzerland. However, in this accident, the claims for indemnity were disposed of at the private level, and State responsibility of Switzerland was not called into question. Hans Ulrich Jessurun D'Oliveira, "The *Sandoz* blaze: the damage and the public and private liabilities", in Francesco Francioni & Tullio Scovazzi (eds.), *International responsibility for environmental harm* (London: Graham & Trotman, 1991) 429 at 439. As regards State practice before 1983, *see* Lammers, *op. cit.* n. 2, at 165-341.

[162] In this incident, the matter was referred to the International Joint Commission (IJC) between the United States and Canada established by the Boundary Waters Treaty of 1909, on the ground that the construction of a thermal power station by Canada in the Poplar river basin might cause pollution harm to the United States. *See* Eleanor C. McDowell, *1976 Digest of United States practice in international law* [hereinafter, *1976 Digest*], (Washington D.C.: U.S. Government Printing Office, 1977), at 590-594. *See* also Marian Lloyd Nash, *1978 Digest* (1980) at 1116-1121; *1979 Digest* (1983) at 1103-1111, 1612-1616. Although the IJC has the power to render a decision by a majority, reports of the IJC shall not be regarded as decisions, and shall in no way have the character of an arbitral award. *See* Articles 8, 9 and 10 of the Treaty between Great Britain and the United States Relating to Boundary Waters, and Questions Arising between the United States and Canada (11 January 1909, Washington), *Legislative Texts*, *op. cit.* n. 160, at 260, No. 79.

[163] In 1981 the IJC, taking account of the *equitable utilization* principle, decided that, while the use of waters would cause some adverse water quality impacts on uses of the United States, this fact alone would not constitute an automatic violation of Article 4 of the Boundary Waters Treaty of 1909. Moreover, the IJC stated as follows: "issues of equitable apportionment and the obligations of Article 4 must be examined at the same time"; "water quality objectives can equally well be viewed as one of the conditions of an equitable apportionment". *See* Wouters, "Allocation of the non-navigational uses of international watercourses: efforts at codification and the experience of Canada and the United States", 30 CYIL (1992) 43 at 75. Both Parties accepted the conclusion of the report of the IJC. In this incident air pollution was at the same time emanated from Canada's power station in question. This would cause the reduction of permissive pollution emission quantity allocated to power stations in the United States, and therefore might cause a certain degree of economic damage. *See* Quentin- Baxter, *Fourth Report on Liability*, YILC, 1983, Vol. II, Part One, at 211, para. 36.

[164] McCaffrey, *Fourth Report*, *op. cit.* n. 2, at 236, para. 87.

[165] (16 September 1971, Stockholm), 825 UNTS (1972) at 191. However, it should be noted that this agreement prescribed rights and obligations between private persons, not between States.

6, Article 7) on the condition of payment of compensation (Chapter 7, Article 1). At the same time, however, the agreement provides that "the operations may not be carried out" "[w]hen the anticipated inconvenience entails a *substantial* deterioration in living conditions for a large number of people or a *significant* loss from the standpoint of nature conservancy or any similar *substantial* damage to the public interest" (the latter half of Chapter 6, Article 7).[166]

As to *appreciable* (=*significant*) harm, there are many treaties stipulating the obligation to prevent such a level of harm through pollution,[167] as well as some State practice recognizing the obligation to prevent pollution harm even less than the *appreciable* level.[168] Like the *Poplar River Project* incident mentioned above, however, there is also some State practice tolerating the occurrence of pollution harm to some extent by taking account of the *equitable utilization* principle even in the phase of *ex ante* prevention of harm. On the other hand, recent tendencies in State practice seem gradually to accept a strict position as manifested by the obligation not to cause an *appreciable* (=*significant*) level of harm while not allowing any "relaxation" of that obligation, in both the *ex ante* and *ex post* phases of prevention of harm. This is shown by the 1992 Transboundary Watercourses Convention,[169] which seems to recognize clearly that no deviation is allowed from the obligation "to *prevent*, *control* and *reduce* pollution of waters causing or likely to cause transboundary impact" (Article 2, paragraph 2(a)), even by invoking the *equitable utilization* principle (the same paragraph(c)).[170]

## 7. THE 1997 DECISION OF THE INTERNATIONAL COURT OF JUSTICE IN THE *GABČÍKOVO-NAGYMAROS PROJECT* CASE[171]

Although in this case there was no question of transfrontier pollution moving from Slovakia to Hungary, Hungary alleged that Slovakia's unilateral

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[166] The harm not allowable in the presence of a water agreement should still be less allowable in the absence of it.

[167] *See 1988 ILC Report*, *op. cit.* n. 15, at 36-37, para. (7).

[168] For example, in the *Colorado River* incident where the United States' drainage of saline waters into the Colorado River caused harm to Mexico, the maximum discharge quantity of salinity was said to be set down in the final agreement of 1973 between the two States so as to eliminate any adverse consequence of the drainage in question. *See* Herbert Brownell & Samuel D. Eaton, "The Colorado River salinity problem with Mexico", 69 AJIL (1975) 255 at 270.

[169] 31 ILM (1992) 1312.

[170] *Id.*, at 1315. Article 2, paragraph 7, of the Convention provides that "[t]he application of this Convention shall not lead to the deterioration of environmental conditions nor lead to increased transboundary impact". *Id.*, at 1316.

[171] *See op. cit.* n. 25. On 3 September 1998, Slovakia asked the ICJ to render an additional Judgment because of the unwillingness of Hungary to implement the 1997 Judgment. *See ICJ Press Communiqué* 98/28 (3 September 1998). As of 31 March 2003, the ICJ has not done so yet.

diversion of water of the Danube river ("Variant C") caused (the risk of) environmental harm within the territory of Hungary.[172] As a result, the relationship between the *equitable utilization* principle and the *no harm* principle became involved. This case will be examined separately because of its importance for the study of international law.

On the one hand, Hungary argued for the priority of the *no harm* principle over the *equitable utilization* principle, by invoking Professor McCaffrey's following comment:[173] "[T]he primacy of the "*no harm* principle" means that the fundamental rights and obligations of States with regard to their uses of an international watercourse are more definite than they would be if governed in the first instance by the more flexible (and consequently less clear) rule of *equitable utilization*."[174]

On the other hand, Slovakia rebutted Hungary's argument, regarding the above statement as affirming "that it was felt not sufficient for the question of harm and damage to be addressed only indirectly through the provisions on equitable use",[175] as is stated in the Commentary on Article 7 of the 1994 ILC Final Draft.[176] According to Slovakia, "[e]ven if Hungary were able to show that the Project had caused it *significant* harm, this would not establish a breach of an obligation by Slovakia. It would instead be viewed in the overall context of the regime of the *equitable utilization* which Hungary helped to devise and construct, and in which Hungary is free to participate."[177]

In the 1997 judgment the ICJ did not express itself on the relationship between the *equitable utilization* principle and the *no harm* principle.[178] It did not apply the latter principle[179] though recognizing its existence under

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[172] *See Hungary's Memorial* Vol. 1 [hereinafter, HM] (2 May 1994), at 167-179, paras. 5.106-5.140; *Hungary's Counter-Memorial* Vol. 1 [hereinafter, HC-M] (5 December 1994), at 153-174, paras. 3.15-3.85; *Hungary's Reply* Vol. 1 [hereinafter, HR] (20 June 1995), at 90-99, paras. 2.50-2.74. Slovakia denied the existence of (the risk of) harm to Hungary. *See Slovakia's Memorial* Vol. 1 [hereinafter, SM] (2 May 1994) at 292, para. 7.44, at 305, para. 7.85; Slovakia's Counter-Memorial Vol. 1 [hereinafter, SC-M] (5 December 1994), at 344, para. 11.44; *Slovakia's Reply* Vol. 1 [hereinafter, SR] (20 June 1995), at 150-151, para. 6.85.

[173] HM, at 231, para. 7.79.

[174] McCaffrey, op. cit. n. 74, at 510.

[175] SC-M, at 338, paras. 11.24-11.26.

[176] *See 1994 ILC Report*, *op. cit.* n. 3, at 236.

[177] SR, at 152, para. 6.87.

[178] Alan E. Boyle, "The *Gabčíkovo-Nagymaros* case: new law in old bottles", 8 *Yearbook of International Environmental Law* [hereinafter, YIEL] (1997) 13 at 16; Stephen Stec & Gabriel E. Eckstein, "Of solemn oaths and obligations: the environmental impact of the ICJ's decision in the case concerning the *Gabčíkovo-Nagymaros* project", *id.*, 41 at 46.

[179] There seem to be at least three reasons, in addition to the purpose of avoiding the decision on the relationship between the *equitable utilization* principle and the *no harm* principle, why the ICJ did not apply the *no harm* principle in this case. First, it was difficult to decide on the existence of (the risk of) actual harm to Hungary caused by putting into operation of Variant C. *See op. cit.* n. 172. Secondly, It was difficult to decide on Slovakia's lack of "*due diligence*". *See* HC-M, at

customary international law;[180] instead it applied the *equitable utilization* principle[181] on a customary basis.[182] Some authors are of the opinion that the judgment actually stands for the priority of the *equitable utilization* principle over the *no harm* principle.[183] Among others, Professor Bourne[184] argues as follows:

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256, para. 6.133; SC-M, at 338, para. 11.26, at 341-343, paras. 11.37-11.42. Lastly, since in this case the Parties had already concluded a watercourse agreement, i.e., the 1977 Treaty concerning the construction and operation of the *Gabčíkovo-Nagymaros* System of Locks [hereinafter, the 1977 Treaty], there was some room for finding Hungary's consent in it to tolerate the possible harm. *See* SM, at 292, para. 7.44. *See* also Separate Opinion of Judge Koroma, ICJ Rep. 1997, at 149. Judge Oda, however, while respecting the agreement between the Parties on the diversion of water of the Danube, states as follows: "if the operation of the Cunovo dam diverting waters into the old Danube river bed has caused any tangible damage to Hungary, Slovakia should bear the responsibility for this mishandling of the division of waters." Dissenting Opinion of Judge Oda, ICJ Rep. 1997, at 166, para. 26.

[180] The ICJ cited the following passage of the *ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* of 8 July 1996: "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." (ICJ Rep. 1996, at 241-242, para. 29.) The Judgment, ICJ Rep. 1997, at 41, para. 53. No judge denied the existence of the *no harm* principle under customary international law; some judges even expressly referred to it. *See* Separate Opinion of Judge Koroma, *id.*, at 149; Dissenting Opinion of Judge Herczegh, *id.*, at 193. Both Parties, too, admitted it. *See* HM, at 219-223, paras. 7.45-7.56; HC-M, at 224-226, paras. 6.34-6.41; HR, at 133-134, paras. 3.56-3.57; SR, at 151, para. 6.86. Article 3, paragraph 1(b), of the Convention concluded between Hungary and Czechoslovakia on the Regulation of Water Management Issues of Boundary Waters (31 May 1976) provides as follows: "The Contracting Parties do hereby undertake that they shall maintain in good condition the beds of watercourses, reservoirs, and equipment located on boundary waters on their own territories and shall operate them in such a manner as to cause no damage to each other." *See* HM, at 215, paras. 7.25-7.26 and Annex 19.

[181] The ICJ held as follows. First, "the operation of Variant C led Czechoslovakia to appropriate ... between 80 and 90 per cent of the waters of the Danube", depriving Hungary of "its basic right to an equitable and reasonable sharing of the resources of an international watercourse". The Judgment, ICJ Rep. 1997, at 54, para. 78. Secondly, "Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube ... failed to respect the proportionality which is required by international law". *Id.*, at 56, para. 85.

[182] While in the 1977 Treaty there was no provision expressly providing for the *equitable utilization* principle, the ICJ recognized the existence of that principle under customary international law by invoking the 1929 PCIJ *River Oder* case and the 1997 Watercourses Convention. *See id.*, at 56, para. 85. *See* also, Lammers, "The *Gabčíkovo-Nagymaros* case seen in particular from the perspective of the law of international watercourses and the protection of the environment", 11 *Leiden Journal of International Law* (1998) 287 at 306.

[183] Jochen Sohnle, "Irruption du droit de l'environnement dans la jurisprudence de la C.I.J.: l'affaire *Gabčíkovo-Nagymaros*", 102 RGDIP (1998) 85 at 113, footnote 115.

[184] Charles B. Bourne, "The case concerning the *Gabčíkovo-Nagymaros* project: an important milestone in international water law", 8 YIEL (1997) 6.

> This denial [of absolute priority to any factor relating to the utilization of the waters of the Danube in this case][185] was, in effect, a rejection by the ICJ of the more general principle...that a utilization of a watercourse is not lawful if it will cause *significant* harm to other watercourse States – a "*no significant harm*" rule.[186] (...) Significantly, the Court made no reference to Articles 20 and 21 of the [1997 Watercourses] Convention, which deal, in particular, with protection and preservation of ecosystems and with pollution that may cause *significant* harm to the environment, thus, giving no credibility to the notion of the existence of a "*no significant harm*" rule that qualifies the principle of *equitable utilization*.[187]

However, the following three arguments may be put forward against his reasoning: first, the ICJ denied absolute priority to any factor through the interpretation of the objectives of the 1977 Treaty without considering the relationship between the *equitable utilization* principle and the *no harm* principle under customary international law; secondly, the absence of a reference to the "*no significant harm*" rule, which forms the basis of Article 20 and is expressly stipulated in Articles 7 and 21 of the 1997 Watercourses Convention, is a natural consequence of the ICJ's non-application of the *no harm* principle in this case;[188] finally, there might have been some hesitation on the part of the ICJ to invoke the "*no significant harm*" rule as stipulated in the 1997 Watercourses Convention because the threshold of "*significant*" was thought to be lower than that of "*serious*" which was recognized under customary international law.[189]

For these reasons the case seems to offer little clarity about the relationship between the two principles under customary international law. In any case it may be said from this case that it is not necessary[190] to make a pro-

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[185] *See* the Judgment, ICJ Rep. 1997, at 77, para. 135.

[186] Bourne, *op. cit.* n. 184, at 7-8. He also adds as follows: "It [the judgment] establishes that the protection of the environment has no absolute priority over other considerations, particularly in the case of developments involving the utilization of international watercourses. These developments must be reasonable and equitable, a matter to be judged in the light of all relevant factors. Among these factors, the protection of the environment of other States is of high, but not overriding, importance." *Id.*, at 11.

[187] *Id.*, at 10.

[188] *See op. cit.* n. 179.

[189] *See 1987 ILC Report*, *op. cit.* n. 15, at 29, para. 16; *1988 ILC Report*, *op. cit.* n. 15, at 36, para. 5; *1994 ILC Report*, *op. cit.* n. 3, at 211-212, paras. 13-15.

[190] *See* Boyle, *op. cit.* n. 178, 8 YIEL (1997) 16; Paulo Canelas de Castro, "The judgment in the case concerning the *Gabčíkovo-Nagymaros* project: positive signs for the evolution of international water law", *id.*, 21 at 23. However, it seems to become necessary to decide on the said relationship where the ICJ itself has to determine the exact range of the "equitable use" or the existence of a breach of the *no (pollution) harm* principle.

nouncement on the said relationship in order to give an indication on a guideline for the negotiations to be held after a judgment.[191]

## 8. AN OVERALL APPRAISAL

On the basis of the foregoing examination, the following two observations may be made about pollution harm: first, under customary international law, the level of harm to be prevented, viz. *serious* harm, may not be raised further by the *equitable utilization* principle, in the phase of *ex ante* as well as in that of *ex post* prevention of harm; *secondly*, according to recent tendencies in State practice, a strict position is gradually being accepted by determining a lower level of harm to be prevented, viz. *appreciable* (=*significant*) harm, and by rejecting a raising of that level by the *equitable utilization* principle both in the phase of *ex ante* and in that of *ex post* prevention of harm, subject to contrary regulation by treaty. It may thus be concluded that the position of the 1997 Watercourses Convention is indeed in accord with the judicial precedents and State practice including its recent tendencies. Seen from this same perspective, the position of the ILA, which to a great extent recognized the "relaxation" of the obligation not to cause the higher level of harm as denoted by the term "*substantial* injury", should be criticized for lacking a basis in the positive law. In the same way, Caflisch's suggestion to adopt the "mitigated no-substantial-harm principle" for pollution harm might well maintain its validity so far as no *serious* harm occurs.

In conclusion, the *equitable utilization* principle, whose essence lies in the *balancing of interests*, is not allowed to raise the level of pollution harm to be prevented to a level as high as *serious* harm, and its operation is apt to remain extremely limited even in that case.[192] This conclusion would of course be criticized by those who support Caflisch's view because of the ambiguity of such concepts as *serious* harm and *appreciable* (=*significant*) harm. While it is true that these concepts are ambiguous, yet it seems that they are simpler and more objective than both the *equitable utilization* principle, which requires all relevant factors to be taken into account, and the "mitigated no-substantial-harm principle", which admits a high disproportion

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[191] *See* the Judgment, ICJ Rep. 1997, at 75-76, para. 131. Hungary asked the ICJ to indicate such a guideline during the oral proceedings. *See* the statement of Dr. Szenasi (Hungary), *ICJ Verbatim Record* 97/13, at 80, para. 7.

[192] According to Dr. Wouters, in the *Garrison Diversion* Project on the diversion from the Missouri river planned by the United States, the IJC (see *op. cit.* n. 162) adopted a broad interpretation of the concept of pollution in its report, taking account of the principle of *equitable utilization* of international watercourses. *See* Wouters, *op. cit.* n. 163, at 70-73, 84. According to the reasoning of that report, there is of course the possibility that the level of harm to be prevented is pulled down by the *equitable utilization* principle. This author does not exclude such a possibility, either. *See op. cit.* n. 70.

between the costs needed to reduce pollution and the benefits gained by that reduction. For a proper understanding of the concept of "*serious*" harm the *Trail Smelter* case provides *prima facie* criteria. Besides, the following criteria are most useful in determining the meaning of "*irreparable* harm", which should in turn be regarded as the core of *serious* harm: (1) "a *substantial* deterioration in living conditions for a large number of people or a *significant* loss from the standpoint of nature conservancy" as stated in the 1971 Finnish-Swedish Agreement concerning Frontier Rivers; (2) "threat to human health and safety" stated in Rosenstock's first report of 1993 and the commentary on Article 7 of the 1994 Final Draft; (3) Poland's observation, as follows: " ... Article 7 [of the Provisional Draft concerning the obligation not to cause *appreciable* harm] is a certain security network for Article 5 [of the Provisional Draft concerning the *equitable utilization* principle] – that is, situations in which negotiations fail."[193] These observations mean that we should recognize the notions of *appreciable* (=*significant*) or *serious* harm, despite their ambiguity, and prescribe an obligation not to cause "factual harm" of these levels. Otherwise, the risk of continuous pollution would greatly increase in case of failure of negotiations, unless the question of whether or not the activity in question falls into the range of "an equitable use" is answered and decided by third party judgment.

Can it be held that this conclusion also applies to cases concerning other components of the ecosystem belonging to the "shared natural resources"? It is suggested that this is a basically separate question that cannot be answered easily.[194] Among other factors that would have to be examined specifically is whether the "*equitable utilization* principle", if applied to "shared natural resources" other than international watercourses, has the same contents as if applied to international watercourses. However, if the use of a certain component of the ecosystem within a State necessarily has an impact on the use of the same component within another State,[195] it seems reasonable to assume the existence of a general principle of *equitable utilization* of "shared natural resources".[196] The essence of the principle would lie in the *balancing of interests*, assuming that a "community of interest" exists, which "becomes the basis of a common legal right" as stated by the PCIJ in the *River Oder* case.

If an "*equitable utilization* principle" be assumed to have been established for a certain component of the ecosystem in a certain area, the foregoing

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193 UN Doc., A/C.4/447/Add.1, at 10.

194 For example, there were some arguments whether the 1994 Final Draft should be applied to "confined transboundary groundwater" unrelated to surface water. The resolution adopted at the final stage merely states that States should be guided by the principles contained in the Final Draft in regulating transboundary groundwater. *See 1994 ILC Report*, *op. cit.* n. 3, at 326.

195 *See* Handl, *op. cit.* n. 10, at 41, footnote 2.

196 But *see*, for example, Patricia W. Birnie & Alan E. Boyle, *International law and the environment* (Oxford: Clarendon Pr., 1992), at 316-317.

analysis could be useful. One might think of cases of pollution of a (semi-) enclosed sea or adjacent coastal waters and also, in view of the existing analogy between water pollution and air pollution as suggested by the *Trail Smelter* case, of cases of regional transfrontier air pollution among neighbouring States.[197] In considering such analogies, however, we should, of course, duly keep in mind the existing differences between the characteristics of the components.

Finally, the determination of the desirable degree of preventive measures may become difficult if the level of harm to be prevented is fixed by the principle of *equitable utilization* of international watercourses or other "shared natural resources". Besides, various factors are to be taken into account in deciding whether or not that level is exceeded. Consequently, it would not be easy to charge the State of origin with responsibility for its failure to take the necessary preventive measures. In view of all this the need for some mechanism to implement the *equitable utilization* principle becomes particularly necessary.[198]

## 9. CONCLUSION: THE NECESSITY OF HARMONIZING *INTRA-GENERATIONAL EQUITY* WITH *INTER-GENERATIONAL EQUITY*

This article has tried to demonstrate that the "relaxation" of the *no pollution harm* principle by the *equitable utilization* principle is allowed only to an extremely limited extent, in so far as *serious* harm does not occur. Accordingly, environmental protection is promoted by prevention of "factual harm". The position will likely be criticized as favouring the interests of developed countries. However, it should not be forgotten that considerations of sustainable development as well as the protection of the interests of future generations are also operative in the area of transfrontier pollution, as was pointed out by McCaffrey in the ILC. These concepts have now been intro-

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[197] *See* Magraw *et al.*, *Fourth Report on LDAP, op. cit.* n. 12, at 26-36, paras. 91-116. Professor Handl draws, from an analysis of customary international law, the following conclusion concerning transfrontier air pollution: *first*, there has been established the obligation of States to avoid any use that entails *significant* transboundary harm, and the occurrence of *significant* harm gives rise to a presumption of illegality, which could be rebutted only upon demonstration of a need for an "*ad hoc* adjustment"; *secondly*, transfrontier harm which is less than the *significant* level but is the *appreciable* level or over is subject to the "*balancing of interests*" test. Handl, *op. cit.* n. 12, at 419, 465. Since he, on the one hand, regards *significant* harm as including both *serious* harm and *appreciable* (=*significant*) harm in the ILC's understanding, and, on the other hand, regards *appreciable* harm as *detectable* (=*measurable*) harm in that understanding, it is impossible to make a simple comparison between his conclusion and that of this paper. However, the conclusions of the two are the same at least at the point that the "*balancing of interests*" test deems inapplicable when "factual harm" exceeds a certain level.

[198] *See* McCaffrey, "Current developments: the forty-third session of the International Law Commission", 85 AJIL (1991) 703 at 706, footnote 14.

duced into positive international law, witness the following pieces of evidence: Principles 1 and 3 of the Rio Declaration on Environment and Development of 1992;[199] Article 3, paragraphs 1 and 4, of the United Nations Framework Convention on Climate Change;[200] Article 5, paragraph 1, of the 1997 Watercourses Convention;[201] and the 1997 ICJ decision in the *Gabčíkovo-Nagymaros* Project case.[202] It is understandable that the consideration of *inter-generational equity*[203] on which the above concepts are based should be respected in the context of the utilization of international watercourses, since a whole chapter, viz. Chapter 18 (entitled "Protection of the quality and supply of freshwater resources") is devoted to the topic in "Agenda 21" as adopted by the United Nations Conference on Environment and Development of 1992.[204] In fact, Article 2, paragraph 5(c), of the 1992 Transboundary Watercourses Convention provides that "[w]ater resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs".[205] Therefore, the *equitable utilization* principle should be interpreted so as to harmonize with *inter-generational equity*. Thus we come to the conclusion that the *equitable utilization* principle should not be regarded as a legal basis for allowing an increase of pollution from developing countries, but as one for helping these countries to receive budgetary or technical assistance for pollution prevention.[206] It should never be admitted that the rejection of the "relaxation" of the *no pollution harm* principle by the *equitable utilization* principle would result in producing advantages for the developed countries only.

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[199] 31 ILM (1992) 874.
[200] *Id.*, at 849.
[201] 36 ILM (1997) 705.
[202] *See* the Judgment, ICJ Rep. 1997, at 78, para. 140. *See* also Separate Opinion of Vice-President Weeramantry, *id.*, at 88-111.
[203] *See* generally Edith Brown Weiss, *In fairness to future generations* (Tokyo: The United Nations University, 1989). *See* also HANDL, "Environmental security and global change: the challenge to international law", 1 YIEL (1990) 3 at 24-27.
[204] *See* Stanley P. Johnson (ed.), *The Earth Summit: The United Nations Conference on Environment and Development (UNCED)* (London: Graham & Trotman, 1993), at 123.
[205] 31 ILM (1992) 1316.
[206] Weiss, *op. cit.* n. 203, at 27-28.

# STATEHOOD, SELF-DETERMINATION AND THE 'TAIWAN QUESTION'

Steve Allen[*]

## 1. INTRODUCTION

The most popular question posed in relation to the island of Taiwan remains whether it constitutes a state in international law. Complexities inherent within the traditional notion of statehood have been exacerbated in the Chinese context by the various positions adopted by the international community, the Republic of China ('ROC') and the Peoples' Republic of China ('PRC') during different phases of the cross-Strait dispute. In this regard, the international community has endorsed the PRC's version of the 'one China' principle by recognising it as the legitimate successor government to the ROC regime. Accordingly, the PRC constitutes the de jure government of China and its sovereignty extends to Taiwan with the ROC judged to be a local authority under its jurisdiction. Therefore, despite its newly found democratic credentials and powerful global economy, the ROC on Taiwan has not been widely perceived as a state in international law. However, while the Chinese dispute remains locked within the traditional paradigms of statehood and sovereignty,[1] the increasing susceptibility of states to the pervasive norms of national self-determination, human rights, and democratic governance may signal a new chapter in cross-Strait relations. This article will therefore examine the rising tension between established norms and the progressive canon of modern international law through the doctrines of recognition, statehood, and national self-determination. Against this background, the article will assess the impact of this institutional conflict on the cross-Strait dispute, and its implications for the international status of Taiwan. Finally, it seeks to determine whether, in a search for suitable autonomous

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[1] Davis, M.C. "Towards Modern Concepts of Sovereignty and Statehood" in Henckaerts, J.M. (ed.), *The International Legal Status of Taiwan in the New World Order: Legal and Political Considerations* (1996), 22, at 31.

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regimes, the case of Taiwan represents an alternative to the 'post-modern tribalism' currently threatening the international order.[2]

## 2. THE ORIGINS OF THE CROSS-STRAIT DISPUTE

In order to regenerate China in the aftermath of its imperial disintegration, the fledgling ROC government sought to construct a strong national unit on which to base a new Chinese political identity.[3] Given the entrenched Westphalian order, in their pressing efforts to build a nation, Chinese leaders were influenced by the European notion of nationalism and its modal form, the nation-State.[4] Modern nationalism advanced the theory that the nation served as the primary source of governmental authority and thus presented the only basis for a sovereign state.[5] Accordingly, each nation has the right to constitute itself as a separate state on the grounds that political and national units should be congruent.[6] In view of the abrupt collapse of imperial China, with its regimented political structures and vast territory, it is unsurprising that the infant Chinese nation lacked the political cohesion and popular support necessary to safeguard its early development. China soon found itself in turmoil and ultimately, a protracted civil war was waged between nationalist and communist factions, each side attempting to realise different conceptions of the Chinese nation. Although the communist forces eventually emerged victorious, the defeated ROC nationalists managed to retreat to the island of Taiwan.[7] The conclusion of the military conflict witnessed the newly constituted PRC government and the decimated ROC regime maintaining their commitment to 'one China', with each side promoting its own state-sponsored brand of Chinese nationalism in a bid to ensure the realisation of their vision of the Chinese nation-State.

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[2] *See* Franck T. M., "Clan and Super Clan: Loyalty, Identity and Community in Law and Practice", 90 AJIL 359 (1996).

[3] For an historical overview of the period *see* Fairbanks, J.K. & Goldman, M., *China: A New History* (1998).

[4] For general sources see Smith, A.D., *Ethnic Origins of Nations* (1986); Gellner, E., *Nations and Nationalism* (1990); Hobsbawm, E.J., *Nations and Nationalism Since 1780: Programme, Myth, Reality* (2nd ed. 1990); Deutsch, K. & Foltz, W., *Nation Building* (1963); Berman, N., "But the Alternative is Despair", 106 *Harvard Law Review* 1792 (1993). In the Chinese context, *see* Hughes, C., *Taiwan and Chinese Nationalism* (1997); Townsend, J., "Chinese Nationalism", *The Australian Journal of Chinese Affairs* 97 (1992); Tozzi, P., "Constitutional Reform on Taiwan: Fulfilling A Chinese Notion of Democratic Sovereignty", 64 *Fordham Law Review* 1193 (1995); and Kryukov, M.V., "Self-determination from Marx to Mao", 19 *Ethnic and Racial Studies* 352 (1996).

[5] Mayall, J., *Nationalism and International Society* (1993), 2 cited in Hughes, n. 4, at 2.

[6] Gellner, n. 4, at 1, cited in Hughes, *ibid.*

[7] This retreat mirrored a similar process that occurred in the seventeenth century when the conquering Manchu dynasty forced the remnants of the Ming dynasty to the island of Taiwan.

In this regard, the PRC sought to reinforce its domestic programme of nation building through recourse to the norms of statehood and sovereignty.[8] It perceived Taiwan as a renegade province, an inalienable part of its territory, and as such any interference from the international community was considered a threat to its territorial integrity. To this end, the original aim of 'liberating' the island by force remained entirely consistent with the nineteenth-century paradigms of statehood and sovereignty.[9] The PRC sought to mobilise Chinese nationalism in order to realise a single Chinese nation co-terminus with its historic territorial parameters.[10] Accordingly, along with Hong Kong and Macao, the return of Taiwan remains central to its self-perception and core legitimacy.[11] The 'one China' principle also underpinned the ROC's strategy for reclaiming the Chinese mainland. However, one of the difficulties confronting the ROC regime was that the Taiwan's population was not homogenous. The majority could be categorised as 'Taiwanese'; although originally from the Chinese mainland, their arrival on the island significantly predated the retreat of ROC supporters (the 'Mainlanders') towards the end of the civil war.[12] Consequently, the ROC advanced a policy of Chinese nationalism to consolidate its position on Taiwan and promote its core aim: the repatriation of the Chinese mainland. Therefore, the regime attempted to transcend the primordial sentiments associated with Taiwanese cultural practices by using traditional Chinese culture characterised by Confucian norms, classical arts, literature, history, and archaeology under the banner of the Mandarin dialect in order to foster a shared consciousness on which to rebuild the Chinese nation.[13]

From an international perspective, notwithstanding its retreat to Taiwan, the ROC retained the China seat at the United Nations and was widely recognised as the legitimate sovereign government of China, irrespective of the *de facto* reality for the best part of thirty years. The onset of the Cold War ensured that western liberal democratic states became increasingly sympathetic to the plight of the failing ROC especially after the outbreak of the Korean War when President Truman ordered the US Seventh Fleet to 'neutralise' the Taiwan Strait thereby preventing the PRC from invading Taiwan and satisfying its territorial claim. Clearly, western states had a vested interest in maintaining the fiction that the ROC still governed the whole of

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[8] Davis in Henckaerts, n. 1, at 30-31. Also *see* Townsend, n. 4, at 117-124.

[9] *See* below.

[10] However, this raises the question of what constitutes the territorial parameters of historic China as its territorial extent waxed and waned during its vast imperial history, *see* generally Fairbanks & Goldman, n. 3.

[11] Hughes, n. 4, at 19-20.

[12] Wachman, A.M., *Taiwan: National Identity and Democratisation* (1994), at 56-90; and Copper, J.F., *As Taiwan Approaches the New Millennium* (1999), at 25-29.

[13] Chun, A., "Democracy as Hegemony, Globalisation as Indigenisation, or the 'Culture' in Taiwanese National Politics", in Lee, W.C. (ed.), *Taiwan in Perspective* (2000), 7, at 9-14.

China in the hope that the communist PRC would falter and provide the ROC with the opportunity of regaining control of the Chinese mainland. To this end, US support in particular was crucial in maintaining the decimated ROC regime. In return, the US gained a foothold in the Asia Pacific which, given the instability of the region, was to prove vital in protecting US commercial and security interests.[14] Further, by continuing to support the ROC and casting the PRC as an international pariah, western states sought to influence the outcome of events in the Far East in favour of capitalism if not of liberal democracy.

However, the promise of untapped mainland markets ensured that this fiction could not be maintained indefinitely. During the 1960s, the rapid expansion in UN membership prompted by decolonisation marked the beginning of a new era within the organisation. New members in particular sought to challenge the policy objectives of its predominant powers through the forum of the General Assembly.[15] In accordance with the spirit of decolonisation, members lobbied for the admission of the PRC on the grounds that the international community should recognise the political reality within modern China. Matters were brought to a head with the passage of resolution 2758, which sought to seat the PRC as the sole representative of China.[16] Although both the PRC and ROC were committed to the 'one China' principle, each saw its respective government as the only legitimate representative of the Chinese state and therefore both were ideologically incapable of accepting either the existence of the other or any compromise solution. Ultimately, the General Assembly supported the cause of the PRC. 'Expelled' from the UN, the ROC faced the prospect of an international decline as the international community began the process of switching diplomatic allegiance from the 'de-recognised' ROC to the PRC.[17] This process was markedly accelerated after the United States recognised the PRC to be the sole *de jure* government of China, and that Taiwan is part of China.[18]

Thus did global events force the ROC to reconsider its own interpretation of the 'one China' principle as it slowly began to accept the political reality of its new international position. In 1991, the ROC relinquished its claim to the Chinese mainland and committed itself to a policy of national unifica-

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[14] Wachman, A.M., "Taiwan: Trapped in a Tempestuous Triad", Conference Paper, 42nd International Studies Association (2001), Chicago, USA.

[15] Wang, V.W., "All Dressed Up But Not Invited to the Party: Can Taiwan Join the United Nations Now the Cold War Is Over?", in Henckaerts, n. 1, 85, at 89-90.

[16] G.A. Res. 2758 (XXVI) 25 Oct. 1971.

[17] Technically, the ROC regime withdrew from the UN when it was clear that this resolution would be voted on. *See* Wang in Henckaerts, n. 15, at 92. Nevertheless, the ROC government is still formally recognised by a small number of states. *See* http://www.mofa.gov.tw/emofa/eindex.html.

[18] *See* the Joint Communiqué of the United States and the PRC government, 73 AJIL 227 (1979).

tion by peaceful means.[19] The leadership of the ROC devised in the form of the National Guidelines for Unification an agenda, which set out its proposed conditions for the eventual unification of China.[20] Although the Guidelines reaffirmed the ROC's commitment to 'one China', this commitment was evidently conditional. The ROC's primary aim was that unification should lead to the creation of a democratic China with guaranteed human rights and adherence to the rule of law. Given the PRC's existing political structure, the Guidelines indicated that unification could be achieved only through a gradual process that would promote mutual understanding, trust and co-operation between the two sides.[21] The ROC's position was subsequently clarified in its White Paper entitled 'Relations Across the Taiwan Straits' (1994).[22] This document suggested that the notion of 'one China' represented an historical, geographical, cultural, and racial entity rather than a political designation. The ROC's new vision thus showed inconsistency with its historical claim to be the legitimate government of China; nor did it conform to the view that the PRC holds this position. Instead, it claimed that unification would lead to the creation of a new China, which would combine the benefits of progressive international norms such as democratic governance and human rights with the economic strength of a unified China. Although during this period the 'one China' principle took on new significance, its actual content became increasingly uncertain. Denied international status, the ROC evidently maintained its ideological commitment more out of convenience than conviction, relying heavily on creative ambiguity in an attempt to retain its political autonomy and expand its international space.[23] The essence of its policy was premised on the view that, while 'one China' existed in the past and may exist again in the future, there are currently two equal political entities within the Chinese context.[24] The ROC therefore argues that since each political entity presently has its own jurisdiction, both sides should respect the *status quo*, thereby allowing each government to advance wider Chinese interests with the resultant benefits accruing to all Chinese peoples in the event of unification. Evidently, a long-term philosophical commitment to 'one China' provides the ROC with considerable

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[19] By repealing the "Temporary Provisions Effective During the Period of Communist Rebellion". *See* Wachman, A.M., "Taiwan: Parent, Province or Blackballed State?", in Lee, W.C. (ed.), *Taiwan in Perspective* (2000), 183, at 189.

[20] *See* http://www.mac.gov.tw/english/MacPolicy/gnueng.htm

[21] *Ibid.*

[22] Reproduced in Henckaerts, n. 1, at 279-292.

[23] Wachman, n. 19, at 189.

[24] *Ibid.*

scope to pursue its own political and economic interests while purporting to support the PRC's nationalist crusade.[25]

On the domestic front, in an effort to counteract the effects of its international isolation, the ROC embarked on a programme of cultural reconstruction by diverting political energy away from the 'one China' issue to promote the full-scale economic development of Taiwan.[26] Accordingly, the government relaxed its grip on the market and encouraged the growth of an export driven economy.[27] The end of martial law and the subsequent march towards democratic governance accelerated this process of 'indigenisation' by promoting political reconciliation between the Mainlander and Taiwanese ethnic groups. From the standpoint of the PRC, the process of democratisation on Taiwan, culminating in the first direct presidential elections in 1996, threatened the prospect of unification by bringing into question the claim that Chinese identity is inherently bound to a single Chinese nation. However, as popular sovereignty now exists exclusively in relation to Taiwan rather than to the mythological Chinese nation, the constraints of Chinese nationalism have been cast off.[28] Consequently, the way has been cleared for the development of ethnic, cultural and economic ties without the imperative for political amalgamation with the Chinese mainland.[29] The declining importance of Chinese nationalism on Taiwan remains problematical for the PRC as such a shift undermines its historical interpretation of China and its justification for unification: the re-uniting of the Chinese nation.[30] Developments on Taiwan, therefore, have ramifications for the national identity and core legitimacy of the PRC itself.[31] Indeed, the PRC's heightened fears were clearly manifest in the missile crisis of 1995/6, and its continuing threat of invasion should Taiwan declare *de jure* statehood. In the circumstances, it is unsurprising that the leaders of mainstream political parties in Taiwan are increasingly committed to the political *status quo* as reflected by the wider population.[32]

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[25] Indeed adherence to the 'One China' principle could also justify initial parallel representation at the UN on the grounds that the unified China would derive substantial benefits in the long-term. *See* Yang, S., "The Republic of China's Right to Participate in the United Nations", in Henckaerts, n. 1, at 117.

[26] Chun, n. 13, at 14-16

[27] *Ibid.*, at 14. For the impressive statistics regarding the ROC economy at the peak of its achievements, *see* Zaid, M.S., "Taiwan: It Looks Like it, it Acts Like it, But is it a State? The Ability to Achieve a Dream Through Membership in International Organisations", 32 *New England Law Review* 805 (1998).

[28] Hughes, n. 4, at 95-96.

[29] *Ibid.*, at 100.

[30] *Ibid.*

[31] For example, *see* the rise of national claims in Tibet and Xinjiang.

[32] As evidenced by the results of the presidential election held in 2000, *see* Kau, M.Y.M., "Taiwan's Presidential Election and Cross-Strait Relations", Taiwan Research Institute, 13 Mar. 2000 http://www.taiwaninformation.org/issues/view_story.php3?101; and Rigger, S., "Is Taiwan Independence

Although the essence of the PRC's policy on unification continues to be based upon the promotion of Chinese nationalism, successive leaders of the PRC have recognised the need for a practical strategy in order to persuade the people of Taiwan to support the process of unification. In this regard, their prime strategy has been characterised as the 'one country, two systems' model under which Taiwan would become a special administrative region of the PRC with a high degree of political and economic autonomy.[33] However, the ROC government has rejected this arrangement on the grounds that it is tantamount to annexation.[34] The ROC has claimed that despite the promise of a high degree of autonomy, Taiwan would be subject to fundamental restrictions including that requiring that its authorities must not violate the PRC's constitution or the decrees of its government, and that the model would be guaranteed only for a transitional period.[35] Against this background, the people of Taiwan have turned to the international community to assist in resolving the cross-Strait dispute in such a manner that will preserve their existing political autonomy. In this regard, the primary legal mechanisms appear to be the doctrines of recognition, statehood, and national self-determination.

## 3. THE INTERRELATIONSHIP OF RECOGNITION AND STATEHOOD IN THE CHINESE CONTEXT

The doctrine of recognition of states in international law is dominated by two conflicting theories.[36] The constitutive theory of recognition maintains that legal personality is conferred through acts of recognition carried out by existing states rather than through a declaration of statehood on the part of a putative state. In contrast, the declaratory theory asserts that a state is legally constituted by its own actions and that its statehood is not dependent on the recognition of other states, the process of recognition being limited to an acceptance of the existing factual situation.[37] As the declaratory theory presents an attractive mechanism for ensuring that the legal position does not stray too far from political reality, it is generally considered to be more

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*Passe*? Public Opinion, Party Platforms, and National Identity in Taiwan", in Chao, C. & Clark, C. (eds.), *The ROC on the Threshold of the Twenty-first Century: A Paradigm Re-examined* (1999), 47.

[33] Under this model, the authorities in Taiwan would continue to exercise political and administrative power and retain control over their own economic, financial and military affairs. Further, autonomy would extend to the capacity to enter into international commercial and cultural agreements and the maintenance of certain rights in the international sphere. *See* PRC White Paper, "The Taiwan Question and the Reunification of China", The Taiwan Affairs Office (August 1993) http://www.china-embassy.org/eng/7127.html.

[34] ROC White Paper 1994 in Henckaerts, n. 1, at 285.

[35] *Ibid.*

[36] These theories are also applicable in relation to the recognition of governments.

[37] Shaw, M.N., *International Law* (4th ed., 1997), at 296-297.

appropriate to the current international regime.[38] Nevertheless, its acceptance in an unadulterated form would suggest that recognition could reduce questions of statehood to a simple matter of power politics.[39] In practice, therefore, states have generally forged a middle course between the two theories.[40] Thus while 'effectiveness' remains the guiding principle, where the legitimacy of a state is in question other factors can be taken into consideration such as its willingness or ability to act in accordance with the terms of international law.[41] Further, although the international community may decide not to recognise a *de facto* state, which controls its own territory effectively, it cannot deny that it possesses certain rights and duties under international law.[42] It is evident that the doctrine of recognition continues to serve two important purposes within international law. First, widespread recognition by the international community provides tangible evidence as to whether a particular *de facto* state has satisfied the traditional criteria for statehood; thus, it may prove to be crucial in situations where the claim of a putative state is susceptible to challenge in some respect.[43] Second, it may be used as a tool for political approval or, more pointedly, disapproval relating to the conduct of a particular state (or government). Regarding the latter, many scholars suggest that the decision whether or not to recognise a *de facto* state or government is essentially a political act cloaked in legal terminology.[44] This is particularly true in relation to the recognition of governments where the criteria for assessing the validity of legal claims are limited to the broad determinants of effectiveness and its prospect of permanence.[45]

In the Chinese context, the ROC regime sought to tackle the crisis of legitimacy brought about through its international de-recognition by recourse to the notion of statehood. However, instead of incurring the wrath of the

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[38] *See* Crawford, J., *The Creation of States in International Law* (1979), at 15-25; Shaw, n. 37, at 296-298; Brownlie, I., *Principles of Public International Law* (5th ed., 1998), at 88-104. More generally *see* Lauterpacht, H., *Recognition in International Law* (1947); Kelsen, H., "Recognition in International Law: Theoretical Observations", 35 AJIL 605 (1941).

[39] Crawford, n. 38, at 78-79; and Rubin, A. P., "Recognition Versus Reality in International Law and Policy", 32 *New England Law Review* 669 (1998).

[40] *See* Shaw, n. 37, at 297. However, these theories have been roundly criticised. *See* Brownlie, I., "Recognition in Theory and Practice," 52 BYIL 197 (1982); and Chiu, H., "International Legal Status of the ROC", (No.5) *Contemporary Asian Studies Series* (1992), 1.

[41] For the seminal interpretation on effectiveness in relation to recognition, *see* the award of Taft J. in the *Tinoco Arbitration* (United Kingdom *v*. Costa Rica) (1923), 1 RIAA 369.

[42] Henkin, L. *et al.* (eds.), *International Law, Cases and Materials* (2nd ed. 1987), at 232 cited in Chiu, n. 40, at 4. Also *see* Shaw, n. 37, at 317. For a discussion of the concept of a *de facto* state, *see* below.

[43] *See* the *Tinoco Arbitration*, n. 41; Crawford, n. 38, at 24; and Opinion No. 8 of the EC Arbitration Commission, 92 ILR 199, at 201.

[44] Shaw, n. 37, at 295-296; and Chiu, n. 40, at 3.

[45] However, *see* Talmon, S., *Recognition of Governments in International Law* (1998) and Harris, D.J., *Cases and Materials in International Law* (5th ed. 1998), at 144-189.

PRC by declaring itself to be a *de jure* state, successive ROC leaders have unofficially asserted that the ROC has been a *de jure* state since its inception in 1912 and claim that as a result, it is unnecessary to make a fresh claim of statehood.[46] While the ROC now accepts that the PRC is the legitimate government of the Chinese mainland, it claims that since the PRC has never effectively occupied Taiwan, the PRC did not succeed to its territory. The basis for this argument stems from the original position of the ROC, that it is the sole government of the Chinese state since its authority was never extinguished on Taiwan, nor was the state that it represented. However, this interpretation suggests that since the conclusion of the civil war there have been two states in the Chinese context. Although this position is contrary to the 'one China' principle historically advanced by the ROC, such revision allows it to draw on the tenets of statehood. In particular, the notion of statehood gives credence to the view that a state may continue to exist despite the severe diminution of its territory or the existence of competing claims from other states.[47] On this re-reading of history, the ROC constitutes a *de jure* state regardless of the massive territorial losses suffered during the civil war and the PRC's continuing claim to Taiwan. Nevertheless, it is clear that the willingness of a significant proportion of the international community to recognise a state remains a vital ingredient of *de jure* statehood and therefore the interrelationship between these two concepts must be fully explored.

In general, scholars have taken great care to maintain the distinction between the notion of statehood and the doctrine of recognition of states in international law, although some are prepared to acknowledge their close relationship.[48] Regarding the recognition of states, a primary issue remains whether an entity qualifies as a *de jure* state in international law. The starting point in this respect is generally believed to be the criteria established by the Montevideo 'Convention on the Rights and Duties of States' (1933).[49] Article 1 provides that the state as a person of international law should possess the following criteria: (a) a permanent population; (b) a defined territory; (c) government; and (d) the capacity to enter into relations with other states. This formulation is consistent with the assertion that the political existence of a state is a question of fact and that the rights and obligations of such a *de facto* state cannot be denied under international law, irrespective of widespread non-recognition.[50] Thus, by creating objective criteria through which *de facto*

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[46] Wachman, n. 19, at 197-198. Also *see* Rigger, S., "Taiwan Rides the Democratic Dragon", 23 *The Washington Quarterly* 107 (2000).

[47] Crawford, n. 38, at 36-40.

[48] *Ibid.*, 74; Grant, T.D., "Defining Statehood: The Montevideo Convention and its Discontents", 37 Col.JTr.L 403, at 446-447 (1999).

[49] 28 AJIL 75 (1934).

[50] Art.3 of the Montevideo Convention, *ibid*. This interpretation was supported in Opinion No.1 of the EC Arbitration Commission on Yugoslavia, 92 ILR 162. Further, *see* below.

states could maintain legitimate claims to *de jure* statehood,[51] the Montevideo Convention embodied the spirit of the declaratory theory of recognition with its inclusive approach to international personality. Accordingly, many scholars have asserted that the ROC on Taiwan is at least a *de facto* state because it clearly satisfies the criteria as formulated by the Montevideo Convention and is therefore entitled to enjoy certain rights and duties in international law by virtue of this status.[52]

However, this interpretation of statehood is made in the full knowledge that both *de facto* and *de jure* states exist within international law. This distinction, which finds its origins in the positivism of the late nineteenth century, accepts that all political communities could be described as states through an accommodation of the classical tenets of *jus gentium*.[53] Therefore, the broad notion of statehood could encompass any organised political community, which would be regarded as possessing sovereign authority over its territory regardless of the level of civilisation it had reached. Nevertheless, by the late nineteenth century, only those states recognised by the 'Family of Nations' could be endowed with legal personality for the purposes of international law. Thus while the positivist international regime did not seek to prescribe requirements for attaining statehood, it did establish criteria to determine which *de facto* states would be permitted to join the Family of Nations and thereby secure *de jure* statehood. Admission was the preserve of the existing membership, which was committed to maintaining its exclusivity. To this end, the criteria established for these purposes represented the fundamental characteristics of the European nation-State; the further from this model a political entity was removed, the less chance it had of becoming a subject of international law. In this respect, the gaze of the Family of Nations was coloured by the cause of 'civilisation' and the link between civilisation and international personality therefore became an express feature of positivist theory. Thus positivist international law demanded that 'primitive' *de facto* states achieve civilisation before gaining recognition as members of the Family of Nations with rights to territorial sovereignty and until such time their political existence was immaterial.[54] In the absence of sovereign rights, *de facto* states were at the mercy of the imperial powers whose actions when dealing with them were not constrained by the rules of international law. This central feature of the positivist international regime purported to justify the actions of the European powers during their programmes of

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[51] Although it is important to note that there is no duty to recognise states, *see* below.

[52] *See* below.

[53] See Castellino, J. & Allen, S., *Title to Territory in International Law: A Temporal Analysis* (2003); Crawford, n. 38, at 5-10; Alexandrowicz, C.H., *The European-African Confrontation* (1973); Andrews, J.A., "The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century", 94 *Law Quarterly Review* 409 (1978).

[54] Lindley, M.F., *The Acquisition and Government of Backward Territory in International Law* (1926), at 20.

colonial acquisition in Asia and Africa by ensuring that the territory of *de facto* states could be deemed *terra nullius* and therefore available for acquisition.[55]

Although the impact of the distinction between *de jure* and *de facto* states was felt principally during the colonial era, the current dispute as to the international status of Taiwan demonstrates that it still has resonance for the current international regime. However, while in the modern context a *de facto* state is not considered to be free from the constraints of international law nor can its territory be treated as *terra nullius*, in practical terms, the core issue lies not in the existence of such rights and duties, but rather in the means of enforcing them in the absence of diplomatic relations.[56] Thus, *de jure* statehood is not a mere technicality of international law; it enables a state to foster significant legal relations with other states, and to participate in the international community. Consequently, despite the significant advances made by the people of Taiwan in the spheres of governance and economic development, the external manifestation of their political identity remains subject to the will of the international community where this is acting in accordance with the principles of international law.

To this end, contemporary scholars have questioned the continuing validity of the traditional criteria for statehood as formulated by the Montevideo Convention with its alleged overemphasis on effectiveness.[57] Accordingly, given the lack of a central authority and the need to maintain a link between the *de jure* position and the political reality of the existing international order, a valid claim to *de jure* statehood cannot necessarily be reduced to the test of effectiveness.[58] In particular, Crawford suggests that the central requirements of *de jure* (and *de facto*) statehood are that a putative state must formally declare its statehood, which must be supported by at least a minimal degree of effective governance.[59] In this regard, Grant suggests that while an entity might possess the attributes of a state, in the absence of such a formal declaration, statehood cannot be achieved.[60] He asserts that if this were not the correct position, many federal units could satisfy the criteria

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[55] Unless acknowledging the 'sovereignty' of these *de facto* states could serve the interests of the European powers. The classical example in this regard was the process by which unequal treaties were concluded in Africa and China, regarding the former *see* Castellino & Allen, n. 53, at 91-118.

[56] Shaw, n. 37 at 317-318.

[57] *See* Grant, n. 48.

[58] Departures are justifiable where a state or government has contravened the norms of *jus cogens* such as the prohibition on the use of force, or some other fundamental illegality, *see* Crawford, n. 38, at 121-128.

[59] *Ibid.*, at 52-72. Also *see* the *Island of Palmas Arbitration*, 22 AJIL 867 (1928).

[60] Grant, n. 48, at 439 derives authority for this proposition from the *Restatement of the Law of the Foreign Relations of the United States* (3rd ed. 1987), Vol. 1, section 201(f). This issue is particularly important in relation to Taiwan.

for statehood, the fact that they do not maintain a claim being determinative of their status.[61]

Despite its manufactured claim to statehood, the ROC has been careful not to formally declare *de jure* statehood, preferring to rely on the designation 'political entity' in a bid to appease the PRC. As such, the ROC has never formally claimed to be a state and thus according to the traditional interpretation, cannot be a *de jure* state (or a *de facto* state) in international law.[62] Although this approach has ostensibly been a factor in the ROC's ongoing commitment to the 'one China' principle, in reality, it derives from the threat that the PRC would invade Taiwan if *de jure* statehood were declared. The bearing of this unique factor on any formal claim to statehood has led eminent scholars to object to the suggestion that the ROC cannot be a state because it does not expressly claim to be so.[63] Arguably, it is incumbent on the international community to take an exceptional stance in relation to Taiwan's political status. The process of democratic reform on Taiwan has reinforced its separateness from the PRC, and has demonstrated that popular sovereignty is vested solely in the people of Taiwan. In the circumstances, it has been suggested that the international community should present a united front against the PRC in this respect.[64] Accordingly, if the international community were to give its collective assurance to protect Taiwan in the event of a formal declaration of statehood, the ROC could become a *de jure* state in international law.

Although the act of recognition is not presently a collective process in international law, international organisations are playing an increasingly important role in relation to issues of statehood and recognition. In this regard, the rising value of UN membership is indicative of broader trends towards political and economic interdependence within the current international regime.[65] While membership is not a prerequisite of statehood, it does provide strong evidence of a legitimate claim, which, although not binding on individual states, is clearly presumptive.[66] Thus, full UN membership has been increasingly perceived as the 'birth certificate' of a state. Importantly, UN membership has enabled entities to achieve statehood where they would otherwise have failed to satisfy the traditional criteria for statehood, as has been apparent in relation to the process of decolonisation and the creation of microstates. To this end, if the international community, acting through

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[61] Grant, n. 48, at 439-440.

[62] Crawford, n. 38, at 146-152. The United States does not accept the ROC as a *de facto* state despite its policy of accepting the political existence *de facto* states where they occupy international space *see* Chiu, n. 40, at 8-10.

[63] Chiu, *ibid.*, at 11-14,

[64] Wang in Henckaerts, n. 15, at 104.

[65] *See* Hannum, H., *Autonomy, Sovereignty and Self-determination: The Accommodation of Conflicting Rights* (1990).

[66] Grant, n. 48, at 445-446; and Shaw, n. 37, at 313.

the UN, were prepared to extend full membership to the ROC, it would enable the people of Taiwan to declare their formal independence from the PRC and thus to establish their own *de jure* state in relative safety.[67]

However, for this proposed course of action to be successful, much depends on the significance attributed to the rising notion of democratic governance in international law. In this respect, the dissolution of, respectively, the Soviet Union and Yugoslavia has introduced a new dynamic in relation to the creation and recognition of states in international law; its implications for the status of Taiwan must be fully considered. The European Community set out its common position in its 'Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union'.[68] Further, in response to the Balkan crisis, it issued a 'Declaration on Yugoslavia', which adopted the Guidelines and developed supplementary criteria according to which the republics of the former Yugoslavia would be recognised.[69] Through its declarations, the European Community reinforced the overtly political nature of recognition by requiring that the putative states meet additional criteria in order to secure statehood, including respect for the rule of law, democracy and human rights, and the observance of the appropriate international commitments.[70] In this context, the United States also adopted towards recognition a new approach that went beyond the traditional criteria for statehood. It developed a two-tier formulation premised on a 'modified declarative view' of recognition.[71] Consequently, if an entity met the traditional criteria for statehood, it was considered to be a *de facto* state and would be accorded the rights and privileges of a state under international law.[72] Nonetheless, in relation to the republics of the former Soviet Union, the United States would not grant recognition until it had decided that conditions broadly similar to those prescribed in the Guidelines of the

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[67] Readmission to the UN has been a high priority of the ROC since the early 1990s. *See* Henckaerts, n. 1, at 261-278.

[68] 31 ILM 1486 (1992).

[69] *Ibid.*, at 1485.

[70] These included the UN Charter, the CSCE's Helsinki Final Act, 14 ILM 1292 (1975); and the "Charter of Paris for a New Europe" 30 ILM 190 (1991).

[71] The traditional approach of the United States closely mirrors the criteria established by the Montevideo Convention, *see* §201 of the *Restatement of the Law of the Foreign Relations of the United States* (3rd ed. 1987), Vol. 1, at 72. However, the United States maintains that a state is not required to formally recognise another state or the government of that state, 72 AJIL 337 (1978). Opinion No. 10 of the EC Arbitration Commission supports this position, 92 ILR 206, at 208.

[72] The United States recognised that Macedonia occupied international space although it refused to formally recognise the former republic of Yugoslavia for a period of eighteen months. *See* Williams, P.R., "Creating International Space for Taiwan: The Law and Politics of Recognition", 32 *New England Law Review* 801, at 802-804 (1998).

European Community had been fulfilled.[73] Certain scholars have welcomed these developments on the grounds that these will enable the wider international community to embrace the progressive norms of self-determination, human rights and democratic governance, which will allegedly lead to long-term international peace and security.[74]

It is apparent that this new dynamic signals a new phase in the doctrine of recognition and the creation of states in international law. The positivism of the late nineteenth century spawned the first incarnation of recognition to ensure that the notion of statehood remained the exclusive preserve of the Family of Nations. This interpretation was subsequently revised in accordance with the principles of modern international law, which promoted the declaratory theory of recognition and the inclusive approach to statehood as typified by the Montevideo Convention. This third phase marks a return to a more prescriptive approach, premised on the ideological aspirations of the predominant international actors, seemingly reminiscent of the purposes served by the notions of statehood and recognition during the late nineteenth century. Clearly, events in the former Soviet Union and Yugoslavia are indicative of a theoretical shift away from the declaratory theory in favour of the constitutive approach.[75] This development not only signifies a shift in the purpose of recognition in order to promote 'suitable' governmental structures in the post-Cold War era, but it also threatens the delicate relationship between recognition and statehood within international law. Grant summarised the problems facing *de facto* states neatly when he stated that:

> The process of recognition, which is probably a hybrid one of law and politics, can blur confusingly with the definition of 'state.' Entities claiming to be states have been denied recognition on grounds that in the past had little to do with statehood, for new criteria are now advanced as prerequisites to statehood. Such criteria furnish apparently legal grounds to decline recognition of new states, but non-recognition may well be inspired by political, not juridical, considerations. Discretionary or political conduct in international relations does not promote the rule of law.[76]

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[73] *See* Murphy S.D., "Democratic Legitimacy and the Recognition of States and Governments", 48 ICLQ 545, at 558 (1999). In relation to the former Yugoslavia, the United States did not provide specific criteria by which it recognised the new states although it acknowledged that their statehood was the result of the democratic exercise of popular sovereignty in the new states. *See ibid.,* at 563.

[74] *See* Reisman, W.M., "Sovereignty and Human Rights in Contemporary International Law", 84 AJIL 866 (1990).

[75] This view is supported by Warbrick, C., "Recognition of States", 41 ICLQ 473, at 480 (1992).

[76] Grant, n. 48, at 452-3.

Arguably the main thrust of this dynamic can be attributed to the rise of democratic governance in the international dimension.[77] By way of example, the will of the people proved to be a determining factor in relation to the creation of new states in the former Yugoslavia. In particular, Opinion No.4 of the EC Arbitration Commission held that the lack of participation by the Bosnian Serbs in the electoral process meant that Bosnia could not be recognised as a state in the absence of an internationally supervised referendum in which all Bosnians could participate.[78] Thus, it could be suggested that a legitimate claim to statehood cannot arise except through the exercise of popular sovereignty.[79]

On a practical level, it is evident that the legitimacy engendered by a regime governing with the consent of its people is difficult to ignore and such a measure of popular support is a useful indication of effective governance irrespective of other considerations.[80] Further, global economic developments that have clearly favoured western liberal democratic states appear to have given them a political mandate to prescribe the criteria by which other states can participate in a 'new world order'. Although it is not suggested that liberal democratic states are prepared to forgo economic relations with non-democratic regimes, it is arguable that such states consider democratic governance to be indicative of a strong civil society and a distinct advantage in producing the kind of order conducive to optimal economic development within the international community.[81] An assertion often made in this context is that democratic states are far less likely to go to war with each other than are non-democratic regimes and therefore present a better model for statehood.[82] Arguably this 'democratic peace' is reinforced by global economic order whose interdependence warrants that the peaceful resolution of conflict is in the best interests of all states and their constituent populations.[83] In the modern context, economically powerful liberal democratic states are seemingly pre-disposed towards putative states or governments that are willing to develop in their image by embracing democratic structures, the corollary being that

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[77] *See* Franck, T.M., "The Emerging Right to Democratic Governance", 86 AJIL 46 (1992). Also *see* Murphy, n. 73; and Reisman, n. 74 (these two essays are also included in Fox, G.H. & Roth, B.R. (eds.), *Democratic Governance and International Law* (2000)). Also *see* Orentlicher, D., "Separation Anxiety-International Responses to Ethno-Separatist Claims", 23 Yale JIL 1 (1998); and Wheatley, S., "Democracy in International Law: A European Perspective", 51 ICLQ 225 (2002).

[78] 31 ILM 1501 (1992), cited in Grant, n. 48, at 440-441.

[79] *Ibid.*, 441. This development is supported by art. 21(3) of the Universal Declaration of Human Rights (1948); and art. 25 of the International Covenant on Civil and Political Rights (1966).

[80] Murphy, n. 48, at 547.

[81] Slaughter, A.M., "International Law in a World of Liberal States", 6 *European Journal of International Law* 503 (1995) http://www.ejil.org/journal/Vol6/No4/art1.htm.

[82] *Ibid.* Also *see* Owen, J.M., "International Law and the 'Liberal Peace'", in Fox & Roth, n. 77, at 343.

[83] Keohane, R.O. & Nye, J.S., *Power and Interdependence* (1977), at 25, cited in Slaughter, n. 81.

the more remote a governmental structure is from the model of liberal democratic state, the less likely it is that it will be recognised by international law, as mentioned on page 9, above. In this regard, an analogy can be drawn between recent developments and the positivist interpretation of the state during the late nineteenth century, which ensured that legal personality was extended only to those *de facto* states reflecting the European model of statehood.

A paradigm shift has clearly occurred in relation to the creation and recognition of states in international law and these developments have serious implications for those *de facto* states or entities wishing to secure *de jure* statehood. Historically, the notion of statehood was founded on the universality of *jus gentium* although its premise was subsequently reinterpreted by the positivism of the late nineteenth century, which led to the distinction between *de facto* and *de jure* states.The Montevideo Convention, by seeking to prescribe the elements of statehood, represented an attempt to produce standardised criteria in order to allow unrecognised non-European entities to become states in international law.[84] However, it appears that the universality of the notion of statehood is once more under threat. The creation of new criteria in an attempt to redefine the notion of statehood serves to create a raft of new problems, further confusing the relationship between statehood and recognition.[85] Arguably, therefore, a policy of non-recognition of states premised solely on political grounds is abhorrent in principle and contrary to the tenets of the UN Charter.[86] Alternatively, as the notion of statehood is historically contingent,[87] it must be influenced by the progressive canon of international law if it is to retain its legitimacy within the current international regime. However, while change may be desirable, in an effort to produce long-term order, the international community *as a whole* should determine the manner in which a new objective approach to recognition and statehood is developed. The present *ad hoc* approach, driven by the particular political preferences of individual states, does not assist those *de facto* states and entities which seek to achieve *de jure* statehood although, at first glance, it would appear that the ascendancy of a constitutive approach premised on the norms of democratic governance, self-determination and human rights might increase Taiwan's chances of becoming a *de jure* state in international law.

However, despite the rise of this persuasive dynamic, there is sufficient evidence of states recognising non-democratic states to show that democratic governance has yet to replace the test of effectiveness as the guiding principle for the creation and recognition of states in international law. Perhaps, there-

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[84] Grant, n. 48, at 448-449.

[85] *Ibid.*, at 451-453.

[86] Art 4(1) provides that membership of the United Nations is open to all peace-loving states which in the judgement of the Organisation are able and willing to accept the obligations of the Charter.

[87] Grant, n. 48, at 456-457.

fore, it is too early to maintain that democratic governance has become the cornerstone of a new international order.[88] In the Chinese context, as long as the PRC is allowed to adhere to traditional interpretations of statehood and recognition, leading international actors will continue to place a higher premium on power politics and the economic imperative than on the widespread promotion of a democratic 'entitlement' and the agenda of international human rights.[89]

Further, the ROC's informal claims of *de jure* statehood and the work of sympathetic scholars appear to disregard the fact that the cross-Strait dispute historically centred on the existence of competing claims to be the *de jure* government of China, not issues of statehood.The 'one China' principle advanced by both the ROC and the PRC consequently ensured that the cross-Strait dispute drew on the doctrine of recognition of governments rather than on the recognition of states. In the absence of formal recognition, a state is required to treat the government of another state as a *de facto* regime if it controls its territory effectively.[90] However, while an unrecognised government of a *de jure* state can possess rights and obligations, in those cases where a government has been de-recognised in favour of another government claiming to represent the same state, its *de jure* authority ceases to exist on the demise of its international personality. Accordingly, when the international community recognised the PRC as the *de jure* government of the Chinese state, the ROC government on Taiwan lost its legal status in international law. Given its historical claim to be a *de jure* government, and the reluctance of international actors to confer *de jure* statehood in the absence of a formal declaration of independence (or to enable such a claim to be made), *de jure* statehood is not a realistic option for the people of Taiwan in the current international environment. Although the case of Taiwan clearly demonstrates the overwhelming importance attached to political considerations in the creation and recognition of states in international law, at present Taiwan can be characterised as a political entity under the authority of a *de facto* government, which effectively controls its territory and population, and discharges the usual functions of government including the responsibility for international relations.[91] Therefore, in a search for a mechanism that can protect the existing political autonomy enjoyed by the people of Taiwan, we must turn to alternate models within the progressive framework of international law.

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[88] Murphy, n. 48, at 579-581.

[89] *See* generally Fox & Roth, n. 77.

[90] §203(1) of the *Restatement of the Foreign Relations Law* (3rd ed. 1987), Vol. 1, at 84, quoted in Chiu, n. 40, at 5.

[91] *Ibid.,* at 10.

## 4. NATIONAL SELF-DETERMINATION AND THE 'TAIWAN QUESTION'

The principle of national self-determination possesses two distinct interpretations in relation to the notion of statehood.[92] First, in its traditional sense, the political existence of a state and the international order that has developed in support of it provides the paradigm example of a nation's right to determine its own political status. In this regard Koskenniemi views self-determination as a justification for statehood and the structure of the international regime that underpins it:

> Without a principle that entitles – or perhaps even requires – groups of peoples to start minding their own business within separately organised 'States' it is difficult to think how statehood and everything that we connect with it – political independence, territorial integrity and legal sovereignty – can be legitimate. As a background principle, self-determination expresses the political phenomenon of State patriotism and explains why we in general endow acts of foreign States with legal validity even when we do not agree with their content and why we think that there is a strong argument against intervening in other States political processes.[93]

This interpretation of self-determination was underpinned by the traditional concerns of international actors during the nineteenth century when the primary focus of a state was on its internal predominance as characterised by the doctrine of territorial sovereignty.[94] The prevalence of this traditional notion of statehood persists in modern international law assisted by the provisions of the UN Charter, which hold that states have no right, as a consequence of the sovereign equality of all states, to interfere in the internal affairs of another state.[95] Thus, the traditional notion of statehood remains heavily reliant on the idea of exclusive territorial competence despite the recent rise of an inclusive reality, which has engendered global interdependence thereby undermining the practical significance of state sovereignty.[96]

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[92] Koskenniemi, M., "National Self-determination Today: Problems of Legal Theory and Practice", 43 ICLQ 241, at 245 (1994).
[93] *Ibid.*, 245.
[94] Davis in Henckaerts, n. 1, at 22-24
[95] UN Charter Art.2(7) states that "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state…" Art.2(4) provides that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."
[96] Davis in Henckaerts, n. 1, at 25-30. Also *see* Barkin, J.S. & Cronin, B., "The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations", 48 *International Organization* 107 (1994); Ruggie, J.G., "Territoriality and Beyond: Problematizing Modernity in International Relations", 47 *International Organization* 138 (1993).

Rather than supporting the notion of statehood, however, the second interpretation of self-determination appears to undermine the international order that statehood has created. By perceiving the state as merely the formal political expression of its constituent nation, this interpretation allows a nation to recreate its political form in the light of subsequent national developments thus ensuring that political and national units remain congruent.[97] The potential scope for 'post-modern tribalism' and the inherent threat posed to the present international regime has meant that the content and application of this radical right of self-determination has been the subject of intense scholarly debate.[98] However, as a result of its ramifications for the traditional conceptions of state sovereignty, the international community has generally been unsupportive of claims of self-determination outside the colonial context. Consequently, secessionist activity has historically been perceived as a domestic matter and therefore beyond the scope of international regulation.[99]

Against this background, the reinvention of the ROC as an existing *de jure* state has serious implications for the application of self-determination in the cross-Strait dispute. Regarding a claim of self-determination, state practice suggests that a seceding entity must obtain the consent or acquiescence of its predecessor state before its statehood will be recognised by the international community.[100] Therefore, in the Chinese context, if the ROC achieved *de jure* statehood after the PRC had become firmly established, it would have required the consent or acquiescence of the PRC as the legitimate representative of its 'predecessor' state. Alternatively, if the ROC has been a *de jure* state since 1912, the PRC should have secured the ROC's consent or acquiescence in order for its 'secession' from the ROC to be accepted by wider international community.[101] Clearly, the history of the Chinese conflict demonstrates the normative limitations of self-determination in this regard. Further, if it is accepted that the ROC is an existing *de jure* state, the people of Taiwan have already determined their political status and therefore the traditional conception of self-determination would be relevant in urging the international community to respect the right of a nation to constitute itself as a state. However, the radical interpretation of self-determination would become applicable only if it is accepted that Taiwan is currently under the sovereignty of the PRC, with the ROC regime on Taiwan being merely provincial in nature. Purely for the purposes of investigating the limits of self-determination in the cross-Strait dispute, this article will

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[97] Koskenniemi, n. 92, at 242.

[98] *See* Castellino, J., *International Law and Self-determination* (2000); Cassese, A., *Self-Determination of Peoples: A Legal Reappraisal* (1995); Tomuschat, C., (ed.), *Modern Law of Self-determination* (1994); and Neuberger, B., *National Self-Determination in Postcolonial Africa* (1986).

[99] Jennings, R.Y., *The Acquisition of Territory in International Law* (1962), at 8-9.

[100] Crawford, J., "State Practice and International Law in Relation to Unilateral Secession" (1997), http://canada.justice.gc.ca/en/news/nr/1997/factum/craw.html

[101] Wachman, n. 19, at 197-199.

proceed on the basis that Taiwan is currently under the *de jure* sovereignty of the PRC.

## 5. TAIWAN: A NATION, FOR THE PURPOSES OF SELF-DETERMINATION?

A preliminary problem, which has traditionally hindered the application of self-determination, has been the enduring difficulty concerning the definition of a nation or a people for such purposes. It is widely acknowledged that international law has never devised the general criteria by which a nation could be recognised.[102] Although self-determination played a central role during the process of decolonisation, its scope was restricted to the colonial context and self-determination as such was not considered to be a general right of all peoples.[103] Nevertheless, such a general right was eventually enshrined in the International Covenants of 1966.[104] Building on the themes raised by the process of decolonisation, art.1 of both Covenants asserted that: 'all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' Although the Covenants denote the origins of a general legal right, in the absence of an authoritative definition of 'peoplehood', the exact scope of its application has remained uncertain.[105] Further, it is clear that the right of self-determination remains subject to the requirement of maintaining the territorial integrity of existing states.[106] Accordingly, the primacy given to the principle of territoriality within the current international regime ensures that not every people can exercise their right of self-determination. Although a substantial literature has developed regarding this

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[102] Koskenniemi, n. 92, at 260-263. This issue clearly plagued the framers of the First World War settlement at Versailles, see Thornberry, P., "The Democratic or Internal Aspect of Self-determination with Some Remarks on Federalism", in Tomuschat, C. (ed.), *Modern Law of Self Determination* (1994), n. 98, at 101. Castellino, J., "Territory and Identity in International Law: The Struggle for Self-determination in the Western Sahara," 28 *Millennium Journal of Legal Studies* 523, at 525-527 (1999).

[103] *See* Hannum, H., "Rethinking Self-determination", 34 VirgJIL 1, at 11-17 (1993).

[104] The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (1966), also *see ibid.*, at 25.

[105] Nonetheless UNESCO experts have broadly defined the notion of 'people-hood' as "a group of individual human beings who enjoy some of the following features: a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection, a common economic life." *See* Thornberry, n. 102, at 124. The test of 'peoplehood' for the purposes of self-determination continues to be a controversial topic. *See* Higgins, R., "Comments", in Brolmann, C., Lefeber, R., & Zieck, M., (eds.), *Peoples and Minorities in International Law* (1993), at 30.

[106] However, the pre-eminence of this principle is subject to challenge in international law. *See* the *Western Sahara* Advisory Opinion, ICJ Rep. 1975, at 12.

issue,[107] factors which may entitle a people to exercise their right of self-determination, include: first, where a state carries out serious human rights violations directed at a minority people belonging to its territory;[108] second, the systematic discrimination of a minority people thereby prohibiting its members from fulfilling their legitimate political aspirations under the existing governmental structure,[109] and third, where, through a democratic process, the people of a compact territory decide to establish their own government in accordance with the concept of popular sovereignty.[110]

In relation to the cross-Strait dispute, it is generally accepted that from at least the seventeenth century until the end of the nineteenth century, the island of Taiwan belonged to imperial China.[111] A steady process of emigration from southern China (most notably Fukien province) occurred during this period, thereby marking the origins of a distinct Taiwanese identity.[112] However, China was forced to cede its sovereignty over the island to Japan by virtue of the Treaty of Shimonoseki (1895) through which the people of Taiwan were subjected to Japanese colonial rule until the conclusion of the Second World War. Further, the subsequent retreat of ROC supporters to Taiwan during the latter stages of the Chinese civil war characterised a new stage in Taiwan's history.[113] Despite representing a minority of the popula-

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[107] *See* Buchanan, A., "Self-determination, Secession and the Rule of Law", in McKim, R. & McMahan, J. (eds.), *The Morality of Nationalism* (1997), at 301. Buchheit L.C., *Secession: The Legitimacy of Self-determination* (1978); Brilmayer, L., "Secession and Self-determination: A Territorial Interpretation" 16 Yale JIL 177 (1991); "The Logic of Secession" (ed.), 89 Yale LJ 802 (1980). Although scholars have traditionally developed these factors to justify secession, it is evident that in certain cases the mechanism of internal self-determination would be applicable.

[108] Buchanan, n. 107.

[109] Heraclides, A., "Secession, Self-determination and Non-Intervention: In Quest of a Normative Symbiosis", 45 *Journal of International Affairs* 399 (1992).

[110] *See* generally Fox and Roth, n. 77.

[111] Copper, J. F., n. 12; Charney, J.I. & Prescott, J.R.V., "Resolving Cross-Strait Relations between China and Taiwan", 94 AJIL 453, at 453-457 (2000); Jianming S., "International Law Rules and Historical Evidences Supporting China's Title to the South China Sea Islands", 21 *Hastings International & Comparative Law Review* 1 (1997). Certain scholars would challenge this assertion. *See* Chen, L.C. & Reisman, W.M., "Who Owns Taiwan: A Search for International Title", 81 Yale LJ 599 (1972); Chen, A.G., "Taiwan's International Personality: Crossing the River by Feeling the Stones", 20 *Loy. L.A. Int'l & Comp. L.J.* 223 (1998); Attix, C., "Between the Devil and the Deep Blue Sea: Are Taiwan's Trading Partners Implying Recognition of Taiwanese Statehood?", 25 *California Western ILJ* 357 (1995).

[112] However, it is important to note that various Austronesian peoples populated the island several millennia before the Han Chinese settlers arrived on Taiwan; as such they constitute its indigenous peoples.

[113] It was generally thought that claims of territorial reversion could not be entertained by international law and as such the return of Taiwan to the ROC at least initially was considered to be controversial. *See* Chen & Reisman, n. 111; Charney & Prescott, n. 111, at 458-461. Further, *see* Phase I of the Eritrea-Yemen Arbitration (Perm. Ct. Arb. 1998), http://www.pca-cpa.org and Antunes, N.S.M., "The Eritrea-Yemen Arbitration: First Stage-The Law of Title to Territory Re-averred",

tion,[114] the Mainlanders quickly established themselves as the political elite on Taiwan. Under the authority of the ROC regime they sought to promote their interpretation of Chinese cultural traditions, which were in sharp contrast to the practices of the pre-existing settler culture, articulated through the Taiwanese dialect. However, it would be erroneous to assume that Taiwanese ethnic practices provide evidence of a non-Chinese cultural tradition. In general, Taiwanese practices reflect those traditions practised in the Chinese provinces from which the Taiwanese people emigrated and thus, at one level, the distinction between Chinese and Taiwanese cultures can be reduced to regional differences historically found on the Chinese mainland.[115] The overriding distinction between the Taiwanese and Mainlander categories thus appears to be the time of their arrival on the island. Consequently, a 'Mainlander' who left Fukien with ROC forces for Taiwan in the late 1940s may share greater cultural similarity with the Taiwanese people than with other Mainlanders who arrived in Taiwan from other parts of China during the same period.[116] While Chinese nationalists would argue that this demonstrates the artificiality of Taiwanese nationalism, the Japanese occupation and the ensuing oppressive emergency measures implemented by the ROC have fostered a shared Taiwanese consciousness that has clearly given rise to a distinct national identity. Therefore, despite sharing cultural similarities with the other Chinese peoples, it is evident that the Taiwanese ethnic group as a result of their distinct political experiences could constitute a people in their own right. Alternatively, leaving the established nationalist categories aside, arguably the people of Taiwan *as a whole* could also comprise a people on the grounds that the political events during the last fifty years in both Taiwan and on the Chinese mainland have severed the national identity of the Chinese peoples on either sides of the Taiwan Strait. Given that a central element in the attainment of people-hood is the existence of a shared consciousness, the solidarity of the entire population of Taiwan in the face of external threats combined with their remarkable political and economic development entitles them to claim both a distinct national identity and the right to determine their own political status as a result.

Although the people of Taiwan could constitute a distinct people according to either of the above interpretations, under international law, they must qualify as a 'people' for the purposes of self-determination. In the circumstances, it appears that a claim could be justified on three grounds.[117] First, that the island of Taiwan represents a compact territory distinct from the Chinese mainland, thereby facilitating the creation of an autonomous political

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48 ICLQ 362 (1999).

[114] Slightly less than 85% of the population identify themselves as 'Taiwanese', 14% as 'Mainlanders' and just over one per cent as indigenous, Wachman, n. 12, at 17.

[115] *Ibid.*, at 57-90

[116] *Ibid.*, at 101-118.

[117] Charney & Prescott, n. 111, at 473.

unit. Second, the presence of a distinct socio-economic system that has flourished on the island over the last fifty years is in contrast to the communist structure that exists in the PRC. Third, there is the presence of a democratic regime established on Taiwan that has consequently reinforced the cross-Strait political divide. These elements combined with the unique factor that Taiwan has been a *de facto* political entity for over half a century could allow the people of Taiwan to make a valid claim for self-determination in accordance with the principles of international law.[118]

Further, a related issue in this context is the question of who decides whether a group qualifies for the purposes of self-determination.[119] From the traditional perspective, governmental arrangements are a domestic matter and are thus beyond the remit of international law.[120] Accordingly, outside the colonial context and situations of dissolution, the existence of a people, for the purposes of self-determination, is ultimately a matter for the state concerned. Nevertheless, persuasive authority now exists to support the view that where a people are denied democratic institutions, minority rights or fundamental human rights, the validity of their claim of self-determination is a question for international law rather than for the state in issue.[121] The prospect of incursions being made into the domestic jurisdiction of states has led optimistic scholars to assert that popular sovereignty characterised by the norm of democratic governance validates the current international regime rather than 'anachronistic' notions of state sovereignty.[122] However, while recent developments have made significant inroads into the traditional conception of state sovereignty, events in Chechnya demonstrate that power politics still plays an important part in determining, on the one hand, those internal conflicts which are accessible to the international community and, on the other, those which are not.[123] Consequently, where the international community is not prepared to become involved in an internal dispute, the people concerned have no available means to enforce their right of self-determination irrespective of their 'democratic entitlement'.[124] In all the circumstances, given the PRC's avowed response to any attempt at 'secession' and the general reluctance of the international community to embrace secessionist activity, the application of the radical interpretation of self-determination in the cross-Strait dispute seems to be unlikely in the present international climate.

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118 *Ibid.*, at 471.

119 Fox, G.H., "Self-determination in the Post-Cold War Era: A New Internal Focus?", 16 *Mich.JIL* 733, 747 (1995); and Charney & Prescott, n. 111, at 467-471.

120 Crawford, n. 100.

121 *Re* Secession of Quebec [1998] 2 S.C.R. 217, paras 134, 138, 154, 155, cited in Charney & Prescott, n. 111, at 469-470.

122 *See* Reisman, n. 74.

123 *See* Grant, T.D., "A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law", 40 VirgJIL 115 (1999) cited in Charney & Prescott n. 111, at 469-470. This factor constitutes an important dynamic in the Chinese context.

124 Fox, n. 119. The case of Taiwan illustrates this point clearly.

## 6. INTERNAL SELF-DETERMINATION AND THE CROSS-STRAIT DISPUTE

It has been suggested that both the attraction and the tragedy of self-determination are a consequence of the widespread belief that it gives peoples the right to establish their own *de jure* state.[125] However, while self-determination in its external form remains inextricably linked to the state structure of the current international regime, its normative essence is not tied to the idea of statehood. To this end, the developing norm of 'internal self-determination' seeks to embrace governmental structures which fall short of statehood, to ensure that existing states meet their fundamental obligation of representing their constituent populations in accordance with the progressive canon of international law.[126] Thus, by performing the dual role of securing political autonomy for particular groups while preserving the territorial integrity of an existing state, internal self-determination attempts to avoid the binary choice between accepting the structure of an existing state, or seeking secession.[127] Evidently, this dilemma has confounded the application of external self-determination since its Wilsonian conception at Versailles, and was apparent in the initial response of the General Assembly to the process of decolonisation.[128] Although the General Assembly originally proclaimed that any attempt aimed at partial or total disruption of the national unity and territorial integrity of a state was incompatible with the purposes and principles of the UN charter,[129] it increasingly appreciated that adherence to the principle of territoriality could be justifiable only if the government of a state represented its entire population without distinction as to race, creed or colour.[130] In keeping with the broader themes of human rights, self-determination accepts that states are not ends in themselves in that they derive their core legitimacy from the will of their constituent populations.[131] Accordingly, by emphasising the obligations of a state rather than its rights, the internal affairs of a state are no longer considered sacrosanct; therefore,

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[125] Tomuschat, C., "Self-determination in a Post-Colonial World", in Tomuschat, n. 98, at 1.

[126] For the purposes of this article the notion of 'internal self-determination' refers to the concept of territorial autonomy rather than any right to participate in the political processes of state.

[127] Charney & Prescott, n. 111, at 475. *See* Steiner, H., "Ideals and Counter-ideals in the Struggle Over Autonomous Regimes for Minorities", 66 *Notre Dame Law Review* 1539, at 1547 (1991); and Anaya, S.J., "The Capacity of International Law to Advance Ethnic or Nationality Rights Claims", 75 *Iowa Law Review* 837 (1990).

[128] Hannum, n. 103, at 11-17.

[129] *See* the "Declaration on the Granting of Independence to Colonial Territories and Peoples", G.A.Res. 1514 (XV)(1960).

[130] See the 'Declaration on the Principles of International Law concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations', G.A.Res. 2625 (XXV)(1970).

[131] Tomuschat, n. 125, at 8; and Charney & Prescott, n. 111, at 467-470.

if a state fails to deliver on its core commitments its legitimacy can be brought into question.[132] While flagrant governmental abuses may result in justifiable claims for secession, in many cases internal self-determination can protect the cultural and political rights of distinct groups by allowing them to maintain their national identity without violating the territorial integrity of an existing state.[133] A great advantage of the internal norm is that its resultant form can be determined by the circumstances of a given case to ensure that the particular needs of the parties are met through the development of appropriate autonomous regimes.[134] Thus, while the internal norm reinforces the structure of current international regime, it also endeavours to redefine the notion of statehood in the light of modern developments.

This developing norm is clearly pertinent to the cross-Strait dispute since the PRC is willing to concede a degree of internal self-government to the people of Taiwan. However, the fundamental problem in this regard concerns the precise formulation of self-governance given that the 'one country, two systems' approach is evidently unacceptable to the ROC. Although the model was developed in relation to Taiwan, it was applied to Hong Kong following its reversion to Chinese sovereignty in 1997.[135] Given that Hong Kong had never exercised its own sovereignty, the people of Taiwan will not be prepared to settle for a comparable level of autonomy, especially in the light of the political developments since reversion.[136] In view of the uncertain guarantees and the PRC's human rights record, the perennial problem remains why the people of Taiwan should accept an autonomous model that purports to offer them no greater authority than that which they already possess.

In its White Paper 'The One China Principle and the Taiwan Issue' (2000), the PRC contends that the phrase 'sovereignty belongs to the people' refers to all the people of the state and therefore cannot be used by sub-state groups to justify their right to self-determination.[137] It claims that sovereignty over

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[132] The Vienna Declaration of 1993 expanded the ambit of this claim by allowing the right of self-determination to be exercisable in situations in which a government fails to represent the whole of its people by making a distinction of any kind. *See* 32 ILM 1661 (1993), cited in Kirgis, F.L., "The Degrees of Self-determination in the United Nations Era", 88 AJIL 304, at 305-307 (1994). Also *see* Tomuschat, n. 125, at 9.

[133] *See* Hannum, H. & Lillich, R.B., "The Concept of Autonomy in International Law", in Dinstein, Y., (ed.), *Models of Autonomy* (1981), at 215.

[134] For alternate models for the protection of minority rights *see* generally Thornberry, P., *International Law and the Rights of Minorities* (1991) and Hannum, H., "Contemporary Developments in the International Protection of the Rights of Minorities", 66 *Notre Dame Law Review* 1431 (1991).

[135] *See* generally Cradock, P. *Experiences of China* (1998).

[136] *See* Edwards, G.E. "Applicability of the 'One Country, Two Systems' Hong Kong Model to Taiwan: Will Hong Kong's Post-Reversion Autonomy, Accountability and Human Rights Record Discourage Taiwan's Reunification with the People's Republic of China?", 32 *New England Law Review* 751 (1998). Klintworth, G., "China and Taiwan-From Flashpoint to Redefining One China", Parliamentary Library of Australia, http://www.aph.gov.au/library/pubs/rp/2000-01/01rp15.htm

[137] *See* Higgins, n. 105.

Taiwan belongs to all the people of China and accordingly any democratic process limited to the people of Taiwan cannot be representative of the will of the Chinese people. Further, as Taiwan has not been a colony during the UN era or subject to any foreign occupation, the principle of self-determination cannot be applied in relation to Taiwan.[138] The PRC, seeking to rely on the traditional interpretation of state sovereignty, has discounted the radical interpretation of self-determination and is therefore prepared to countenance modern developments only where they bolster the traditional position.[139] Evidently, the PRC does not accept that it is the inherent duty of a state to represent all its constituent populations without distinction of any kind or that a failure to meet such obligations may result in the legitimacy of its governance being brought into question.

Clearly, the reluctance of the PRC to adopt the progressive canon of international law with its ramifications for state sovereignty is a corollary of China's modern history. Chinese political leaders began to promote their vision of Chinese nationalism some two hundred years after nationalism had transcended the political institutions of Europe. The humiliations of modern Chinese history combined with the urgent need to establish the Chinese nation across a vast territory resulted in an accelerated commitment to nationalism and the task of nation building.[140] In addition, given the Chinese civil war and the obstacles left in its wake, it is notable that both the ROC and PRC clung to Chinese nationalism and traditional interpretations of state sovereignty in a desperate attempt to maintain their perceived legitimacy. The process of international de-recognition ultimately forced the ROC to alter its historic demands and embrace progressive international norms in a bid to carve out a political identity for itself. However, an accommodating international community has allowed the PRC to maintain its commitment to Chinese nationalism and the traditional interpretations of state sovereignty for the present.

Nonetheless, global market forces have meant that the PRC is slowly changing its focus, as has been demonstrated by its recent admission to the WTO. Further, the PRC is starting to acknowledge its wider responsibility of upholding international order, as evidenced through its increased role in UN peacekeeping missions and international anti-terrorist strategies.[141] Although the PRC is beginning to accept the tenets of the economic system that has spawned global interdependence, the extent to which it is prepared to embrace the attendant forces of democratic governance, self-determination

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[138] Clearly the PRC has adopted a restrictive interpretation of self-determination in this regard. *See* Hannum, n. 103, at 12-17

[139] PRC White Paper, "The One China Principle and the Taiwan Issue", The Taiwan Affairs Office, 21 Feb. 2000. http://www.china-embassy.org/eng/7128.html.

[140] Townsend, n. 4, at 112-124

[141] Bates, G. & Reilly, J., "Sovereignty, Intervention and Peace-Keeping: The View from Beijing", 42 *Survival* 41 (2000).

and human rights remains less clear. In this regard, despite the end of the Cold War and the demise of the Soviet Union, Yugoslavia and other communist states, the PRC appears to have actually reinforced its commitment to the traditional notions of statehood and sovereignty, perhaps because of the heightened fears that such events have engendered for its own existence.

## 7. POLITICAL IDENTITY UNDERPINNED BY ECONOMIC DETERMINANTS

The continuing existence of the ROC can arguably be attributed to its successful incorporation into the global economy; undoubtedly, its underlying economic strength has been a major factor in its social transformation. It has been suggested that Taiwan represents the first quasi-national entity whose successful existence is largely attributable to globalisation, with its flow of trans-national capital and promotion of de-territorialized economic identities.[142] However, political identity defined by reference to economic determinants can produce instability, with identity's being held hostage to the fortunes of global capitalism. In this regard, a central problem facing the ROC derives from its apparent over-reliance on the economic factors that underpin its existence. Despite its strong export-driven economy, the thawing of cross-Strait relations in the early 1990s encouraged Taiwan's entrepreneurs to exploit commercial opportunities developing on the Chinese mainland.[143] With its cheap land and labour costs, cultural similarities, shared language and distinct industrial strengths, the mainland clearly presents an attractive proposition. Notwithstanding the existence of governmental restrictions,[144] the flow of exports and investments to the PRC has soared,[145] leaving political leaders in Taiwan increasingly anxious about the dangerous pull of the mainland economy and about the inherent risk of political concessions being made as a result of economic duress.[146] Further, the impact of the recent recession in Taiwan has compounded fears that the increasing dependence on the PRC's rapidly expanding markets will lead to the 'hollowing out' of Taiwan's economy.[147] Faced with a shrinking ROC economy, the Chinese mainland continues to offer the best prospect for Taiwan's economic re-

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142 Chun, n. 13, at 24.

143 Hughes, n. 4, at 113-122.

144 In addition to initial ROC restrictions regarding the types of products that could be exported and forms of approved investment, a ban on direct trade, transport and communication links (collectively known as the 'three direct links') remains in force.

145 By 2001, ROC businesses had invested approximately $70 billion since business relations were liberated in 1987. *South China Morning Post*, 12 Nov. 2001. Also *see* http://www.mac.gov.tw/english/CSExchan/Welcome.html

146 Hughes, n. 4, at 113-122.

147 In 2001, unemployment in Taiwan reached 4.5% and the economy shrank by 2%. *The Economist*, 5 Jan. 2002.

invigoration and, in recognition of this fact, the ROC government has replaced its cautious attitude with a policy of actively encouraging mainland investment, making closer economic integration inevitable.[148] Against this background, in January 2002, the ROC acceded to the World Trade Organisation ('WTO') under the name 'Customs Territory of Taiwan, Pengu, Kinmen and Matsu'. In this context, President Chen has claimed that membership of this 'economic United Nations'[149] will enable the ROC to exploit new commercial opportunities and allow it to rejoin the international community. Chen has also emphasised that the recent accession of the PRC to the WTO has created a new institutional mechanism whereby the spirit of economic liberalisation and the regulatory framework of the WTO can combine to advance cross-Strait relations.[150] However, early signs indicate that the PRC considers the WTO to be purely an economic forum and is unwilling to address issues that may compromise its claim of sovereignty over Taiwan.[151]

## 8. CONCLUSION

Since the withdrawal of international recognition, political identity on Taiwan has been guaranteed by economic determinants and therefore its changing economic fortunes could undermine the very basis for the existence of the ROC. Although it has been suggested that, given its democratic reforms, liberal democratic states have a moral responsibility to support Taiwan,[152] the general apathy of the international community does not inspire confidence. Evidently, if the ROC declines as an economic force, its bargaining power in unification negotiations will be severely diminished. In the past, scholars have assured the people of Taiwan that time is on their side and that in all probability the cross-Strait dispute will recede on the basis of 'masterly inactivity'.[153] However, these views were premised on the ROC's maintaining its economic vitality and global outlook; now that these postulates are open to question and given the rapid international expansion of the PRC, the ROC's position looks more vulnerable than at any time since its widespread de-recognition. Arguably, the best opportunity for a cross-Strait

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[148] *Ibid.*

[149] *See* Ma, M., "WTO approval greeted with enthusiasm", *South China Morning Post*, 19 Sept. 2001.

[150] Chen, S.B., ROC Government Information Office, 12 Nov. 2001. http://www.taiwaninformation.org/issues/view_story.php3?508. However, accession to the WTO has not been without domestic costs. *See* Dickie, M., "Taiwan Entry to WTO Raises Concerns at Home", *Financial Times*, 2 Jan. 2002.

[151] *See* "Benefits and Challenges of Taiwan WTO Membership", Taiwan Studies Institute, 1 Dec. 2001. http://www.taiwanstudies.org/tsi_publications/view_story.php3?521.

[152] Hughes, n. 4, at 143-144

[153] Henckaerts, J.M., "Self-determination in Action for the People of Taiwan", in Henckaerts, n. 1, at 241, 244; and Charney & Prescott, n. 111, at 474.

settlement favourable to the people of Taiwan has passed and the prospect of accepting the 'one country, two systems' model in its present form has moved a step closer. If the unification of China becomes a reality, the people of Taiwan will be reliant on the development of the progressive norms of international law in order to safeguard the level of political autonomy agreed through any cross-Strait 'settlement'. In this regard, internal self-determination will have particular resonance in the seeking of the ROC to ensure that Beijing adheres to any agreed model. To this end, the international community must support a fundamental revision of the traditional notions of statehood and sovereignty, in the interests of a sustainable international order and the advancement of international human rights.

However, accession to the WTO has had profound implications for the PRC.[154] Membership has clearly raised the spectre of political liberalisation; economic freedom will inevitably heighten expectations for further reform, indirectly placing the question of human rights on the domestic agenda. The PRC remains distinctly uncomfortable about the institutional bias of the WTO, fearing that the preponderance of western states will manipulate its mechanisms in order to undermine the PRC's sovereignty.[155] Evidently, the PRC wishes to secure the benefits of globalisation without accepting the basis for such gains (i.e., economic liberalisation through the relaxation of governmental controls). By joining the WTO, the PRC has pledged itself to fulfilling a diminishing role in economic affairs and will consequently lose the ability it now has to control its citizens *via* its vast network of state-owned enterprises, which provide the foundations of the Chinese communist party. Over time, it is anticipated that the introduction of market forces will marginalise the communist party, ultimately resulting in political transformation.[156] International expansion may therefore lead to the creation of a new political community on the Chinese mainland, which increasingly satisfies the ROC's criteria for unification; in turn, this will thereby enhance the prospect of 'one China' for the people of Taiwan and guarantee their political autonomy without the need for direct intervention by the international community.

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[154] Barshefsky, C., "Enter China: WTO Membership Has Important Potential", *Washington Post*, 9 Nov. 2001.

[155] Chan, V.P.K., "Chinese Economists Fear Favoured West may Threaten Sovereignty", *South China Morning Post*, 13 Nov. 2001.

[156] *See* "Special Report on Politics in China", *The Economist*, 30 June 2001.

# LEGAL MATERIALS

# STATE PRACTICE OF ASIAN COUNTRIES IN THE FIELD OF INTERNATIONAL LAW*

## INDIA

### JUDICIAL DECISIONS[1]

**Reservations and State practice under Article 36 (2) of the Statute of the International Court of Justice (ICJ) – Commonwealth Reservation and Multilateral Convention Reservation – General Act 1928 – Succession to Treaties**

**Case concerning the aerial incident of 10 August 1999**
**International Court of Justice, 21 June 2000**

(PAKISTAN V. INDIA)

The case concerning the Aerial Incident of 10 August 1999 between Pakistan and India was decided by the ICJ on 21 June 2000.[2] The Court by fourteen votes to two found that it had no jurisdiction to entertain the Application filed by Pakistan on 21 September 1999. Before proceeding on the merits, the Court, in consultation with the parties, decided to determine separately the question of jurisdiction.[3]

*India's Preliminary Objections to Assumption of Jurisdiction:*

India raised preliminary objections to the assumption of jurisdiction by the Court on the basis of Pakistan's application. These objections related to what is known

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* Edited by B.S. Chimni, General Editor. The materials reflect state practice for the years 1999 (latter half) and 2000. The footnotes of contributors have been retained in their original format.
1 Contributed by V.G. Hegde, Senior Legal Officer with the Ministry of External Affairs, India.
2 For the full text of the judgment, see Mimeographed version, ICJ Judgement, General List No. 119; also see *Indian Journal of International Law*, vol. 40, no.2, April-June, 2000, pp. 271-371.
3 The scope of this write-up is limited to highlighting the arguments and views of India concerning three jurisdictional aspects, namely, (a) General Act of 1928; (b) Commonwealth Reservation; and (c) Multilateral Convention Reservation.

*Asian Yearbook of International Law,* Volume 9 (B.S. Chimni *et al.,* eds.)
© 2004 Koninklijke Brill NV. Printed in The Netherlands, pp. 223-279.

as "Commonwealth reservation"[4] and "Multilateral Convention reservation".[5] India contended:

(i) That Pakistan's Application did not refer to any treaty or convention in force between India and Pakistan, which confers jurisdiction upon the Court under Article 36 (1).
(ii) That Pakistan's Application fails to take into consideration the reservations to the Declaration of India dated 15 September 1974 filed under Article 36 (2) of its Statute. In particular, Pakistan, being a Commonwealth country, is not entitled to invoke the jurisdiction of the Court as sub-paragraph 2 of paragraph 1 of that Declaration excludes all disputes involving India from the jurisdiction of this Court in respect of any State which 'is or has been a Member of the Commonwealth of Nations'.
(iii) The Government of India also submits that sub-paragraph 7 of paragraph 1 of its Declaration of 15 September 1974 bars Pakistan from invoking the jurisdiction of this Court against India concerning any dispute arising from the interpretation or application of a multilateral treaty, unless at the same time all the parties to such a treaty are also joined as parties to the case before the Court. The reference to the UN Charter, which is a multilateral treaty, in the Application of Pakistan as a basis for its claim would clearly fall within the ambit of this reservation. India further asserts that it has not provided any consent or concluded with Pakistan any special agreement that waives this requirement.

India's Position on the General Act of 1928:

Pakistan cited Article 17 of the General Act of 1928[6] as the basis of the Court's jurisdiction,[7] which, it argued, provided for the submission of disputes to the Permanent Court of International Justice (PCIJ). In reply India contended that

> (t)he General Act of 1928 is no longer in force and that, even if it were, it could not be effectively invoked as a basis for the Court's jurisdiction.

India argued that the numerous provisions of the General Act referred to organs of the League of Nations or to the Permanent Court of International Justice; that, in

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[4] This reservation excludes "…disputes with the government of any State which is or has been a Member of the Commonwealth of Nations". See *Year Book of the International Court of Justice*, 1992-1993, pp. 87-88.

[5] *Ibid*; The Multilateral Convention Reservation states "…disputes concerning the interpretation or application of a multilateral treaty unless all the parties to the treaty are also parties to the case before the Court or Government of India specially agree to jurisdiction".

[6] On 21 May 1931 British India acceded to this General Act. According to Pakistan, subsequently both India and Pakistan became parties to the General Act as successor States.

[7] Article 17 provides: "All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal. It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice".

consequence of the demise of those institutions, the General Act has “lost its original efficacy” India also pointed out that the UN General Assembly adopted a new General Act in 1949; that “those parties to the old General Act which have not ratified the new act” cannot rely on the old Act except “in so far as it might still be operative’, that is, in so far … as the amended provisions are not involved”; that Article 17 is among those amended in 1949 and that, as a result, Pakistan cannot invoke it today.

(a) ‘Succession’ or ‘Continuity’?

India argued that the General Act was an agreement of a political character, which by its nature, was not transmissible. India also argued that it made no notification of succession as provided for in the case of newly independent States by Articles 17 and 22 of the Vienna Convention of 1978 on Succession of States in respect of Treaties.[8] According to India, this Convention was a codified customary law. Above all, the clear and conclusive communication of 18 September 1974 by India to the Secretary-General of the United Nations that it “… never regarded … as bound by the General Act of 1928 since her Independence in 1947 whether by succession or otherwise”, should be treated as enough proof of its intentions.[9]

On the question of succession to the General Act of 1928, Pakistan had argued that “there was no succession. There was continuity”. According to Pakistan “the communication of 18 September 1974 was a subjective statement, which had no objective validity. Pakistan, for its part … acceded to the General Act in 1947 by automatic succession by virtue of international customary law”. Pakistan referred to the provisions of Indian Independence (International Arrangements) Order issued by the Governor General of India on 14 August 1947.

India disputed the above interpretation of the Indian Independence (International Arrangements) Order. It referred to Article 4, which stated: … membership of all international organizations together with the rights and obligations attaching to such membership, will devolve solely upon the Dominion of India”. The same article also provided that “… the Dominion of Pakistan will take such steps as may be necessary to apply for membership of such international organizations as it chooses to join”.

India accordingly argued that Pakistan could not have succeeded under the Order and agreement of 14 August 1947 to the rights and obligations acquired by British India by virtue of her membership of the League of Nations. In support of this argument India referred to an interpretation provided by the Supreme Court of Pakistan on 6 June 1961 referring to the provisions of the Schedule to the Order of 1947.[10]

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[8] India is not a party to this Convention. Article 17 (in Section 2 dealing with Multilateral Treaties) concerns “Participation in treaties in force at the date of the succession of States”. Article 22 provides for “Consent to be bound by part of a treaty and choice between differing provisions”.

[9] It may be noted that this 18 September 1974 communication by India was in response to 30 May 1974 notification by Pakistan addressed to the UN Secretary-General stating that it “…continues to bound by the accession of British India of the General Act of 1928”. Pakistan also added that it did not affirm the reservations made by British India.

[10] The Supreme Court of Pakistan had held that “… Pakistan … did not automatically become a member of the United Nations nor did she succeed to the rights and obligations which attached to India by reason of her membership of the League of Nations at Geneva or the United Nations”.

In order to show that its succession to treaties was express with particular reference to the General Act of 1928, India also referred to the report of Expert Committee No. IX on Foreign Relations, which in 1947 had been instructed, in connection with the preparation of the Order of 1947, "to examine and make recommendations on the effect of partition" on *inter alia*, "the existing treaties and engagements between [British] India and other countries and tribes". India referred in particular to Annexure V to the said report, which contained a list of those treaties and engagements. The General Act of 1928 did not appear on that list.

(b) Position under the Simla Accord of 2 July 1972:

In support of its argument invoking Court's jurisdiction Pakistan further referred to the Agreement signed between India and Pakistan on 2 July 1972 in which both the countries declared themselves "resolved to settle their differences by peaceful means through bilateral negotiations or by any other peaceful means mutually agreed upon between them". Pakistan sought to link this provision to the General Act of 1928 and argued that it created mutually binding obligations between them to resolve the disputes by "peaceful means".

India while interpreting its view on this aspect of the Simla Accord argued that the Accord:

> [...] is no more than an arrangement between India and Pakistan to first enter into negotiations in case of any difference, and following such negotiations, to refer the matter to any other method of settlement to the extent that there is any further and specific agreement between the parties.[11]

On 'Extra-Statutory' Reservations:

As regards the Commonwealth Declaration made by India, Pakistan went on to argue that it "…was maintained by India only as a bar to actions by Pakistan…This discrimination against Pakistan in India's acceptance of the optional clause really amounted to an abuse of right".[12] India rejecting Pakistan's line of reasoning pointed out that

The issue before Supreme Court of Pakistan was concerning the 1927 Convention for the Execution of Foreign Arbitral Awards, which had been ratified by British India in 1937. India argued that "This reasoning was transposable in all respects to the General Act of 1928".

[11] The Court, in the final analysis, regarded the provision of the Simla Accord as "an obligation, generally, on the two States to settle their differences by peaceful means, to be mutually agreed by them". The Court further pointed out that "The said provision in no way modifies the specific rules governing recourse to any such means, including judicial settlement. Thus, the Court cannot interpret that obligation as precluding India from relying, in the present case, on the Commonwealth reservation contained in its declaration". Pakistan had also relied on Article 1 of the Simla Accord, which provides that both India and Pakistan agree
"(i) That the principles and purposes of the Charter of the United Nations shall govern the relations between the two countries".

[12] The Court, however, did not accept Pakistan's argument that India's reservation was a discriminatory act constituting an abuse of right, because the only purpose of this reservation was to prevent

> "None of the commentators on the jurisdiction of the Court…have suggested that the reservation is invalid on this, or any other ground. Article 36 (3) was envisaged from the beginning as allowing a choice of partners [in regard to which a government was prepared to accept the jurisdiction of the Court]…"

India also questioned the correctness of the theory of "extra-statutory"[13] reservations put forward by Pakistan pointing out "any State against which the reservation was invoked could escape from it by merely stating that it was extra-statutory in character". India also rejected Pakistan's alternative argument that was based on estoppel, saying that in any event no estoppel relating to the Court's jurisdiction could arise in relation to the Simla Accord, as it "does not contain a compromissory clause".[14]

India further argued that "Even if, as Pakistan now contends, the claims are based upon customary international law, the multilateral convention reservation of India will apply wherever there is a reliance upon causes of action which, in the final analysis, are based upon the United Nations Charter".

Decision of the Court:

Referring to the Simla Accord of 2 July 1972 and the Lahore Declaration of 21 February 1999 the Court "reminds the Parties of their obligation to settle their disputes by peaceful means" and in particular the present dispute.[15] With reference to the General Act of 1928 the Court held that "… India considered that it had never been party to the General Act of 1928 as an independent State; hence it could not have been expected formally to denounce the Act. Even if, *arguendo*, the General Act was binding on India, the communication of 18 September 1974 is to be considered in the circumstances of the present case as having served the same legal ends as the notification of denunciation provided for in Article 45 of the Act".

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Pakistan from bringing an action against India before the Court. As to the argument that the Commonwealth declaration made by India was obsolete, the Court at the outset recalled that any declaration "must be interpreted as it stands, having regard to the words actually used … and that a reservation must be given effect "as it stands". It was also noted that the four declarations, whereby since its independence in 1947 India had accepted the compulsory jurisdiction of the Court, had all contained a Commonwealth reservation. In its most recent form, that of 18 September 1974, the reservation was amended so as to cover "disputes with the government of any State which is or has been a Member of the Commonwealth of Nations".

[13] Pakistan had argued that the reservation in question was in excess of the conditions permitted under Article 36 (3) of the Statute under which …the permissible conditions [to which a declaration may be made subject] have been exhaustively set out […] as (i) on condition of reciprocity on the part of several or certain states or (ii) for a certain time". This reservation was accordingly "illicit"…Pakistan contended …citing Article 1 of the Simla Accord that, even if the reservation were to be regarded as valid India would in any case be prevented by the operation of estoppel from invoking it against Pakistan.

[14] The Court did not accept the Pakistan's argument that a reservation such as India's Commonwealth reservations as "extra-statutory".

[15] According to the Court –

"This provision represents an obligation entered into by the two States to respect the principles and purposes of the Charter in their mutual relations. It does not as such entail any obligation on India and Pakistan to submit their dispute to the Court".

**Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW) – Beijing Declaration – International Covenant on Economic, Social and Cultural Rights**

APPAREL EXPORT PROMOTION COUNCIL V. A.K. CHOPRA[16]

**Supreme Court of India. Decision by Dr. A.S. Anand, Chief Justice of India, and Justice V.N. Khare.**
**AIR 1999 Supreme Court 625**

Facts

The respondent, Chairman of the Apparel Export Promotion Council, a government agency, allegedly misbehaved with a woman employee. Upon a written complaint by the employee, the Chairman was placed under suspension pending enquiry. The Enquiry Officer after considering the documentary and oral evidence and the circumstances of the case arrived at the conclusion that the respondent had acted against moral sanctions and that his acts against the woman employee did not withstand the tests of decency and modesty. He, therefore, held the charges levelled against the Chairman as proven. Upon this report of the Enquiry Officer the Chairman was removed from service. The matter went to the High Court which, disallowing the report of the Enquiry Officer, reinstated the Chairman. Aggrieved by the judgment of the High Court the Employer-Appellant, i.e., Apparel Export Promotion Council, filed an appeal to the Supreme Court.

State Practice and Implementation:

The Supreme Court, considering the definition of "sexual harassment" referred to CEDAW and Beijing Declaration, It also referred to the International Covenant on Economic, Social and Cultural Rights. The Court stated:

> "There is no gainsaying that each incident of sexual harassment, at the place of work, results in violation of the Fundamental Right to Gender Equality and the Right to Life and Liberty – the two most precious Fundamental Rights guaranteed by the Constitution of India. As early as in 1993 at the ILO seminar held at Manila, it was recognized that sexual harassment of woman at the work place was a form of 'gender discrimination against woman'. In our opinion, the contents of the fundamental rights guaranteed in our Constitution are of sufficient amplitude to encompass all facts of gender equality, including prevention of sexual harassment and abuse and the Courts are under constitutional obligation to protect and preserve those fundamental rights. That sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admits of no debate. The message of international instruments such as the Convention on the Elimination of All forms of Discrimination Against Women, 1979 ("CEDAW") and the Beijing Declaration which directs all State Parties to take appropriate measures to prevent discrimination of all forms

[16] AIR 1999 Supreme Court 625.

> against women besides taking steps to protect the honour and dignity of women is loud and clear. The International Covenant on Economic, Social and Cultural Rights contains several provisions particularly important for women. Article 7 recognizes her right to fair conditions of work and reflects that women shall not be subjected to sexual harassment at the place of work, which may vitiate working environment. These international instruments cast an obligation on the Indian State to gender-sensitise its laws and the courts are under an obligation to see that the message of international instruments is not allowed to be drowned. This Court has in numerous cases emphasised that while discussing constitutional requirements, Court and counsel must never forget the core principle embodied in the International Conventions and Instruments and as far as possible give effect to the principles contained in those international instruments. The Courts are under an obligation to give due regard to International Conventions and Norm for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law" (emphasis added).[17]

The Court further added:

> In cases involving violation of human rights, the Court must for ever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field. In the instant case, High Court appears to have totally ignored the intent and content of the International Conventions and Norms while dealing with the case.

## Precautionary Principle – Principle of Intergenerational Equity

A.P. Pollution Control Board v. M.V. Naidu[18]

### Supreme Court of India. Decision by Justice S.B. Majmudar and Justice M. Jagannadha Rao

Facts:

The Andhra Pradesh (A.P) State Pollution Control Board and the Society for Preservation of Environment and Quality of Life ('SPEQL') an NGO filed an appeal (altogether there were five petitions) in the Supreme Court against the order of the A.P. High Court directing the A.P. Pollution Control Board to grant consent for the setting up of an industry for production of castor oil derivatives which the State Pollution

[17] The Court surveyed available case law on the subject – *Prem Sankar v. Delhi administration,* AIR 1980 SC 1535; *Mackntinnon Mackenzie and Co. v. Audrey D Costa* (1987) 2 SCC 469 – AIR 1987 SC 1281; *Sheela Bares v. Secretary Children''s Aid Society*, AIR 1987 SC 656; *Vishaka v. State of Rajasthan* AIR 1997 Supreme Court Weekly (SCW) 3043; *People's Union for Civil Liberties s. Union of India* 1997 AIR SCW 1234; and *D.K.. Basu v. State of West Bengal* 1997 AIR SCW 233.

[18] AIR 1999 Supreme Court 812.

Control Board had categorized as environmentally unsound. The Court noted that the cases involved the

> … correctness of opinions on technological aspects expressed by the Pollution Control Boards or other bodies whose opinions are placed before the Courts. The basic dilemma before the Court was "… in adjudicating upon the correctness of the technological and scientific opinions presented to the Courts or in regard to the efficacy of the technology proposed to be adopted by the industry or in regard to the need for alternative technology or modifications as suggested by the Pollution Control Board or other bodies.[19]

State Practice & Implementation:

The Court, in para 31, traced the evolution of the Precautionary Principle. It stated:

> A basic shift in the approach to environmental protection occurred initially between 1972 and 1982. Earlier the concept was based on the 'assimilative capacity' rule as revealed from Principle 6 of the Stockholm Declaration of the U.N. Conference on Human Environment, 1972. The said principle assumed that science could provide policy-makers with the information and means necessary to avoid encroaching upon the capacity of the environment to assimilate impacts and it presumed that relevant technical expertise would be available when environmental harm was predicted and there would be sufficient time to act in order to avoid such harm. But in the 11th Principle of the U.N. General Assembly Resolution on World Charter for Nature, 1982, the emphasis shifted to the 'precautionary principle', and this was reiterated in the Rio Conference of 1992 in its Principle 15 …[20]

Having considered the evolution of 'precautionary principle' as the established norm under international law, the Court referred to:

> The duty of the present generation towards posterity: Principle of Intergenerational Equity: Rights of the Future.

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[19] The Court cited the views of various eminent authorities and scholars; it also made particular reference to its own decision in the *Vellore Case* (1996 AIR SCW 3399) in which it held that "precautionary principle and Polluter Pays Principle are part of the environmental law of the country. The Court had further observed that these principles "… are accepted as part of the Customary International Law and hence there should be no difficulty in accepting them as part of our domestic law".

[20] The Court quotes Principle 15 of the Rio Conference of 1992. The Court also refers and quotes the article written by Barto in the *Harvard Environmental Law Review* (1988) vol.22, p.509. Also extensively refers to the First Report of the Special Rapporteur of the International Law Commission on the subject of International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law.

The Court also noted that:

> "The principle of Inter-generational equity is of recent origin. The 1972 Stockholm Declaration refers to it in Principles 1 and 2. In this context, the environment is viewed more as a resource basis for the survival of the present and future generations"[21]

Having considered in detail the application of the concepts of 'precautionary principle' and 'inter-generational equity' the Court framed the issues as

(a) Is the respondent industry a hazardous one and what is its pollution potentiality, taking into account, the nature of the product, the effluents and its location?
(b) Whether the operation of the industry is likely to affect the sensitive catchment area resulting in pollution of Himayat Sagar and Osman Sagar lakes supplying drinking water to the twin cities of Hyderabad and Secunderabad?

The Court eventually referred the matter for scientific and technical investigations and opinion under the National Environmental Appellate Authority Act, 1997 to the National Environmental Appellate Authority.

### Universal Declaration of Human Rights

CHAIRMAN, RAILWAY BOARD AND OTHERS V. MRS CHANDRIMA DAS AND OTHERS[22]

**Supreme Court of India. Decision by Justice S. Saghir Ahmad and Justice R.P. Sethi**

Facts

The case involved issues relating to the violation of right to life and the right of a foreign national to be treated with dignity. The violation took place within State premises and was committed by railway employees. The High Court of West Bengal held that the State must pay compensation, as it was vicariously liable for an act of tort of its employees. It was argued before the Supreme Court "… that Smt. Hanuffa Khatoon was a foreign national and, therefore, no relief under Public Law could be granted to her as there was no violation of the Fundamental Rights available under the Constitution".

State Practice & Implementation:

The Court, while disagreeing with the above contention, inter alia stated:

> This argument must [...] fail for two reasons; first, on the ground of Domestic Jurisprudence based on Constitutional provisions and secondly, on the ground of Human Rights Jurisprudence based on the Universal Declaration of Human Rights, 1948

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[21] The Court quoted Principle 1 and 2 of the 1972 Stockholm Declaration.
[22] AIR 2000 SC 988; Reproduced from Indian Journal of International Law, vol. 40, no.3, July-September 2000 pp. 563-76.

> which has the international recognition as the "Moral Code of Conduct" having been adopted by the General Assembly of the United Nations.

The Court, in support of its above views, quoted (in para 20) the preambular provisions of the 1948 Universal Human Rights Declaration. In para 21 of its judgement the Court quoted various articles of the Declaration, in particular Articles 1, 2, 3, 5, 7, and 9.

The Court also referred to the General Assembly Resolution on Declaration on the Elimination of Violence against Women dated 20 December 1993. In para 22 of its judgement the Court reproduced Article 1 of this Declaration – which *inter alia* refers to "violence against women" – "means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life".

The Court further (in para 24) stated:

> The International Covenants and Declarations as adopted by the United Nations have to be respected by all signatory States and the meaning given to the above words in those Declarations and Covenants have to be such as would help in effective implementation of those Rights. The applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence".[23]

While referring to the domestic application of international human rights and norms, the Court stated:

> "The domestic application of international human rights and norms was considered by the Judicial Colloquia (Judges and Lawyers) at Bangalore in 1988. It was later affirmed by the Colloquia that it was the vital duty of an independent judiciary to interpret and apply national constitutions in the light of those principles. Further Colloquia were convened in 1994 at Zimbabwe, in 1996 at Hong Kong and in 1997 at Guyana and in all those Colloquia, the question of domestic application of international and regional human rights especially in relation to women, was considered. The Zimbabwe Declaration 1994, *inter alia*, stated:

[23] In support of this view the Court referred to Lord Diplock in *Salomon v. Commissioners of Customs and Excise* [1996] 3 All ER 871 pointing out that "there is a, *prima facie*, presumption that Parliament does not intend to act in breach of international law, including specific treaty obligations". The Court also referred to Lord Bridge in *Brind v. Secretary of State for the Home Department* [1991] 1 All ER 720 pointing out that it was well settled that "in construing any provisions in domestic legislation which was ambiguous in the sense that it was capable of a meaning which either conform to or conflicts with the International Convention, the courts would presume that Parliament intended to legislate in conformity with the Convention and not in conflict with it".

"Judges and Lawyers have [the] duty to familiarize themselves with the growing international jurisprudence of human rights particularly with the expanding material on the protection and promotion of the human rights of women".[24]

## INDONESIA[*]

### LEGISLATION ON INTERNATIONAL LAW MATTERS

### Conduct of foreign relations

### Act on Foreign Relations (Act No.37/1999 of 28 July 1999)[1]

The preamble of the Act refers to the ratification by Indonesia, in 1982, of the 1961, 1963 and 1969 Vienna Conventions on diplomatic and consular relations and on special missions. The increase of the international relations and the need of fulfilling the principles of Indonesia's independent and active foreign policy are referred to as underlying the wish to regulate the conduct of foreign relations comprehensively and in an integrated manner in one law. The substantive part of the Act is sub-divided in ten chapters: (1) Articles 1-4: "General provisions", (2) Articles 5-12: "The conduct of foreign relations and the implementation of foreign policy", (3) Articles 13-15: "The conclusion and ratification of international agreements", (4) Articles 16-17: "Immunities, privileges and exemptions from legal obligations", (5) Articles 18-24: "The protection of Indonesian nationals", (6) Articles 25-27: "The granting of asylum and the issue of refugees", (7) Articles 28-34: "Instruments for international relations", (8) Articles 35-38: "The issuance and acceptance of letters of credence", (9) Article 39: "Transitory provisions", (10) Article 40: "Final provision".

In its Chapter II the Act prescribes the foreign relations (of Indonesia) to be in accordance with, *inter alia*, international law and custom (Art.5) and declares this prescription applicable to all performers of international relations, "governmental as well as non-governmental". The same chapter determines the distribution of competence in the field of foreign relations, including the dispatch (abroad) of forces and peace-keeping missions. Chapter III essentially affirms the coordinating role of the foreign minister in matters of treaty making, and explicitly refers to a separate law on the conclusion and ratification of international agreements. Chapter IV distinguishes between, on the one side, the usual immunities, privileges and exemptions which are to be granted in accordance with municipal and international law and

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[24] The Court pointed out that (in para 27 of its judgment) that "this situation may not really arise in our country". It further noted that: "Our Constitution guarantees all the basic and fundamental human rights set out in the Universal Declaration of Human Rights, 1948, to its citizens and other persons."

[*] Contributed by Hikmahanto Juwana, University of Indonesia.

[1] *Lembaran Negara* [State Gazette] 1999 No.156.

international custom and, on the other side, special exemptions granted under municipal law to other persons. Chapter V mainly deals with the obligations of the (Indonesian) state towards its nationals abroad, but still refers to "international law and custom" as the States' standard. In matters of granting asylum to aliens the law in its Chapter VI refers to "accordance with national law with due attention to international law, custom and practice" (Art.26). Chapter VII deals with the various agents entrusted with the conduct of foreign relations, including the foreign minister and the diplomatic service, referring to ministerial decrees for further regulation.

## Human rights

### Act on Human Rights (Act No.39/1999 of 23 September 1999)[2]

The Act acknowledges, in its preamble, the universal and permanent character of fundamental human rights, and the fact that persons have, besides, fundamental duties toward each other as well as toward the society as a whole in social life, in their life as a nation, and within a state. The preamble also acknowledges that as a member of the United Nations Indonesia has the moral and legal responsibility to honour and observe the Universal Declaration of Human Rights and the various other international instruments on fundamental human rights that have been acceded to by the Republic of Indonesia.

In providing definitions of various terms for the purpose of the Act, the notion of "fundamental human duty" is defined as a "set of obligations the fulfilment of which is essential for the fulfilment and maintenance of the fundamental rights."

The Act is divided in the following chapters: I. General Provision (Art.1); II. Basic principles (Arts.2-8); III. Fundamental human rights and freedoms (Arts.9-66, sub-divided into 10 Parts: the right to life, the right to a family and descendants, the right to develop one's personality, the right to justice, the right to personal freedom, the right to security, the right to welfare, the right to participate in government, the rights of women, the rights of a child); IV. Fundamental human duties (Arts.67-70); V. Governmental obligations and responsibilities (Arts.71-72); V. Restrictions and prohibitions (Arts.73-74); VII. The National Commission on Human Rights (Arts.75-99); VIII. Participation from society (Arts.100-103); IX. The Court for fundamental human rights (Art.104); X. Transitional matters (Art.105); XI. Final provision (Art.106).

Under the basic principles of Chapter II of the Act, Article 3 declares, inter alia, that "Every person has the right to recognition, guarantee, protection and just treatment under the law and to be granted legal certainty and equal treatment before the law" and "Every person is entitled to protection of his fundamental human rights and freedoms, without discrimination."

Moreover, Article 7 declares that: "Every person has the right to have resort to all national legal remedies and international fora for any breach of a fundamental human right that is protected by Indonesian and international law." Correspondingly Article 7 paragraph 2 determines that "Norms of international law relating to fundamental human rights which are recognized by the Republic of Indonesia become

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[2] *Lembaran Negara* [State Gazette] 1999 No.165.

national law". Accordingly, Article 67 prescribes that "Every person within the territory of the Republic of Indonesia has the duty to abide by the written and unwritten laws and the international laws on fundamental human rights that are recognized by the Republic of Indonesia".

With regard to restrictions and prohibitions Article 73 establishes that "The rights and duties in question can only be restricted by and on the basis of the law, and solely for the purpose of safeguarding the acknowledgement and respect of the fundamental rights and freedoms of other persons, and of good morals, public order and the nation's interest".

The Act refers to a National Commission on Human Rights in accordance with its prescriptions. As a consequence it declares the existing, identically named, Commission that was established in 1993 under Presidential Decree, to be henceforth the Commission within the meaning of the Act. (Art.105).

## Treaties; conclusion, ratification

### Act on International Agreements (Act No.24/2000 of 23 October 2000)[3]

The preamble of the Act refers, *inter alia*, to the brevity of the constitutional provision [Art.11] on the conclusion and ratification of treaties which necessitates elaboration in further legislation, and to the fact that a 1960 letter of the President to Parliament on the matter which has thus far served as a guide for the conclusion and ratification, is no more in conformity with the (current) spirit of reformation. [It does not refer to the 1969 Vienna Convention on the Law of Treaties, to which Indonesia is not a party]

Apart from the usual chapters on the use of terms (Ch.1), on transitional matters (Ch.7), and on its entry into force (Ch.8) the Act deals with the procedures on the conclusion of treaties (Ch.2), their ratification (Ch.3), their application and amendment (Ch.4), their deposit (Ch.5), and their termination (Ch.6).

Under Article 9 ratification is prescribed if so required by the international agreement in question. It "is performed by way of" act of parliament [which is a joint action of parliament and the President] or by Presidential decree. Article 10 determines that the former format applies for international agreements dealing with the following items: "issues of state polity, peace, defence and security"; "changes in the territory or borders of the Indonesian state"; "the sovereignty or the sovereign rights of the state"; "fundamental human rights and environmental matters"; "the creation of new legal rules"; "foreign financial loans and/or aid". According to Article 14 the "instruments of ratification" bear the signature of the minister responsible for external affairs and foreign policy.

In the chapter on the termination of international agreements Article 18 enumerates the usual familiar grounds for termination, but also mentions the following ground: "the presence of facts which are harmful to the national interests". The official explanatory memorandum[4] on the Act elucidates that the term "national interests" "is to be interpreted as public interest, the protection of the Republic of

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[3] *Lembaran Negara* [State Gazette] 2000 No.185.

[4] *Tambahan Lembaran Negara* [Annex to the State Gazette] No.4012.

Indonesia as a legal subject, and the sovereign jurisdiction of the Republic of Indonesia".

On the matter of state succession Article 20 states that: "International agreements are not terminated as a result of state succession as long as the successor state declares itself bound by that agreement".

## Adjudication of international crimes

### Act on the Court for Fundamental Human Rights (Act No.26/2000 of 6 November 2000)[5]

The preamble of the Act states that in order to participate in maintaining world peace and assuring the observance of fundamental human rights it was considered necessary to expeditiously set up a Court for Fundamental Human Rights [CHR] to deal with serious violations of fundamental human rights.

The Act is divided into ten chapters: I. General provision (Art.1); II. The status and location of CHRs (Arts.2-3); III. Jurisdiction (Arts.4-9); IV. Law of procedure (Arts.10-33); V. Protection of victims and witnesses (Art.34); VI. Compensation, restitution and rehabilitation (Art.35); VII. Penalties (Arts.36-42); VIII. Ad hoc Court for Fundamental Human Rights (Arts.43-44); IX. Transitional matters (Art.45); X. Final provisions (Arts.46-51).

The CHR has jurisdiction over serious violations of fundamental human rights committed in Indonesia and those committed outside Indonesia by an Indonesian national (Arts.4 and 5), and explicitly abolishes the statute of limitation for these offences (Art.46). It carries out its functions, in the first instance as well as in appeal cases and at the cassation level, in panels of five judges, consisting of two professional judges and three ad hoc judges (Arts.27, 28, 32, 33).

In accordance with the general principle of *nullum crimen sine lege* the Act applies only to acts committed after its entry into force. However, it opens the door to include acts which have taken place before that time by introducing the possibility of an "Ad hoc Court for Fundamental Human Rights" for these cases, which may be set up by presidential decree at the proposal of Parliament. Besides, the Act leaves the possibility of having these early cases dealt with by a (not yet established) Truth and Reconciliation Commission.

Article 7 defines the notion of "serious violation of fundamental human rights" as consisting of the crime of genocide and that against humanity. As to the issue of liability for the acts of subordinates, Article 42, containing the relevant prescription, is practically taken over from Article 28 of the ICC Statute, although the Indonesian text may, in the absence of an explicit reference to the ICC provision, give rise to interpretations different from that of the ICC text.

In the case of crimes of genocide the Act establishes the death penalty and a prison sentence of twenty-five years as the maximum penalties, and a prison sentence of ten years as the minimum penalty (Art.36). The same applies to most crimes

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[5] Lembaran Negara [State Gazette] 2000 No.208. The Act replaced the provisional "Government Regulation *in lieu of* an Act" No.1/1999 (*Lembaran Negara* 1999 No.191) on the same subject.

against humanity, with lower maximum and minimum sentences for less serious crimes against humanity (Arts.37-40).

# IRAN*

NATIONAL LAWS ON MATTERS OF INTERNATIONAL LAW

## Law on Jurisdiction of Iranian Judiciary to Hear Civil Suits against Foreign States

The Single Act on the Jurisdiction of the Iranian Judiciary to Hear Civil Suits against Foreign States (hereafter the Act) was enacted by the Iranian Parliament (the Majlis) on 9 November 1999.[1] The Implementing By-Law (hereafter the By-Law) of the Single Act was approved by the Council of Ministers on 15 May 2000, which designated Tehran's Courts of Justice as competent to hear the proceedings instituted under the Act.[2]

*Cause of Action*

Pursuant to the Act Iranian nationals may bring civil action against foreign States for the following two causes:

(1) Damage arising from any act or conduct of a foreign State which is contrary to international law, including intervention in the internal affairs of Iran resulting in death, physical, mental or financial injury to the individual;

(2) Damage arising from any act or conduct of individuals or terrorist groups supported by a foreign State or through permission to stay, to transit through or operate within the territory of the foreign State, resulting in death or physical, mental or financial injury to Iranian nationals.

*Scope of Application*

The application of the Act is limited to two sets of foreign States:

(1) States who have violated sovereign immunity of Iran or immunity of its officials (presumably by exercising jurisdiction over claims against Iran or its officials);
(2) States who have assisted in the execution of judgments that are made in violation of sovereign immunity of Iran or immunity of its officials.

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* Contributed by Jamal Seifi, Faculty of Law, Shahid Beheshti (National) University of Iran, Tehran, and G. Zamani, Faculty of Law, Allameh Tabatabai University, Tehran.
[1] Iranian Official Gazette No. 15950 dated 27 December 1999.
[2] Iranian Official Gazette No. 16095 dated 21 May 2000.

States falling within one of the above categories will be determined by the Ministry of Foreign Affairs and communicated to the judiciary.

The Act is retroactive and includes claims originating prior to the date of its enactment.

As stated, the scope of application of the Act is limited to those States who have violated the sovereign immunity of Iran or the immunity of its officials. As such, the Act has the character of a counter-measure and does not claim a new exception to sovereign immunity unless as a matter of counter-measure. In the same direction, Article 6 of the By-Law provides that the Government of Iran will pursue all international avenues, including resort to international institutions necessary for protection of its immunity.

This legislation is made in response to the terrorism exception amendment (1997)[3] to the United States Foreign Sovereign Immunities Act (1976). Subsequent to the terrorism exception amendment civil proceedings were instituted by private individuals in United States Courts against Iran in several cases for injuries sustained by American nationals in the course of violent incidents taking place in Lebanon, Israel and other countries of the Middle East. In several cases rulings were made by United States courts against Iran awarding huge sums of money in favour of the Claimants. For instance, the first of this series of cases, *Flatow v. The Islamic Republic of Iran* (999 F. Supp. 1 (D.D.C. 1998) related to an incident in which Stephen Flatow's daughter was killed when a tourist bus was bombed in Gaza, apparently by the Palestinian Group Islamic Jihad. It was claimed that the Group was being funded by Iran and thus it should be held responsible for the Group's actions. The court entered a default judgment against Iran, finding Iran and the co-defendants jointly and severally liable for compensatory damages, loss of accretions, solatium and $225 million in punitive damages.

## JAPAN[*]

### JUDICIAL DECISIONS

**Nanjing Massacre by Army Unit 731 – the Hague Convention and the Hague Regulations on Land Warfare – Article 3 of the Hague Convention and the individual's right to claim compensation**

**Tokyo District Court, Judgment, 22 September 1999**
Hanrei Taimuzu [Law Times Reports] No.1028, at 92

A *ET AL.* V. STATE OF JAPAN

[3] Section 1605(7).

[*] Contributed by IGARASHI Masahiro, Kanazawa University, Kanazawa, member of the Study Group on Decisions of Japanese Courts Relating to International Law.

As to the facts, the court noted that "there are various arguments as to the truth of the Nanjing Massacre and Army Unit 731, including opinions that deny their very existence, or definitely downgrade them". In past lawsuits regarding the contents of a history book, "the defendant, the State of Japan, did not argue whether the fact itself was suitable for trial, but argued only the details," and held that while it cannot strictly confirm the details and scale of the Nanjing Massacre, it is almost certain that an act that can collectively be called the Nanjing Massacre did indeed take place. The court also held, regarding Unit 731, that without any doubt the Unit had existed and carried out experiments on human bodies, and so on.

The court recognized, on the one hand, that the Hague Convention and Regulations on Land Warfare laid down the contents which had already become established as customary international law, when the incidents of this case occurred. But, on the other hand, it held that Article 3 did not provide for the individual's right to claim compensation, in the light of the interpretation of the said Article, its *travaux préparatoires* and the subsequent State practice in this matter.

State responsibility – Claims for compensation for damage based on international law – gross violations of human rights – *jus cogens* – Reports submitted by van Boven and Coomaraswamy to the Commission on Human Rights and its Sub-Commission – the International Convention on Slave Trade and the customary international law to the same effect – Articles 14 and 15 of the Forced Labour Convention – crimes against humanity – war crimes and the customary international law to the same effect – the International Convention for the Suppression of the Traffic in Women and Children – the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity – Article 38(b) of the Statute of the International Court of Justice – the Cairo Declaration (1943) – the Potsdam Declaration (1945) and the Treaty of Peace with Japan (1952) – omission of domestic legislation

**Tokyo District Court, Judgment, 1 October 1999, (unreported)**

SO SHINTO V. STATE OF JAPAN

As to the "facts regarding the presumption of the judgment which are determined as undisputed facts (between the parties concerned)", the court found that comfort stations had been established in 1932 when the so-called Shanghai Incident occurred, until the end of the war, at the request of the military authorities in those days. Moreover, as to the "facts determined with respect to the plaintiff", the court found that, in about 1938, the plaintiff was asked to go to work at the front by a middle-aged Korean woman, who appeared before the plaintiff and said that she was an acquaintance of her mother, and said, "You will gain financially, if you will go to work at the front for her country", and the plaintiff, who was tempted by the offer, accepted it, because she was unaware that it involved prostitution. After that, she "was forced to keep company with soldiers almost every day" at the various comfort stations in China, and "was forced to engage in prostitution with soldiers as a comfort woman at various comfort stations until the end of the Second World War in 1945".

The court, first, examined the general principles of international law as to a right to claims of compensation for damage based on international law, and held:

> "International law governs the relationship between States, and, therefore, if a State violates international law by infringing on the right or rights of a national of another State, it is in principle the State of which the victim is a national that is entitled to pursue the responsibility for the infringement. Today, however, in view of the fact that some, if exceptional, treaties have express provisions directly granting rights to individuals, it can no more be concluded that individuals are unqualified directly to claim reparation for the damage caused by the wrong-doing State on the ground that international law does not inherently provide for the rights and duties of individuals. But such treaties are exceptional, and it would be safe to say that, in order for individuals to be permitted to go to court, there must be a special norm of international law which not only provides for their rights and duties but also enables them to pursue the responsibility of the delictual State by claiming, in their own name, their rights under international law, instead of relying on the diplomatic protection of the State of which they are nationals".

As to the claims for apology and compensation for damage based on customary international law, the plaintiff contended that, under customary international law, it has been established that a State, which has committed gross violations of human rights or acted against *jus cogens*, has a duty directly to repair damage to individual victims, who are entitled directly to demand an apology and compensation for the damage from the offending State in pursuing reparation of the damage.

The court held that in general, as Article 38(1)(b) of the Statute of the International Court of Justice provides, it is necessary for the establishment of customary international law that there should be both State practice (a general practice) and *opinio juris.* In this connection, since no piece of the evidence brought before the court proved that there had been a case in which individuals against whom a State committed a gross violation of human rights or acted in violation of *jus cogens* could directly seek a discharge of the obligation by the wrong-doing State of compensation for the damage, without relying on the diplomatic protection of the State of which they were nationals, it cannot be established that such international practice (a general practice) and *opinio juris* or legal conviction of States had existed at the time when this incident occurred.

Although the plaintiff referred to the Report submitted by Van Boven, it should be noted that the Report does not mention any concrete case in which a State has directly repaired the damage inflicted on an individual of another State. Its concluding chapter presents no more than a set of recommendations on fundamental principles and proposed guidelines. As regards the Report submitted by Coomaraswamy, so long as the legal responsibility of the defendant as seen from the point of view of the individual's right to claim compensation is concerned, all it does is to refer to the view of the Van Boven Report. No concrete case addressing direct compensation for the individual is quoted there, nor are there are facts to establish customary international law to that effect. Consequently, there is no point in rendering judgement on the other remaining points.

With respect to the claim of compensation for damage based on the Forced Labour Convention, the plaintiff contends that, in so far as Articles 14 and 15 of the Convention make it an obligation to pay compensation for industrial accidents to a person who was forced to labour, the Convention should be understood as granting those individual victims who were illegally forced to labour the right to file claim for payment against the offending State. In this regard, it is one thing that

treaties generally come to have domestic force in Japan by *Kofu* (promulgation) as a matter of course (Articles 7(1), 98(2) of the Constitution of Japan), and quite another is whether the court is able to settle legal disputes between individuals and a State by directly applying treaties as domestic law. Since a treaty is a form of international law that governs inherently the rights and duties between States, it needs, in principle, to be supplemented with such a domestic measure as legislation, in order for it to be applied as the criteria for judgement by the court to the rights and duties between individuals and a State or between individuals. Although some provisions of a treaty can have direct applicability as domestic law as such, the question as to which provisions are directly applicable as domestic law as such should be judged concretely, in taking into consideration the purpose, contents, and terms of each provisions of the treaty concerned, as well as the relevant provisions of domestic law, and so on. In addition, both the subjective requirement that the State desire to make the relevant treaty directly applicable as a domestic law and the objective requirement that the treaty be so clear, definitive and specific as to be directly applicable as a domestic law should be met. However, neither of these requirements is met in the Forced Labour Convention by the evidence presented before the court.

As to the claim for compensation based on the Cairo Declaration (1943), the Potsdam Declaration (1945) and the Treaty of Peace with Japan (1951), the plaintiff contends that the provisions of these instruments have imposed an obligation on the defendant to repair the damage which Korean people sustained from being placed under slave-like conditions as a result of wrongful acts of the defendant under their colonial rule. However, the Cairo Declaration should be interpreted as providing for an expression of the basic guidelines of the three States issuing it (the United States, Great Britain and China) regarding mainly the treatment of the areas that were then Japanese territory among the conditions of peace with Japan, and therefore, paragraph 8 of the Potsdam Declaration[1] which followed the Cairo Declaration should be interpreted as only requiring Japan to grant independence to Korea, and so on. Furthermore, the Treaty of Peace with Japan, which followed the Potsdam Declaration, should be interpreted in the same way as the Potsdam Declaration.

As to claims for apology and compensation for damage based on the State Redress Law by reason of defamation, violation of the duty to punish and omission of legislation, the plaintiff seems to contend that if an act of a State comes under a gross violation of human rights and violates *jus cogens*, the State concerned has an obligation to repair the damage which occurred under customary international law, and therefore that the obligation to enact legislation for compensation arises under the said customary international law. But the court held that no customary international law can be found to support such arguments.[2]

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[1] Paragraph 8 of the Potsdam Declaration provides that "The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine."

[2] Tokyo High Court dismissed the appeal on 6 December 2000, and the Supreme Court again dismissed the final appeal on March 28, 2003.

## MALAYSIA[*]

### JUDICIAL DECISIONS

#### Staying of Foreign Proceedings

BSNC LEASING SDN BHD v. SABAH SHIPYARD SDN BHD & 2 OTHERS (AND ANOTHER APPEAL)[1]

When faced with a request to stay the court proceedings in a foreign country, the Malaysian court relies on common law principles. It does not actually order a foreign court from stopping its proceedings but instead places an injunction on the plaintiff of the foreign proceedings, forcing him to stop his action overseas. This type of action, known as anti-suit injunctions, requires that the plaintiff of the foreign proceedings be under the jurisdiction of the Malaysian courts. There are three situations where an anti-suit injunction may be requested:

a. "Single forum cases", where the case is being heard in a foreign country which has exclusive jurisdiction. The only connection to Malaysia is that the defendant is amenable to its own jurisdiction.
b. "Forum selection cases", where the parties have chosen a foreign forum (normally through a choice of forum clause in a contract), but one of the parties wants to have the case heard in Malaysia, therefore requests the court to stop the foreign proceedings by way of injunction.
c. "Alternative forum cases", where two or more courts have jurisdiction over the case but one of the parties would rather have it heard in Malaysia.

Due to the sensitivities such cases provoke, courts are very cautious when faced with a request for an anti-suit injunction. The rules are strict. These were discussed in great detail in the present case.

Its facts are as follows. Sabah Shipyards (S.S) was a company that built power barges. These are large boats used for providing electrical energy. In order for these barges to work they require energy producing turbines on board. S.S bought one such turbine from Wing Teik Holdings Bhd (Wing Teik). S.S could not pay the full amount therefore they entered into a hire purchase agreement with BSNC Leasing (BSNC). According to the hire purchase agreement, BSNC would cover slightly over half of the cost of the turbine. The turbine was duly handed to S.S and was placed upon a barge called Victoria II.

Due to the economic downturn of 1997, S.S faced financial difficulties and could not keep up its payments to BSNC. Realising that it was in dire straits, S.S moved the court for various orders under S 176(10) of the Companies Act 1965[2] restraining

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[*] Contributed by Azmi Sharom, Faculty of Law, University of Malaysia.
[1] [2000] 1AMR 1141.
[2] Laws of Malaysia Act 165.

any legal proceedings against itself.[3] BSNC tried to intervene in the proceedings so that it could repossess the turbine under the hire purchase agreement. BSNC failed and the hire purchase agreement was held to be void by the High Court.

BSNC appealed against this decision. Meanwhile, Victoria II, along with the disputed turbine, was sold by S.S to Starweaver Ltd who then leased the barge to an Ecuadorian company. Upon discovering this, BSNC commenced proceedings in Ecuadorian courts and obtained an order for the arrest of the barge. S.S then tried to obtain an order from the Malaysian courts for an injunction restraining BSNC from prosecuting the Ecuadorian proceedings (in other words, it applied for an anti-suit injunction). S.S failed at the high court, but proceeded to appeal to the Court of Appeal.

The fundamental issue facing the Court of Appeal was whether the Malaysian court should interfere in the jurisdiction of Ecuador and stop the proceedings by placing an injunction on BSNC.[4] This is an "alternative forum case" as both Malaysia and Ecuador had jurisdiction to judge the matter.

It was held by Gopal Sri Ram JCA[5] that the authority for the Malaysian courts to grant an anti-suit injunction is provided for by the Specific Relief Act 1950.[6] The relevant sections are S 52(3)(e) and 54 (a). This statute is based on the Specific Relief Act 1877 of India. Therefore, the court believed that looking at Indian cases would help to determine the principles to be used when deciding to grant an anti-suit injunction.

In the case of *Naik v. Balvant*[7] it was held that an injunction would be granted to stop a foreign proceeding if that foreign proceeding is oppressive and vexatious to the person applying for the injunction. "Oppressive and vexatious" is not defined as it is prudent to let each case be judged on its own merits. On a general note however, it can be said that the foreign proceeding is "oppressive and vexatious" if the plaintiff in the foreign suit is able to obtain some sort of unfair juridical advantage.

This principle was also used in the case of *SNI Aerospatial v. Lee Kui Jak & Anor*[8] that confirms the "oppressive and vexatious" test. The Privy Council in that case added that any court facing a request for an anti-suit injunction should also see if by stopping the foreign proceedings they would in some way be unjustly depriving the plaintiff of those proceedings of some sort of juridical advantage.

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[3] The section reads: "Where no order has been made or resolution passed for the winding up of a company and any such compromise or arrangements has been proposed between the company and its creditors or any class of those creditors, the Court may, in addition to any of its powers, on the application in a summary way of the company or of any member or creditor of the company restrain further proceeding against the company except by leave of the Court and subject to such terms as the Court imposes".

[4] There is another issue in this case and that is whether property had actually passed to BSNC, but for the purposes of the Conflict of Law survey, that issue is irrelevant.

[5] The other two judges on the bench, Mokhtar Sidin JCA and Haidar Mohd. Noor JCA, both agreed with his lordship's decision.

[6] Laws of Malaysia Act 137, revised 1974.

[7] AIR 1927 Bom 135.

[8] [1987] 3 All ER 510.

Another case that supports this principle is *Airbus Industrie GIE v. Patel & Ors*[9] in which it was held that an injunction would be granted to meet the ends of justice. For example if it is done in order to stop an unconscionable foreign action. Furthermore, if the Malaysian court is the natural forum for the case,[10] this is even stronger justification to grant the anti-suit injunction.

Applying these principles to the facts at hand, the learned judge held that;

> [T]here was here, at the time when the anti-suit injunction was sought, a judgment in Sabah Shipyard's favour upon the very issue which was pivotal to the possessory action in the Ecuadorian court. Absent that issue, the Ecuadorian proceedings were without a foundation. Accordingly, the continued arrest of the "Victoria II" and the prosecution of the action before the latter tribunal negate the judgment of the High Court at Kuala Lumpur and render the declarations granted thereunder a mere *brutum fulmen*.[11] To use the language of the authorities, the Ecuadorian proceedings were vexatious and oppressive.[12]

In other words, the foreign suit was started by BSNC as a way to get around an unfavorable decision in the Kuala Lumpur High Court. It was an unconscionable action, which is therefore oppressive and vexatious. Furthermore, Malaysia was the natural forum in which to settle the dispute because:

a. The original contract for the sale of the turbine was made here.
b. The hire purchase agreement was made here.
c. All the companies involved in the original dispute are Malaysian.
d. The original dispute over ownership arose in Malaysia and was settled in a Malaysian court.

Therefore, the Court of Appeal held in favour of S.S and granted a mandatory injunction directing BSNC to vacate the order of arrest of Victoria II and to discontinue all Ecuadorian proceedings.

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[9] [1998] 2 All ER 241.

[10] It should be stated here that Gopal Sri Ram JCA provided *obiter dictum* a clarification on how to determine if a court is the natural forum for a case. Basically he was confirming the *forum non-convenience* test as established in *Spiliada Maritime Corp v. Consulex Ltd* [1986] 3 All ER 843. The test states that a court is the natural forum if the dispute has a real and substantial connection to the courts; that all or most of the important witnesses are to be found within the court's jurisdiction; that the plaintiff will enjoy a personal or juridical advantage by having the dispute tried by the Malaysian courts.

[11] An empty threat.

[12] Supra note 41, p. 1170.

## Jurisdiction and the Place of Tort

TAN SRI ABDUL RAHIM BIN DATUK THAMBY CHIK V. JOHN MARCOM (NO.2)[13]

In this case the defendant had written an article published in *Time* magazine that the plaintiff claims was defamatory. The defendant was served with a writ whilst temporarily in Malaysia. The defendant's defence was based on the Malaysian Court's lacking the jurisdiction to hear the case.

His argument was based on two grounds: firstly, that the mere service of a writ did not constitute jurisdiction for the Malaysian court; and secondly, since the article was written in Jakarta and then sent for publication in Hong Kong, the Malaysian court did not have jurisdiction by virtue of section 23 (1)(a)[14] of the Courts of Judicature Act 1964[15] as the cause of action did not arise in the country.

The judge held against the defendant on both counts. Regarding the first line of defence, it was held that the common law principle that the serving of a writ within jurisdiction was akin to submission and therefore sufficient to provide the court with the necessary jurisdiction to hear the case, as reiterated by the case of *HRH Maharanee Seethadevi Gaekwar of Baroda v. Wildenstein*,[16] was applicable in Malaysia. This is by virtue of section 23(2) of the Courts of Judicature Act, which states that the High Court of Malaysia would have the jurisdiction vested in it immediately prior to independence on August 31, 1957. Since this common law principle was in existence at the time, it can be said that the Malaysian court was free to use it to establish jurisdiction.

With regard to the second line of defence it was held that defamation occurs where the publication is read or heard; it is therefore irrelevant to say that the article was written outside of Malaysia when its effect was felt within the country. Therefore, the tort was deemed to have arisen in Malaysia thus providing the court with jurisdiction as per section 23 (1)(a) of the Courts of Judicature Act.

This judgment is in line with established English cases such as *Church of Scientology of Californa v. Commissioner of the Metropolitan Police.*[17]

## Diplomatic Immunity for UN Special Rapporteur

INSAS BHD AND ANOTHER V. DATO' PARAM CUMARASWAMY[18]

In this case the issue of diplomatic immunity from prosecution was raised. This was a defamation case in which the defendant was supposed to have defamed the plaintiffs in an interview given to the magazine *International Commercial Litigation*. In this

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[13] [2000] 5 MLJ.

[14] Section 23 (1)(a) reads: "Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where ... the cause of action arose within the local jurisdiction of the Court".

[15] Laws of Malaysia Act 91 revised 1972.

[16] [1972] 2QB 283.

[17] (1976) 120 SJ 690.

[18] [2000] 4 CLJ 709.

interview Dato' Param Cumarasamy had made statements which suggested that there were wealthy businessmen in Malaysia who were able to influence and manipulate the justice system. The plaintiffs claim that this article implied that they were involved in the corrupting of Dato' V.K. Lingam, a Malaysian judge.

When the plaintiffs commenced proceeding for defamation before a Senior Assistant Registrar, the defendant had entered a conditional appearance. He made an application for the writ of summons either to be set aside or to be struck out. The Senior Assistant Registrar rejected this application and insisted that the defendant put forward his defence.

Dato' Param Cumarasamy's primary defence was that at the time of the interview, he was acting in his role as the United Nations Special Rapporteur. He was appointed to that role during the 15th Session of the Commission of Human Rights by resolution 1994/41. This appointment was made in the light of the Commission's noticing the increasing weakening of the independence of the judiciary, lawyers and court officials in Malaysia, and how this weakening corresponded with an increase in human rights violations.

His task was to investigate any substantial allegations made against the Malaysian judiciary; to identify and record not only the attacks made on judicial independence but also any improvements in the situation (along with concrete suggestions if requested); and finally to study for the purpose of making proposals, important and topical questions of principle with a view of protecting and enhancing the independence of the judiciary and the legal fraternity.

With this appointment he now had diplomatic immunity as stated by s 22(b) article VI of the Convention on the Privileges and Immunities of the United Nations 1946 (the convention). This Convention was ratified by Malaysia in 1957. The Convention clearly states that a person who is an expert appointed by the United Nations to conduct a mission, is totally immune from any legal proceedings for acts done in his capacity as a U.N. official. This immunity for acts done during that time is to extend even after his appointment has ended.

It was held by R.K. Nathan J that this case could be decided based on the decision of the earlier case of *Dato Param Cumaramaswamy v. MBF Capital Bhd & Anor* (the MBF case).[19] This was also a defamation case and Dato' Param Cumaraswamy had used the same defence. In the MBF case, the defendant had obtained a letter from the United Nations Secretary-General, Mr. Kofi Annan, confirming that he was indeed a United Nations Special Rapporteur and as such had immunity under the Convention. The Malaysian government was asked to respect that immunity.

The Court of Appeal had decided, however, that they had the authority and should be the ones to decide the matter of immunity. Meanwhile, the Malaysian government and the United Nations agreed to refer the matter of immunity to the International Court of Justice (ICJ). The Malaysian government had agreed to comply with the decision of the ICJ. Due to this the Court of Appeal postponed a motion by the

[19] [1997] 3 MLJ 824.

plaintiffs to tax their costs on the defendant, until after the ICJ had made their decision.

The ICJ decided in favour of Dato' Param Cumaraswamy[20] holding that immunity was a preliminary issue to be decided upon before any hearing can continue. Furthermore, the defendant did indeed have immunity and that all actions against him should be stopped.[21]

R.K. Nathan J reluctantly held that the Malaysian court was bound by the ICJ's decision and therefore the plaintiff's failed in their defamation suit on the grounds that the defendant had immunity. The judge stated that he thought that the ICJ was overstepping its jurisdiction for, having determined that immunity is a preliminary issue, it should then have left the decision in the hands of the Malaysian courts. With all due respect to the learned judge, it is submitted that surely the ICJ was acting in accordance with its ambit because the advisory opinion asked of it was not simply about whether immunity is a preliminary issue or not, but was on the broader question as to whether the defendant had immunity.

## NATIONAL LAWS ON INTERNATIONAL LAW MATTERS

### Enforcement of Foreign Judgments[22]

When enforcing judgments from other jurisdictions, the Malaysian Courts have two sources of rules. These are the common law and the Reciprocal Enforcement of Judgments Act 1958.[23] The Act lays down the procedure through which foreign judgments can be enforced in the country. This is done through a process of registering the foreign judgment as determined by Part II of the Act. The Act is applicable only to the judgments of the high courts of nations listed in the First Schedule. In the year 2000 The Reciprocal Enforcement of Judgments (Extension of Part II) Order 2000[24] was passed. This subsidiary legislation has extended this list of foreign nations to include Brunei Darussalam. Therefore, the judgments of the High Court of Brunei Darussalam can now be enforced in Malaysian courts, using the rules set out by the Reciprocal Enforcement of Judgments Act 1958.

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[20] This ICJ decision entitled "Difference Relating to Immunity from Legal Processes of a Special Rapporteur of the Commission on Human Rights" can be found on the ICJ website at http://www.icj-cij.org/icjwww/idocket/inuma/inumaframe.htm

[21] The ICJ also decided that the Government of Malaysia had the obligation to inform the Malaysian courts of the finding of the Secretary-General that Dato' Param Cumaraswamy was entitled to immunity from legal process; That the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*; That Dato' Param Cumaraswamy shall be held financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs; That the Government of Malaysia has the obligation to communicate this advisory opinion to the Malaysian courts, in order that Malaysia's international obligations be given effect and Dato' Param Cumaraswamy's immunity be respected.

[22] See also Sharom A "Conflicts of Law" chapter in *Survey of Malaysian Law 2000*, ed. Ahmad S, University of Malaya Press, 2000, Kuala Lumpur, at page 169.

[23] Laws of Malaysia Act 99.

[24] P.U. (a) 122, made 27 March 2000.

OTHER RELEVANT STATE PRACTICE

**Human Rights Commission of Malaysia**

On 9 September 1999 the Human Rights Commission of Malaysia was formed. This was done by an act of Parliament entitled Human Rights Commission of Malaysia Act 1999.[25] This Act was seen to be an important step towards the further recognition of human rights in the country. In the context of international law, the Human Rights Commission has the potential in aiding the government of the country to comply with their international obligations. Malaysia is party to the Convention for the Rights of the Child 1989 (CRC)[26] and the Convention Against All Forms of Discrimination Against Women 1979 (CEDAW).[27] Furthermore, the Act acknowledges the principles of the Universal Declaration of Human Rights 1948 (UDHR)[28] as being the foundation upon which the Commission is to carry out its functions (section 4(4)).[29]

The functions of Human Rights Commission are listed in section 4 as:

a. To promote awareness of and provide education in relation to human rights
b. To advise and assist the Government in formulating legislation and administrative directives and procedures and recommend the necessary measures to be taken
c. To recommend to the Government with regard to the subscription or accession of treaties and other international instruments in the field of human rights
d. To inquire into complaints regarding infringements of human rights

The Commission is a body corporate with a maximum of twenty members. The members are to be selected by the King upon the recommendation of the Prime Minister. The King shall select the Chairman and the members shall vote the Vice Chairman.[30] Currently there are thirteen members.[31]

According to section 12 the Commission has the power to conduct inquiries on its own motion or based on a complaint made by individuals or groups. This power of inquiry is limited by the principles of sub judice. In relation to the power to conduct inquiries the Commission has the power:

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[25] Laws of Malaysia Act 597.

[26] 28 ILM 1448 (1989).

[27] 19 ILM 33 (1980).

[28] G.A. Res. 217A (III), UN Doc. A/810 at 71 (1948).

[29] However, there is a proviso, in that the UDHR is to be regarded "to the extent that it is not inconsistent with the Federal Constitution".

[30] Section 5.

[31] The method of selecting the members of the Commission raises some doubt as to the impartiality and independence of the body seeing as how they are ultimately the choice of the executive. To a certain extent this concern has been proven correct with the appointment of the second Chairman of the Commission, Abu Talib Othman. He was the Malaysian Attorney General during the infamous mass detentions without trial in 1987 known also as "Operation Lalang". For a critical examination of this episode in Malaysian history, see CARPA (Committee Against Repression in the Pacific and Asia) Tangled *Web: Dissent, Deterrence and the 27 October 1987 Crackdown in Malaysia*, 1988, Haymarket.

a. To procure and receive all such evidence and to examine individuals as witnesses
b. To require that the evidence of any witness be given on oath or affirmation, as if he were giving evidence in a court of law,
c. To summon any person residing in Malaysia to attend any meeting of the Commission to give evidence or produce any document or other thing in his possession, and to examine him as a witness
d. To admit notwithstanding any of the provisions of the Evidence Act 1950, any evidence, whether written or oral, which may be inadmissible in civil or criminal proceedings
e. To admit or exclude the public from such inquiry or any part thereof

The Commission has been fairly active in this regard having conducted several inquiries. Amongst its most celebrated finding have been regarding the right to assembly where they proposed dramatic changes to the practice of the police with regard to the granting of permission for public assemblies and the policing of such assemblies. The Commission has also suggested to the government to ratify the International Covenant on Economic Social and Cultural Rights 1966 (CESCR),[32] the International Covenant on Civil and Political Rights 1966 (CCPR),[33] the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT)[34] and to remove all reservations made in CEDAW.[35]

## NEPAL[*]

### JUDICIAL DECISIONS

**Citizenship – Jus soli and Jus sanguinis tests – CEDAW**

JAVIR YASIN V. HMG MINISTRY OF HOME AND OTHERS

Writ Petition No. 3503 of 1998 decided by Division Bench of the Supreme Court of Nepal on 11 November 2000.

The petitioner Javir Yasin was denied citizenship by the District Administration Office, Kathmandu on the ground that his father was not a Nepalese citizen and he was not eligible to acquire citizenship from his mother, who is a Nepalese citizen. Javir Yasin's father was a citizen of Saudi Arabia and had married a Nepalese woman in Kathmandu. Their marriage was registered in Kathmandu District Office. Javir was born in Kathmandu, had had his birth registered before the Kathmandu Muni-

[32] 6 ILM 360 (1967).
[33] 6 ILM 368 (1967).
[34] 23 ILM 1027 (1984).
[35] See *SUHAKAM Annual Report 2001* at www.suhakam.org.my
[*] Contributed by Surendra Bhandari.

cipality, and had obtained a birth certificate. He was educated in Nepal, and had land and a house in the name of his mother. His father had died in his childhood and he was reared by his mother. When he was denied citizenship by the Kathmandu District Administration Office he turned to the Supreme Court of Nepal for issuance of an order of mandamus and certiorari to grant him citizenship on the ground of *jus soli* and *jus sanguinis* as his mother is a Nepalese citizen. Javir Yasin grounded his petition on the equal protection clause of the Constitution of the Kingdom of Nepal 1990 and Article 9 (1) and (2) of the Convention on Elimination of All Forms of Discrimination against Women, 1979 (CEDAW) to which Nepal had become a party on 22 April 1991.

There were the following legal questions to be decided by the court:

i. Whether a person is eligible to acquire Nepalese citizenship under the Constitution of the Kingdom of Nepal 1990 and Citizenship Act 1964 on the condition that his/her father is not a Nepalese citizen but the mother is a Nepalese citizen,
ii. Whether one can acquire Nepalese citizenship based on *jus soli*, and
iii. Whether Nepal needs to give effect to the international laws relating to nationality, especially CEDAW Article 9.[1]

The Supreme Court of Nepal decided that to acquire citizenship of Nepal on the ground of *jus sanguinis* requires the father to be a citizen of Nepal; the father of the writ petitioner was not a Nepalese citizen. Therefore, the writ petitioner was not eligible to acquire Nepalese citizenship. The Supreme Court of Nepal did not interpret the relationship between Article 9 of the CEDAW convention and laws of Nepal relating to citizenship.

**Equality before the law – Universal Declaration of Human Rights – CEDAW**

REENA BAJRACHARY V. HMG SECRETARIAT, COUNCIL OF MINISTERS AND OTHER

Writ Petition No. 2812 of 1997, decided on 8 June 2000 by Special Bench of the Supreme Court of Nepal

Royal Nepal Airline (RNA) Service Rules, 1974 amended in 1996 discriminated in service conditions between crew members. All crew members were allowed to retire at the age of 55 except air hostesses, who were retired at the age of 30 or at the date of completion of 10 years of service. The writ petitioner, an air hostess, challenged the discriminatory provision of the RNA Service Rules on the ground

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[1] *See UN Convention on Elimination of All Forms of Discrimination against Women*, (1979). Article 9.1 of the convention prescribes that, "States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband." Similarly, Article 9.2 prescribes, "States Parties shall grant women equal rights with men with respect to the nationality of their children."

that it violated Article 11 of the Constitution of the Kingdom of Nepal,[2] Article 2, 7, and 23 of the Universal Declaration of Human Rights and Article 15 of CEDAW. The Writ petitioner asked the court to issue an order to treat air hostesses equally, in terms of service, retirement, and other benefits, to male crew members.

The Supreme Court of Nepal decided that the impugned Rule was discriminatory and inconsistent with the provision of the Constitution of the Kingdom of Nepal and CEDAW. The court issued an order to the respondents to treat female crew members equally to male crew members in terms of salary, retirement age and other benefits.

## PHILIPPINES[*]

### JUDICIAL DECISIONS

**Interpretation of Tax Treaties; Most Favored Nation (MFN) clause**

COMMISSIONER OF INTERNAL REVENUE V. S.C. JOHNSON AND SON, INC., AND COURT OF APPEALS

[G.R. No. 127105, 309 SCRA 87. 25 June 1999, J. Gonzaga-Reyes]

SC Johnson and Son, Inc. argues that the preferential tax rate of 10% should apply to the royalties it pays to SC Johnson and Son, USA pursuant to the License agreement entered between them. The argument is based on Article 13(2) (b) (iii) of the RP-US Tax Treaty,[1] also known as the "most favoured nation" clause. It provides that "the lowest rate of the Philippine tax at 10% may be imposed on royalties derived by a resident of the United States from sources within the Philippines only if the circumstances of the resident of the United States are similar to those of the resident of West Germany."

The RP-US Tax Treaty is just one of the bilateral treaties entered into by the Philippines to avoid double taxation. The purpose of these treaties is to reconcile the national fiscal legislations of the contracting states to help the taxpayer avoid simultaneous taxation in two different jurisdictions. This is to encourage the free

[2] *See Constitution of the Kingdom of Nepal*, (1990). Article 11(1) of the Constitution provides, "All citizens shall be equal before the law. No person shall be denied the equal protection of the laws." Article 11 (2) provides, "No discrimination shall be made against any citizen in the application of general laws on grounds of religion, race, sex, caste, tribe or ideological conviction or any combination of these."

[*] Contributed by Harry Roque, Senior Lecturer, University of the Philippines, College of Law.

[1] Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital, signed on 1 October 1976, entered into force on 17 October 1982, Vol. VII, Philippine Treaty Series, p. 523.

flow of goods and services and the movement of capital, technology and persons between countries, in order to create robust and dynamic economies.[2]

The Supreme Court ruled that since the RP-US Tax Treaty does not give a matching tax credit of 20% for the taxes paid to the Philippines on royalties as allowed under the RP-West Germany Tax Treaty, SC Johnson and Sons cannot be deemed entitled to the 10% rate granted under the latter treaty for the reason that there is no payment of taxes on royalties under similar circumstances. The reason for construing the phrase "paid under similar circumstances" as used in Article 13 (2) (b) (iii) of the RP-US Tax Treaty as referring to taxes is anchored upon a logical reading of the text in the light of the fundamental purpose of such treaty, which is to grant an incentive to the foreign investor by lowering the tax and at the same time crediting against the domestic tax abroad a figure higher than that which was collected in the Philippines.[3]

The Vienna Convention on the Law of Treaties states that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[4]

Tax refunds, being in the nature of tax exemptions, are considered to be in derogation of sovereign authority and must be strictly construed against the person or entity claiming them. Hence, the burden of proof is upon the person who claims the exemption and this must be clearly supported by organic or statute law.

SC Johnson and Son, Inc. has not overcome the burden of proof necessary to support its claim that the tax on royalties under the RP-US Tax Treaty is paid under similar circumstances as the tax on royalties under the RP-West Germany Tax Treaty.

### Treaties on Industrial Property; Protection of Trademarks and Tradenames; Res Judicata

PRIBHDAS J. MIRPURI V. COURT OF APPEALS, DIRECTOR OF PATENTS AND THE BARBIZON CORPORATION

[G.R. No. 114508, 318 SCRA 516. 19 November 1999, J. PUNO]

The petitioner brings an action to register the trademark of "Barbizon" claiming that their products have been sold in the Philippines since 1970. Barbizon, Co., USA, a foreign corporation, opposes the application, hinging its cause of action on the Paris Convention. "The Convention of Paris for the Protection of Industrial Property is a multilateral treaty seeking to protect industrial property consisting of patents, utility models, industrial designs, trademarks, service marks, trade names and indications of source or appellations of origin, and at the same time aims to repress unfair competition.[5]" States have undertaken to afford trademark and other similar rights enjoyed by their nationals to citizens of the other member countries to protect the

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[2] 309 SCRA 101-102 citing P. Baker, Double Taxation Conventions and International Tax Law (1994), 6.

[3] 309 SCRA 106.

[4] 309 SCRA 106-107, citing the Vienna Convention on the Law of Treaties, Article 31.

[5] 318 SCRA 540, citing R. Agpalo, Trademark Law and Practice in the Philippines, (1990), 200.

latter against unfair competition and to assure them of a certain minimum of international protection of their industrial property. The Philippines and the United States of America are signatories to the Convention.

The Convention protects well-known trademarks. Each member country binds itself to refuse or cancel the registration and prohibit the use of a trademark which tends to create confusion with a mark considered well-known in the country, as being the mark of a person entitled to the benefits of the Convention and used for identical or similar goods.

Pursuant to the said Convention, the Director of Patents of the Philippines was directed to reject all pending applications for registration of signature and other world-famous trademarks by applicants apart from its original owners or users.

The oppositions filed by Barbizon, the USA, are based on different laws. The first opposition was based on the Trademark Law, i.e., on the confusing similarity of trademarks and on the requisite damage to file an opposition to a petition for registration. The second one invoked the Paris Convention,[6] Executive Order No. 913, which provides that the rule-making and adjudicatory powers of the Minister of Trade and Industry should be revitalized to enable the Minister to apply more swift and effective solutions to problems such as infringement of internationally-known tradenames and trademarks, the Ongpin[7] and Villafuerte[8] Memoranda of the Minister of Trade and Industry as well as Article 189 of the Revised Penal Code. These are statutes totally different from the Trademark Law.

"Causes of action which are distinct and independent from each other, although arising out of the same contract, transaction, or state of facts, may be sued on separately, recovery on one being no bar to subsequent actions on others."[9] *Res judicata* therefore does not apply to the present case.

The Intellectual Property Code of the Philippines declares that

> "All agreements concerning industrial property, like those on trademarks and trade names, are intimately connected with economic development since they speed up transfer of technology and industrialization."

It was enacted in 1998 to strengthen the intellectual and industrial property system in the Philippines as mandated by the country's accession to the Agreement Establishing the World Trade Organization (WTO).

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[6] Paris Convention for the Protection of Industrial Property, signed by the Philippines on 27 September 1965.

[7] Signed on 25 October 1983.

[8] Signed on 20 November 1980.

[9] 318 SCRA 553, citing Nabus v. CA, 193 SCRA 732, 734, 746, (1991).

**Extradition Treaty – Interpretation based on intent**

SECRETARY OF JUSTICE V. HON. RALPH C. LANTION AND MARK B. JIMENEZ

[G.R. No. 139465, 343 SCRA 377. 17 October 2000]

The Supreme Court, in this motion for reconsideration, overturned its previous ruling and said that Jimenez is not entitled to the due process right to notice and hearing during the evaluation stage of the extradition process. The RP-US Extradition Treaty[10] and Presidential Decree 1069,[11] which implements the said treaty, contains no provision which gives the extraditee the right to demand from the Secretary of Justice copies of the extradition request from the US government and its supporting documents, as well as to be given time to comment on it.

The Supreme Court said that a "court cannot alter, amend or add to a treaty by the insertion of any clause, small or great, or dispense with any of its conditions and requirements or take away any qualification, or integral part of any stipulation, upon motion of equity, or general convenience, or substantial justice."[12]

All treaties should be interpreted in the light of their intent. The preamble of Presidential Decree 1069 defines its intent. The RP- US Extradition Treaty calls for an interpretation that will minimize, if not prevent the escape of extraditees from the long arm of the law and speed up their trial.

An extradition treaty is not a criminal proceeding that will call into operation all the rights of an accused as guaranteed by the Bill of Rights. The guilt or innocence of the accused shall be adjudged in the court of the state where he will be extradited. As a rule, an extraditee cannot invoke constitutional rights that are only relevant to determine the guilt or innocence of an accused especially by one whose extradition papers are still being evaluated.[13]

The temporary hold on private respondent's privilege of notice and hearing is a soft restraint on his right to due process which will not deprive him of fundamental fairness should he decide to resist the request for his extradition to the United States. There is no denial of due process as long as fundamental fairness is assured a party.[14]

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[10] "Extradition Treaty Between the Government of the Republic of the Philippines and the Government of the United States of America" signed by then Secretary of Justice, Franklin M. Drilon, representing the Government of the Republic of the Philippines, on 13 November 1994.

[11] "Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country" issued by President Ferdinand E. Marcos on 13 January 1977.

[12] 343 SCRA 383, citing Note, The United states v. Libelants and Claimants of the Schooner Amistad, 10 L. Ed 826 (1841), citing The Amiable Isabella, 6 Wheat 1.

[13] 343 SCRA 386, citing Defensor-Santiago, Procedural Aspects of the Political Offence Doctrine, 51 Philippine Law Journal 238, (1976), 258.

[14] 343 SCRA 393.

**Warsaw Convention; Jurisdiction**

AMERICAN AIRLINES V. COURT OF APPEALS, HON. BERNARDO LL. SALAS AND DEMOCRITO MENDOZA

[G.R. Nos. 116044-45, 327 SCRA 482. 9 March 2000 J. Gonzaga-Reyes]

The private respondent filed an action for damages before the trial court in the province of Cebu for the embarrassment and mental anguish he suffered at the Geneva Airport when the American Airlines' security officers prevented him from boarding the plane, detained him for about an hour and allowed him to board the plane only after all the other passengers had boarded.

American Airlines filed a motion to dismiss for the lack of jurisdiction of the Philippine courts under the Warsaw Convention.[15] The trial and the appellate courts both held that the suit may be heard in the Philippines under the pool partnership agreement among the IATA members, which include Singapore Airlines and American Airlines. In this situation, they acted as agents of each other in issuing tickets to those who may need their services.

The Supreme Court ruled that the "contract of carriage" perfected in Manila between the private respondent and Singapore Airlines binds the petitioner as an agent of Singapore Airlines. The highest court ruled that since American Airlines has a place of business in Manila, the plaintiff could avail of the third option listed under the Warsaw Convention: that the action may be brought in the place where the contract was perfected and where the airline has a place of business. Hence, Philippine courts have jurisdiction to entertain the suit.

The Warsaw Convention to which the Philippines is a party and which has the force and effect of law applies to all international transportation of persons, baggage or goods performed by an aircraft gratuitously or for hire.[16] The "contract of carriage" entered into by the private respondent with Singapore Airlines and subsequently with American Airlines is a contract of international transportation, therefore the provisions of the Warsaw Convention exclusively govern the rights and liabilities of the airline and its passengers. Although the "contract of carriage" is performed by different carriers through a series of airline tickets, it still comprises a single operation pursuant to a general pool partnership agreement which members of the IATA follow. They serve as agents of each other in the issuance of tickets to passengers. Petitioner's act of accepting of the unused portion of the conjunction tickets, entering it in the IATA clearing house, and transporting the private respondent over the route covered by the unused portion of the tickets, serve as tacit recognition of its commitment to act as agent of the Singapore Airlines.

The Warsaw Convention clearly states, "A contract of air transportation is taken as a single operation whether it is founded on a single contract or a series of contracts." The number of tickets issued does not detract from the oneness of the contract of carriage as long as the parties regard the contract as a single operation. This aims to promote international air travel by facilitating the procurement of a series of

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[15] Convention for the Unification of Certain Rules Relating to International Transportation by Air.

[16] 327 SCRA 489.

contracts for air transportation through a single principal and obligating different airlines to be bound by one contract of transportation.[17]

**Doctrine of incorporation; Equal Remuneration For Work of Equal Value; Discrimination**

INTERNATIONAL SCHOOL ALLIANCE OF EDUCATORS V. HON. LEONARDO A. QUISUMBING *ET AL.*

[G.R. No. 128845, 333 SCRA 13. 1 June 2000. J. KAPUNAN]

International School, Inc. hires both foreign and local teachers as members of its faculty, classifying them into: (1) foreign-hires and (2) local-hires. The school grants foreign-hires certain benefits that are not provided to local-hires, including housing, transportation, shipping costs, taxes and home leave travel allowance. They are also paid at a salary rate twenty-five per cent (25%) more than local-hires. The justification for the difference is that foreign-hires have to endure the "dislocation factor" and limited tenure.

The International School Alliance of Educators contested the disparity in salary rates between foreign and local-hires; it claims that the point-of-hire classification employed by the school is discriminatory to Filipinos, and further states that the grant of higher salaries to foreign-hires amounts to racial discrimination.

The Supreme Court ruled in favor of the petitioner and found the point-of-hire classification an invalid classification as there is no reasonable distinction between the services rendered by foreign-hires and local-hires. The practice of according higher salaries to foreign-hires contravenes public policy.

The Philippine Constitution exhorts Congress to "give highest priority to the enactment of measures that protect and enhance the right of all people to human dignity, reduce social, economic, and political inequalities." The Civil Code also requires every person, "in the exercise of his rights and in the performance of his duties, to act with justice, give everyone his due, and observe honesty and good faith."[18]

Furthermore, international law also proscribes discrimination. General principles of law include principles of equity and these are embodied by the Universal Declaration of Human Rights, the International Covenant on Economic, Social. and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Discrimination in Education, and the Convention Concerning Discrimination in Respect of Employment and Occupation. The Philippines has made this principle part of its national laws by virtue of the doctrine of incorporation.

The International Covenant on Economic, Social, and Cultural Rights provides that member states recognize the right of everyone to enjoy just and favorable conditions of work, which ensures fair wages and equal remuneration for work of equal value without distinction of any kind. Therefore, persons who work with

[17] 327 SCRA 493.

[18] 333 SCRA 19-20, citing Sec. 1, Article XIII of the Philippine Constitution.

substantially equal qualifications, skill, effort and responsibility, under similar conditions, should be paid similar salaries.

## Proof of foreign Law

WILDVALLEY SHIPPING CO., LTD. V. COURT OF APPEALS AND PHILIPPINE PRESIDENT LINES INC.

[G.R. No. 119602, 342 SCRA 213. 6 October 2000. J. Buena]

The ship *Philippine Roxas* ran aground in the Orinoco River, thus obstructing the ingress and egress of vessels. As a result, a vessel owned by the petitioner Wildvalley Shipping Company, Ltd. was unable to sail out of Puerto Ordaz on that day. The latter filed a suit with the Regional Trial Court of Manila against Philippine President Lines, Inc. owner of the *Philippine Roxas*, and the insurer of *Philippine Roxas* for damages in the form of unearned profits plus interest.

A Venezuelan pilot manned the *Philippine Roxas.* He was designated by the harbor authorities in Puerto Ordaz to navigate the said vessel through the Orinoco River.

The Supreme Court ruled in favor of the Philippine President Lines and said that the grounding of the vessel is attributable to the Venezuelan pilot. Vasquez was assigned to pilot the *Philippine Roxas* as well as other vessels on the Orinoco River due to his knowledge of the same. His failure to determine the depth of the said river and his decision to hold his set course, in all probability, caused damage to the vessel. Thus, he is negligent and liable for its grounding.

The Venezuelan law was not pleaded before the Philippine court. "A foreign law is considered pleaded if there is an allegation in the pleading about the existence of the foreign law, its import and legal consequence on the event or transaction in issue."[19] Private international law requires a foreign law to be properly pleaded and proved as a fact, otherwise the laws of a foreign country will be presumed to be the same as our own local or domestic law. This is called processual presumption.

Although the Supreme Court does not dispute the competency of the Assistant Harbor Master, Captain Monzon, to testify on the existence of the pilotage law of Venezuela and the rules governing the navigation of the Orinoco River. His testimony as regards the *Gaceta Oficial*, and the book published by the *Ministerio de Comunicaciones* of Venezuela containing the said laws are not enough. Our Rules of Court requires a certificate stating that he is the officer who had legal custody of those records, and this certificate should be prepared by a secretary of the embassy, consul general, consul, vice consul or consular agent or by any officer in the foreign service of the Philippines stationed in Venezuela, and authenticated by the seal of his office accompanying the copy of the public document. No such certificate could be found in the records of the case.

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[19] 342 SCRA 223, citing Jovito R. Salonga, Private International Law, p. 82.

With respect to proof of written laws, parol proof is objectionable, for the written law itself is the best evidence. When a foreign statute is involved, the best evidence rule requires that it be proved by a duly authenticated copy of the statute.[20]

**Visiting Forces Agreement; Pacta Sunt Servanda; Process of Ratification and Concurrence**

BAYAN V. EXECUTIVE SECRETARY

[G.R. No. 138570. 10 October 2000. G.R. No. 138572. 10 October 2000 G.R. No. 138587. 10 October 2000 G.R. No. 138680. 10 October 2000 G.R. No. 138698, 342 SCRA 449. 10 October 2000. J. Buena]

President Joseph E. Estrada ratified the Visiting Forces Agreement[21] (VFA) approved by President Fidel V. Ramos in 1998. President Estrada officially transmitted to the Senate the Instrument of Ratification, the letter of the President and the VFA for concurrence pursuant to the requirement in the 1987 Constitution. The Senate voted in concurrence with the treaty.

On 1 June 1999, the VFA officially entered into force after an "Exchange of Notes" between respondent Foreign Affairs Secretary Domingo Siazon and United States Ambassador Thomas Hubbard.

The VFA is an agreement that defines the treatment of United States troops and personnel visiting the Philippines. It provides for the guidelines to govern such visits of military personnel, and further defines the rights of the United States and the Philippine government in the matter of criminal jurisdiction, movement of vessel and aircraft, importation and exportation of equipment, materials and supplies.

The petitioners assailed the constitutionality of the VFA and imputed grave abuse of discretion to the President and the Senate for ratifying the agreement.

The Supreme Court ruled that the President, in ratifying the VFA and in submitting the same to the Senate for concurrence, acted within the powers vested in him by the Constitution. Furthermore, although he erred in submitting the VFA to the Senate for concurrence under the provisions of Section 21 of Article VII, instead of Section 25 of Article XVIII of the Constitution, he is not guilty of committing grave abuse of discretion. The Senate, by acting on the referral submitted to it by the Chief Executive, also performed a task sanctioned by the Constitution. The Senate may either accept or reject the proposed agreement, and this would pertain to the wisdom rather than the legality of the act.

Section 25, Article XVIII, of the Constitution, which specifically deals with treaties involving foreign military bases, troops, or facilities, should have been used in this case. Instead of Section 21, Article VII, for the latter will only be applicable with regard to the determination of the number of votes required to obtain the valid concurrence of the Senate.

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[20] 342 SCRA 222-223, citing Vicente J. Franciso, The Revised Rules of Court in the Philippines, Vol. VII, Part 2, 1997 edition, 365, citing 20 Am Jur 371-372.

[21] Petition, G.R. No. 138698, Annex "B," Rollo, 61-62.

Section 25, Article XVIII disallows foreign military bases, troops, or facilities in the country, unless the following conditions are sufficiently met: (a) it must be under a treaty; (b) the treaty must be duly concurred in by the Senate and, when so required by Congress, ratified by a majority of the votes cast by the people in a national referendum; and (c) recognized as a treaty by the other contracting state.[22] The first two requisites were satisfied in the case of the VFA. As regards the third requisite, the Supreme Court held that the phrase "recognized as a treaty" means that the other contracting party accepts or acknowledges the agreement as a treaty. "To require the United States to submit the VFA to its Senate for concurrence pursuant to its Constitution is to accord strict meaning to the phrase. This goes against the principle that the words used in the Constitution are to be given their ordinary meaning except where technical terms are employed."[23]

It is of no matter whether the United States treats the VFA as an executive agreement because international law provides that an executive agreement is as binding as a treaty as long as it possesses the elements of an agreement under international law.

A treaty, as defined by the Vienna Convention on the Law of Treaties, is "an international instrument 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."[24] International law makes no distinction between treaties and executive agreements in their binding effect upon states concerned, as long as the negotiating functionaries have remained within their powers.

"The ratification, by the President, of the VFA and the concurrence of the Senate should be taken as a clear and unequivocal expression of our nation's consent to be bound by said treaty, with the concomitant duty to uphold the obligations and responsibilities embodied thereunder."[25] It is incumbent upon us to be bound by the terms of the agreement. Thus, the Constitution declares that the Philippines adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations. We are tasked to assure that our government, Constitution and laws will carry out our international obligation. In addition to this, we have the duty to carry out in good faith our obligations arising from treaties and other sources of international law. This is known as the principle of *pacta sunt servanda.*

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[22] 342 SCRA 486.

[23] 342 SCRA 488.

[24] 342 SCRA 488-489, citing The Vienna Convention on the Law of Treaties, Article 2.

[25] 342 SCRA 491-492.

**Enforcement of Foreign Judgment**

PHILIPPINE ALUMINUM WHEELS, INC. V. FASGI ENTERPRISES, INC.

[G.R. No. 137378, 342 SCRA 722. 12 October 2000. J. Vitug]

FASGI Enterprises Inc., an American corporation, entered into a distributorship arrangement with Philippine Aluminum Wheels Incorporated (PAWI), a domestic corporation, and Fratelli Pedrini Sarezzo S.P.A., an Italian corporation. PAWI was remiss in its obligation under the distributorship agreement and in the later supplemental settlement agreement.

FASGI filed with the US District Court of California a stipulation for judgment against PAWI. The US District Judge issued a certificate of finality of judgment. PAWI, by this time, was approximately twenty (20) months in arrears in its obligation under the supplemental settlement agreement.

Unable to obtain satisfaction of the final judgment within the United States, FASGI filed a complaint for enforcement of foreign judgment before the Regional Trial Court of Makati, Philippines. The Makati court denied the enforcement of the foreign judgment within Philippine jurisdiction, on the ground that the decree was tainted with collusion, fraud, and clear mistake of law and fact.

FASGI appealed and the appellate court reversed the decision of the trial court and ordered the full enforcement of the California judgment.

The Supreme Court affirmed the Court of Appeals.

> "Generally, in the absence of a special compact, no sovereign is bound to give effect within its dominion to a judgment rendered by a tribunal of another country. The rules of comity, utility and convenience of nations, however, have established a usage among civilized states by which final judgments of foreign courts of competent jurisdiction are reciprocally respected and rendered efficacious under certain conditions that may vary in different countries. In this jurisdiction, a valid judgment rendered by a foreign tribunal may be recognized insofar as the immediate parties and the underlying cause of action are concerned so long as it is convincingly shown that there has been an opportunity for a full and fair hearing before a court of competent jurisdiction; that trial upon regular proceedings has been conducted, following due citation or voluntary appearance of the defendant and under a system of jurisprudence likely to secure an impartial administration of justice; and that there is nothing to indicate either a prejudice in court and in the system of laws under which it is sitting or fraud in procuring the judgment. A foreign judgment is presumed to be valid and binding in the country from which it comes, until a contrary showing, on the basis of a presumption of regularity of proceedings and the giving of due notice in the foreign forum."[26]

In the instant case, the allegations of collusion, mistake of law and fraud were not proven. For fraud to hinder the enforcement of a foreign judgment, within a state's jurisdiction, it must be extrinsic, or that which would go to the jurisdiction of the

[26] 342 SCRA 734, citing Cuculu v. Louisiana Insurance Co. (La) Mart NS 464 and Jovito R. Salonga, Private International Law, 1995 edition, 543.

court or would deprive the party against whom judgment is rendered a chance to defend the action to which he has a meritorious case or defense. Fraud that goes to the very existence of the cause of action such as fraud in obtaining the consent to a contract, as is questioned in this case, is deemed already adjudged, and cannot militate against the recognition or enforcement of the foreign judgment.

## Extradition Treaty; Doctrine of Incorporation

JUSTICE SERAFIN R. CUEVAS, SUBSTITUTED BY ARTEMIO G. TUQUERO IN HIS CAPACITY AS SECRETARY OF JUSTICE V. JUAN ANTONIO MUÑOZ

[G.R. No. 140520, 348 SCRA 542. 18 December 2000. J. De Leon, Jr.]

The Hong Kong Magistrate's Court issued a warrant for the arrest of respondent for violating provisions in the Prevention of Bribery Ordinance of Hong Kong. The warrant remains in full force and effect up to the present time. The Philippine Department of Justice received a request for the provisional arrest of the respondent from the Hong Kong Department of Justice pursuant to the RP-Hong Kong Extradition Agreement.[27]

The Regional Trail Court issued the Order of Arrest for respondent. The latter was arrested pursuant to the said order, and is currently detained at the NBI detention cell.

The respondent filed with the Court of Appeals a petition for certiorari, prohibition and mandamus with application for preliminary mandatory injunction and/or writ of habeas corpus assailing the validity of the Order of Arrest. The Court of Appeals declared the Order of Arrest null and void.

The Secretary of Justice appealed and said that there was urgency for the provisional arrest of the respondent and that the request for provisional arrest of respondent and its accompanying documents are valid despite lack of authentication.

The pertinent provision of the RP-Hong Kong Extradition Agreement enumerates the documents that must accompany the request. The provision does not specify that these documents must be authenticated copies.

The provisions of Presidential Decree No. 1069[28] and the RP-Hong Kong Extradition Agreement, as they are worded, serve the purpose that is sought to be achieved by treaty stipulations for provisional arrest.

> "It is an accepted practice for the requesting state to rush its request for extradition in the form of a telex or diplomatic cable, the practicality of the use of which is conceded. Even our own Extradition Law (P.D. No. 1069) allows the transmission of a request for provisional arrest via telegraph. In the advent of modern technology, the telegraph or cable have been conveniently replaced by the facsimile machine. Therefore, the transmission by the Hong Kong DOJ of the request for respondent's

[27] "Agreement between the Government of the Republic of the Philippines and the Government of Hong Kong for the Surrender of Accused and Convicted Persons."

[28] "Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country" issued by President Ferdinand E. Marcos on 13 January 1977.

> provisional arrest and the accompanying documents, namely, a copy of the warrant of arrest against respondent, a summary of the facts of the case against him, particulars of his birth and address, a statement of the intention to request his provisional arrest and the reason therefore, by fax machine, more than serves this purpose of expediency."[29]

The request for the respondent's provisional arrest was accompanied by facsimile copies of the outstanding warrant of arrest issued by the Hong Kong government, a summary of the facts of the case against respondent, particulars of his birth and address, an intention to request his provisional arrest and the reason therefore. The said documents were appended to the application for respondent's provisional arrest filed in the Regional Trial Court and formed the basis of the judge's finding of probable cause for the issuance of the warrant of arrest against respondent.[30]

The Supreme Court granted the application for provisional arrest of respondent pursuant to the extradition treaty forming part of the law of our land through the doctrine of incorporation. It is part of our system of laws and is recognized by Presidential Decree No. 1069 and the Constitution through the adoption of international laws, treaties and conventions as part of the law of the land.

## NATIONAL LAWS ON INTERNATIONAL LAW MATTERS

### Electronic Commerce Act

### Republic Act No. 8792 – "Electronic Commerce Act of 2000"

The E-Commerce Act of the Philippines was approved in September 2000 as a first step in the government's efforts to secure a place in the New Economy spurred by Internet development. The Act, patterned after the UNCITRAL Model Law on Electronic Commerce, primarily governs the form within which E-Commerce transactions are to be conducted. The intrinsic validity of such transactions remains covered by the Philippine substantive laws.

E-commerce refers to transactions conducted digitally. It aims to facilitate business dealings made on-line. As a matter of policy, the role of the government is limited, nonetheless important in that, it is required to provide a stable legal environment and a competitive business environment. It should avoid imposing undue restrictions especially since the development of electronic commerce is envisioned to be private sector led.

Among the law's more significant provisions include legal recognition of electronic writing or document and data messages. They are to have the same legal effect, validity and enforceability as any other document. They are also afforded evidential weight. Electronic signatures are also legally recognized and presumed the signature of the person to whom it correlates and electronic documents are considered original.

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[29] 348 SCRA 558, citing Sec. 20(b) of Presidential Decree No. 1069.

[30] 348 SCRA 562-563.

Electronic documents and electronic data messages may be authenticated by any party involved including Certificate Authorities, third-party Internet Service Providers, and electronic notaries.

All departments, bureaux, offices and agencies of the government, as well as all government-owned and-controlled corporations, are required to use and accept electronic data messages, electronic documents and electronic signatures in their transactions. This is to be done within two (2) years from the date of the coming into effect of this Act.

There shall also be installed an electronic online network in accordance with RPWEB, to facilitate the open, speedy and efficient electronic online transmission, conveyance and use of electronic data messages or electronic documents among all government agencies and the general public.

The Department of Trade and Industry (DTI) shall direct and supervise the promotion and development of electronic commerce in the country in coordination with relevant government agencies aimed in protecting the interests of the consuming public.

The interpretation of the Act shall consider its international origin (UNCITRAL Model Law on Electronic Commerce) and the need to promote uniformity in its application and the observance of good faith in international trade relations. The generally accepted principles of international law and convention on electronic commerce shall also be considered.

All benefits, privileges, advantages or statutory rules established under this Act, including those involving practice of profession, shall be enjoyed only by parties whose country of origin grants the same benefits and privileges or advantages to Filipino citizens.

The Act penalizes hacking or cracking, which is the unauthorized access to or intrusion into a computer or a computer network and/or a telecommunications system by means of computer or a device through the use of information technology. Piracy of copyrighted works and legally protected sound recordings or information materials is also penalized.

## The Professional Regulation Commission Modernization Act

### Republic Act No. 8981 – "The PRC Modernization Act Of 2000"

The State recognizes the important role of professionals in nation building; its aim is to promote the sustained development of a reservoir of professionals whose competence has been determined by honest and credible licensure examinations, and whose standards of professional service and practice are internationally recognized and considered world-class.

The powers, functions, and responsibilities of the Commission include administering regulatory policies of the national government with respect to the regulation and licensing of the various professions and occupations including the enhancement and maintenance of professional and occupational standards and ethics. It also enforces the rules and regulations relative thereto.

> "Upon recommendation of the Professional Regulatory Board concerned, the Commission also approves the registration of and authorizes the issuance of a certificate of

> registration/license and professional identification card with or without examination to a foreigner who is registered under the laws of his state or country and whose certificate of registration issued therein has not been suspended or revoked: *Provided*, That the requirements for the registration or licensing in said foreign state or country are substantially the same as those required and contemplated by the laws of the Philippines and that the laws of such foreign state or country allow the citizens of the Philippines to practice the profession on the same basis and grant the same privileges as those enjoyed by the subjects or citizens of such foreign state or country."
>
> "The Commission may, upon recommendation of the Board concerned, authorize the issuance of a certificate of registration/license or a special temporary permit to foreign professionals who desire to practice their professions in the country under reciprocity and other international agreements; consultants in foreign-funded, joint venture or foreign-assisted projects of the government, employees of Philippine or foreign private firms or institutions pursuant to law, or health professionals engaged in humanitarian mission for a limited period of time: *Provided,* That agencies, organizations or individuals whether public or private, who secure the services of a foreign professional authorized by law to practice in the Philippines for reasons aforementioned, shall be responsible for securing a special permit from the Professional Regulation Commission (PRC) and the Department of Labor and Employment (DOLE), pursuant to PRC and DOLE rules."

The Commission supervises foreign nationals who are authorized by existing laws to practise their professions either as holders of a certificate of registration and a professional identification card or a temporary special permit in the Philippines. It must ensure strict compliance with the terms and conditions for the practice or of their employment.

When the professional was hired and allowed to practise his/her profession without permit, the Commission has to file upon due process request for deportation with the Bureau of Immigration and Deportation (BID).

The Act was approved on 5 December 2000.

## OTHER RELEVANT STATE PRACTICE

### Opinions of the Secretary of Justice[31]

#### Trade-Related Investment Measures in the World Trade Organization; *Pacta Sunt Servanda*

Opinion No. 088 Series 1999- Full Implementation Of The Agreement On Trade-Related Investment Measures Under The World Trade Organization *vis àvis* The Continued Enforcement And Implementation Of Measures In Conflict With Such.

There is a conflict between the provisions of the TRIMS Agreement relating to the commitment of member countries to adopt the national treatment principle and

[31] Executive Pronouncements.

to eliminate quantitative restrictions under the 1994 General Agreement on Tariff and Trade (GATT) and the provisions of E.O. No. 259 which require local sourcing of raw materials in the manufacture of detergent products in the country and which requires the same to be applied to imported detergent products.

TRIMS provides that the Philippines has until 31 December 1999 to comply with the commitment of eliminating all trade-related investment measures which are in conflict with the provisions of the TRIM Agreement. E.O. No. 259 being in the nature of a law needs a legislative fiat to repeal or amend it.

A treaty is a formal agreement entered into by states or entities possessing the treaty-making capacity for the purpose of regulating their mutual relations under the law of nations. It has the effect of automatically invalidating or superseding a local law inconsistent with it provided the treaty is more recent and its provisions are self-executing.

The Agreement on TRIM is not self-executing and cannot have the effect of automatically amending and/or superseding the provisions of E.O. No. 259, which is a law. In the event that E.O. No. 259 not be repealed/amended to conform with the Agreement on TRIM on or before 31 December 1999, the Philippines is still required to perform in good faith, its treaty obligation based on the fundamental rule of "*pacta sunt servanda*". Efforts to reconcile or harmonize the provisions of E.O. No. 259 with our treaty commitment under the Agreement on TRIM should therefore be made. If this is not achieved, the Executive should continue working for the amendment or repeal of inconsistent provisions of E.O. No. 259.

**Doctrine of Incorporation; Reconciling Treaty Provisions and Municipal Law**

Opinion No. 057 Series 2000- The Legal Effect Of The Proposal Of The German Government That Would "Allow Members Of The Families Of Members Of Diplomatic Missions, Consular Posts, Or Mission To An International Organization To Engage In Gainful Employment On The Basis Of Reciprocity".

The proposed agreement provides that "a member of the family" includes "any child under the age of 25 who permanently forms part of the household of a member of a diplomatic mission or consular post or mission to an international organization". This provision is inconsistent with the definition of "child" under the Philippine Immigration Act of 1940, as amended, which refers to an "unmarried child under 21 years of age".

The Secretary of Justice held that Section 48 of the Philippine Immigration Act of 1940, as amended, indicates that the Act shall not be construed to apply to an official of a recognized foreign government who is coming on the business of his government nor to his family, attendants, servants and employees, as long as they possess passports or other credentials showing their official status, and they are duly issued with a visa by Philippine diplomatic officials abroad. Hence, the qualitative and quantitative controls of our immigration law do not apply to individuals with diplomatic or quasi-diplomatic status since they fall within the category of "foreign government officials".

A treaty or international agreement, once ratified by the Philippine Senate in accordance with the Constitution constitutes part of the internal law of the land. It is of the same class as an enactment of Congress of the Philippines. Thus, in case of irreconcilable conflict between a treaty and a statute, the prior act is superseded

by the later act. However, when a treaty is superseded by a subsequent statute of Congress, it is repealed or amended as part of the law of the land, yet it still subsists as an engagement of the Philippines, although it may not be enforceable by our courts. Once the proposed agreement is ratified by the representatives of both the German and Philippine governments, it would have effectively amended irreconcilably inconsistent provisions of the Philippine Immigration Act of 1940, as amended.

## International Agreements

Opinion No. 067 Series 2000- Memoranda Of Understanding Proposed Between The National Food Authority And The Vietnam Southern Food Corporation, The Ministry Of Commerce Of Thailand, And The China National Cereals, Oils And Foodstuffs Import And Export Corporation Of The People's Republic Of China Being Subject To The Requirements And Provisions Of And Act Providing For The Guidelines In The Negotiation Of International Agreements And Its Ratification

The Office of the Government Corporate Counsel opined that the Memorandum of Agreement between the NFA and the above-named parties are not subject to the requirements and provisions of E.O. No. 459 since the NFA is a mere government-owned and controlled corporation. Hence, its contracts cannot be classified as an international agreement or a treaty.

The Department of Foreign Affairs on the other hand contends that such MOUs are subject to E.O. No. 459, particularly to the standard provision on "Entry into Force."

The Department of Justice declined to render an opinion since the Office of the Government Corporate Counsel is the "principal law office of all government-owned or controlled corporations" and has the duty to render all important legal questions for opinion, advice and determination on all proposed contracts and important court cases. The Department of Justice will render its own opinion only when the OGCC opinion is patently erroneous.

The Department of Justice has ruled that the term "international agreement" in the Constitution refers to agreements that are permanent in nature and does not include executive agreements. Trade agreements are also not subject to legislative conformity.

> 'The well-recognized distinction between an executive agreement and a treaty is that the former cannot alter the existing law and must conform to all prior statutory enactments, whereas a treaty, if ratified by two-thirds of the Senate, itself becomes the supreme law of the land and takes precedence over any prior statutory enactments.'

### Executive Orders[32]

### International Humanitarian Law Day

Executive Order No. 134- Declaring 12 August 1999 And Every 12th Day Of August Thereafter As International Humanitarian Law Day

President Joseph Ejercito Estrada declared August 12, 1999 and every 12th day of August thereafter as International Humanitarian Law Day.

The Philippines is a Contracting Party to the: (1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; (II) Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; (III) Geneva Convention Relative to the Treatment of Prisoners of War; and (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, and Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts. In this regard, the Philippines accepts direct responsibility for the application of international humanitarian law when involved in an armed conflict.

The commemoration of International Humanitarian Law Day aims to promote greater awareness of the principles of International Humanitarian Law, as such all concerned departments and agencies of the government are enjoined to observe International Humanitarian Law Day and actively to participate in programs and activities to commemorate the Day.

## SINGAPORE[*]

JUDICIAL DECISIONS

### Forum non conveniens

PEH TECK QUEE V. BAYERISCHE LANDESBANK GIROZENTRALE[1]

In this case the issue arose as to whether Singapore or Malaysia was the proper law of the contract governing a ‘Multi-Currency Revolving Facility’ between a German bank operating in Singapore (the respondent) and a Malaysian customer (the appellant). It was held that the parties’ express intention that the governing law should be Singapore law must be treated as the objective choice of law in the absence of evidence to show that application of the law is contrary to public policy and that the choice was made *mala fide*.

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[32] Executive Pronouncements.

[*] Contributed by SOH Tze Bian, Deputy Senior State Counsel, International Affairs Division (IAD), Attorney-General’s Chambers, Singapore.

[1] [2000] 1 SLR 148.

### YUE XIU ENTERPRISES (HOLDINGS) & ANOR V. PT HUTAN DOMAS RAYA & ANOR[2]

This case concerned the appeal by the Plaintiffs (a company incorporated in Hong Kong) against a stay of proceedings in favour of the first defendant (a company incorporated in Indonesia). The Singapore action against the second defendant (the guarantor) was at an advanced stage and to be heard shortly. Although the Court agreed that Jakarta is clearly the more appropriate forum for the trial, it was of the opinion that there would be a real prospect of a different outcome in respective courts in two jurisdictions on the same issue if the Singapore action against the first defendants was stayed. In the circumstances, the Court allowed the appeal.

### YUSEN AIR & SEA SERVICE (S) PTE LTD V. KLM ROYAL DUTCH AIRLINES

This case involved concurrent proceedings in New York and Singapore over the same subject matter. The issue was whether the mere commencement of one set of proceedings amounted to an election to proceed in that jurisdiction. Finding that there was strong evidence that the appellant intended to pursue its claim in Singapore, the Court held that the mere commencement of proceedings in New York did not amount to election to proceed in that jurisdiction over Singapore.

### PARNO V. SC MARINE PTE LTD

This case involved the issue of applicable choice of law in Singapore with respect to torts committed overseas (i.e., Myanmar). The Court of Appeal held that it is the Singapore common law of negligence that should be applied as neither party had pleaded Myanmar law with respect to the alleged negligence or raised any point of Myanmarese law.

### THE TRADE RESOLVE[3]

This case involved the defendant's claim that the arrest of their vessel was effected outside of Singapore's territorial waters and therefore the arrest was wrongful, unlawful and ineffective. The plaintiffs argued that the court had jurisdiction to hear the matter concerning the lien because the entry of appearance by the defendants would give the court *in personam* jurisdiction over the defendants and therefore the defendants were precluded from disputing the legality of the arrest of the vessel. The Court decided that while it clearly had *in personam* jurisdiction over the defendants as they had entered appearance to apply to the court for the cargo to be sold and the sale proceeds paid into court, this did not preclude the defendants from arguing that the vessel's arrest was wrongful; it accordingly dismissed the plaintiffs' claim.

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[2] [2000] 4 SLR 522.

[3] [1999] 4 SLR 424.

THE JIAN HE[4]

This case was an appeal against a decision of the High Court refusing the defendants' application for a stay of proceedings on the ground of an exclusive jurisdiction clause. One of the issues was whether the Singapore court is entitled to construe the jurisdiction clause in accordance with local rules of construction. As the bill of lading expressly provided that the laws of the People's Republic of China were to apply, the courts held that the Chinese rules of construction should have applied in the construction of the jurisdiction clause. However, as there was no evidence showing that the rules of construction under Chinese law were any different from those under Singapore law, a Singapore court would be entitled to construe the jurisdiction clause in accordance with Singapore's rules of construction.

## NATIONAL LAWS ON INTERNATIONAL LAW MATTERS

During the period from 1999 to 2000, the Singapore Legislature enacted or amended the following Acts to give effect to international conventions as follows

a. Prevention of Pollution of the Sea Act 1999 was amended on 11 February 1999 to give effect to the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC Convention) which has been adopted by the International Maritime Organization (IMO) in 1990 and to enable Singapore to implement any international agreement relating to the prevention, reduction or control of pollution of the sea and pollution from ships. The amended Act also increases the penalties for various offences under the Act.

b. Carriage by Air (Amendment) Act 1999 was enacted on 11 February 1999 to amend the Carriage by Air Act (Chapter 32A of the 1989 Revised Edition) to give effect to the provisions of Protocol No. 4 signed at Montreal on 25th September 1975 which further amended the Warsaw Convention concerning international carriage by air as amended at the Hague on 28th September 1955.

c. Chemical Weapons (Prohibition) Act 2000 was enacted on 25 April 2000 to give effect to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction concluded at Paris on 13 January 1993.

[4] [2000] 1 SLR 8.

## SRI LANKA*

JUDICIAL DECISIONS

**Fundamental Rights – Proposed agreement for exploration and mining of phosphate – Environmental and developmental policies applicable to exploitation of natural resources – International standards and requirements of domestic law – contractual provisions calculated to circumvent local laws – Denial of the rights of the public to object to the proposed agreement – Articles 12(1), 14(1)(g) and 14(1)(h) of the Constitution**

**Supreme Court, 2 June 2000, (2000) 3 Sri Lanka Law Reports 243**
**Amerasinghe, Wadugodapitiya and Gunasekera JJ**

BULANKULAMA AND OTHERS V. SECRETARY, MINISTRY OF INDUSTRIAL DEVELOPMENT AND OTHERS

This was a fundamental rights application filed under Article 17 of the Constitution read with Article 126. The seven petitioners alleged that the proposed Mineral Investment Agreement, that was to be entered into between the Government of Sri Lanka and a foreign mining company for the exploitation of Sri Lanka's phosphate reserves, would result in the imminent infringement of their fundamental rights as it would result in their being displaced from their homes and lands. The petitioners cited Articles 12 (1) (right to equality before the law and the equal protection of the law), Article 14(1)(g) (the freedom to engage by oneself or in association with others in any lawful occupation, profession, trade, business or enterprise) and Article 14 (1) (h) (the freedom of movement and the right to choose one's residence within Sri Lanka).

Although the basis of the case was the imminent infringement of fundamental rights under the Constitution, the potential adverse environmental impacts of the mining project provided a strong basis for the arguments of Counsel for the petitioners. This in turn gave rise to an examination of issues of environment and development in the judgement. A section of the judgement entitled "Sustainable Development" contains an exhaustive analysis of principles of international environmental law and their application in Sri Lanka. In making this analysis the Court made continual reference to the Stockholm and Rio Declarations. This case is significant for its interpretation of these principles and their application in Sri Lankan law.

Discussing the principle of sustainable development, the Court observed:

> Undoubtedly, the state has the right to exploit its own resources pursuant, however, to its own environmental and development policies. (Cf. Principle 21 of the U.N Stockholm Declaration (1972) and Principle 2 of the U.N. Rio de Janeiro Declaration (1992). Rational Planning constitutes an essential tool for reconciling any conflict between the needs of development and the need to protect and improve the environment. (Principle 14, Stockholm Declaration) Human beings are at the centre of

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> concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature. (Principle 1, Rio de Janeiro Declaration). In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. (Principle 4, Rio de Janeiro Declaration). In my view, the proposed agreement must be considered in the light of the foregoing principles. Admittedly, the principles set out in the Stockholm and Rio De Janeiro Declarations are not legally binding in the way in which an Act of our Parliament would be. It may be regarded merely as 'soft law'. Nevertheless, as a Member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior courts of record and by the Supreme Court in particular, in their decisions.

The Court elaborated on the principle of sustainable development and its elements including the principle of inter-generational equity.

> In my view, due regard should be had by the authorities concerned to the general principle encapsulated in the phrase 'sustainable development', namely that human development and the use of natural resources must take place in a sustainable manner.
>
> There are many operational definitions of 'sustainable development', but they have mostly been variations on the benchmark definition of the United Nations Commission on Environment and Development chaired by Gro Harlem Brundtland, Prime Minister of Norway, in its report in 1987 "... development that meets the needs of the present without compromising the ability of future generations to meet their own needs".
>
> Some of the elements encompassed by the principle of sustainable that are of special significance to the matter before this court are, first, the conservation of natural resources for the benefit of future generations – the principle of inter-generational equity; second, the exploration of natural resources in a manner which is 'sustainable' or 'prudent' – the principle of sustainable use; the integration of environmental considerations into economic and other development plans, programmes and projects – the principle of integration of environment and development needs.
>
> International standard setting instruments have clearly recognized the principle of inter-generational equity. It has been stated that humankind bears a solemn responsibility to protect and improve the environment for present and future generations (Principle 1, Stockholm Declaration). The natural resources of the earth including the air, water, land flora and fauna must be safeguarded for the benefit of present and future generations. (Principle 2, Stockholm Declaration). The non-renewable resources of the earth must be employed in such a way as to guard against their future exhaustion and to ensure that benefits from such employment are shared by all humankind (Principle 5, Stockholm Declaration). The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. (Principle 3, Rio de Janeiro Declaration). The inter-generational principle in my view, should be regarded as axiomatic in the decision making process in relation to matters concerning the natural resources and the environment of Sri Lanka in general, and particularly in the case before us. It is not something new to us, although memories may need to be jogged.

The Court also discussed the precautionary principle as it is enunciated in the Rio and Stockholm Declarations and observed:

> …. attention is drawn, especially of the 4th respondent in applying the National Environmental Act and the regulation framed thereunder, to the principles of the Stockholm Declaration: "The discharge of toxic substances..... in such quantities or concentrations as to exceed the capacity of the environmental to render them harmless, must be halted in order to ensure that serious or irreversible damage is to inflicted upon eco-system. The just struggle of the peoples of all countries against pollution should be supported" (Principle 6). "States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea" (Principle 7). It might be noted, particularly by the 4th respondent, that Principle 15 of the Rio de Janeiro Declaration marked a progressive shift from the preventive principle recognized in Principles 6 and 7 of the Stockholm Declaration which was predicated upon the notion that only when pollution threatens to exceed the assimilative capacity to render it harmless, should it be prevented from entering the environment. Principle 15 of the Rio De Janeiro Declaration stated: "In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." The precautionary principle acts to reverse the assumption in the Stockholm Declaration and, in my view, ought to be acted upon by the 4th respondent. Therefore if ever pollution is discerned, uncertainty as to whether the assimilative capacity has been reached should not prevent measures being insisted upon to reduce such pollution form reaching the environment.

Citing the "polluter pays" principle, the Court took the view that the measures contained in the mineral investment agreement in regard to the restoration of the environment were inadequate:

> Moreover, learned counsel for the petitioners drew attention to the inadequacy of the protection afforded by Articles 25.1 and 25.3 of the proposed agreement with regard to the repair of environmental damage. The petitioners did not share the belief expressed by the first respondent in his affidavit on the adequacy of the safeguards by way of the proposed Environmental Compliance Bond and Environmental Restoration Escrow Account and the undertaking given with regard to environmental compliance and restoration. It seems to be that the provisions in the proposed agreement on the matter are the product of outdated mainstream economic thought: They appear to be based on the views of persons who at best nominally recognize the environment or have considerable difficulty in placing a 'value' on it. Today, environmental protection, in the light of the generally recognized "polluter pays" principle (e.g., see Principle 16 of the Rio Declaration), can no longer be permitted to be externalized by economists merely because they find it too insignificant or too difficult to include it as a cost associated with human activity. The cost of environmental damage should, in my view, be borne by the party that causes such harm, rather than being allowed to fall on the general community to be paid through reduced environmental quality or increased taxation in order to mitigate the environmentally degrading effects of

> a project. This is a matter the Central Environmental Authority must take into account in evaluating the proposed project and in prescribing terms and conditions.

Although the Sri Lankan Constitution does not contain a right to information, it is significant that the Court gave judicial recognition to this right in relation to environmental issues, on the basis of the Rio Declaration. This issue arose as a result of the respondents' attempts to circumvent domestic environmental laws, specifically those requiring an environmental impact assessment (EIA) of projects of this nature. The EIA process calls for public participation in the decision-making process and requires that all EIA reports are made available to the public for a specified period for their comments. In this regard, the Court stated:

> Access to information on environment issues is of paramount importance. The provision of public access to environmental information has, for instance, been a declared aim of the European Commission's environmental policy for a number of years. Principle 10 of the Rio Declaration calls for better citizen participation in environmental decision-making and rights of access to environmental information, for they can help to ensure greater compliance by States of international environmental standards through the accountability of their governments. Principle 10 states as follows: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

Pointing out that the proposed agreement circumvented the laws of the country, the Court went on to say

> … reinforced by the confidentiality provision of the proposed agreement, the proposed agreement effectively excluded public awareness and participation, as contemplated by our legislature as well as by Principle 10 of the Rio Declaration. …. Further, although the law of Sri Lanka provides for the judicial review of the acts of administrative authorities, and Principle 10 of the Rio Declaration calls for effective access to judicial and administrative proceedings, the proposed agreement substitutes arbitration for such proceedings, in which, of course, the public have no role.

Fundamental Rights – Prevention of Terrorism (Temporary Provisions) Act – Arrest and Detention of a person by a police officer for "unlawful activity" – Preconditions for a valid arrest and detention – Articles 13 (1) and 13(2) of the Constitution

**Supreme Court, 26 June 2000, (2000) 1 Sri Lanka Law Reports 387**

**Fernando, Amerasinghe and Dheeraratne JJ**

WEERAWANSA V. THE ATTORNEY GENERAL AND OTHERS

The Petitioner, a Customs Officer, was arrested under the Prevention of Terrorism (Temporary Provisions) Act (PTA) for unlawful activity. He was detained for several months but was not informed as to the reasons for being so detained. In its decision, the Court held that there was no reasonable suspicion of unlawful activity on the part of the Petitioner and therefore his purported arrest was not in accordance with the provisions of the PTA. The arrest was in violation of his rights under Article 13(1) of the Constitution, which provides that no person shall be arrested except according to procedure established by law and that any person arrested shall be informed of the reason for his arrest. Since the Petitioner had not been arrested in accordance with the PTA, the police had no right to keep him in custody without producing him before a Magistrate and therefore his fundamental rights under Article 13(2) of the Constitution had also been infringed. Article 13(2) provides that every person held in custody or detained shall be brought before a judge of the nearest competent court according to procedure established by law and shall not be further detained except upon an order of such judge made in accordance with procedure established by law.

In the course of its judgement, the Court pointed out that these safeguards are internationally recognised. The Court stated that Sri Lanka is a party to the International Covenant on Civil and Political Rights (as well as the Optional Protocol) and quoted Article 9 of the Covenant. It asked the question as to whether this Court should have regard to the provisions of the Covenant and concluded that it must. It quoted Article 27(15) of the Constitution found in the Chapter on Directive Principles of State Policy, which requires the State to "endeavour to foster respect for international law and treaty obligations in dealings among nations". It stated "(t)hat implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford to them the benefit of the safeguards which international law recognises".

## NATIONAL LAWS ON INTERNATIONAL LAW MATTERS

**Suppression of Terrorist Bombings Act No. 11 of 1999**

This Act is meant to give effect to the Convention for the Suppression of Terrorist Bombings adopted by the UN General Assembly on 15 December 1997 and opened for signature on 12 January 1998. The Government of Sri Lanka became a signatory to the Convention on that date. The Act was passed to give effect to the provisions of the Convention.

Section 1 of the Act states that it shall come into operation on such date as the Minister certifies as the date on which the Convention enters into force in respect of Sri Lanka. The Minister may by Order published in the Gazette certify the States which are Parties to the Convention and these States shall be known as Convention

States. (Section 2). Section 3 and the Schedule to the Act set out the acts deemed to be offences under this statute and the High Court shall have jurisdiction in respect of such offences. The Act also provides for extradition of accused persons between Sri Lanka and Convention States.

The Government of Sri Lanka is also required to provide all necessary assistance to Convention States in respect of the investigation and prosecution of offences under Section 3 or the Schedule to the Act. The Government of Sri Lanka is also required to take measures to prevent any person or group of persons from committing or encouraging, instigation, organizing or knowingly financing the commission of any such offence whether in or outside Sri Lanka.

**Mutual Assistance in Civil and Commercial Matters Act No. 39 of 2000**

The long title to the Act states that it is an Act to provide for the rendering of mutual assistance in civil and commercial matters between Sri Lanka and other countries and to give effect to the Hague Convention on the service abroad of judicial and extra judicial documents in civil and commercial matters and the Hague Convention on the taking of evidence abroad in civil and commercial matters.

The objects of the Act are to facilitate the provision of, and the obtaining by Sri Lanka of, assistance in civil and commercial matters, including the service of judicial and extra judicial documents, the examination of witnesses and the obtaining of evidence, documents and other articles and the provision of documents and other records. The Central Authority to the Act is the secretary to the Ministry of Justice.

**Prevention of Hostage Taking Act No. 41 of 2000**

This Act was passed to give effect to the International Convention against the Taking of Hostages. According to Section 1 it shall come into force on such date as the Minister certifies as being the date on which the Convention enters into force in respect of Sri Lanka.

Section 3 sets out the offences under the Act, and Section 4 designates the High Court as the Court having jurisdiction to try such offences. The Act also provides for extradition of accused persons between Sri Lanka and other parties to the Convention. Where there is no extradition agreement between Sri Lanka and any of such parties, the Convention may be treated as an extradition agreement. Section 9 states that the Government of Sri Lanka shall afford all assistance to and may also request such assistance from, other Parties to the Convention as may be necessary to investigate and prosecute offences under the Act.

**Suppression of Unlawful Acts Against the Safety of Maritime Navigation Act No. 42 of 2000**

This Act gives effect to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation adopted in Rome on 10 March 1988. At the time of enactment Sri Lanka had not yet acceded to the Convention and the long title states "whereas Sri Lanka intends to accede to the aforesaid Convention and

whereas it is necessary to make legal provision to give effect to Sri Lanka's obligations under the aforesaid Convention".

The Act specifies the offences under it and designates the High Court as the Court having jurisdiction in respect of such offences. This Act also provides for extradition of accused persons between Sri Lanka and other parties to the Convention. Further provisions require the government of Sri Lanka to provide necessary assistance to other States Parties in such matters and also provides for the requesting of such assistance.

## THAILAND*

### JUDICIAL DECISION

**The Treaty-making power of the Executive under the Constitution of the Kingdom of Thailand; Whether relevant provisions of the Convention on Biological Diversity require a change in the jurisdiction of Thailand which would in turn require prior approval by the National Assembly for its ratification by the Executive**

**Constitutional Court, 5 October 2000**
**Judgment No. 33 / 2543**

Prasert Nasakun, president, Komen Bhatarabhirom, Joompol Na Songkla, Jul Atirek, Preecha Charoemvanij, Mongkol Saratun, Sujit Boonbongkarn, Suchinda Yongsunthorn, Suvit Theerapongse, Anant Ketwongse, Issara Nititunprapas, Ura Wang-Omklang, JJ.

### IN RE CONVENTION ON BIOLOGICAL DIVERSITY OF 1992

The case came before the Constitutional Court in the form of a writ petition by the Cabinet pursuant to Section 266 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) which provides: "In the case where a dispute arises as to the powers and duties of organs under the Constitution, such organs or the President of the National Assembly shall submit a matter together with the opinion to the Constitutional Court for decision."

The dispute arose out of the decision of the Cabinet on 28 October 1997 to the effect that Thailand could proceed to ratify the 1992 Convention on Biological Diversity, which Thailand signed on 12 June 1992, without seeking prior approval from the National Assembly. By virtue of the second paragraph of Section 224 of the Constitution, "A treaty which provides for a change in the Thai territories or the jurisdiction of the State or requires the enactment of an Act for its implementation

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* Contributed by Patacharapa Thawinyarti, Barrister-at-Law, Bangkok.

must be approved by the National Assembly." The Cabinet resolved that Thailand did not have to enact any new law to implement obligations under the Convention, and it instructed the Ministry of Foreign Affairs to draft a declaration to be deposited at the time of ratification stating that Thailand's ratification would not result in a change in the Thai territories or the jurisdiction of the State and that implementation of the Convention would be subject to Thai law.

The Ministry of Foreign Affairs submitted that no such declaration was necessary because nothing in the Convention would result in a change in the Thai territories or the jurisdiction of the State, and the Convention does not obligate Contracting Parties to enact any new law to implement obligations under the Convention. On the other hand, the Council of State, the government body acting as legal adviser to the Royal Thai Government on Thai law and also responsible for drafting Thai law, disagreed with both the Cabinet and the Ministry of Foreign Affairs. According to the Council of State, Article 1 of the Convention makes it clear that the objectives of the Convention are, *inter alia,* "the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources …" Article 15 of the Convention under the heading "Access to Genetic Resources" provides:

> "1. Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.
> 2. Each Contracting Party shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention.
> …."

The Council of State reasoned that Article 15 had to be read in conjunction with Article 1, and since Article 37 expressly prohibits reservations to the Convention, Thailand had to permit access to genetic resources in Thailand whenever requested by another Contracting Party to the Convention, and without any restriction on the access. In the Council of State's view, existing Thai law was not adequate to authorize such access in all cases, and Thailand would not be able to enact any law incompatible with the relevant provisions of the Convention. This would also mean that there would be a change in the "legislative jurisdiction" of the State if Thailand became a Contracting Party to the Convention. It, therefore, concluded that the Convention had to be submitted to the National Assembly for prior approval pursuant to the second paragraph of Article 224 of the Constitution.

The Ministry of Foreign Affairs disputed the above reasoning of the Council of State. The Ministry explained that Article 15 (2) merely obligates Contracting Parties to "endeavour" to: (i) create conditions to facilitate access to genetic resources; and (ii) not to impose restrictions that run counter to the objectives of the Convention. In other words, the word "endeavour" applies throughout Article 15 (2), and this was a compromise achieved at the time of drafting the Convention. Therefore, each Contracting Party has the authority and inherent discretion to allow or deny access by other Contracting Parties to its genetic resources, as Article 15 (1) makes it clear. In addition, the wording "a change in the jurisdiction of the State" in Article 224 of the Constitution has a special meaning. It first appeared in the Constitution of the Kingdom of Thailand B.E. 2534 (1991) to signify maritime areas or zones known

as the exclusive economic zone and the continental shelf adjacent to the territorial sea or Thai territories over which Thailand merely has sovereign rights and certain jurisdiction under international law. Contrary to the Council of State's view, "a change in the jurisdiction of the State" would mean a change in the limit of the maritime zones to become larger or smaller than previously proclaimed by Thailand, and not a change in the way Thailand might exercise its "legislative jurisdiction".

The relevant Thai authorities that concurred with the Ministry of Foreign Affairs were the Ministry of Agriculture and Cooperatives, the Ministry of Commerce, and the Ministry of Science and Technology. On the other hand, the Ministry of Public Health agreed with the Council of State.

In its writ of petition, the Cabinet requested the Constitutional Court to decide:

A. the meaning of "a change in the Thai territories or the jurisdiction of the State" under Section 224 of the Constitution; and
B. whether Article 15 (2) of the Convention would obligate a change in the Thai law and, consequently, a change in the jurisdiction of the State as mentioned in Section 224, second paragraph, of the Constitution.

**The judgment**

The Constitutional Court declined to answer (A) on the ground that the Cabinet was merely seeking advice on the meaning of that constitutional provision, whereas the Constitutional Court does not give advisory opinions but renders judgments on contentious questions.

After going through all the provisions of the 1992 Convention, the Court concluded that Article 15 (2) had to be read subject to Article 1 to the effect that Contracting Parties must facilitate access to their genetic resources and must endeavour not to impose restrictions that run counter to the objectives of the Convention. This, in the Court's view, was tantamount to a change in the jurisdiction of the Contracting Parties in the use of their genetic resources because the Contracting Parties no longer have absolute sovereignty over their genetic resources. Besides, Article 4 of the Convention under the heading "Jurisdictional Scope" stipulates, *inter alia*, that the provisions of the Convention apply, in relation to each Contracting Party:

> "(a) In the case of components of biological diversity, in areas within the limits of its national jurisdiction; and
> (b) In the case of processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction."

Therefore, by becoming a Contracting Party, Thailand would be entitled to certain new rights as well as would simultaneously lose certain rights it had already had. This would necessitate enactment of new law or amendment of existing law to comply with the objectives, principles and scope of the Convention. The Convention would thus entail a change in the jurisdiction of the State in the use of genetic resources; hence, a treaty that requires prior approval by the National Assembly.

In addition, Articles 15 (7), 16 (3) and (4), and 19 (1) provide that each Contracting Party "shall take … legislative … measures … as appropriate … with the aim

of …". This would mean that if Thailand became a Contracting Party to the 1992 Convention Thailand would have to take such legislative measures in order to comply with its obligations under the Convention.

For these reasons, the Constitutional Court held that the Convention on Biological Diversity of 1992 was a treaty which provides for a change in the jurisdiction of the State and, as such, which must be approved by the National Assembly pursuant to the second paragraph of Section 224 of the Constitution.

# PARTICIPATION IN MULTILATERAL TREATIES*

## Editorial introduction

This section records the participation of Asian states in open, multilateral law-making treaties that, in the main, aim at world-wide adherence. It updates to 31 December 2000 the treaty sections of earlier Volumes. New data are preceded by a reference to the most recent previous entry. In the event that no new data are available, the title of the treaty will be listed with a reference to the latest Volume containing such data.

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. The Editors wish to express their gratitude to all those international organisations that have so kindly responded to our request by making available information on the status of various categories of treaties.

*Note:*

- Where no other reference to specific sources is made, data are derived from Multilateral Treaties deposited with the Secretary-General – Status as at 31 December 2000 (ST/LEG/SER.E/19).
- No indication is given of reservations and declarations made.
- Sig. = signature; Cons. = consent to be bound; E.i.f. = entry into force

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Kuala Lumpur, 16 July 1998

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Brunei | | 17 Aug 2000 | Korea (Rep.) | | 25 Jan 2000 |

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**International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969**
(Continued from Vol. 7 pp. 324-325)
(Status as included in IMO doc. 7772, as at 31 December 2000)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| India | 16 Jun 2000 | 14 Sept 2000 |

**International Convention on Civil Liability for Oil Pollution Damage, 1969**
(Continued from Vol. 8 p. 176)
(Status as included in IMO doc. 7772, as at 31 December 2000)

| *State* | *Denunciation* | *E.i.f.* |
|---|---|---|
| India | 21 Jun 2000 | 21 Jun 2001 |

**International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971**
(Continued from Vol. 8 p. 176)
(Status as included in IMO doc. 7772, as at 31 December 2000)

| *State* | *Denunciation* | *E.i.f.* |
|---|---|---|
| China | 5 Jan 19995 | Jan 2000 |
| India | 21 Jun 2000 | 21 Jun 2001 |
| Sri Lanka | 22 Jan 1999 | 22 Jan 2000 |

**Convention for the Protection of the Ozone Layer, 1985**
(Continued from Vol. 8 p. 177)

| *State* | *Cons.* |
|---|---|
| Kyrgyzstan | 31 May 2000 |

**Protocol on Substances that Deplete the Ozone Layer, 1987**
(Continued from Vol. 8 p. 177)

| *State* | *Cons.* |
|---|---|
| Kyrgyzstan | 31 May 2000 |

**Amendment to the Montreal Protocol, 1992**
(Updated from Vol. 8 p. 177)

| *State* | *Cons.* |
|---|---|
| Bangladesh | 27 Nov 2000 |
| Singapore | 22 Sept 2000 |

**Amendment to the Montreal Protocol**
**Montreal, 17 September 1997**
Entry into force: 10 November 1999

| *State* | *Cons.* | *State* | *Cons.* |
|---|---|---|---|
| Korea (Rep.) | 19 Aug 1998 | Sri Lanka | 20 Aug 1999 |
| Singapore | 22 Sept 2000 | | |

**Framework Convention on Climate Change, 1992**
(Continued from Vol. 8 p. 177)

| *State* | *Sig* | *Cons* |
|---|---|---|
| Kyrgyzstan | | 25 May 2000 |

**International Convention on Oil Pollution Preparedness, Response, and Cooperation**
**London, 30 November 1990**
Entry into force: 13 May 1995
(Status as included in IMO doc. 7772, as at 31 December 2000)

| *State* | *Cons.* | *E.i.f.* | *State* | *Cons.* | *E.i.f.* |
|---|---|---|---|---|---|
| China | 30 Mar 1998 | 30 Jun 1998 | Pakistan | 21 July 1993 | 13 May 1995 |
| India | 17 Nov 1997 | 17 Feb 1998 | Korea (Rep.) | 9 Nov 1999 | 9 Feb 2000 |
| Iran | 25 Feb 1998 | 25 May 1998 | Singapore | 10 Mar 1999 | 10 Jun 1999 |
| Malaysia | 30 July 1997 | 30 Oct 1997 | Thailand | 20 Apr 2000 | 20 Jul 2000 |

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Convention on the Law Applicable to Maintenance Obligations, 1973: *see* Vol. 6 p. 244.

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(Continued from Vol. 6 p. 244)
(Status as on 31 December 2000 as provided by the Hague Conference on Private International Law)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| China | 30 Nov 2000 | | Mongolia | | 25 Apr 2000 |

## FINANCE

Agreement Establishing the Asian Development Bank, 1965: *see* Vol. 7 p. 327.

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(Continued from Vol. 8 p. 178)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Laos | | 5 Apr 2000 | Thailand | | 20 Oct 2000 |

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### Convention on the Political Rights of Women, 1953

(Continued from Vol. 8 p. 179)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Kazakhstan | | 28 Mar 2000 |

### Convention on the Nationality of Married Women, 1957

(Continued from Vol. 7 p. 328)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Kazakhstan | | 28 Mar 2000 |

**International Covenant on Economic, Social and Cultural Rights, 1966**
(Continued from Vol. 8 p. 179)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Laos | 7 Dec 2000 | |

**International Covenant on Civil and Political Rights, 1966**
(Updated from Vol. 8 p. 179)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Bangladesh | | 6 Sept 2000 |
| Laos | 7 Dec 2000 | |

**International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990**
(Continued from Vol. 8 p. 180)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Tajikistan | 7 Sept 2000 | |

**Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women**
New York, 6 October 1999
Entry into force: 22 December 2000

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Bangladesh | 6 Sept 2000 | 6 Sept 2000 |
| Indonesia | 28 Feb 2000 | |
| Kazakhstan | 6 Sept 2000 | |
| Mongolia | 7 Sept 2000 | |
| Philippines | 21 Mar 2000 | |
| Tajikistan | 7 Sept 2000 | |
| Thailand | 14 Jun 2000 | 14 Jun 2000 |

**Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict**
New York, 25 May 2000
Entry into force: 12 February 2002

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Bangladesh | 6 Sept 2000 | 6 Sept 2000 |
| Cambodia | 27 Jun 2000 | |
| Kazakhstan | 6 Sept 2000 | |
| Korea (Rep.) | 6 Sept 2000 | |
| Nepal | 8 Sept 2000 | |
| Philippines | 8 Sept 2000 | |
| Singapore | 7 Sept 2000 | |
| Sri Lanka | 21 Aug 2000 | 8 Sept 2000 |
| Vietnam | 8 Sept 2000 | |

**Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography**
New York, 25 May 2000
Entry into force: 18 January 2002

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Bangladesh | 6 Sept 2000 | 6 Sept 2000 | Korea (Rep.) | 6 Sept 2000 | |
| Cambodia | 27 Jun 2000 | | Nepal | 8 Sept 2000 | |
| China | 6 Sept 2000 | | Philippines | 8 Sept 2000 | |
| Kazakhstan | 6 Sept 2000 | | Vietnam | 8 Sept 2000 | |

## HUMANITARIAN LAW IN ARMED CONFLICT

International Conventions for the Protection of Victims of War, I-IV, 1949: *see* Vol. 6 p. 249.
Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977: *see* Vol. 7 p. 330.
Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977: *see* Vol. 7 p. 329.

## INTELLECTUAL PROPERTY

Universal Copyright Convention, 1952: *see* Vol. 6 p. 251.
Protocols 1, 2 and 3 annexed to the Universal Copyright Convention, 1952: *see* Vol. 6 p. 251.
International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961: *see* Vol. 6 p. 252.
Convention Establishing the World Intellectual Property Organization, 1967: *see* Vol. 6 p. 252.
Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, 1971: *see* Vol. 8 p. 181.
Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties, 1979: *see* Vol. 6 p. 252.

**Convention for the Protection of Industrial Property, 1883 as amended 1979**
(Continued from Vol. 8 p. 181)
(Status as included in WIPO doc. 423(E) of 15 Jan 2000)

| *State* | *Party* | *Latest Act to which State is party* |
|---|---|---|
| Bhutan | 4 Aug 2000 | Stockholm |

**Convention for the Protection of Literary and Artistic Works, 1886 as amended 1979**
(Continued from Vol. 8 p. 181)
(Status as included in WIPO doc. 423(E) of 15 Jan 2000)

| *State* | *Party* | *Latest Act to which State is party* |
|---|---|---|
| Tajikistan | 9 Mar 2000 | Paris |

## INTERNATIONAL CRIMES

Convention on the Prevention and Punishment of the Crime of Genocide, 1948: *see* Vol. 8 p. 182.
Slavery Convention, 1926 as amended in 1953: *see* Vol. 7 p. 331.
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956: *see* Vol. 7 p. 331.
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968: *see* Vol. 6 p. 254.
International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973: *see* Vol. 7 p. 331.
Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, 1973: *see* Vol. 8 p. 183.
International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989: *see* Vol. 8 p. 184.

**Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963**
(Continued from Vol. 8 p. 182)
(Status as at 31 December 2000 provided by the ICAO Secretariat)

| *State* | *Cons.* | *Eff. date* |
|---|---|---|
| Kyrgyzstan | 28 Feb 2000 | 28 May 2000 |

**Convention for the Suppression of Unlawful Seizure of Aircraft, 1970**
(Continued from Vol. 8 p. 182)
(Status as at 31 December 2000 provided by the ICAO Secretariat)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Kyrgyzstan | | 25 Feb 2000 |

**Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971**
(Continued from Vol. 8 p. 182)
(Status as at 31 December 2000 provided by the ICAO Secretariat)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Kyrgyzstan | | 25 Feb 2000 |

**International Convention Against the Taking of Hostages, 1979**
(Continued from Vol. 8 p. 183)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Pakistan | | 8 Sept 2000 | Sri Lanka | | 8 Sept 2000 |

**Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988**
(Corrected and continued from Vol. 8 p. 183)
(Status as included in IMO doc. 7772, as at 31 December 2000)

| *State* | *Cons* | *E.i.f.* | *State* | *Cons* | *E.i.f.* |
|---|---|---|---|---|---|
| China | 20 Aug 1991 | 1 Mar 1992 | Sri Lanka | 4 Sept 2000 | 3 Dec 2000 |
| India | 15 Oct 1999 | 13 Jan 2000 | Turkmenistan | 8 Jun 1999 | 6 Sept 1999 |
| Japan | 24 Apr 1998 | 23 July 1998 | Uzbekistan | 25 Sep 2000 | 24 Dec 2000 |
| Pakistan | 20 Sept 2000 | 19 Dec 2000 | | | |

**Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988**
(Corrected and continued from Vol. 8 p. 183)
(Status as included in IMO doc. 7772, as at 31 December 2000)

| *State* | *Cons* | *E.i.f.* | *State* | *Cons* | *E.i.f.* |
|---|---|---|---|---|---|
| China | 20 Aug 1991 | 1 Mar 1992 | Pakistan | 20 Sept 2000 | 19 Dec 2000 |
| India | 15 Oct 1999 | 13 Jan 2000 | Turkmenistan | 8 Jun 1999 | 6 Sept 1999 |
| Japan | 24 Apr 1998 | 23 July 1998 | Uzbekistan | 25 Sep 2000 | 24 Dec 2000 |

**Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1988**
(Continued from Vol. 8 p. 183)
(Status as at 31 December 2000 provided by the ICAO Secretariat)

| *State* | *Cons.* | *Eff. date.* | *State* | *Cons.* | *Eff. date.* |
|---|---|---|---|---|---|
| Brunei | 20 Dec 2000 | 19 Jan 2001 | Pakistan | 26 Sept 2000 | 26 Oct 2000 |
| Kyrgyzstan | 28 Feb 2000 | 29 Mar 2000 | | | |

**Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991**
(Continued from Vol. 8 p. 184)
(Status as at 31 December 2000 provided by the ICAO Secretariat)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Kyrgyzstan | 14 Jul 2000 | 12 Sept 2000 | India | 16 Nov 1999 | 15 Jan 2000 |

## INTERNATIONAL REPRESENTATION
(*see also*: Privileges and Immunities)

Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, 1975: *see* Vol. 6 p. 257.

## INTERNATIONAL TRADE

Convention on Transit Trade of Land-locked States, 1965: *see* Vol. 6 p. 257.
Convention on the Limitation Period in the International Sale of Goods, 1974: *see* Vol. 6 p. 257.
UN Convention on Contracts for the International Sale of Goods, 1980: *see* Vol. 8 p. 184.
UN Convention on the Liability of Operators of Transport Terminals in International Trade, 1991: *see* Vol. 6 p. 257.

## JUDICIAL AND ADMINISTRATIVE COOPERATION

Convention Relating to Civil Procedure, 1954: *see* Vol. 6 p. 258.

**Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961**
(Continued from Vol. 7 p. 332)
(Status as provided by the Hague Conference on Private International Law)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Kazakhstan | | 1 Dec 2000 |

**Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965**
(Continued from Vol. 7 p. 332)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Kazakhstan | 1 Dec 2000 | | Sri Lanka | | 31 Aug 2000 |

**Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1970**
(Continued from Vol. 7 p. 332-333)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Sri Lanka | | 31 Aug 2000 |

## LABOUR

Forced Labour Convention, 1930 (ILO Conv. 29): *see* Vol. 7 p. 333.
Right to Organise and Collective Bargaining Convention, 1949 (ILO Conv. 98): *see* Vol. 8 p. 185.
Equal Remuneration Convention, 1951 (ILO Conv. 100): see Vol. 8 p. 185.
Employment Policy Convention, 1964 (ILO Conv. 122): see Vol. 8 p. 186.

**Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO Conv. 87)**
(Continued from Vol. 8 p. 185)
(Status as at 31 December 2000 as provided by the ILO)

| *State* | *Ratif. registered* |
|---|---|
| Kazakhstan | 13 Dec 2000 |
| Papua New Guinea | 2 Jun 2000 |

**Abolition of Forced Labour Convention, 1957 (ILO Conv. 105)**
(Continued from Vol. 8 p. 185)
(Status as at 31 December 2000 as provided by the ILO)

| *State* | *Ratif. registered* |
|---|---|
| India | 18 May 2000 |

**Discrimination (Employment and Occupation) Convention, 1958 (ILO Conv. 111)**
(Continued from Vol. 8 p. 185)
(Status as at 31 December 2000 as provided by the ILO)

| *State* | *Ratif. registered* |
|---|---|
| Papua New Guinea | 2 Jun 2000 |

**Minimum Age Convention 1973 (ILO Conv. 138)**
Entry into force: 19 June 1976
(Status as at 31 December 2000 as provided by the ILO)

| *State* | *Ratif. Registered* | *Min. age spec.* |
|---|---|---|
| Cambodia | 23 Aug 1999 | 14 |
| China | 28 Apr 1999 | 16 |
| Indonesia | 13 Feb 1985 | 15 |
| Iraq | 22 Jun 1978 | 15 |
| Japan | 23 Mar 1998 | 15 |
| Kazakhstan | 9 Apr 1979 | 16 |
| Korea (Rep.) | 15 Nov 1999 | 15 |
| Mongolia | 6 Jan 2000 | 15 |
| Nepal | 14 Sept 1976 | 14 |
| Philippines | 22 Mar 1978 | 15 |
| Tajikistan | 16 Dec 1998 | 16 |
| Vietnam | 15 June 2000 | 15 |

**Worst Forms of Child Labour Convention**
1999 (ILO Conv. 182)
Entry into force: 19 November 2000
(Status as at 31 December 2000 as provided by the ILO)

| *State* | *Ratif. registered* |
|---|---|
| Indonesia | 28 Mar 2000 |
| Malaysia | 10 Nov 2000 |
| Papua New Guinea | 2 Jun 2000 |
| Philippines | 28 Nov 2000 |
| Vietnam | 19 Dec 2000 |

NARCOTIC DRUGS

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.
Agreement Concerning the Suppression of Opium Smoking, 1931, amended by Protocol, 1946: *see* Vol. 6 p. 261.
Protocol Amending the Agreements, Conventions and Protocols on Narcotic Drugs, concluded at The Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925 and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936, 1946: *see* Vol. 6 p. 261.
Protocol bringing under International Control Drugs outside the Scope of the Convention of 1931, as amended by the protocol of 1946: *see* Vol. 6 p. 262.
Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, 1936, amended 1946: *see* Vol. 6 p. 262.
Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, 1953: *see* Vol. 6 p. 262.
International Opium Convention, 1925, amended by Protocol 1946: *see* Vol. 7 p. 334.
Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 1931, and amended by Protocol, 1946: *see* Vol. 7 p. 334.
Single Convention on Narcotic Drugs, 1961: *see* Vol. 7 p. 334.
Protocol amending the Single Convention on Narcotic Drugs, 1972: *see* Vol. 8 p. 186.

**Single Convention on Narcotic Drugs, 1961, as Amended by Protocol 1972**
(Continued from Vol. 8 p. 187)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Maldives | | 7 Sept 2000 |

**Convention on Psychotropic Substances, 1971**
(Continued and corrected from Vol. 8 p. 187)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Iran | 21 Feb 197 | 19 Aug 2000 | Maldives | | 7 Sept 1999 |

**United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988**
(Continued from Vol. 8/9 p. 187)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Maldives | 5 Dec 1989 | 7 Sept 2000 |

## NATIONALITY AND STATELESSNESS

Convention relating to the Status of Stateless Persons, 1954: *see* Vol. 6 p. 264.
Optional Protocol to the Vienna Convention on Diplomatic Relations concerning Acquisition of Nationality, 1961: *see* Vol. 6 p. 265.
Optional Protocol to the Vienna Convention on Consular Relations concerning Acquisition of Nationality, 1963: *see* Vol. 8 p. 187.

## NUCLEAR MATERIAL

Convention on Civil Liability for Nuclear Damage, 1963: *see* Vol. 6 p. 265.
Joint Protocol Relating to the Application of the Vienna Convention (and the Paris Convention on Third Party Liability in the Field of Nuclear Energy), 1980: *see* Vol. 6 p. 265.
Convention on Nuclear Safety, 1994: *see* Vol. 8 p. 188.
Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, 1997: *see* Vol. 8 p. 188.
Protocol to amend the 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.

**Convention on the Physical Protection of Nuclear Material, 1980**
(Continued from Vol. 8 p. 188)
(Status as at 31 December 2000, provided by IAEA)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Pakistan | | 12 Sept 2000 |

**Convention on Early Notification of a Nuclear Accident, 1986**
(Continued from Vol. 7 p. 336)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Iran | | 9 Oct 2000 |

**Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1986**
(Continued from Vol. 7 p. 336)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Iran | | 9 Oct 2000 |

## 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. 6 p. 267.
Convention on Registration of Objects launched into Outer Space, 1974: *see* Vol. 7 p. 337.

## PRIVILEGES AND IMMUNITIES

Convention on the Privileges and Immunities of the Specialized Agencies, 1947: *see* Vol. 7 p. 338.
Vienna Convention on Diplomatic Relations, 1961: *see* Vol. 6 p. 268.
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. 8 p. 189.
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.

**Convention on the Privileges and Immunities of the United Nations, 1946**
(Continued from Vol. 8 p. 189)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Kyrgyzstan | | 28 Jan 2000 |

## REFUGEES

Convention relating to the Status of Refugees, 1951: *see* Vol. 8 p. 190.
Protocol relating to the Status of Refugees, 1967: *see* Vol. 8 p. 190.

## ROAD TRAFFIC AND TRANSPORT

Convention on Road Traffic, 1968: *see* Vol. 7 p. 338.
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.
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.8 p. 190.
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: *see* Vol. 8 p. 191.

**United Nations Convention on the Law of the Sea, 1982**
(Continued from Vol. 8 p. 190)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Maldives | 10 Dec 1982 | 7 Sept 2000 |

## 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.
International Convention on Load Lines, 1966: *see* Vol. 6 p. 274.

International Convention on Tonnage Measurement of Ships, 1969: *see* Vol. 6 p. 274.
Special Trade Passenger Ships Agreement, 1971: *see* Vol. 6 p. 275.
Protocol on Space Requirements for Special Trade Passenger Ships, 1973: *see* Vol. 6 p. 275.
Convention on the International Regulations for Preventing Collisions at Sea, 1972 as amended: *see* Vol. 6 p. 275.
International Convention for Safe Containers, as amended 1972: *see* Vol. 6 p. 275.
Convention on a Code of Conduct for Liner Conferences, 1974: *see* Vol. 6 p. 276.
International Convention for the Safety of Life at Sea, 1974, as amended: *see* Vol. 6 p. 276.
UN Convention on the Carriage of Goods by Sea, 1978: *see* Vol. 6 p. 276.

**Convention on Facilitation of International Maritime Traffic, 1965 (as amended)**
(Continued from Vol. 8 p. 191)
(Status as included in IMO doc. J/7772, as at 31 December 2000)

| *State* | *Cons.* | *E.i.f.* |
|---|---|---|
| Bangladesh | 21 Sept 2000 | 20 Nov 2000 |

**Protocol Relating to the International Convention for the Safety of Life at Sea, 1974 (as amended) 1978**
(Continued from Vol. 6 p. 276)

| *State* | *Cons.* | *E.i.f.* |
|---|---|---|
| Iran | 31 Aug 2000 | 30 Nov 2000 |

**Protocol Relating to the International Convention on Load Lines, 1988**
(Continued from Vol. 8 p. 192)
Entry into force: 3 February 2000
(Status as included in IMO doc. J/7772, as at 31 December 2000)

| *State* | *Cons.* | *E.i.f.* |
|---|---|---|
| China | 3 Feb 1995 | 3 Feb 2000 |
| India | 10 Aug 2000 | 10 Nov 2000 |
| Japan | 24 Jun 1997 | 3 Feb 2000 |
| Korea (Rep.) | 14 Nov 1994 | 3 Feb 2000 |
| Singapore | 18 Aug 1999 | 3 Feb 2000 |

SOCIAL MATTERS

International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, 1923: *see* Vol. 6 p. 277.
International Convention for the Suppression of the Traffic in Women and Children, 1921: *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 and Children, 1921, amended by Protocol in 1947, *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.
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.
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950: *see* Vol. 7 p. 340.
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. 6 p. 278.

## TELECOMMUNICATIONS

Constitution of the Asia-Pacific Telecommunity, 1976: *see* Vol. 8 p. 192.
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.

### Agreement establishing the Asia-Pacific Institute for Broadcasting Development, 1977

(Continued from Vol. 8 p. 193)

| *State* | *Sig.* | *Cons* |
|---|---|---|
| Bhutan | | 5 Jun 2000 |

### Amendments to articles 3(5) and 9(8) of the Constitution of the Asia-Pacific Telecommunity, 1991

(Continued from Vol. 8 p. 193)

| *State* | *Cons.* | *State* | *Cons.* |
|---|---|---|---|
| Iran | 29 Nov 2000 | Nepal | 15 Feb 2000 |
| Laos | 3 Jul 2000 | | |

## TREATIES

Vienna Convention on the Law of Treaties, 1969: *see* Vol. 8 p. 193.

Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 1986: *see* Vol. 6 p. 280.

## 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. 6 p. 282.
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. 6 p. 282.
Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1976: *see* Vol. 8 p. 194.

### 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. 8 p. 194)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Bangladesh | | 6 Sept 2000 | Maldives | | 7 Sept 2000 |

### Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1993

(Continued from Vol. 8 p. 194)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Kazakhstan | 14 Jan 1993 | 23 Mar 2000 | Malaysia | 13 Jan 1993 | 20 Apr 2000 |

### Comprehensive Nuclear Test Ban Treaty, 1996

(Continued from Vol. 8 p. 194)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Bangladesh | 24 Oct 1996 | 8 Mar 2000 | Laos | 30 Jul 97 | 5 Oct 2000 |
| Cambodia | 26 Sept 1996 | 10 Nov 2000 | Maldives | 1 Oct 97 | 7 Sept 2000 |

**Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997**

(Continued from Vol. 8 p. 195)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Bangladesh | 7 May 1998 | 6 Sept 2000 | Philippines | 3 Dec 97 | 15 Feb 2000 |
| Maldives | 1 Oct 1998 | 7 Sept 2000 | | | |

# ASIA AND INTERNATIONAL ORGANIZATIONS

# ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE BI-ANNUAL SURVEY OF ACTIVITIES 1999-2000

## including the work of its Thirty-ninth Session, held at Cairo, 19-23 February 2000.*

M.C.W. Pinto

*Note*: The Asian-African Legal Consultative Committee** was established on 15 November 1956 to facilitate the exchange of views and information on legal matters of common concern to its Members. The Committee's regular Sessions are convened annually, alternately in Asia and Africa. A Session generally takes place in the first half of a calendar year, and is known by the name of the city in which it is held. Consideration of a topic introduced at one Session may continue at subsequent Sessions, as well as inter-sessionally through seminars or expert group meetings, which retain their association with the originating Session. Reports on inter-sessional activities may be discussed at the following Session.

Member States are represented at Sessions by high level delegations; these may include Chief Justices, Judges, Cabinet Ministers, Attorneys-General, and senior Public Officials. Sessions are routinely attended by observers from non-Member States, and inter-governmental and non-governmental organizations. The Committee maintains working relationships with the United Nations and its Specialized Agencies and Commissions, as well as with other international organizations, including the International Atomic Energy Agency, UNIDROIT, The Hague Conference on Private

* Source: unless otherwise specified, Report of the Thirty-ninth Session ('Report') held in Cairo from 19-23 February, 2000 and related documents prepared by the Secretariat of the AALCC. Items are presented here according to their agenda category, and in the order in which they were reportedly dealt with by the Committee. See www.aalco.org/cairodoclist. The following text is the reproduction of the relevant AALCC document. Despite the risks involved, the editors have decided to amend and correct suspected typing errors.

** On 24 June 2001, during its Fortieth Session held at New Delhi, the Committee, by resolution, changed its name to *Asian-African Legal Consultative Organization* (AALCO).

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International Law, the Commonwealth Secretariat, the Organization of African Unity, and the League of Arab States.

The present survey covers the work of the Committee's Thirty-ninth Session (Cairo, 2000) and contains, furthermore, references to activities associated with Sessions which were covered in earlier volumes of this *Yearbook*.

1. *MEMBERSHIP AND ORGANIZATION*

There were forty-four Members of the Committee at the time of its Thirty-ninth Session: Bahrain, Bangladesh, China, Cyprus, Egypt, Gambia, Ghana, India, Indonesia, Iran, Iraq, Japan, Jordan, Kenya, Democratic People's Republic of Korea, Republic of Korea, Kuwait, Lebanon, Libya, Malaysia, Mauritius, Mongolia, Myanmar, Nepal, Nigeria, Oman, Pakistan, Palestine, Philippines, Qatar, Saudi Arabia, Senegal, Sierra Leone, Singapore, Somalia, Sri Lanka, Sudan, Syria, Tanzania, Thailand, Turkey, Uganda, United Arab Emirates, and Yemen. Botswana is an Associate Member. It may be noted that Lebanon, the most recent Member, joined at the Thirty-ninth Session of the Committee.

2. *SUBJECTS DEALT WITH BY THE COMMITTEE*

The Committee considered and adopted decisions on the subjects listed below, the order of their discussion being determined at the commencement of the Session. The references next to each subject are to the relevant pages of the Report of the Thirty-ninth Session issued by the Secretariat.

**I. Questions under consideration by the International Law Commission** (pp. 155-262)

The Secretariat's report on the work of the Commission at its Fifty-first Session (1999) summarizes and comments on the Commission's work on seven topics: State responsibility; International liability for injurious consequences arising out of acts not prohibited by international law; Reservations to treaties; State succession and its impact on the nationality of natural and legal persons; Diplomatic protection; Unilateral acts of States, and Jurisdictional immunities of States and their property. Of particular interest from an Asian perspective are (1) *Jurisdictional immunities of States and their property*, a topic which, on the initiative of Japan at the Cairo Session of the AALCC, was placed on the Committee's agenda (see II.5 and **C** below); and (2) *International liability for injurious consequences arising out of acts not prohibited by international law*, a topic on which the Commission's Special Rapporteur is Dr. P. Sreenivasa Rao of India. Dr. Rao placed before the Commission 17 draft articles dealing with prevention of transboundary damage from hazardous activities (pp. 202-4).

## II. Matters referred to the Committee by Member States

**1. Status and treatment of Refugees** (pp. 77-153)

The Committee continued its work aimed at producing a consolidated text of the Revised Bangkok Principles (for the original text see AsYIL, Vol. 7 (1997), pp. 381-7) taking into account Member States' comments reproduced in the Report of the Cairo Session, and previous Sessions of the Committee.

**2. Deportation of Palestinians and other Israeli practices, among them the massive immigration and settlement of Jews in occupied territories in violation of international law, particularly the Fourth Geneva Convention of 1949** (pp. 335-359)

A Secretariat study containing a report on the *Conference of the High Contracting Parties to the Fourth Geneva Convention on Measures to Enforce the Convention in Occupied Palestinian Territory, including Jerusalem*, held in Cairo, 14-15 June 1999 (pp. 346-359), is reproduced at **A** below.

**3. Legal protection of Migrant Workers** (pp. 361-375)

The Committee continued its discussion of the structure of model legislation for the protection of migrant workers, and sought the views of Members on the creation of an open-ended Working Group for dealing with the subject in depth.

**4. Extra-territorial application of national legislation: sanctions imposed against third parties** (pp. 41-75)

Members re-affirmed views expressed at the Committee's Thirty-sixth and Thirty-seventh Sessions that the extra-territorial imposition of national laws violated State sovereignty and interfered with the legitimate economic interests of States. A Secretariat study on the subject with special reference to the effect of "Executive Orders" and "Presidential Determinations", and the Secretariat's report on discussion of related issues at the 54th Session of the United Nations General Assembly, are reproduced at **B** below.

**5. Jurisdictional immunities of States and their property** (pp. 161-4; 242-62)

The texts of a proposal by Japan to have the AALCC study the topic (pp. 161-4) and of the Secretariat's report on renewed work on the topic by the International Law Commission, and by a Working Group of the Sixth Committee established at the 54th Session of the United Nations General Assembly, are reproduced at **C** below.

## III Matters of common concern having legal implications

**1. The United Nations Decade of International Law** (pp. 19-39)

The United Nations General Assembly at its 44th Session declared the last decade of the twentieth century a "Decade of International Law" (resolution 44/23) with the objectives of promoting respect for international law, promoting methods and means for the peaceful settlement of disputes between States, encouraging the teaching, dissemination and wider appreciation of international law, and encouraging the progressive development of international law and its codification. Discussion of the outcome of that initiative, with a Secretariat summary of the conclusions reached

at meetings on major themes during the Decade (e.g. disarmament, international humanitarian law, peaceful settlement of disputes), are at pp. 19-39 of its Report.

**2. Follow-up of the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court (Rome, 15 June-17 July 1998): work of the Preparatory Commission for an International Criminal Court** (pp. 263-306)

The Secretariat's report of the work of the Preparatory Commission is reproduced at **D**, below.

**3. United Nations Conference on Environment and Development: follow-up** (pp. 307-333)

The Report contains the Secretariat's review of the work of the Conference of the Parties to the *UN Convention on Climate Change* at its first, second, third, fourth, and fifth sessions, as well as of initiatives taken with a view to bringing the *Kyoto Protocol* into force. An excerpt from a review by the Secretariat of implementation of the Convention is at **E** below. The Report also covers the work of the fourth Session of the Conference of the Parties to the *UN Convention on Biological Diversity* (1998) and work during 1999; and of the third session of the Conference of the Parties to the *Convention to Combat Desertification*.

## IV Trade Law Matters (pp. 421-500)

The Secretariat continued its regular review of the work of international organizations in the field of international trade law. The review covers the work of the *United Nations Commission on International Trade Law (UNCITRAL)*, the *United Nations Conference on Trade and Development (UNCTAD) and its Commissions*, and the United Nations *Industrial Development Organization (UNIDO)*; as well as of the *International Institute for the Unification of Private Law UNIDROIT)* and the *Hague Conference on Private International Law*.

A Report by the Secretariat on the outcome of the *Third WTO Ministerial Conference*, held at Seattle in 1999 is reproduced at **F** below.

## V Special Meeting (pp. 389-449)

A special meeting on the subject *Electronic Commerce: Legal Issues and Impact on the Developing Countries* was held on 21 February 2003 during the Committee's Cairo Session, with financial and technical assistance from the World Intellectual Property Organization (WIPO). Dr. Lincoln C.W. Wee acted as Rapporteur (pp. 380-7). The Secretariat's study on electronic commerce-related issues is reproduced at **G** below.

## ANNEXES

### A1 – United Nations International Meeting on the Convening of the Conference on Measures to Enforce the Fourth Geneva Convention in the Occupied Palestinian Territory, including Jerusalem, Cairo (Egypt) 14-15 June 1999 (Report by the Secretariat)[1]

The United Nations International Meeting on the Convening of the Conference on Measures to Enforce the Fourth Geneva Convention in the Occupied Palestinian Territory, including Jerusalem, was held at Cairo, Egypt on 14 and 15 June 1999[2] and was attended by l00 Governments, Palestine, five Intergovernmental Organizations, eleven United Nations bodies and agencies, including the ICRC, as well as representatives of non-governmental organizations.

The participants emphasized the importance of upholding and enforcing the purposes and principles of the Charter of the United Nations, international humanitarian law and human rights law. They stressed the universal character of the Geneva Conventions and the fact that their provisions have been accepted as norms of international customary law. They also recalled that 1999 marked the fiftieth anniversary of the signing of the four Geneva Conventions, and the centenary of the First Hague Peace Conference. It was therefore, opportune for the international community to renew its determination to promote international humanitarian law further and to ensure respect for the four Geneva Conventions.

The participants in the meeting were unanimous in the view that the Palestinian people had been subjected to flagrant violations of their basic human rights as well as of their rights as protected persons under Israeli occupation. They expressed concern with regard to grave breaches and violations by Israel, being the occupying power according to the Geneva Convention, including arbitrary detention, ill treatment of and violence against the civilian population, torture, summary execution, confiscation and destruction of property, forcible transfers and deportations, and the various forms of collective punishment, as well as the destruction of economic and social structures of the occupied Territory.

The continuing of settlement activities, which include illegal land confiscations and the transfer of Israeli civilians to the occupied Palestinian Territory, including Jerusalem, provoked immense concern as it is in clear violation of Article 49 of the Fourth Geneva Convention; this stipulates that: "the occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies". This po1icy, aimed at expansion and annexation apart from being illegal, was deemed to be detrimental to the peace process.

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[1] [Yearbook editorial note: Footnotes in the following texts are numbered consecutively as they appear in this reproduction of the main text of the Annexes and not separately for each Annex. For this reason and because only parts of the original main text are reproduced here, the numbering differs from that in the original Annexes.].

[2] Under the auspices of the Committee on the Exercise of the Inalienable Rights of the Palestinian People.

The participants reaffirmed the existing international consensus on the *de jure* applicability of the Fourth Geneva convention to the occupied Palestinian Territory, including Jerusalem, in accordance with relevant General Assembly and Security Council resolutions. They also called upon Israel, the occupying power, fully to comply with the provisions of the Convention. Furthermore, they recalled that the Fourth Geneva Convention, as an instrument of international humanitarian law, has to be applicable regardless of the national legislation of Israel, which is a High Contracting Party to the Convention. The participants appealed to all the High Contracting parties to the Fourth Geneva Convention to fulfil their obligations in accordance with common Article 1 which requires the High Contracting Parties to respect and ensure respect for the Convention in all circumstances.

The participants supported the convening of the Conference on measures to enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, as recommended in General Assembly resolutions ES-10/3, 4 and 5. They also supported that the High Contracting Parties convene the said Conference on 15 July 1999 at the United Nations Office at Geneva in accordance with General Assembly resolution ES-I0/6, overwhelmingly adopted on 9 February 1999. They also called upon all High Contracting Parties to actively participate in the conference. They welcomed the consultations taking place on the preparations for the Conference, including those conducted by Switzerland in its capacity as the depositary of the Geneva Conventions, and emphasized the need for the widest possible participation in those consultations.

The participants called upon the High Contracting Parties to strive for concrete results by the Conference; these were then to be incorporated in a declaration or resolution, or in both.

The Conference should emphasize the responsibility of the High Contracting Parties to ensure respect for the Convention. It should reaffirm, among others, the *de jure* applicability of the fourth Geneva Convention in the occupied Palestinian Territory, including Jerusalem, and in view of the various Israeli violations of the provisions of the convention, in particular its illegal settlement policy, call upon the High Contracting Parties to live up to their obligations under the Convention. The participants called upon the High Contracting Parties participating in the Conference to establish a follow-up mechanism.

**G-8 Summit, 20 June 1999**

On 20 June 1999, the *G-8* Summit, which was held in Germany (in its capacity as G-8 Presidency), issued a statement on regional issues, including a statement on the Middle East Peace Process. (The G-8 nations comprise Canada, France, Germany, Italy, Japan, Russian Federation, the United States, and the United Kingdom). The statement reaffirmed the positions held by the leaders of the G-8 nations on various aspects of the peace process, including the Palestinian-Israeli track; with regard to the process in general, the leaders reaffirmed their support for a negotiated settlement in the Middle East, which should be based on the fun implementation of existing commitments and the principle of “Land for Peace”, Security Council Resolutions

242 (1967) and 338 (1973), the Madrid and Oslo Agreements, Security Council resolution 425 (1978), and secure and recognized boundaries. They called upon all parties to pursue the Middle East peace process with resolve, renewed efforts and good faith, leading to a comprehensive, just and lasting peace.

### A2 – The Conference of the High Contracting Parties to the Fourth Geneva Convention on Measures to Enforce the Convention in the Occupied Palestinian Territory including Jerusalem, Geneva, 15 July 1999

For the first time in the history of the Geneva Conventions, a Conference was convened to consider a specific case of violation of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12, 1949. The Conference of the High Contracting parties to the Fourth Geneva Convention on Measures to Enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, was held on 15 July 1999 at United Nations Headquarters at Geneva, Switzerland.[3]

The conference was convened on time as recommended by the resolutions of the Tenth Emergency Special Session of the General Assembly. An important statement, reflecting "the common understanding reached by the participating High Contracting Parties to the Conference", was adopted by the Conference.

A package was agreed upon with regard to the conference among the main parties; this followed difficult negotiations, especially between the Arab Group and the European Union. According to that package, the conference would convene on time, in accordance with resolution ES-10/6, but would be short, without a debate, and with a limited outcome. Following this the conference would adjourn "on the understanding that it will convene again in the light of consultations on the development of the humanitarian situation in the field".

As part of the package, the statement adopted by the High Contracting Parties reaffirmed basic principles with respect to the Convention and the protected Palestinian population, including a reaffirmation of "the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem", and reiteration of "the need for full respect for the provisions of the said Convention in that territory."

The practical impact of the conference lay in the fact that it elevated to a new level the position of the international community with regard to Israeli breaches and violations of the Convention, especially settlement activities. That level is one in which the parties to a treaty have legally affirmed its applicability and the need for

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[3] The process of convening this conference of the High Contracting Parties to the 4th Geneva Convention began with the adoption by the Tenth ESS of resolution ES-10/3 on 15 July 1997. Three more resolutions were adopted by the 10th ESS, ES-10/4 (13 November 1997), ES-10/5 {17 March 1998), and ES-10/6 (9 February 1999), each reiterating the recommendation for convening the conference; the UN Security Council, in resolution 681 of 20 December 1990, had also called "upon the High Contracting Parties to the Fourth Geneva Convention of 1949 to ensure respect by Israel, the occupying Power, for its obligations under the convention in accordance with article 1 thereof.".

full respect of its provisions. Such an affirmation will help the Palestinians since it creates parity between the parties. While the Israelis have the power on the ground, the Palestinians maintain the power of international law and legitimacy.

The need for a conference on measures to enforce the Convention specifically in the occupied Palestinian Territory, including Jerusalem, rather than simply in general cases of occupied territories, is based on reasons emerging from the distinct uniqueness of the Palestinian territory; this has been characterized by a multiplicity and intensity of grave breaches, breaches and serious violations of the Fourth Geneva Convention and other acts contrary to its provisions, all of which have caused immense suffering to the Palestinian civilian population. Israel's policies and practices have constituted systematic violations of international humanitarian law.

Secondly, those breaches and other acts have continued for an extensive period of 32 years, in utter disregard for the clear position of the international community; furthermore, these were in blatant violation of many Security Council and other UN resolutions. Thirdly, the Israeli occupation is unique because it has effectively transformed the situation in the occupied Palestinian Territory, including Jerusalem, from one of "normal" occupation to one of active expansion into and annexation of the Palestinian land. It has thus denied the legitimate national right of an entire people. For all of these reasons and after all these years, the High Contracting Parties determined to take serious action in addressing such violations through convening a conference on measures to enforce the convention and ensure its respect by Israel, the occupying Power.

Following two years of resolutions, negotiations, meetings and consultations, the Conference of the High Contracting Parties was finally convened on 15 July 1999 at Geneva. While it was not possible to achieve optimum results in the Conference, the event was nevertheless significant: not only did the High Contracting Parties for the first time in the history of the Convention convene to consider a specific situation; they also determined to reconvene the Conference by adjourning "on the understanding that it will convene again in the light of consultations on the development of the humanitarian situation in the field". This clarification was considered an important inclusion in the statement made by the Palestinian side, given that it provides a mechanism for the High Contracting Parties to continue this process in the future. While it is hoped that Israel, the occupying power and a High Contracting Party to the Convention, will heed the message sent by the High Contracting Parties, the Palestinians intended to take measures to follow up progress in order to ensure that the Convention in the occupied Palestinian Territory, including Jerusalem, was indeed being respected.

**Sharm El-Sheikh Memorandum, Cairo (Egypt) 4 September 1999**

Another important event in the last year was the signing on 4 September 1999 of "The Sharm el-Sheikh Memorandum Implementation Timeline of Outstanding Commitments of Agreements signed and the Resumption of Permanent Status Negotiations". It was concluded after intensive negotiations between the Palestinian and Israeli sides in Cairo, with full-scale Egyptian, Jordanian and US participation. The

UN Secretary General welcomed the signing of the agreement, and hoped that this new important step would pave the way for further agreements leading to a comprehensive peace in the Middle East. The memorandum was built heavily on the Wye River Memorandum and remained largely within its parameters.

Some of the significant features of the memorandum are as follows:

(i) The understanding regarding the concept of redeployment remained, as it had been, separate from the Permanent Status negotiations, and including exactly the same percentage of the territory. That percentage involves a redeployment of 11.2% of the West Bank, in addition to another 7.2% that will be transferred from an Area B to an Area A designation, i.e., under full Palestinian Control. The third phase of further redeployment was also reaffirmed in the memorandum. The change made in this regard involved the timeline for redeployment which was stretched to extend over four-and-a-half months, until 20 January 2000, when that second phase of redeployment is to be concluded. The other change was that the redeployment is now planned to take place in three, instead of two, stages.

(ii) Another important element in the Memorandum is that it extends the commitment of the parties to the existing agreement until September 2000, the date when "the two sides will conclude a comprehensive agreement on all permanent status issues". Another new concept included in the memorandum was the introduction of a "Framework Agreement", which should be reached by February 2000.

(iii) The memorandum also includes a part on the release of prisoners. It also revived the Committee on Displaced Persons (Palestinians who fled Palestine in 1967 as a result of hostilities), to resume its activities on 1 October 1999.

(iv) With regard to the issues concerning prior commitments made between the two sides, such as the Southern and Northern Safe Passage between Gaza and the West Bank, the Gaza Seaport and the Hebron (Al-Khalil) issues, the Sharm El-Sheik memorandum is more specific than the Wye River Memorandum: the former presents clear steps to be taken on specific dates.

(v) It also addresses those security issues and unilateral actions, i.e., the illegal settlement activities, viewed as destructive to peace.

**Security Council Resolution on the Protection of Civilians in Armed Conflict**

On 17th September 1999, the UN Security Council adopted resolution 1265 (1999) on the Protection of Civilians in Armed Conflict. The resolution was unanimously

adopted in a follow-up of the Council's earlier Presidential Statements on 12 February 1999 and 8 July 1999 and after the Council's consideration of the report submitted by the UN Secretary General on 8 September 1999, which contained specific recommendations to the Council.

Among the many important paragraphs within the comprehensive text of Security Council resolution 1265 (1999), operative paragraph 4 "urges all parties concerned to comply strictly with their obligations under international humanitarian, human rights and refugee law, in particular those contained in the Hague Conventions of 1899 and 1907 and in the Geneva Conventions of 1949 and their Additional Protocols of 1977, as well as with the decisions of the Security Council". Further in this regard, inoperative paragraph 6 the Council "emphasizes the responsibility of States to end impunity and to prosecute those responsible for genocide, crimes against humanity and serious violations of international humanitarian law and acknowledges the historic significance of the adoption of the Rome Status of the International Criminal Court."

**Oslo Memorial Summit – 3 November 1999**

A two-day memorial summit took place in Oslo on 3-4 November 1999. During the Summit the UN Secretary General, Kofi Annan, stressed the need "to work tirelessly and courageously" to complete the Middle East Peace Process. The Secretary General said that the UN would continue to support the Middle East Peace Process and would do "everything possible to help achieve peace with justice and security for all". The two leaders from Palestine and Israel agreed to draft a framework for final peace by February, 2000 which, in his view would be the most decisive step towards a just and lasting peace.

**Final Status Talks – 8 November 1999**

On 8 November 8 1999, final status talks began in Ramallah (West Bank) between the Palestinian and Israeli negotiators. It was felt that a framework agreement on a final settlement would be reached by February 2000. According to the Palestinians there were three prerequisites for successful negotiations: (i) the implementation of United Nations Resolutions 242 and 338, which call on Israel in exchange for peace to withdraw from territories occupied in the 1967 war; (ii) the realization of the "legitimate rights of the Palestinian people", including the right of self-determination, and (iii) the right of Palestinian refugees to return to the homes from which they were expelled in the wars of 1948 and 1967.

**54th Session of the General Assembly**

In his address to the 54th Session of the General Assembly the President of Palestine stated that the "Sharm EI-Sheikh Memorandum" of 4 September 1999 aimed at the implementation of all the obligations of the interim period under the Oslo Agreement, the Wye River Memorandum and the Hebron Protocol, and for the resumption of the permanent status negotiations. These had been held in the hope

of bringing to an end the practice of delaying and freezing implementation of the accords. He hoped that the Israeli Government would decisively cease all measures that violated international resolutions, law and covenants, and that destroy the chances of achieving peace. At the forefront of such activities and measures were the settlement activities and confiscation of land, especially in Al-Quds Al- Sharif (Jerusalem) and its surroundings, and the siege of the city of Bethlehem and the rest of the Palestinian territories.

In his view the realization of the right of the Palestinian people to establish their independent State would provide the definitive guarantee for the establishment of a permanent peace in the Middle East and would also be a validation of the Charter of the United Nations and its numerous resolutions for over fifty years, beginning with Resolution 181. He added that the goal of the current peace process is the implementation of Security Council Resolutions 242, 338 and 425, and the principles of "land for peace", that is, the total Israeli withdrawal from all Palestinian and other territories occupied in 1967, including Al-Quds Al-Sharif (Jerusalem).

In conclusion he stated that the question of the Palestine refugees was the oldest and largest refugee issue in the contemporary world. Those refugees did have a legitimate right to return to their homeland, in accordance with United Nations resolutions. Peace and stability could not come to the Middle East unless Resolution 194, which states the refugees' right to return to their homeland, be implemented.

**Assessment**

It is encouraging to note from the foregoing developments and international efforts that the peace process is now heading towards a new and positive stage. The Minister of Foreign Affairs, H.E. Amre Moussa, of the Arab Republic of Egypt, stated at the 54th Session of the General Assembly: "[I]t is our hope that this will lead to a comprehensive peaceful settlement that will be beneficial to all the parties concerned".

The AALCC fully supports the on-going peace process, based on the legal instruments and in particular the Madrid Declaration of Principles on Interim Self-government Arrangement of 1993, as well as subsequent implementation agreements, including the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip of 1995, the Wye River Memorandum of 1998 and the most recent Sharm El-Sheikh memorandum, and expresses the hope that the process will lead to the establishment of a comprehensive, just and lasting peace in the Middle East. However, it was strongly in favour of commitment to the principle of "land of peace" and the implementation of all Security Council Resolutions, mainly 242 (1967) and 338 (1973), that form the basis of the Middle East Peace Process, and the need for immediate and unfailing implementation of the agreements reached between the Parties.

A significant step in the implementation of the "Sharm El-Sheikh" accord is the "right of passage" to future Palestinians. A safe passage between the West Bank and Gaza was opened by the Israelis on 25 October 1999. The opening of the 47-kilometre passage will reunite Palestinians in these areas. This Safe Passage is bound to have a more positive effect on the Palestinians than have most other peace clauses, an idea affirmed in the Wye River accord last year. The passage is a well-thought-out

measure since the Palestinian Authority is divided between the West Bank and Gaza. The Gaza on the Mediterranean coast has its own airport and seaport under construction. This allows Palestinians to travel abroad from their own territory without their first having to journey to other countries.

Nevertheless, and despite all efforts to bring to the Middle East an "enduring and lasting peace" for all the people and countries of the region and thus will lead to a far better "future" for all, it is noticed that this concept is still unfortunately remote, because of a number of violations on the part of the occupying power. The confiscation of land, especially in Al-Quds Al-Sharif (Jerusalem) and its surroundings, and the siege of the city of Bethlehem and the rest of the Palestinian territories, can in no way help to create the optimum atmosphere that will assist all parties to attain the ultimate goal of land for peace, peace for development, and development for a better future.

## B.1 – Secretariat Study: Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties

### Reasons for the Imposition of Unilateral Sanctions

The reasons for the imposition of unilateral sanctions have ranged from boycott activity[4] to the issue of workers' rights[5], and have hitherto included such other issues as communism,[6] transition to democracy,[7] environmental activity, expropriation,[8] harbouring war criminals, human rights,[9] market reform, military aggression, narcotics activity, political stability, proliferation of weapons of mass destruction, and terrorism.[10] The Federal Legislation invoked to impose unilateral sanctions and/or impose a secondary boycott have included the Andean Trade Preference Act; the Anti-Terrorism and Effective Death Penalty Act, 1996 (Antiterrorism, 1996); the Arms Export Control Act (AECA); the Atomic Energy Act; the Cuban Liberty and Democracy Act, 1992; the Cuban Liberty and Democratic Solidarity Act, 1996 (Helms-Burton or LIBERTAD Act); the Department of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1990 (Commerce Appropriations, 1990); the Department of Defence Appropriations Act, 1987 (Defence Appropriations Act, 1987); the Export Administration Act; the Export-Import Bank Act ("E-Im"); the Fisherman's Protective Act, 1967; the Foreign Assistance Act (FAA); Foreign

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[4] See the Foreign Relations Act, 1994.

[5] See the Andean Trade Preference Act.

[6] Aimed at Cuba and North Korea. See the Cuba Regulation and the North Korea Regulations.

[7] See the Cuban Democracy Act of 1992.

[8] The Helms-Burton Act, 1996.

[9] During 1993-96 human rights and democratization were the most frequently cited objectives of foreign policy; thirteen countries were specifically targeted with 22 measures adopted.

[10] The Iran-Libya Sanctions Act, 1996. The former representative, Toby Roth, criticized the Iran-Libya Sanctions Act as "good politics….but bad law." Its only effect, he said, "so far had been to unify the European Union, all 15 members, against the US policy toward Iran and Libya".

Relations Act; the Foreign Relations Authorization Act; the Foreign Operations, Export, Financing, and Related Programs Appropriation Act, 1995; the General System of Preferences Renewal Act (GSP); the High Seas Drift Net Fisheries Enforcement Act (Drift Net Act); the Internal Emergency Economic Powers Act (IEEPA); the Internal Revenue Code; the Internal Security and Development Cooperation Act, 1985 (ISDCA); the International Financial Institutions Act; the Iran-Iraq Non Proliferation Act, 1992; the Iran and Libya Sanctions Act, 1996; the Iraq Sanctions Act, 1990; the Marine Mammal Protection Act, 1972 (Marine Act); the Narcotics Control Trade Act;[11] the National Defence Authorization Act, 1996 (Defence Authorization Act, 1996); the Nuclear Non-Proliferation Act, (NNPA) 1994; the Omnibus Appropriation Act, 1997 (1997 Omnibus); the Spoils of War Act; the Trade Act, 1974 (Trade Act), and the Trading with the Enemy Act (TWEA).

**Executive Orders / Presidential Determinations**

During the period 1997-98 there were four instances of unilateral imposition of sanctions by Executive Orders and Presidential Determinations. These include Executive Order 13047 of May 21, 1997 invoking a prohibition on new investment in Burma (Myanmar); Executive Order 13067 of November 3, 1997, imposing a comprehensive trade embargo on Sudan; Presidential Determination No. 98-22 of May 13, 1997, prohibiting the sale of specific goods and technology and United States Bank loans to the Government of India, terminating the sale of defence articles and design and construction equipment and services, and shutting down Export-Import Bank (Ex-Im), Overseas Private Investment Corporation (OPIC) and TDA; and Presidential Determination No. 98-XX of May 30, 1998, prohibiting the sale of specific goods and technology and United State Bank loans to the Government of Pakistan, terminating sales of defence articles and design and construction equipment and services, and shutting down Ex-Im, OPIC and TDA.

**State and Local Sanctions Acts**

In addition to the Federal Legislation State, local governments have been increasingly inclined over the last year and a half to impose sanctions against foreign countries in response to human rights practices. Some twelve American states and cities have sought to establish their own measures against other countries, and have imposed restrictions against States ranging from Myanmar to Switzerland. Thus, following the imposition of United States investments sanctions on Myanmar in May 1997[12] a dozen or so local governments restricted the granting of public contracts to companies that do business with Myanmar; these include the Commonwealth of

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[11] The uncertified drug producing/transit countries are Afghanistan, Burma, Columbia, Iran, Nigeria, and Syria.

[12] See Executive Order 13047 of May 20, 1997. In imposing the investment ban the President is said to have exercised authority given by an amendment to the fiscal year 1997 Foreign Operations Appropriation Act.

Massachusetts, the Cities of San Francisco and Oakland, California, and several other Governments that have enacted "selective purchasing ordinances" against domestic and foreign companies that do business with Myanmar. Some States are contemplating similar procurement restrictions against companies that deal with Indonesia.

### (a) The "Massachusetts Burma Law" of 1996

The Massachusetts Burma Law of 1996[13] was characterized by the United States District Court of the State of Massachusetts as infringing "on the federal government's power to regulate foreign affairs". In reaching its conclusion the Court had *inter alia* relied on an *amicus curiae* brief filed by the European Union.[14]

In its *amicus curiae* brief the European Union had called to the Court's attention the following points: (i) The Massachusetts Burma Law interferes with the normal conduct of EU-US relations; (ii) the Massachusetts Burma Law has created a significant issue in EU-US relations, including raising questions about the ability of the United States to honour international commitments it has entered into in the framework of the World Trade Organization (WTO); and (iii) failure to invalidate Massachusetts Burma Law "constitutes a direct interference with the ability of the EU to cooperate and carry out foreign trade with the United States. The Massachusetts Burma Law is thus aimed at influencing the foreign policy choices of the Union and its Member States, and at sanctioning the activities of EU companies which are not only taking place in a third country but which are also lawful under EU and Member States' laws".

As to the impugned Massachusetts Burma Law's having created an issue of serious concern in EU-US Relations, the *amicus curiae* brief stated that the "Massachusetts Burma Law charts a very different course. It is a secondary boycott – an extraterritorial economic sanction – that is targeted not at the regime but at nationals of third countries that may do business with Burma".

Finally, the European Union expressed its concern that the failure to enjoin the Massachusetts Burma Law will lead to the proliferation of US State and local sanctions or laws, and stated that at least six US municipalities had enacted measures purporting to regulate business activities in Nigeria, Tibet or Cuba; eighteen States and local governments had considered or "were considering similar measures restricting business ties to Switzerland, Egypt, Saudi Arabia, Pakistan, Turkey, Iran, North Korea, Iraq, Morocco, Laos, Vietnam, Indonesia or China". It emphasized that "the United States and the European Union had expended considerable effort in ... seeking to resolve their differences over US extraterritorial economic sanctions" and that "this

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[13] See Massachusetts Act of June 25. 1996. The State of Massachusetts admitted before the District Court of Appeal the Statute "was enacted solely to sanction Myanmar for human rights violations and to change Myanmar's domestic policy".

[14] See the judgement of the Court of November 4, 1998 in *National Foreign Trade Council vs. Charles D. Baker in his official capacity as Secretary of Administration and Finance of the Commonwealth of Massachusetts and Philmore Anderson III in his official capacity as a State Purchasing Agent for the Commonwealth of Massachusetts.*

effort has not yielded progress on the issue of extraterritorial sanctions imposed by state and local governments, a shortcoming that is of considerable concern to the US". It went on to recall that in "recognition of this danger of proliferation of sanctions measures, the EU-US agreed at the EU-US Summit on May 18, 1998 on a set of principles covering the future use of sanctions in the context of the Trans-atlantic Partnership on Political Cooperation. This included agreeing that the EU and the US *"will not seek or propose, and will resist, the passage of new economic sanctions legislation based on foreign policy grounds which is designed to make economic operators of the other behave in a manner similar to that required of its own economic operators and that such sanctions will be targeted directly and specifically against those responsible for the problem*".[15]

The validity of punitive measures against Myanmar adopted by state and municipal governments and ordinance in the United States has been analyzed under various provisions of the United States Constitution and it has been said that such local measures are constitutionally infirm.[16] It has been pointed out in this regard that "Article VI of the Constitution provides that the laws and treaties of the United States are 'the Supreme Law of the Land' and prevail over, or pre-empt state and local enactments. Thus any local law that purports to regulate or govern a matter explicitly or implicitly covered by federal legislation is pre-empted, even if it is an area otherwise amenable to state regulation".[17]

**(b) The Banana War**

The United States had, in 1998, accused the European Union of not complying with a ruling of the World Trade Organization (WTO) calling upon it to change its banana import regime, which had been ruled illegal because it favoured the produce of African, Caribbean and Pacific States (the ACP States), and had discriminated against imports of fruit marketed mainly by United States' companies in Latin America.[18] The European Union on its part believed that it had rectified the situation by making changes to its regime with effect from 1 January 1999, yet the amendment is seen by the United States as being derisory; the US argued that it was within its rights to retaliate.

In October 1998, the United States Administration announced a series of steps that would lead under section 301 of the Trade Act of 1974 to the imposition of trade sanctions against the European Communities by March 1999, in retaliation for what

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[15] See the *Amicus Curiae* Brief of August 13, 1998 filed by the European Union in support of Plaintiff National Foreign Trade Council in the *National Foreign Trade Council vs. Charles* D. *Baker and Philmore Anderson III (*emphasis added).

[16] David Schmahmann and James Finch: "The Unconstitutionality of State and Local Enactments in the United States Restricting Trade Ties With Burma", Vanderbilt Journal of International Law, vol.30, (1997).

[17] Ibid.

[18] The complaints in the dispute before the Dispute Settlement Body of the WTO had included Ecuador, Guatemala, Honduras, Mexico and the United States of America.

the US claims to be an incorrect implementation of the DSB recommendations in the banana dispute. The United States of America had announced retaliatory 100% tariffs on 520 million dollars'-worth of imports of EC products should it find that the EC had failed to implement the DSB recommendations. A unilateral determination by the US Administration would violate the fundamental obligations of the WTO's Dispute Settlement Understanding. A unilateral decision to restrict imports from the EC would also violate substantive obligations such as those incorporated in Articles I, II and XI of GATT, 1994. An overwhelming majority of the WTO's members[19] is opposed to the United States' embarking on unilateral action on this issue.

The threat to retaliate against the EU results from a US judgement that the EU has failed to comply with a WTO ruling "condemning" the EU banana import regime; the conflict has raised serious issues of interpretation of WTO laws and brought to light ambiguities in the WTO rule book.

**B.2 – The General Assembly: Fifty-fourth Session** (Report by the Secretariat)

The General Assembly, at its recently concluded Fifty-fourth session, for the eighth consecutive year asserted the need to end the United States-imposed embargo against Cuba. It adopted a resolution entitled, "Necessity of ending the economic, commercial and financial embargo against Cuba". The resolution urged all States that applied laws and measures of an extraterritorial nature that affected the sovereignty of States and freedom of trade and navigation to repeal or invalidate them as soon as possible. The text further reiterates the Assembly's call for States "to refrain from promulgating and applying such laws and measures, in conformity with their obligations under the Charter and international law".

A number of statements were made during the course of the debate on the topic in the Assembly. Statements were made in the debate and in explanation of vote by the representatives of Cuba; Mexico, Myanmar, Lao People's Democratic Republic, Libya, Argentina, Vietnam, Syria, Mali, Zambia, Malaysia, Indonesia, Namibia, Jamaica, United Republic of Tanzania, Venezuela, Russian Federation, Sudan, Iraq, South Africa, Iran, Finland (on behalf of the European Union); United States; Belarus; Saint Vincent and the Grenadines, Japan, Canada, Republic of Korea, Uruguay, Brazil, China and Norway. Twelve AALCC Member States spoke on the occasion.

Introducing the text, the representative of Cuba said that despite seven previous resolutions in the same vein, the United States continued to engage in pressures and manoeuvres intended to thwart the will of the Assembly. He drew particular attention to the Helms-Burton Act, and its extraterritorial provisions. He said for nearly four decades, the blockade had caused illness, deaths, pain and suffering to millions of Cubans.

The Representative of the United States expressed the view that the said embargo was strictly a matter of bilateral trade policy and not an appropriate matter for the Assembly to discuss.

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[19] At present 133 States are members of the World Trade Organization.

The Representative of Finland (speaking on behalf of the European Union) reaffirmed the Union's strong opposition to the imposition of secondary boycotts and legislation with extraterritorial effects. She added that the United States had made an agreement with the Union not to adopt such extraterritorial measures in future.

The Representative of Myanmar while calling for an end to the embargo noted that, despite the adoption of Resolution 53/4 last year by an overwhelming majority of last year's General Assembly, the United States had further tightened embargo measures and introduced new ones, against the will of the international community. He added a view that a Member State's promulgation and application of laws and regulations that affected the sovereignty of other States and impaired freedom of trade and navigation violated the principles of international law.

The Representative of Libya was of the view that the United States should first respect international law before asking other States to do so.

Similarly, the Republic of Syria expressed the view that the principle of sovereignty was enshrined in the Charter. He furthermore felt that all Members of the United Nations, particularly a great power like the United States, should respect the provisions of the Charter.

Malaysia was of the view that, based on the adoption by an overwhelming majority of past resolutions on the subject, it was clear that the international community opposed the unilateral efforts by the United States to effect extraterritorial application of the Helms-Burton legislation. The Representative felt that the embargo was 'coercive and discriminatory and a clear breach of international law and the Charter provisions'. He also expressed concern that such policies of the United States against a small developing country that posed no threat constituted a disturbing situation.

The Representative of Indonesia said his country had always been committed to justice, equality and peace and their promotion, which was a fundamental obligation under the UN Charter and international law. He also added that his country had consistently renounced the use of coercive measures as a means of exerting pressure in relations among Member States.

The Representative of Tanzania stated that it was a matter of concern that despite numerous resolutions of the Assembly the United States continued to apply the Helms-Burton Act, with its broad and unacceptable implications against Cuba.

The Representative of Sudan said the imposition of sanctions was a violation of the sovereignty of States and also of the principles that should govern relations between large and small nations.

The Representative of Iraq expressed the view that extraterritorial application of national laws was a direct violation of international law and prevented those States from enjoying free trade with Cuba.

The Representative of Iran said that, despite the existence of a new international environment that was conducive to strengthening constructive dialogue and genuine partnership to promote further economic cooperation for development, the recourse to unilateral coercive economic measures was on the rise. He expressed the view that such measures impeded access by all countries to financial resources and hampered economic development and thereby global trade and international financial

relations. He expressed the view that all countries should refrain from recourse to measures that were contrary to the Charter and to principles of international law. Sanctions, he added, adversely affected social and economic development and the humanitarian situation of the target country; they also violated human rights. Furthermore, he stated that it was an undeniable right of every State to choose its own political, economic, social, and cultural system. Calling for a peaceful settlement of disputes, he said that as the ultimate objective of the sanctions was to undermine international peace and security, and to create political and economical instability in another country, the embargo should be lifted.

The Representative of Japan expressed concern over the extraterritorial application of jurisdiction arising from such legislation as the Helms-Burton Act.

The Representative of China expressed concern over United States' lack of response to the international community's calls, and its refusal to implement relevant Assembly resolutions.

Apart from the AALCC Member States, a number of other States expressed the urgent need to relinquish the extraterritorial application of national laws. Views were expressed that only sanctions adopted by the international community through relevant and representative organizations had legitimacy. Another view was that the Twelfth Non-Aligned Movement Summit had reiterated the position that the international community must oppose any interference, intervention, economic coercive measures or extraterritorial laws that affected the sovereignty of other States.

On the basis of statements and the intervening explanations the Assembly adopted the Resolution contained in document A/54/L.11 by a recorded vote of 155 in favour to two against, with eight abstentions.

**Comments and Observations**

It is increasingly observed that the United States continues to resort to unilateral economic sanctions against a broad range of countries for a wide variety of reasons. Apart from the increase in the instances of unilateral imposition of sanctions has been the issue of "secondary boycott measures which extended the reach of the United States law to overseas companies doing business in the targeted countries". The Unilateral imposition of sanctions is at the core of the problem of extraterritorial application of national legislation.

Owing to its extraterritorial reach, the imposition of unilateral sanctions for foreign policy purposes has often caused a new set of commercial problems with allies, as happened in the instances of both the Helms-Burton and the D'Amato-Kennedy Act. The abrogation, annulment or revocation of extraterritorial provisions and Acts would require a new Act.

Just as the validity or constitutionality of municipal, local and state laws must be tested within the framework and parameters of the Constitution of that State, the *vires* of a national legislation which imposes unilateral sanctions and has extraterritorial reach must be examined in the context of the provisions of the Charter of the United Nations and other international instruments which that State has negotiated and ratified. The preliminary study prepared by the Secretariat had emphasized this

point and has sought to demonstrate that national legislation with extraterritorial reach contravenes not one or two but several norms and principles of contemporary international law. The most important of these are the sovereignty of States and the principles of non-interference.

Many of these international instruments had been negotiated, concluded and brought into force to establish a rule-based system and to promote the rule of law in international relations. This is particularly true of international economic and trade relations where such legislation poses a challenge to the avowed objective of the international community to establish a rule-based system to ensure stability and predictability in international trade relations. National legislation with extraterritorial reach, explicit or implicit, undermines the further development and growth of the rule- based system that the members of the international community are endeavouring to evolve. Such legislation, apart from undermining the principle of rule of law in inter-state relations, poses a challenge – if not a threat – to the avowed objective of the international community to make international law the language of international relations in this millennium.

## C1 – TEXT OF THE EXPLANATORY NOTE FORWARDED TO THE AALCC BY THE GOVERNMENT OF JAPAN ON 28 DECEMBER 1999.

The Government of Japan is concerned about the situation of state practice with regard to state immunity. Certainly, it is an established fact that a State enjoys immunity from foreign jurisdiction for acts of sovereign authority, and that immunity does not apply to its commercial activities. The modalities of such restrictive immunities, however, vary considerably depending on the legal tradition of the forum State. Local courts are sometimes found to be showing hesitation and even contradictions in their judgements.

Several States enacted domestic legislation to re-establish coherence in their jurisprudence in regard to State immunity. From Japan's point of view, such domestic legislation, of course, is the implementation of principles of international law, as well as a very significant contribution to the development of law regarding State immunity. Such domestic legislation is, however, not the final solution to providing an international standard in the practice of State immunity, because it cannot be expected that many countries are to take legislative measures in the near future, and there are divergences of principles among the forms of legislation. The question is, rather, of how to establish basic rules of the modalities of State immunity at the international level when most countries have shifted to adopting a restrictive doctrine of immunity.

The International Law Commission formulated the draft articles of "Jurisdictional immunity of States and their property" and in 1991 reported to the General Assembly of the UN. The Sixth Committee identified, through its deliberations in the Working Group, on several issues of which the views of the governments differed. The Sixth Committee resumed its consideration on the topic this year, based on the new report

prepared by the International Law Commission. It also decided to continue the work next year and to urge the governments to submit their comments.

The Government of Japan considers it very important that the member governments of the AALCC take an active role in the codification process of this topic and accordingly proposes to subscribe this topic as an agenda of the Thirty-ninth Session of the AALCC.

## B. BACKGROUND PAPER PREPARED BY THE JAPANESE DELEGATION February 7, 2000

### I. Formulation or Draft Articles by the ILC

The General Assembly of the United Nations invited, in 1997, the International Law Commission to commence work on the topic of jurisdictional immunity of States and their properties (Res. 32/151 of 19 December 1977). The Commission commenced its work on codification of the topic in 1978 and completed the formulation of the articles in 1991. The draft articles reflect the transition from absolute rule to restrictive rule of jurisdictional immunity. As a rule, a State cannot invoke immunity from jurisdiction of the foreign court for commercial transaction, contract of employment, tort, etc. In submitting the draft articles, the Commission recommended the Assembly to convene an international conference to conclude a convention on the subject.

### II. Consideration of Draft Articles in the GA

The General Assembly considered the draft articles in the WG in 1992 and 1993 and again in informal consultation in 1994. While the Chairman of the Working Group and informal consultation Ambassador Carlos Calero Rodrigues, was not able to attain a consensus, he identified the five major issues and offered his conclusions (A/C.6/49.L.2).

The General Assembly resumed its consideration on the topic last year in the WG. Before it lay the comment from the ILC on major issues identified by Ambassador Calero Rodrigues (pp.360-419 of the Report of the ILC 1999, A 54/10). The most contentious issues are "criteria for determining the commercial character of a contract of transactions" (the question of whether a purpose test could be applied in addition to a nature test), "Contract of employment" (the question of clarifying the employees who are recruited to perform government functions), and "measure of constraint against state property" (the question concerning over which state property pre-judgement and post-judgement measure of constraint could be taken).

The General Assembly decided to reconvene the Working Group this year to conduct substantive discussion on these major issues. It is scheduled to meet 6-10 November.

## III. The role to be played by AALCC

In view of the rapidly increasing number of cases where states are being sued in foreign courts all over the world, it will be beneficial for members of the AALCC to have a standard rule regulating jurisdictional immunity. It is, therefore, of utmost importance for the AALCC members to make an active and positive contribution in the work of the Working Group of the General Assembly for codification of this subject.

Therefore, with reference to the note of the Government of Japan the item "Jurisdictional Immunities of States and their Property" was included in the Agenda for the Cairo Session (2000) and was taken up for discussion.

## C.2 – JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY
(Report by the Secretariat)

The General Assembly had, by operative paragraph 1 of its Resolution 53/98 of 8 December 1998, decided to establish at its Fifty-fourth session an open-ended working group of the Sixth Committee open also to participation by States members of the specialized agencies. The Open-ended Working Group was intended to consider outstanding substantive issues related to the draft articles on Jurisdictional Immunities of States and their property adopted by the International Law Commission, taking into account the recent developments of State practice and legislation and any other factors related to this issue since the adoption of the draft articles, as well as the comments submitted by States in accordance with paragraph 2 of Resolution 48/61 and paragraph 2 of Resolution 25/ 151.

Operative paragraph 2 of that Resolution had invited the International Law. Commission to present any preliminary comments it may have regarding outstanding substantive issues related to the draft articles in the light of the results of the informal consultations held pursuant to General Assembly decision 48/413 of 9 December and taking into account the recent developments of State practice and other factors related to this issue since the adoption of the draft articles, in order to facilitate the task of the working group.

Pursuant to that mandate the Commission at its Fifty-first session decided to establish a Working Group on Jurisdictional Immunities of States and their property,[20] and entrusted it with the task of preparing preliminary comments as requested by operative paragraph 2 of General Assembly Resolution 53/98 of 8 December 1998.

The Working Group had before it the draft articles on the topic, submitted by the Commission to the General Assembly in 1991;[21] comments submitted by Govern-

[20] The working Group was composed as follows: Mr. G. Hafner (Chairman), Mr. C. Yamada (Rapporteur), Mr. H. Al-Baharna, Mr. I. Brown1ie, Mr. E. Candioti, Mr. J. Crawford, Mr. C. Dugard, Mr. G. Gaja, Mr. N. Elaraby, Mr. Q. He, Mr. M. Kamto, Mr. I. Lukashuk, Mr. T. Melescanu, Mr. P. Rao, Mr. B. Sepulveda, Mr. P. Tomka and Mr. R. Rosenstock (*ex officio*).

[21] Document A/.C.6/40fL.2.

ment, at the invitation of the General Assembly, on different occasions since 1991;[22] the reports of two Working Groups established by the Sixth Committee of the General Assembly at its Forty-seventh (1992)[23] and Forty-eighth (1993)[24] session, and an informal document prepared by the Codification Division of the Office of Legal Affairs containing a summary of cases on jurisdictional immunities of States and their property occurring between 1991 and 1999, as well as a number of conclusions regarding those cases; an informal background paper, and a number of memoranda prepared by the Working Group's Rapporteur, Mr. C. Yamada, on various issues related to the topic; the text of the 1972 European Convention on State Immunity; the Resolution of "Contemporary problems concerning the immunity of States in relation to questions of jurisdiction and enforcement" adopted by the Institute of International Law at its 1991 session; and the report of the International Committee on State Immunity of the International Law Association session held at Buenos Aires in 1994.

In considering possible approaches as to how to organize its work, the Working Group took into account the wording of paragraph 2 of General Assembly Resolution 53/98, which had invited the Commission to present any preliminary comments it may have "regarding outstanding substantive issues related to the draft articles ... in the light of the results of the informal consultations held pursuant to General Assembly decision 48/413 of 9 December 1993".

It accordingly decided to concentrate its work on the five main issues identified in the conclusions of the Chairman of the above-mentioned informal consultations,[25] namely, (1) Concept of a State for purposes of immunity; (2) Criteria for determining the Commercial character of a contract or transaction; (3) Concept of a State enterprise or other entity in relation to commercial transactions; (4) Contracts of employment, and (5) Measures of constraint against State property.

In its report the Working Group set out the provisions of the ILC draft articles with regard to each of the above-mentioned issues. It also included an examination of how the issue had evolved and a summary of recent relevant case law, as well as the preliminary comments in the form of suggestions of the Working Group regarding possible ways of resolving each issue and as a basis for further consideration.[26] The suggestions often contain various possible technical alternatives, a final selection among which requires a decision by the General Assembly.

In addition, the report contained, as an annex, a short background paper on another possible issue which may be relevant for the topic of jurisdictional immunities, which was identified within the Working Group, stemming from recent practice. It concerns the question of the existence or non-existence of jurisdictional immunity in actions arising, *inter alia,* out of violations of *jus cogens* norms. Rather

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[22] See Documents A/53/274 and Add.l; A/52/294; A/47/326 and Add. l to 5; A/48/313; A/48/464 and A/C.6.6/48/3).

[23] See Document A/C.6/47/L.1O..

[24] See Document A/C.6/48/L.4.

[25] See Document A/C.6/49/L.

[26] See Document A/CN.4/L.576 of 6 July 1999.

than taking up this question directly, the Working Group decided to bring it to the attention of the Sixth Committee.

**Comments and suggestions by the Working Group**

**1. Concept of state for purpose of immunity**

When examining the issue of the Concept of State for purposes of Immunity, the Working Group established by the Commission considered its possible relationship with the question, under State responsibility, of the attribution to the State of the conduct of other entities empowered to exercise elements of governmental authority. While some members of the Working Group felt that there should be parallels between the provision concerning the "concept of State for purpose of immunity" in the State immunity draft and the provision on "attribution to the State of the conduct of entities exercising elements of the governmental authority" in the State responsibility draft, other members felt that this was not necessarily the case. Although some members felt that it was not necessary to establish total consistency between the two sets of draft articles, it was considered desirable to bring this draft article into line with the draft articles on State responsibility.

Taking into account all the elements the Working Group agreed that the following suggestions could be forwarded to the General Assembly:

(i) Paragraph l(b) (ii) of article 2 of the draft could be deleted and the element, "constituent units of a federal State" would join "political subdivisions of the State" in present paragraph l(b) (iii).
(ii) The qualifier "which are entitled to perform acts in the exercise of the sovereign authority of the State" could apply both to "constituent units of a federal State" and to "political subdivisions of the State".

It has further suggested that the phrase "provided that it was established that that entity was acting in that capacity" could be added to the paragraph, for the time being, between brackets. It may be stated that the Working Group also suggested that the expression "sovereign authority" in the qualifier should be replaced by the expression "government authority", to align it with the contemporary usage and the terminology used in the State responsibility draft.

The above suggestions seek to assuage the particular concern expressed by some States. It allows for the immunity of constituent units yet, at the same time, addresses the concern of States where these found the difference in treatment between constituent units of federal States and political subdivisions of the State confusing.

A reformulation of subparagraph (b) of paragraph 1 of article 2, for suggestion to the General Assembly, would thus read as follows:

**1. For the purposes of the present articles:**

……

(b) "State" means:

(i) the State and its various organs of government;

(ii) constituent units of a federal State and political subdivisions of the State, which are entitled to perform acts in the exercise of the governmental authority of the State, [provided that it was established that such entities were acting in that capacity];

(iii) agencies or instrumentalities of the State and other entities, to the extent that they are en titled to perform acts in the exercise of the governmental authority of the State;

(iv) representatives of the State acting in that capacity.

**2. Criteria for determining the commercial character of a contract or transaction**

The Working Group observed in its Report that the following activities had hitherto been held to be "commercial activities": (i) the issuance of debt, transporting of passengers for hire, conclusion of a contract of sale, negotiation and placating the majority shareholder, the lease of premises to conduct private business, the issuance of bills of exchange by a State-owned bank as guarantee for construction of public works, the guarantee under the charter party for the charter of a ship to a governmental corporation, and the hiring of services from a private company for advice in the development of rural areas of a State.

It also found that the activities that have been held not to have been "commercial activities" included: the acceptance of caveats, decisions to lift them, notification of the public, conduct of labour relations at a naval base, issuing currency, chartering of companies, regulation of companies, oversight of companies, the exercise of police powers, the imposition and collection of charges for air navigation services in national and international airspace, the power to seize property to collect a debt without prior judicial approval, implementing the general State policy of preserving law and order and keeping the peace, and keeping for disposal and actual disposal of one State's bank notes in another State.

After discussing the issue in the light of the foregoing elements, the Working Group agreed to forward the following two suggestions to the General Assembly that (i) the issue concerning which criteria to apply in determining the commercial character of a contract or transaction arises only if the parties have not agreed on the application of a specific criterion and the applicable legislation does not require otherwise, and that (ii) the criteria contemplated in national legislation or applied by national Courts offer some variety including, *inter alia,* the nature of the act, its purpose or motive as well as some other "Complementary criteria" such as the location of the activity and the context of all of the relevant circumstances of the act.

While considering this issue, the working Groups examined the following seven possible alternatives:

(i) The nature test as the sole criterion;
(ii) The nature test as a primary criterion [second half of paragraph 2 of article 2 would be deleted];
(iii) Primary emphasis on the nature test supplemented by the purpose test with a declaration of each State about its legal rules of policy;
(iv) Primary emphasis on the nature supplemented by the purpose test;
(v) Primary emphasis on the nature test supplemented by the purpose test with some restrictions on the extent of "purpose" or with some, enumeration of "purpose". Such restrictions or enumeration should be broader than a mere reference to some humanitarian grounds;
(vi) Reference be made in article 2 only to "commercial contracts or transactions", without further explication; and
(vii) Adoption of the approach followed by the Institut de Droit International in its 1991 recommendations which are based on the enumeration of criteria and a balancing of principles, in order to define the competence of the court, in relation to jurisdictional immunity in a given case.

As a result of this examination and in view of the differences of the facts of each case as well as the different legal traditions, the members of the Group felt that alternative (vi) above was the most acceptable. It was felt that the distinction between the so-called nature and purpose tests might be less significant in practice than may be suggested by the long debate over this topic. It was noted that certain of the criteria contained in the draft article of the Institut de Droit International could serve as useful guidance to national courts and tribunals in determining whether immunity should be granted in specific instances.[27]

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[27] It may be recalled that Article 2 of the 1991 draft of the "Institut de Droit Internationale" reads as follows: " *Article 2 Criteria indicating the Competence of Courts or other Relevant Organs of the Forum State in relation to Jurisdictional Immunity:*
1. In determining the question of the competence of the relevant organs of the forum State, each case is to be separately characterized in the light of the relevant facts and the relevant criteria, both of competence and incompetence; no presumption is to be applied concerning the priority of either group of criteria.
2. In the absence of agreement to the contrary, the following criteria are indicative of the competence of the relevant organs of the forum State to determine the substance of the claim, notwithstanding a claim to jurisdictional immunity by a foreign State which is a party:
a) The organs of the forum State are competent in respect of proceedings relating to a commercial transaction to which a foreign State (or its agent) is a party;
b) The Organs of the forum State are competent in respect of proceedings concerning legal disputes arising from relationships of a private law character to which a foreign State (or its agent) is a party; the class of relationship referred to includes (but is not confined to) the following legal categories: commercial contracts; contracts for the supply of services, loans and financing arrangements; guarantees or indemnities in respect of financial obligations; ownership, possession and use of property; the protection of industrial and intellectual property; the legal incidents attaching to incorporated bodies, unincorporated bodies and associations, and partnerships; actions *in rem* against ships and cargoes; and bills of exchange.

## 3. Concept of a state enterprise or other entity in relation to commercial transactions

The draft recommended by the Commission on the General Assembly in 1991 had contained the following provisions:
Article 10. Commercial transactions
.......

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c) The organs of the forum State are competent in respect of proceedings concerning contracts of employment and contracts for professional services to which a foreign State (or its agent) is a party;
d) The organs of the forum State are competent in respect of proceedings concerning legal disputes arising from relationships which are not classified in the forum as having a "private law character" but which nevertheless are based upon elements of good faith and reliance (legal security) within the context of the local law;
e) The organs of the forum State are competent in respect of proceedings concerning the death of, or personal injury to, a person, or loss or damage to tangible property, which are attributable to activities of a foreign State and its agents within the national jurisdiction of the forum State;
f) The organs of the forum State are competent in respect of proceedings relating to any interest of a foreign State in movable or immovable property, being right or interest arising by way of succession, gift or *bona vacantia*; or a right or interest in the administration of property forming part of the estate of a deceased person or a person of unsound mind or a bankrupt; or a right or interest in the administration of property of a company in the event of its dissolution or winding up; or a right or interest in the administration of trust property or property otherwise held on a fiduciary basis;
g) The organs of the forum State are competent insofar as it has a supervisory jurisdiction in respect of an agreement to arbitrate between a foreign State and a natural or juridical person;
h) The organs of the forum State are competent in respect of transactions in relation to which the reasonable interference is that the parties did not intend that the settlement of disputes would be on the basis of a diplomatic claim;
i) The organs of the forum State are competent in respect of proceedings relating to fiscal liabilities, income tax, customs duties, stamp duty, registration fees, and similar impositions provided that such liabilities are the normal concomitant of commercial and other legal relationships in the context of the local legal system.
3. In the absence of agreement to the contrary, the following criteria are indicative of the incompetence of the organs of the forum State to determine the substance of the claim, in a case where the jurisdictional immunity of a foreign State party is in issue.
a) The relation between the subject matter of the dispute and the validity of the transactions of the defendant State in terms of public international law;
b) The relation between the subject matter of the dispute and the validity of the internal administrative and legislative acts of the defendant State in terms of public international law;
c) The organs of the forum State should not assume competence in respect of issues, the resolution of which has been allocated to another remedial context;
d) The organs of the forum State should not assume competence to inquire into the content or implementation of the foreign defence and security policies of the defendant State;
e) The organs of the forum State should not assume competence in respect of the validity, meaning and implementation of intergovernmental agreement or decision creating agencies, institutions of funds subject to the rules of public international law.

3. The immunity from jurisdiction enjoyed by a State shall not be affected with regard to a proceeding which relates to a commercial transaction engaged in by a State enterprise or other entity established by the State which has an independent legal personality and is capable of:

(a) suing or being sued, and

(b) acquiring, owning or possessing and disposing of property, including property which the State has authorized it to operate or manage.

The Working Group considered, in particular, the possible basis for a compromise contained on this issue in the report of the Chairman of the informal consultations held in the Sixth Committee in 1994. It concluded that the following suggestions could be forwarded to the General Assembly.

Paragraph 3 of draft article 10 could be clarified by indicating that the immunity of a State would not apply to liability claims in relation to a commercial transaction engaged in by a State enterprise or other entity established by that State where:

(a) the State enterprise or other entity engages in a commercial transaction as an authorized agent of the State;
(b) the State acts as a guarantor of a liability of the State enterprise or other entity.

It has been suggested that this clarification could be achieved either by a characterization of the acts referred to in (a) and (b) as commercial acts or by a common understanding to this effect at the time of the adoption of this article.

The Working Group also considered a third option for State liability suggested as basis for a compromise, namely "where the State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim".

The Working Group considered that this suggestion went beyond the scope of article 10 and that it addressed a number of questions such as: immunity from jurisdiction, immunity from execution, and the question of the propriety of piercing the corporate veil of State entities in a special case. The Working Group was of the view that this suggestion ignores the question whether the State entity, in so acting, acted on its own or on instructions from the State.

The Working Group was aware of the fact that the problem of piercing the corporate veil raises questions of a substantive nature and questions of immunity, but did not consider it appropriate to deal with these in the framework of its present mandate.

## 4. Contracts of employment

The draft recommended by the Commission to the General Assembly contained the following provision:

Article 11. Contracts of employment

(1) Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a Court of another State which is otherwise competent in a proceeding that relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

(2) Paragraph 1 does not apply if:
  (a) the employee has been recruited to perform functions closely related to the exercise of governmental authority.

The Working Group noted in this regard that under article 11(2)(b) a foreign State does enjoy immunity in cases concerning contract of employment where the subject of the proceeding in cases concerning contract of employment where the subject of the proceeding is recruitment, renewal or reinstatement. But the immunity does not exclude jurisdiction for unpaid salaries or, in certain cases, damages for dismissal.

It also noted that there was a distinction between the rights and duties of individual employees and questions of the general policy of employment, which essentially concern management issues about the public service of the forum State.

After discussing the issue in the light of the elements of recent case law the Working Group agreed that the following suggestions could be forwarded to the General Assembly.

As regards sub-paragraph (1) of paragraph 2 of article 11, the Working Group provisionally agreed that in the expression "perform functions closely related to the exercise of governmental authority", the words "closely related to" could be deleted in order to restrict the scope of the subparagraph to "persons performing functions in the exercise of governmental authority".

The Working Group also agreed that the subparagraph could be further clarified by stating clearly that paragraph 1 of article 11 would not apply if the employee has been recruited to perform functions in the exercise of governmental authority", in particular: (i) Diplomatic staff and consular officers, as defined in the 1961 Vienna Convention on diplomatic relations and the 1963 Vienna Convention on consular relations, respectively; (ii) Diplomatic staff of permanent missions to international organizations and of special missions; and (iii) Other persons enjoying diplomatic immunity, such as persons recruited to represent a State in international conferences.

As regards subparagraph (c) of paragraph 2 of article 11, the Working Group agreed to recommend to the General Assembly that it would be advisable not to delete this, as it could not be reconciled with the principle of non-discrimination based on nationality. This deletion, however, should not prejudge on the possible inadmissibility of the claim on grounds other than State immunity, such as, for instance, the lack of jurisdiction of the forum State. In this respect, the Working Group notes a possible uncertainty in paragraph 1 of article 11 as regards, for example, the meaning of the words "in part".

The Working Group noted that it might be desirable to reflect explicitly in article 11, in respect of the distinction between the rights and duties of individual employees and questions of the general policy of employment; these essentially concern management issues about the public services of the forum State.

### 5. Measure of constraint against State property

The relevant provisions of the draft recommended by the Commission to the General Assembly in 1991 had contained the following provisions:

Article 18. State immunity from measures of constraint.

1. No measures of constraint, such as attachment, arrest and execution, against the property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

a) the State has expressly consented to the taking of such measures as indicated:
   (i) by international agreement;
   (ii) by an arbitration agreement or in a written contract; or
   (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen;

b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or

c) the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory the State of the forum and has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed.

After examining the issue in the light of all the elements above, the Working Group agreed that the following suggestions could be forwarded to the General Assembly.

The Working Group concluded that a distinction between pre-judgment and post-judgement measures of constraint may help ameliorate the difficulties inherent in this issue. It was, however, stressed that both types of measures are subject to the conditions of article 19 [property for governmental non-commercial purposes].

As regards **prejudgment measures** of constraint, the Working Group was of the view that these should be possible [only] in the following cases:

a. Measures on which the State has expressly consented either *ad hoc* or in advance;
b. Measures on property designated to satisfy the claim;
c. Measures available under internationally accepted provisions *[leges specialis]* such as, for instance, ship arrest, under the International

Convention relating to the arrest of seagoing ships, Brussels, 24 February 1956;

d. Measures involved in property of an agency enjoying separate legal personality if it is the respondent of the claim.

*À propos* **post-judgement** measures, the Working Group was of the view that these should be possible [only] in the following cases:

(a) Measures on which the State has expressly consented either *ad hoc* or in advance;
(b) Measures on designated property to satisfy the claim;

Beyond this, the Working Group explored three possible alternatives that the Assembly may decide to follow:

**Alternative I**

(i) Recognition of judgement by State and granting the State a two- to three-month grace period for compliance, as well as freedom to determine property for execution;
(ii) If no compliance occurs during the grace period, the property of the State, [subject to article 19] could be subject to execution.

**Alternative II**

(i) Recognition of judgement by the State and granting the State a two- to three-month grace period for compliance, as well as freedom to determine property for execution;
(ii) If no compliance occurs during the grace period, the claim is brought into the field of interstate dispute settlement; this would imply the initiation of dispute settlement procedures in connection with the specific issue of the execution of the claim.

**Alternative III**

The Assembly may decide not to deal with this aspect of the draft, because of the delicate and complex aspects of the issues involved. The matter would then be left to State practice, on which there are different views. The title of the topic and of the draft would be amended accordingly.

In an Annex to the Report of the Working Group the Commission has drawn the attention of the Sixth Committee to recent developments in State practice and legislation on the subject of immunities of States since the adoption of the draft articles considered necessary by the ILC. The development concerns the argument increasingly put forward that immunity should be denied in the case of death or

personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens,* particularly the prohibition on torture.

It has pointed out that in the past decade, a number of civil claims have been brought in municipal courts, particularly in the United States and United Kingdom, against foreign Governments, arising out of acts of torture committed not in the territory of the forum State but in the territory of the defendant and other States.

In support of these claims, the Commission has observed, plaintiffs have argued that States are not entitled to plead immunity where there has been a violation of human rights norms with the character of *jus cogens.* While National courts, in some cases, have shown some sympathy for this argument in most cases, however, the plea of sovereign immunity has succeeded.

The Commission has also drawn attention to the occurrence of two important developments that give further support to the argument that a State may not plead immunity in respect of gross human rights violations, since the handing down of these decisions.

The first of these relates to the amendment of the United States Foreign Sovereign Immunity Act (FSIA) incorporating a new exception to immunity. This exception, introduced by section 221 of the Anti-Terrorism and Effective Death Penalty Act of 1996, stipulates that immunity will not be available in any case "in which money damages are sought against a foreign State for personal injury or death that was caused by an act of torture, extra-judicial killing, aircraft sabotage, hostage-taking ..." A Court will decline to hear a claim if the foreign State has not been designated by the Secretary of State as a State sponsor of terrorism under federal legislation or if the claimant or victim was not a national of the United States when the act occurred. This provision has been applied in two cases.

Secondly, the *Pinochet case* has emphasized the limits of immunity in respect of gross human rights violations by State officials. Although the judgement of the House of Lords in that case holds only that a former head of State is not entitled to immunity in respect of acts of torture committed in his own State and expressly states that it does not affect the correctness of decisions upholding the plea of sovereign immunity in respect of civil claims, as it was concerned with a criminal prosecution, there can be no doubt that this case, and the widespread publicity it received, has generated support for the view that State officials should not be entitled to plead immunity for acts of torture committed in their own territories in both civil and criminal actions.

The Commissions has emphasized that these developments are not specifically dealt with in the draft articles on Jurisdictional Immunities of States and their Property. It has recommended that recent developments relating to immunity should not be ignored.

## D. – Secretariat Study: Follow up of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome, Italy, 15 June – 17 July 1998): Work of the Preparatory Commission for ICC.

The terror and social alarm generated world-wide by increasing and systematic criminal offences against populations and groups in times of peace and war has created the conditions for the advent of international criminal law, and for the creation of a category of actions known as "crimes against the peace and security of mankind".[28] The victims of these offences are not only the individuals and respective relatives whose lives and interests have been directly violated by the offences, but also humankind as a whole. The magnitude of a crime against humanity offends all individuals and groups including states living "peacefully" on Earth, and all citizens in the world community should be legally protected from these crimes committed against customary international law.[29]

### (i) *The ILC Draft Statute*

When the issue of establishing an international criminal court was put back on the agenda of the UN General Assembly in 1989,[30] the General Assembly referred the matter to the International Law Commission by requesting a report in one year (General Assembly Resolution 44/39, 1990). The Commission recognized that there was agreement on the desirability of such a court; this was reported to the General Assembly and the Commission was subsequently asked to prepare a draft statute for an international criminal court.[31] The ILC established a Working Group on an International Criminal Court, which in turn formulated basic propositions for the establishment of such a Court.[32] The Working Group set up in 1993 and 1994, presented the International Law Commission's initial report to the Sixth Committee of the General Assembly (Res. 47/33 of 25 November 1993) and finally produced a Draft Statute for the International Criminal Court (Res. 48/31 of 9 December 1993) which was contained in its 1994 report.[33]

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[28] Thirteenth Report on the Draft Code of Crimes against the Peace Security of Mankind, Special Rapporteur: Doudou Thiam (Senegal) UN Doc. A/CN, 4/466, 24 March 1995.

[29] European Law Students' Association: Handbook on the Draft Statute for an International Criminal Court, May 1998, Chapter 1 p. 3..

[30] UNGA Doc A/C.6/44/SR.38-41 (1989).

[31] UNGA Res. 47/33, UN Doc A/47/49 (1992).

[32] UNGA Doc. A/47/10/ (1992), p.143.

[33] Report of the ILC on the work of its Forty-sixth session, by the Secretary General, UNGA Doc.A/49/355, 1 September 1994.

**(ii)** ***Ad hoc Committee***

During the Sixth Committee debate in 1994 the States faced a difficult choice on the methodology relating to the establishment of the Court, and the future work of an international diplomatic conference. Some delegations did not favour negotiations, while others viewed negotiations as straightforward, bearing in mind that the Security Council had created *ad hoc* International Criminal Tribunals for Yugoslavia and Rwanda. Thus, an *ad hoc* Committee was established to review the major substantive and administrative issues arising out of the ILC Draft Statute. The Committee also considered the agreements[34] for the convention of an international conference of plenipotentiaries. More than 60 counties participated in the discussions; after discussion in the Sixth Committee, it was felt that the *ad hoc* Committee review of the ILC draft was neither sufficient nor comprehensive.

**(iii)** ***Preparatory Committee***

Thus, with Resolution 50/46 adopted by the General Assembly in 1995, the Preparatory Committee was established; the Committee would start negotiations in light of the convening of a conference of Plenipotentiaries and continue the work of the *ad hoc* Committee with a renewed and enlarged mandate. The Preparatory Committee on the establishment of an ICC met twice during 1996.[35] Its mandate was renewed by the General Assembly and there were three PREPCOM meetings in 1997 and a conclusive one in March/April 1998. The mandate of the 1997/1998 Preparatory Committee was to finalize a draft consolidate text of the ICC Statute to be presented to the decision makers at the Rome Conference. In February 1997 the PREPCOM adopted the ICC consolidated Draft Statute which constituted the main working instrument at the Rome Diplomatic Conference.

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[34] The *ad hoc* Committee met twice during 1995: 3-13 April and 14-25 August (Report of Committee UNGA Doc.A/50/22, 6 September 1995).

[35] The Preparatory Committee on the Establishment of an International Criminal Court was established by GA Resolution 50/46 of 11 December 1995 further to consider major substantive and administrative issues arising out of the draft statute of an ICC prepared by the ILC in 1994 and to draft texts with a view to preparing a widely acceptable consolidated text of a convention for an ICC for consideration by a Conference of plenipotentiaries. Its mandate was thereafter reaffirmed by GA Res. 51/207 of 17 December 1996. The PREPCOM under the chairmanship of Mr. Adriaan Bos (Netherlands) held a total of six sessions: first, March 25-April 12, 1996; second, August 12-30, 1996; third, February 10-21, 1997; fourth, August 4-15, 1997; fifth, December 1-12, 1997; and sixth, March 16-April 3, 1998. In addition the PREPCOM held an inter-sessional meeting in Zutphen, the Netherlands, January 19-30, 1998. The Secretariat of the AALCC was represented only at the Second Session of the Preparatory Committee.

**UN Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC, Rome (Italy)**

By its resolution 51/207 of 17 December 1996 the General Assembly *inter alia* decided to hold, in 1998, a diplomatic conference of plenipotentiaries with a view to finalizing and adopting a convention on the establishment of an International Criminal Court.

Thereafter, the General Assembly at its Fifty-second session accepted "with deep appreciation the generous offer of the Government of Italy to act as host to the diplomatic conference of plenipotentiaries" and decided that the UN Conference of Plenipotentiaries on the Establishment of an ICC, open to all States Members of the UN or members of specialized agencies or of the International Atomic Energy Agency, shall be held at Rome from 15 June to 17 July 1998, with a view to finalizing and adopting the convention on the establishment of an ICC.

In his address to the Fiftieth Anniversary Congress of the International Bar Association the Secretary General of the United Nations, Mr. Kofi Annan, stated: "Peace and justice are indivisible. They are indivisible in the former Yugoslavia, in Rwanda, in all post conflict situations where the dawn of peace must begin with the light of justice.

"The International Criminal Court is the symbol of our highest hopes for its unity of peace and justice. It is the vital part of an emerging system of international human rights protection. It will ensure that indicted criminals suspected of genocide in any country can be tried and convicted."

"Great progress has been made since the 1994 Draft Statute prepared by the International Law Commission. The General Assembly has decided to convene a conference of Plenipotentiaries in 1998 to adopt a convention on the establishment of an ICC. That Conference will coincide with the fiftieth anniversary of the adoption of the Genocide Convention. I cannot think of a more significant occasion for the world to take the final step toward global justice. The creation of an ICC will not only complete the vision of the genocide convention; it will bring that vision into reality."[36]

The UN Diplomatic Conference of Plenipotentiaries on Establishment of International Criminal Court elected Mr. Giovanni Conso (Italy) as President. It elected as Vice-Presidents the representatives of 32 States.[37] In addition, four Committees

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[36] Address to the Fiftieth Anniversary Congress of the International Bar Association, UN, New York, 11 June 1997.

[37] Algeria, Austria, Bangladesh, Burkina Faso, China, Chile, Colombia, Costa Rica, Egypt, France, Gabon, Germany, India, (Islamic Republic of) Iran, Japan, Kenya, Latvia, Malawi, Nepal, Nigeria, Pakistan, Russian Federation, Samoa, Slovakia, Sweden, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, and Uruguay.

were set up by the Conference: General Committee;[38] (ii) Committee of the Whole;[39] (iii) Drafting Committee;[40] and (iv) Credentials Committee.[41]

Participating in the Conference were delegations from 160 countries, 17 intergovernmental organizations, 14 specialized agencies and funds of the United Nations, and 124 organizations. The Statute of the Court was adopted by a non-recorded vote requested by the United States, 120 in favour to seven against, with 21 abstentions.

## Salient Features of the Rome Statute

The "Rome Statute for the Establishment of an International Criminal Court", comprising of a Preamble and 128 articles, is substantially longer than the ILC Draft Statute of 60 articles.[42] The Preamble to the Statue sets out the main purpose of the Court, and also affirms that "the most serious crimes of concern to the international community as a whole must not go unpunished," and their effective prosecution must be ensured by measures at the national level, through enhancing international cooperation. It also emphasizes that the Court shall be complementary to national criminal jurisdictions, and expresses its resolve to guarantee lasting respect for the enforcement of international justice.

The 128 Articles are grouped together in 13 parts *viz*. Part 1: Establishment of the Court (Articles 1-4); Part 2: Jurisdiction, Admissibility and Applicable Law (Articles 5-21); Part 3: General princip1es of Criminal Law (Articles 22-33); Part 4: Composition and Administration of the Court (Articles 34-52); Part 5: Investigation (Article 53-61); Part 6: The Trial (Articles 62-76); Part 7: Penalties (Articles 77-80); Part 8: Appeal and Review (Articles 81-85); Part 9: International Cooperation and Judicial Assistance (Articles 86-102); Part 10: Enforcement (Articles 103-111); Part 11: Assembly of States Parties (Article 112); Part 12: Financing of the Court (Articles 113-118), and Part 13: Final Clauses (Articles 119-128). The text of these provisions, along with their alternative formulations (the draft provided by the Preparatory

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[38] Comprising of the President of the Conference and Members, i.e., the President and Vice-Presidents of the Conference, the Chairman of the Committee of the Whole and the Chairman of the Drafting Committee.

[39] Chairman: Mr. Philippe Kirsch from Canada, and four Vice-Presidents, i.e., Ms. Silvia Fernandez de Gurmendi (Argentina), Mr. Constantin Virgil Ivan (Romania) and Mr. Phakiso Mochochoko (Lesotho), and a Rapporteur, Mr. Yasumasa Nagamine (Japan).

[40] The Drafting Committee was chaired by Mr. Cherif Bassiouni (Egypt) and 24 Members from Cameroon, China, Dominican Republic, France, Germany, Ghana, India, Jamaica, Lebanon, Mexico, Morocco, Philippines, Poland, Republic of Korea, Russian Federation, Slovenia, South Africa, Spain, Sudan, Switzerland, Syrian Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, and Venezuela. The Rapporteur of the Committee as a whole participated *ex officio* in the work of the Drafting Committee in accordance with rule 49 of the rules of procedure of Conference.

[41] The Credentials Committee was chaired by Ms. Hannelore Benjamin (Dominica) and its Members were from Argentina, China, Cote d'Ivoire, Dominica, Nepal, Norway, Russian Federation, United States of America, and Zambia.

[42] Report of the ILC UN, GAOR, 49 Session, Supp. No.

Commission), constituted the basic working document for the Conference of Plenipotentiaries convened at Rome. Following are the salient features of the Statute:

### (i) Establishment and Structure of the Court

The Statute establishes an International Criminal Court as a permanent institution with the power to exercise jurisdiction over persons for the most serious crimes of international concern, and which is complementary to national criminal jurisdiction.[43] Besides providing for the institutional structure, it lays down the general principles of criminal law[44] to be applied by the Court and hence is both a constituent instrument as well as a codification treaty.

The Statute establishes the following organs of the Court: the Presidency, an Appeals Division, a Trial Division, and a Pre-Trial Division; the office of the prosecutor and the Registry.[45] The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties,[46] with functions such as (i) providing management supervision over the principal organs, i.e., the Presidency, Prosecutor and Registrar, regarding the administration of the Court; (ii) considering and approving the budget of the Court; (iii) determining whether to alter the number of judges serving on a full-time or part-time basis, and (iv) perform any other function or take any other action as specified in the Statute of the Rules of Procedure and Evidence. The Assembly of States Parties can, upon the recommendation of the Court or its own Bureau, consider any question relating to non-cooperation by States Parties and take appropriate measures. The Seat of the Court shall be established at The Hague in the Netherlands.[47]

It may be recalled that during the Special Meeting on International Aspects between the International Criminal Court and International Humanitarian Law held during the Thirty-sixth Session of the AALCC held at Tehran in May 1997, delegates had unanimously favoured the establishment of an independent and impartial international criminal court, free from political pressures and tendencies. Preference was for the establishment of the Court by multilateral treaty.

### (ii) Material Jurisdiction of the Court

The Court would be competent to adjudicate upon the core crimes, i.e., the most serious crimes of concern to the international community as a whole, including genocide; crimes against humanity; war crimes, and the crime of aggression.[48]

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[43] See Part I, Article 1 of the Rome Statute of the International Criminal Court Doc. A/CONF. 183/9 dated 17 July 1998.
[44] See Part 3 (Articles 22-23) of the above document.
[45] See Part 4 Composition and Administration of the Court of the Rome Statute A/CONF.183/9.
[46] See Article 112 in Part 11 of the Statute, see also Part 13 on Final Clauses A/CONF.183/9.
[47] See Art.3, Part I, Doc. A/.CONF.183/9.
[48] Part 2, Arts 5-8 of the Statue Doc. A/-CONF.183/9.

The Preparatory Commission[49] shall *inter alia* determine the definition and elements of crimes of aggression and the conditions under which the Court shall *inter alia* determine the definition and elements of crimes of aggression and the conditions under which the Court shall exercise its jurisdiction with regard to this crime. In one of the six resolutions adopted at the Conference, it was recognized that terrorist acts were serious crimes, of concern to the international community, and that the international trafficking of illicit drugs was a very serious crime sometimes destabilizing the political, social and economic order in States. It was regretted that no generally acceptable definition of the crimes could be agreed upon for inclusion within the jurisdiction of the Court. It was recommended that the Review Conference provided for in Article 123 of the Statute should consider illicit trafficking in drugs and terrorism and try to arrive at an acceptable definition and inclusion in the list of crimes within the Court's jurisdiction.

Article 24 of the Statute deals with the non-retroactivity of *rationae personae* and emphasizes that the Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute.

With regard to *rationae personae,* it may be stated that while the statute contemplates jurisdiction of the court over legal persons, with the exception of States,[50] Article 25 of the Statute deals with individual criminal responsibility and clearly states that the court is primarily to have jurisdiction over natural persons. It may be mentioned here that in the context of the applicable penalties, that the Court shall have no jurisdiction over persons under 18 years of age.[51] As to the jurisdiction *rationae temporis* of the court, paragraph 1 of Article 8 of the Statute states that the "Court has jurisdiction only in respect of crimes committed after the date of entry into force of this Statute".

**(iii) Complementarity**

The third preambulatory paragraph provides that the principle of jurisdiction of the International Criminal Court is to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective. Besides the preambulary paragraph the principle of complementarity involves issues of admissibility "*ne bis in idem*"; initiation of an investigation; a general obligation to cooperate, and the surrender of a person to the Court. More specifically, attention needs to be drawn to the vague formulations involved in determination of the actions of a State or its legal system as regards an unwillingness or inability to prosecute, doubts on the independence or impartiality of proceedings, etc. These issues involve subjective elements of determination; the real implications of the complementarity principle could be determined only when the Court starts applying a set of identifiable criteria to decide when the national legal systems are ineffective or unavailable. The views as expressed by the AALCC Member States

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[49] See Arts 121 and 123 of the Statute Doc. A/CONF.183/9.

[50] Art. 25 of the Statute.

[51] Art. 26 of the Statute.

are still valid as regards the drawing up of clear jurisdictional boundaries between the jurisdiction of the Courts functioning within the criminal legal system of States and the court so as to avoid the overlapping of jurisdictions in the administration of justice.

### (iv) Trigger Mechanism

Although the consent of the State is primary in deciding the extent of jurisdiction of the Court the "trigger mechanism" was carefully considered by the Conference of Plenipotentiaries. This mechanism touches upon two main clusters of issues: (i) acceptance of the Court's jurisdiction, State consent requirements and conditions for the exercise of jurisdiction, and (ii) the determination of who can trigger the system, and the role of Prosecutor.[52] The jurisdiction of the Court over a person with respect to a crime referred to in the statute of the Court may be invoked by (i) a State Party; (ii) the Prosecutor or (iii) the Security Council.

### (v) Role of the Security Council

Under the Charter of the United Nations the Security Council is entrusted with the task of maintaining international peace and security. Article 39 of the UN charter confers on the Council the power to determine an act constituting aggression or threat to international peace. Besides enabling the Security Council to refer a matter to the Court for the exercise of its jurisdiction, the Statute empowers the Security Council to seek a deferral of any investigation or prosecution for a period of 12 months from the date of its request.[53] Article 16 of the Statute states that no investigation or prosecution may be commenced or proceeded with for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect. It was felt that the Security Council should have a minimum role to play in the functioning of the Court or else it could mar the independent functioning of the Court.

### (vi) Principles of Criminal Law

Although there were different views on many aspects of the Court, there was a broad agreement that the fundamental principles of criminal law be applied to the crimes punishable under the Statute of the Court be clearly pronounced in accordance with the principle of legality, *nullum crimen sine lege, nulla poena sine lege.* Accordingly, Part 3 of the Statute (Articles 22-33) addressed the General principles of Criminal Law.

The General Principles of Criminal Law are to be supplemented by Rules of Procedure and Evidence to be prepared by the Preparatory Commission established

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[52] Articles 13 (Exercise of Jurisdiction), 14 (Referral of a Situation by a State Party) and 15 (Prosecutor) Doc. No.A/CONF.183/9.

[53] See Article 16 (Referral of Investigation or Prosecution.

by the Rome Conference. The draft text of the Rules and Procedures and Evidence would thereafter be approved by the States Parties to the Statute.

The Statute incorporates fairly detailed and elaborate provisions for conducting investigation and prosecution of cases (Part 5, Art. 53-61); The Trial (Part 6, Art. 62-76); Penalties (Part 7, Art. 77-80); Appeal and Review (Part 8, Art. 80-84); and Enforcement (Part 10, Art. 103-111). It also stipulates the Court's organizational law, by specifying the required qualification of judges, etc. (Part 4).

**(vii) Financing of the Court**

Part 12 of the Statute comprised of six articles (113-118) concerns the financing of the Court. Article 115 of the Statute states that expenses of the Court and of the Assembly of States Parties shall be mainly derived from two sources, i.e., assessed contributions made by States Parties, and funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council. It also provides that the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties. This was an issue where there was divergence in views in the Preparatory Committee. It may be recalled that during the Thirty-seventh Session of the AALCC concern was expressed by Member States that a sound financial system was essential to ensure the smooth and effective functioning of the Court.

**(viii) Review Conference**

Article 123 addresses the issue of the Statute's review and provides that, seven years after entry into force, the Secretary General of UN is to convene a *Review Conference* to consider any amendment to it. Such a review may include but is not limited to the list of crimes under the jurisdiction of the Court. Subsequent debates in the Sixth Committee reveal that delegates do favour only a review of matters yet are against altering the basic elements of the court.

**(ix) Ratification**

Article 126 in Part 13 of the Statute deals with Entry into Force. It states that the Statute shall enter into force on the first day of the month after the sixtieth day following the deposit of the sixtieth instrument of ratification, acceptance, approval or accession with the Secretary General of the United Nations. It may be recalled that the Statute was opened for signature in Rome on 17 July 1998 and will remain open for signature at the United Nations Headquarters until 31 December 2000. (We already have before us the experience of the UN Convention on the Law of the Sea which required 60 ratifications to enter into force, and about which it was felt that in a bid to ensure universality of participation too large a number delayed its entry

into force. However, a lower number of ratifications could jeopardize the objective of universality of acceptance of an international criminal jurisdiction.)

**Establishment of the Preparatory Commission**

One of the recommendations of the Final Act adopted at Rome was the establishment of a Preparatory Commission, assigned to prepare proposals for practical arrangements for the establishment and coming into operation of the Court.

The Commission is to prepare proposals for a provision on aggression, including the definition and elements of crimes of aggression and the conditions under which the ICC shall exercise its jurisdiction with regard to this crime. It shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision relating to the crime of aggression, and shall enter into force for the States Parties in accordance with the relevant provisions of this Statute. The Commission shall remain in existence until the conclusion of the first meeting of the Assembly of States Parties.

The Commission shall remain in existence until the conclusion of the first meeting of the Assembly of States Parties,[54] Part 11, Article 115 of the Statute establishes the Assembly of States Parties, on which other States which have signed the Statute or the Final Act may take part as observers. Among other functions, the Assembly shall consider and adopt recommendations of the Preparatory Commission; providing management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court; consider and decide the budget for the Court; decide whether to alter the number of judges, and consider any question relating to non-cooperation; it shall prepare a report on all matters within its mandate and submit this to the Assembly of States Parties, and shall meet at the Headquarters of the United Nations.

At its Fifty-third Session, by its Resolution 53/105 of January 1999, the General Assembly took note of the outcome of the Rome Conference and also of the Final Act of
the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court done at Rome on 17 July 2998, which provided for the establishment of a Preparatory Commission for the Court.

The Preparatory Commission has been mandated to prepare draft texts of the Rules of Procedure and Evidence and of the Elements of Crimes, before 30 June 2000, it shall *inter alia* prepare draft texts of:

(1) Rules of Procedure and Evidence;
(2) Elements of Crimes including the definition and elements of the crime of aggression and the conditions under which the court shall exercise jurisdiction with regard to this crime;
(3) A relationship agreement between the Court and the UN;

[54] See Article 115 of the Statute.

(4) Basic provisions governing a headquarters agreement to be negotiated between the Court and the Host country.
(5) Financial regulations and rules;
(6) A budget for the first financial year; and
(7) Rules of procedure of the Assembly of States Parties.

The General Assembly directed the Preparatory Commission to hold three sessions during the year 1999: the first, 16-26 February; the second, 26 July-13 August, and the third, 29 November-17 December 1999, to carry out its mandate.

**Substantive Output of both First and Second Sessions of Preparatory Commission**

The Preparatory Commission as envisaged by Resolution F of the Final Act of the Rome Statute and in accordance with the General Assembly resolution 53/105 adopted at the Fifty-third Session has so far held two sessions at the UN headquarters in New York, one each February 16-26, and July 26-August 13 1999.[55] To facilitate its work the Commission has at its session established three Working Groups: (1) Working Group on Rules of Procedure and Evidence; (l-a) Working Group on composition and Administration; (2) Working Group on Elements of Crimes; and (3) Working Group on the definition of the Crime of Aggression. The first two were established in February and third was established during the July/August Session.[56]

**Working Group on Rules of Procedure and Evidence**

While the **First Session** of the Preparatory Commission considered various proposals submitted in connection with Part 5 of the Statute, it took into account the written proposals and the views expressed in the working group and informal consultations. The co-ordinator proposed discussion papers for consideration at the next session of the Preparatory Commission.[57]

The **Second Session** of the Preparatory Commission concentrated on rules pertaining to the following parts of the Rome Statute:

Part 4 (Composition and Administration of the Court), Part 5 (Investigation and Prosecution), Part 6 (the trial) and Part 8 (Appeal and Revision). The Working Group

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[55] The Officers of the Preparatory Commission are Mr. Philippe Kirsch (Canada) Chairman; Mr. Muhamed Sacirbey (Bosnia and Herzegovina), Mr. Medard Rwelamira (South Africa), and Mr. George McKenie (Trinidad and Tobago), Vice-Chairmen, and Mr. Salah Suheimat (Jordan), Rapporteur.

[56] Ms. Silvia Fernandez de Gurmendi (Argentina) was appointed Co-ordinator for the Working Group on Rules of Procedure and Evidence. Mr. Medard Rwelamira (South Africa) is co-ordinator for this Working Group with a specific mandate to deal with para 4 of the statute while Mr. Herman van Hebel {Netherlands) is coordinator of the Working Group on Elements of Crimes.

[57] For details of the Work of the First Session of the Preparatory Commission see Doc. No.AALCC/XXXVIII/Accra/99/S-8.

made considerable progress on Parts 5, 6 and 8 of the Statute, even though it was unable to conclude its consideration of the last Part.

The Working Group held twelve meetings between 26 July and 6 August 1999. It had before it several proposals, in addition to those which had been made at the first session of the Preparatory Commission. The proposals submitted at the second session are contained in documents: (i) PCNICC/1999/DP.8 Add.1/Rev.1; PCNICC/1999/DP.8 Add.1/Rev.1; PCNICC/1999/WGRPE/DP.5-38, and PCNICC/1999/WGRPE/INF.2 and Add.1.

The Working Group considered proposals related to Parts 6 and 8 of the Statute. Numerous informal consultations were also held on rules related to the aforementioned parts of the Statute, as well as to Part 5, which the Preparatory Commission had begun to consider during its first session.

Taking account of the views expressed in the Working Group and in informal consultations, the coordinator proposed the following discussion papers for consideration at the November-December session of the Preparatory Commission (i) PCNICC/WGRPE/RT.5/Rev.l, Add.l and Corr.l, and Add.2 and 3 on rules related to part 6 of the statute (ii) PCNICC/WGRPE/PT.6 on rules related to part 5 of the statute; and (iii) PCNICC/WGRPE/RT. 7 on rules related to Part 8 of the statute.

### (1) (a) Composition and Administration of the Court

Mr. Medard Rwelamira (South Africa), Coordinator for the Working Group on Part 4 dealing with the Rules on Composition and Administration of the Court, said that Group had held comprehensive discussion on (i) Rules governing disciplinary measures; (ii) excuse and disqualification; (iii) organization of the various organs of the court, including replacement; (iv) authentic texts, and (v) amendments and languages.

The Working Group had not, however, been able to finalize its discussion on Rules governing the office of Defence Counsels and Alternate Judges. At the end of the general discussion, the Working Group had turned to informal consultations divided into three clusters. Consultations on the first cluster, situations that may affect the functioning of the Court, had materialized into a paper[58] that would be the basis for discussion. That document constituted a measure of progress in carrying out the working group's mandate, and would facilitate work in the next session.

### (ii) Working Group on Element of Crimes

The coordinator of the Working Group on Elements of Crimes, Mr. Herman van Hebel (Netherlands), in his oral report given at the **First Session** of the Commission stated that at the first stage of the discussion, the working group considered the elements for the crime of genocide, in article 6 of the Rome Statute, as well as

[58] PCNICC/1999/WGRPC (4) RT. l.

paragraph 2(a) of article 8 concerning war crimes, on the basis of proposals before it. The discussions in the Working Group focussed mostly on substantive issues.

Taking account of the views expressed in the Working Group and of the written proposals, in order to facilitate discussion, the coordinator prepared discussion papers for the elements of crime of genocide and for the element of crimes relating to sub-paragraphs (i) to (iii) of article 8, paragraph 2(a), on war crimes.

After the **Second Session** of the Preparatory Commission held in Ju1y/August, the coordinator of the Working Group stated that the Group had before it several proposals in addition to those introduced at the Commission's first session in February 1999.[59] The Working Group had resumed consideration of the elements of war crimes, article 8 of the Statute begun at the first session. The remaining provisions of the article were divided into nine clusters because of the possible commonality of their elements. This had been done in order to facilitate discussions. Taking into account all the views expressed it was suggested that at the next session the Group would consider elements of articles 8(2)(a),[60] 8(2)(C),[61] 8(2)(b)(xxii),[62] 8(2)(b)(xiii)-(xvi) and (xxi),[63] 8(2)(b)(i)-(iii),[64] 8(2)(b)(vi), (vii), (xi) and (xii),[65] and a compilation of proposals by Governments on elements of article 8(2)(b)(viii).[66] Document PCNICC/1999/WGEC/INF.3 and Corr.l contains a compilation of proposals by Governments on elements of article 8(2)(b)(vii) relating to the crime of transferring population.

While the Working Group had a general discussion on the elements of all the Crimes contained in Article 8, there was not enough time for the coordinator to prepare discussion papers on all the provisions of war crimes. Though substantial progress had been made on article 8 (war crimes), further consideration of the article was required at the Working Group's next session to ensure the formulation of generally acceptable elements of crimes contained in article 8, as part of a complete set of elements of crimes, for all crimes laid down in the Court's Statute.

### (iii) Report on the Crime of Aggression

During the First Session of the Preparatory Commission, a preliminary meeting was held to consider modalities of discussion for a definition of the crime of aggression, which is included in the Statute, but not yet defined. As a result of the suggestions of many Member States Mr. Tuvako Manongi (United Republic of Tanzania),

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[59] The latest proposals were contained in Documents PCNICC/1999/WGEC/DP.8 to DP.27; and PCNICC/1999/WGEC/INF.2 and Adds 1-2.

[60] PCNICC/1999/WGEC/RT.4.

[61] PCNICC/1999/WGEC/RT.5.

[62] PCNICC/1999/WGEC/RT.6.

[63] PCNICC /1999/WGEC /RT.7.

[64] PCNICC/1999/WGEC/RT.9.

[65] PCNICC/1999/WGEC/RT.l0.

[66] PCNICC/1999/WGEC /INF.3.

was designated Coordinator for the Crime of Aggression. Informal bilateral or multilateral discussions continued in the inter-sessional period.

During the **Second** Session, the Coordinator held consultations to explore the possibility of a consensus on a possible definition of the crime of aggression and the conditions under which the International Criminal Court was to exercise jurisdiction over the crime. On the basis of proposals he received, the Coordinator would continue to consult with delegations, with the object of identifying those elements which were common and those not, and to see how any resulting differences could be bridged or narrowed. A large number of delegations continued, as they had during the last session of the Preparatory Commission, to express their desire to see the establishment of a Working Group charged with that specific responsibility.

The Chairman of the Preparatory Commission, said "considerable time was being spent by delegations on organizational issues relating to the definition of aggression, to the detriment of substantive discussions on the subject".

There were persistent differences among delegations on some of those organizational issues, notably the principle and timing of the establishment of a Working Group on the definition of "aggression". Essentially, some delegations felt that a Working Group should be established to reflect the importance of the issue and the need to make progress during the lifetime of the Preparatory Commission. These included the Islamic Republic of Iran, Arab Republic of Egypt, Syria, Kuwait, People's Republic of China, Saudi Arabia, Pakistan, Senegal, Iraq, Republic of Korea, and Oman, among others.

Yet others were not convinced that a Working Group should be established at this time, and were concerned that such a Working Group might prejudice the ability of the Preparatory Commission to complete the rules of procedure and evidence and elements of crimes by 30 June 2000, as mandated by Resolution F of the Rome Conference.

At the same time, Mr. Kirsch said that "delegations favouring the establishment of a Working Group on aggression consistently maintained that their intention was in no way to delay or hamper work towards meeting the mandatory deadlines imposed by Resolution F".

In order to resolve the organizational issues the Preparatory Commission agreed on the following arrangements concerning the question of the crime of aggression:

a) Working Group on the crime of aggression will be established at the outset of the next session of the Preparatory Commission;
b) At the next and following session of the Preparatory Commission, the plenary session traditionally held each Monday morning will be maintained, but will be significantly shorter, essentially limited to brief reports by the coordinators;
c) A meeting of the Working Group on the crime of aggression will follow each of the Monday morning plenary meetings, until the end of the morning;
d) Informal consultations on the crime of aggression will be conducted at other times where possible and appropriate, it being understood that

this should be without prejudice to the requirements of the work on subjects that must be completed by 30 June 2000. Within the limits of what is practicable, the Secretariat will endeavour to provide the best possible facilities for there informal consultations;

e) The above arrangements are based on a clear and general understanding that they will remain.

During the Second Session, the President of the International Criminal Tribunal for the former Yugoslavia, Judge Gabrielle Kirk McDonald, stated that the establishment of the International Criminal Court was the recognition by the International Community that humanitarian norms must be enforced. However, that recognition was only a first step. The International community must work to ensure that the Court was more than "an empty promise or merely a paper tiger."

She noted that rules were important to the Court because they establish the framework for conducting trial and appellate proceedings. They provide guidance to the parties as to what the latter could expect in those proceedings, and brought consistency to the Court's decisions and work. While the rules served several important functions, she said, it should be borne in mind that they could only be a framework. The rules could not, no matter how well drafted, foresee every courtroom situation. These rules should be a framework and not a straitjacket.

Judge McDonald noted the Statute for the International Criminal Court had established rigorous requirements for the court's judges, for the judges effectively to manage and direct proceedings. She said the rules must allow them to address evolving situations and respond to issues that could not be anticipated during the drafting process.

She hoped that the report of the judges of the Tribunal for the former Yugoslavia would assist the Preparatory Commission in its work. The Tribunal's judges had actively supported the creation of the ICC. Their unprecedented experience in handling the trials and appeals of prosecutions of international crimes gave them a particularly well informed perspective on the unique process of dispensing international justice. That was especially true regarding the drafting and application of rules for such proceedings. The Tribunal's judges had been responsible for the formulation and amendment of its rules, procedures and evidence, and had had to revise them in light of what actually happened in those proceedings.

She stated that the wisdom of the judges was a vital resource in the process of adopting rules for the ICC. The Preparatory Committee should recommend to the Assembly of States Parties that Judges be elected first, in order to allow their input into the rules. If that was not possible, the Commission or Assembly of States Parties should consider establishing an advisory committee of judges, and provide advice before the adoption of the rules.

## Other Activities

The Preparatory Commission took note of the Intergovernmental Regional Caribbean Conference for the signature and ratification of the Statute of the Inter-

national Criminal Court hosted by the Ministry of the Attorney General of Trinidad and Tobago and the No Peace Without Justice Foundation, at Port of Spain 15-17 March 1999, as well as the Port of Spain Declaration resulting therefrom; the international seminar on victims access to the International Criminal Court hosted by the Government of France at Paris 27-29 April 1999; the informal inter-sessional meeting hosted by the International Institute of Higher Studies in Criminal Sciences at Siracusa, Italy 21-27 June 1999; and the two briefing sessions on the ratification and implementation of the Rome Statute, hosted by the International Human Rights Law Institute of De Paul University and Parliamentarians for Global Action on 31 July and on 7 August 1999 at the United Nations Headquarters in New York.

## General Comments

The Chairman of the Preparatory Commission, Mr. Philippe Kirsch (Canada) in his closing remarks stated "that the main function of the Preparatory Commission for the International Criminal Court was to create conditions that would allow the Court to function effectively as soon as its Statute enters into force"

Accordingly it could be said that the Commission, within its mandate, was supposed to develop a series of instruments that would be necessary for the Court to function; an agreement on the relationship between the Court and the United Nations, a headquarters Agreement with the Government of Netherlands; and financial regulations, including the first budget for the Assembly of States Parties.

As a priority, the Commission is mandated to complete two instruments by the end of June 2000. The first is related to the rules of procedure and evidence and the other is related to the elements of crimes. The second was a document that would help the Court to interpret crimes listed in the Statute. Most of the work at the second session of the Preparatory Commission had focussed on the priority items, and progress had been made on the rules of procedure and evidence. The progress had maintained the balance between different legal systems to be reconciled. In the words of Mr. Kirsch: "Irrespective of any substantive differences it is quite difficult to just reconcile civil law and common law for purposes like this".

Substantial progress had been made on the elements of crimes. Particular emphasis was placed on respecting the principle of *nullum crimen sine lege* and on ensuring consistency with existing laws of armed conflict. The focus of discussion had been on war crimes; a number of elements have been developed pertaining to that issue.

The last session had focussed on genocide, while the next session would focus on crimes against humanity. The establishment of the working group on the crime of aggression, and its being under the courts jurisdiction would create wider acceptance of the Statute. An agreed definition of this crime would encourage more States to ratify the Statute.

A lot depends on the progress that would be made during the remaining session of the Preparatory Commission, and whether or not it can fulfil its mandate. A large number of substantial issues remain to be resolved. They include (i) the definition of aggression and (ii) relationship agreement between the Court and the UN. Here, the role of Security Council *vis-à-vis* the Court is an issue that has still not been

resolved. The primary aim of the Security Council, of determining the existence of an act of aggression, is to be noted. Furthermore, there are countries that would require terrorism, the use of nuclear weapons, and drug trafficking to be included in the list of crimes.

The other issues on the agenda of the Commission, i.e., Headquarters Agreement, Financial Rules and Regulations, the budget for the first financial year, and Rules of Assembly of States Parties are equally important in nature and considerable guidance is available from the Law of the Sea Convention and the General Assembly Rules of Procedure.

It is to be noted that the Court will be established only after 60 States ratify the Statute to have created it at the Rome United Nations Diplomatic Conference of Plenipotentiaries in June-July 1998. As of 12 August 1999, eighty-four[67] States have signed the Rome Statute, nine among them are Member States of AALCC.[68] Four States, Senegal, Trinidad and Tobago, San Marino, and Italy have ratified the Statute. It is encouraging to note in this regard that during 1999 the Intergovernmental Regional Caribbean Conference for the signature and ratification of the Statute of the International Criminal Court was hosted by the Ministry of the Attorney General of Trinidad and Tobago. Two briefing sessions on the ratification and implementation of the Rome Statute were also hosted by the International Human Rights law Institute of De Paul University and Parliamentarians for Global Action on 31 July and on 7 August 1999 at the United Nations Headquarters in New York. A ratification kit developed by SADC Legal Experts would be of great help in the ratification of the Rome Statute. However, at present the focus is to achieve consensus on the issues which were left unresolved at the time of adoption of the Rome Statute and ratification by States at the earliest.

The AALCC's Legal Advisers' Meeting which was held at New York in October 1999 also provided an opportunity for the AALCC Member States to reflect on the progress made so far during the two substantive sessions of the Preparatory Commission. It is a matter of great satisfaction that the Member States of AALCC have actively participated in the work of the Commission, and it is hoped that they will continue to make useful contributions at the Third Session of the Preparatory Commission scheduled to be held in November / December this year.

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[67] Countries that have signed the Rome Statute are: Albania, Andorra, Angola, Antigua and Barbuda, Argentina, Australia, Austria, Belgium, Bolivia, Burkina Faso, Burundi, Bulgaria, Cameroon, Canada, Chile, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Ecuador, Eritrea, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Haiti, Honduras, Hungary, Iceland, Ireland, Italy, Jordan, Kenya, Kyrgyzstan, Latvia, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Mali, Malta, Mauritius, Monaco, Namibia, Netherlands, New Zealand, Niger, Norway, Panama, Paraguay, Poland, Portugal, Romania, Samoa, San Marino, Senegal, Sierra Leone, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sweden, Switzerland, Tajikistan, Trinidad and Tobago, Uganda, the Former Yugoslav Republic of Macedonia, United Kingdom, Venezuela, Zambia and Zimbabwe.

[68] Nine AALCC States are: Cyprus, Gambia, Ghana, Jordan, Kenya, Mauritius, Sierra Leone, Senegal, and Uganda. Senegal was the first country to ratify the Convention.

**Future Work in the Third Session of Preparatory Commission**

The provisional plan of the Commission would be formally approved at the commencement of the Commission's next Session in November. It would be adjusted as required throughout the session. Plenary meetings would be held on Mondays followed by the Working Group on the Crime of Aggression. The Work Plan had been prepared with the hope of having a complete first reading of the two priority instruments, the Rules of Procedure and Evidence, and Elements of Crimes, by the end of the next Session.

**E. – Secretariat Study: United Nations Conference on Environment and Development – Follow Up**

The United Nations Framework Convention on Climate Change (UNFCCC) adopted in 1992 entered into force on March 21 1994, ninety days after the receipt of the Fiftieth ratification. To date, 180 countries have ratified the Convention. At the Conference of Parties (COP-l) delegates reached an agreement to consider the key issue of adequacy of commitments in an open-ended *Ad Hoc* Group on the Berlin Mandate (AGBM). This mandate called for strengthening Annex-I party commitments through the adoption of a protocol or any other legal instrument; COP-1 also requested the Secretariat to make arrangements for the sessions of the subsidiary bodies on scientific and technological advice (SBSTA) and implementation (SBI). The SBSTA serves as the link between the information provided by competent international bodies and the policy needs of the COP, whereas the SBI was created to assist the COP in the review and implementation of the decisions of the UNFCCC. The COP-l also decided to set up an *Ad Hoc* Group on Article 13 to elaborate the multilateral consultative process (MCP) for parties to resolve issues of implementation.

COP-2 was convened in 1996. The *Ad Hoc* Group of Berlin Mandate had by this time met four times; it continued its consideration of a text on binding commitments. The issue whether or not to allow mechanisms that would provide Annex-I Parties with flexibility in meeting quantified emissions limitation and trading (QELTOs) was the central issue.

COP-3, at Kyoto in 1997, was a watershed in the ongoing process of climate negotiations. Parties came together after prolonged negotiations to agree upon and adopt the UNFCCC. The Kyoto Protocol (as it is now called), provides that Annex-I Parties to the UNFCCC agree to commitments with a view to reducing their overall emissions of six Greenhouse Gases (CHG) by at least five per cent below 1990 levels between 2008 and 2012. The Protocol also establishes emissions trading and joint implementation (JI) between developed country Parties, and a clean development mechanism (CDM) for encouraging joint emissions reduction projects between developed and developing country parties. For the protocol to enter into force it requires ratification by 55 countries including Annex-I Parties representing at least

55 per cent of total carbon dioxide emissions by Annex-I Parties for 1990. As of December 1999, 84 parties have signed the protocol and 16 have ratified it.[69]

The COP-4 held in Buenos Aires, 1998 focussed mainly on the strengthening of the UNFCCC and preparation for the entry into force of the Kyoto Protocol. It adopted the Buenos Aires Plan of Action (BAPA) which, among other things, envisaged the speedy resolution of methodological issues relating to the financial mechanism; development and transfer of technologies to developing countries, implementation of Articles 4.8 and 4.9 of the UNFCCC dealing with "adverse effects" and Activities Implemented Jointly, and the bringing into functional operation of the protocol mechanisms.

The fifth conference of parties (COP-5) to the UNFCCC met in Bonn, Germany between 25 October-5 November 1999. COP-5 continued consideration of the programme charted out by BAPA. A number of decisions and conclusions dealing *inter alia* with the review of implementation of commitments and the UNFCCC provisions, besides the preparation for the first session of the COP serving as the meeting of Parties in the Kyoto Protocol (COP /MOP-l), were adopted. A high-level segment, with the participation of ninety-three ministers and other heads of delegation, was held on 2-3 November. The Conference concluded with an optimism and determination to work towards the self imposed deadline for the entry into force of the Kyoto Protocol in 2002 and decided to (i) intensify the work programme during the inter-sessional period in order to set a lively pace for negotiation on outstanding issues and sharpen the focus of debate; (ii) to convene COP-6 to be held in The Hague, the Netherlands between13-24 November 2000 following the twelfth session of FCCC subsidiary bodies to be held between 12-16 June 2000. A brief summary of the discussion on the important items is set out below. Among the items included are (i) review of implementation; (ii) capacity building; (iii) development and transfer of technologies; (iv) adverse effects; (v) activities implemented jointly (AIJ); (vi) Land Use, Land Use Change and Forestry (LULUCF); (vii) protocol mechanisms, and (viii) compliance requirements.

## Review of Implementation

As per Article 12 of the UNFCCC Parties are supposed to communicate to the COP, through the Secretariat information relating to implementation of the Convention. The item considered by SBSTA and SBI was "Guidelines for the preparation of National Communication from Annex-I". The decision *inter alia* provides that Part II of the guidelines be used for the preparation of the third national communications.[70] It also requested Annex-I Parties to provide detailed reports on their activities. Moreover, Annex-II Parties were urged to assist Parties with economies in transitions (EITs) with technical knowledge in preparing national communications.

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[69] All 16 countries happen to be non-Annex-I Parties.

[70] It may be recalled that second national communication by Annex-I Parties were submitted by 15 April 1997 and 15 April 199:8 by parties undergoing economic transition.

It was also decided that Part-I reports dealing with annual inventories of the UNFCCC guidelines for the preparation of national communication be submitted by early 2000.

As regards non-Annex-I Parties communications, developing countries called for the provision of adequate financial resources, technical assistance and capacity building in order better to enable the collection of data and adoption of proper methodologies for communication. A view was also expressed by some Parties calling for non-Annex-I Party participation in preparation of non-Annex-I communication. Developing countries argued that differentiated timetables should be provided for them under the UNFCC, and no effort shou1d be made to alter the existing guidelines for non Annex-I communications. As a consequence of these deliberations the COP adopted decisions on the first compilation of initial communications from non-Annex-I Parties.[71] This decision calls upon non-Annex-I Parties that have failed to submit their initial communications within three years of the entry into force of the UNFCCC to do so at the earliest opportunity. The Secretariat was also asked to prepare the second compilation of initial non-Annex-1 communications to be submitted to the SBI for consideration at COP-6.

## Capacity Building

This agenda item was introduced by the developing countries with a proposal[72] for enhanced capacity building. This proposal called among other items upon the COP-5 to conduct capacity-building activities in developing countries; to provide necessary financial resources to strengthen national focal points; to promote climate-related research and the capacity building of national institutions and expertise.

This proposal was welcomed by many country Parties who asked for capacity building to be country specific rather than agency specific. Views were expressed supporting the involvement of some EITs in the process of capacity building. Based on these discussions the decision on this item *inter alia* recognizes the special capacity-building needs of least developed countries (LDCs) and small island developing states (SIDS);[73] and that financial and technical support for capacity building be provided through the financial mechanisms of bilateral and multilateral agencies.

## Transfer of Technologies

In the course of the discussions on this item several delegates appreciated the convening of an African regional workshop to advance the understanding of technology transfer. Views were expressed calling upon the SBSTA to ensure effective transfer of environmentally sound technologies (ESTs) on the basis of an integrated approach involving stake holders in sustainable development. Some Annex II Parties suggested a possible link up of CDM in transfer of technology. On the other hand, some of the non Annex-1 Parties stressed that technology transfer under the Protocol

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71 UNFCCC/CP/1999 /L.10.

72 FCCC/SBSTA/1999/MISC.9.

73 FCCC/CP/1999/L.1.

was an obligation under the UNFCCC. The decision invited concerned parties to identify their needs and priority for capacity building, and requests the Secretariat both to compile and synthesize the information and to develop a draft framework for capacity-building activities.

**Adverse Effects**

Another important matter considered by the joint session of the SBI/SBSTA relates to UNFCCC Article 4.8 and 4.9 and Protocol article 3.14, dealing with adverse effects. Developing countries expressed concern that information related to the effects of climate on policies and measures were not easily available. They called for more detailed study and research on the adverse effects of dangerous climate change. Fossil fuel producing countries, to be the most economically affected, called for response measures amounting to compensation. Many countries expressed concern over the efforts made by Annex-I Parties towards gathering information on initial actions needed to address the specific needs of developing countries and LDCs arising out of climate change impact measures. Besides, it called for identification of actions necessary under the UNFCCC relating to funding, insurance and the transfer of technologies to developing country parties, especially LDCs.

**Activities Implemented Jointly**

The item was discussed in detail at joint meetings of SBI/SBSTA. There were differing views on AIJ projects under UNFCCC and their relationship with other Protocol mechanisms. While a number of developing country Parties called for the extension of the pilot phase of AIJ projects, others felt the pilot phase was long enough and now needed to become operational. In this regard, developed country Parties stressed the need for the "eligibility of an AIJ project under a JI or CDM mechanism". This suggestion was opposed by a number of SIDS and developing country parties, as they felt that AIJ under UNFCCC and JI/CDM, under the protocol, had differing functions. Despite no common meeting point a decision[74] was adopted which *inter alia* took note of the review progress of AIJ, and called for continuation of the AIJ pilot phase beyond the end of the decade, i.e., 2000 without prejudice to future decisions. It requested the parties to submit proposals to improve the draft revised uniform reporting format.

**Land Use, Land Use Change and Forestry (LULUCF)**

This item is still in its formative stage and essentially deals with the use of land. Views were expressed that the IPCC special Report on LULUCF must first be studied before any decision be taken. As data available on country specific activity were limited, it was felt that, while endorsing a work programme with elements dealing

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[74] FCCC/CP/1999 /L.13.

with LULUCF, the COP-6 could recommend the COP/MOP-I to adopt a decision on Protocol Article 3.3 dealing with emissions removal and Article 3.4 dealing with additional human-induced activities relating to changes in emissions and removals.

**Protocol Mechanisms**

Most contentious issues in COP-5 were Protocol mechanisms, i.e., the international emission trading regime, the clean development mechanism, and the joint implementation mechanism. These mechanisms would help the developed countries in reducing the cost of reaching their combined emission reduction target by the period 2008-2012. The issue relating to Protocol mechanisms was discussed first in the Joint SBI/SBSTA session and later in different contact groups. The discussions were based on a revised synthesis of proposals by parties on principles, modalities, rules, and guidelines on the protocol mechanisms.[75] Several participants proposed the drawing up of a draft negotiating text on the mechanisms; others felt that fundamental queries still remained unanswered. It was agreed to intensify efforts towards the consideration of a draft negotiating text at COP-6.

The COP adopted a decision recommended by SBI/SBSTA, on a mechanism pursuant to Articles 6, 12 and 17 of the Protocol.[76] The decision *inter alia* requested the SBI/SBSTA chairs to revise the "Synthesis of the Parties proposals based on further submissions, and to consolidate the text and place it before COP-6 for further consideration". Towards this end, the Chairman was asked to hold an inter-sessional meeting to assist the preparatory work of COP-6.

**(a) Clean Development Mechanism**

Many developing states stressed that the parties participating in CDM project activities must be responsible at all stages and in all aspects for the project activity in which they are participating. There were many proposals regarding sink enhancement projects. While some country Parties stressed the need for including forest protection initiatives under emission avoidance, others subjected to forests being included within CDM. Some suggested that projects related to sinks and source, both be covered under CDM. Views were also expressed calling for serious EIAs to be undertaken before CDM projects are sanctioned, taking into consideration the socio-economic aspects of the host country.

On the issue of funding CDM projects countries wondered whether financial assistance would be bilateral or multilateral, or even unilateral. Developing countries expressed concern that the CDM projects must be additional to ODA and other development assistance commitments. Some countries felt that unilateral funds could help non-Annex I countries to reduce their GHG, by way of added incentives. Views were also expressed for a strong participation by the private sector in CDM projects...

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[75] FCCC/CP/1999/8.

[76] PCCC/CP/1999/L.1.

### (b) Joint Implementation

Issues discussed in this context included whether decisions regarding certification or validation would be made by the parties involved or by an independent entity. While some suggested individual parties play such a role, others felt that bureaucratic bottlenecks would discourage Annex-I Parties from entering into JI projects...

### (c) Emission Trading

On the issue of emissions trading, views differed on rights and ownership. While some delegates sought the establishment of a common set of principles across all mechanisms, developed country Parties felt that trading should be founded on monitoring and reporting provided under Articles 5 and 7 of the Protocol. Several developing country Parties argued that the nature and scope of emissions trading must be known before undertaking the task of operational details. On the other hand, developed country Parties stressed the need for cost-effective mechanisms, with stringent monitoring and verification requirements.

Another contentious issue discussed was fungibility. Fungibility refers to the interchangeability of the emissions reduction credits among the mechanisms. Developed country parties expressed the view that Articles 3.10, 3.11 and 3.12, (QELTOs) of the Protocol do provide for the transfer of assigned amount units (AAUs), certified emission reductions (CERs) and emission reduction units (ERUs). This trading formula was opposed by a number of developing countries, who argued that while AAUs derived from past emissions are retrospective, CERs are derived from the future and hence are prospective. A number of other countries expressed their concern as to the difference in value of AAU and CER compliance and the safety of such operations.

### Compliance

The item on compliance mechanism was considered at the Joint Session of SBI/SBSTA. A joint working Group (JWG) on compliance was established for the informal exchange of views.

On the question of the design of such a compliance body, many countries were of the view that such a system should promote compliance and prevent non-compliance; it should also address issues of non-compliance. A number of developing country Parties argued that this whole mechanism should be based on the principle of common but differentiated responsibilities. Some Parties also opposed a triggering role to be given to the secretariat, as they were of the view that the secretariat's role should be limited to information gathering.

As regards the item Expert Review Teams (ERTs) some countries felt that the reports should automatically be submitted to the compliance committee through the Secretariat. Several developing countries expressed the view that ERTs should be mere fact-finding bodies and it would thus be inappropriate to give them a triggering role.

On the question of the structure of the compliance body, delegates felt that it should be a standing body. Such a body, they added, would ensure continuity and build confidence. Some felt that the body should be small and composed of scientific, technical and legal experts appointed by the governments acting in their proposed capacities. They also added that such a composition should ensure equitable geographical distribution. Others felt that there should be an equal number of Annex-B Parties and non-Annex-B parties. Views were also expressed calling for outside experts on the body to review the rules of procedures laid down by the body itself.

On the consequences of non-compliance, a number of delegates emphasized that knowing the consequences in advance would ensure predictability and deter non-compliance. While some delegates suggested an indicative list of consequences to be applied gradually, taking into account the cause, type, degree, and frequency of non- compliance, other developed countries felt that non-compliance should entail automatic sanctions. In a similar vein, views were expressed suggesting that the cost of sanctions should be lower than the cost of withdrawal from the protocol. Possible sanctions, some delegates suggested, could be the subtraction of excess emissions from the levels permitted during the subsequent period, with a penalty rate.

The COP-5 endorsed the JWG conclusions and called for intensifying its efforts to invite parties to submit by 31 January 2000 further proposals on compliance and to convene a workshop on matters relating to a compliance system in March 2000.

## AALCC Secretariat Comments

The Protocol has for the first time evolved a climate change regime wherein Annex-1 Parties are to undertake legally binding commitments. This mandate was discussed and sincere efforts were made to render operational the rules and procedure of the Protocol mechanisms at COP-6 in Buenos Aires. Despite the adoption of the Buenos Aires Plan of Action (BAPA), new contentious issues arose by way of LULUCF as regards the structure and composition of the compliance mechanism, besides the already existing matters of transfer of technology and capacity building.

The protocol mechanisms CDM, JI and emission trading are complex exercises involving the interplay of market forces. The complete scope and relevance of these should be explained by way of confidence building for the non-Annex-I Parties. Voluntary or any form of commitment by developing countries in the future will largely depend on the extent to which developed country Parties are able to implement their commitments. As socio-economic development and the eradication of poverty remain overriding priorities for the developing world, Annex-I Parties are expected to take a lead by supplying technological and financial resources, as stipulated in the Convention, that the Party should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities.

The G-77 countries accepted the CDM at Kyoto in the belief that new and additional funding as well as transfer of technology will flow through this mechanism. The CDM, in order to be workable and acceptable to all countries, will need to be transparent, equitable and accountable.

Under the emission trading regime, developed countries may transfer or acquire among themselves any excess reduction of CHG. An important issue in emission trading will be the question of fixing a ceiling on the purchase of emission credit. In the absence of a ceiling, a country can either substantially reduce or even get away from meeting its QELRO target simply because it can afford to pay; this would entail that there would be no significant global reduction of emission, but only a redistribution of emissions.

The period from COP-3 to COP-5 has witnessed ratification of the Protocol by 16 country parties, all of which are non Annex-I countries. To realize the aims and objectives of the Protocol by way of its entering into force in 2002 would require greater commitment, cooperation and understanding by Annex-I Parties. It may also be suggested that AALCC Member States despite having divergent views on a number of issues could come together at COP-6 to reach an agreement on issues of common concern.

## F. – Secretariat Study: Report on the Outcome of the Third WTO Ministerial Conference, Seattle, 1999

### A. Background

The 'Ministerial Conference' is the WTO's highest level decision-making body, which meets at least once every two years. The first Ministerial Conference was held at Singapore in December 1996 and the second conference at Geneva in May 1998.

At the last WTO Ministerial Conference held in May 1998 in Geneva, Ministers established a process under the WTO General Council to prepare for the Third Ministerial Conference. This process, which had been underway since September 1998 in Geneva, called on the General Council to submit recommendations regarding the WTO's work programme to Ministers, enabling them to take decisions at the Third Ministerial Conference.

The preparations launched at the Second Ministerial Conference in May 1998 gathered pace when the WTO's General Council met at a special session in September 1998. Proposals for items to be negotiated were first tabled in March 1999. By mid-September, more than 150 proposals had been tabled. These proposals related to a wide range of issues covering tariffs, anti-dumping, subsidies, safeguards, investment measures, trade facilitation, electronic commerce, competition policy, fisheries, transparency in government procurement, technical assistance, capacity-building and other development issues, and intellectual property protection. Besides this, the Agreement on Agriculture and Services contains a built-in agenda that calls for new negotiations from January 2000. For the sake of clarity, the issues related to the Third WTO Conference could be categorized as follows:

1. Built-in agenda: Agricultural products and services.
2. Implementation issues: providing greater content to the provisions relating to Special and Differential treatment; increased transitory

periods; improved markets for developing countries' exports (more particularly in agriculture and textiles); a meaningful role for developing countries in international standard setting in Agreements on Sanitary and Phytosanitary measures and Technical Barriers to Trade.

3. Issues related to the mandate of the First WTO Ministerial Conference (Singapore): Foreign investment, completion policies, transparency in government procurement.
4. Non-trade issues: Links between trade and labour; trade and environment.
5. New Issues: Electronic Commerce

Further, many countries had argued for a new round of negotiations to be launched at the third Ministerial Conference, to achieve a further reduction of tariffs on all industrial products. Variously named as the "Millennium Round" or the "Development Round", it was proposed that the new round could initiate negotiations on a multilateral agreement on investment and a global pact on competition policies. A section of the developing country Members staunchly opposed the start of a new round until the difficulties of the implementation of the Uruguay Round Agreements were addressed.

**The Third Ministerial Conference, Seattle, 30 November-3 December 1999**

The third Ministerial Conference was held at Seattle, United States of America 30 November-3 December 1999. Almost 4000 delegates from 135 WTO Member States attended the Conference. Ambassador Ms. Charlene Barshefsky, the US Trade Representative, was the Chairperson of the Conference.

The opening day of the meeting was marred by demonstrations by protestors representing trade unionists, environmentalists, feminists, farmers, and students, thus leading to the cancellation of the opening ceremony. The negotiations however commenced on the second day, December 1 1999. The negotiations took place in five working groups:

1. Agriculture working group
2. Working group on implementation and rules
3. Working group on market access
4. Working Group on the Singapore Agenda and other Issues.
5. Working Groups on trade and labour standards

The working groups were constituted with the aim of bridging the differences among various delegations on the issues under negotiations and to formulate consensual text, which could ultimately be incorporated in the Ministerial Declaration to be adopted on the final day of the Conference.

The Working Groups met on l-2 December 1999; in instances where the issues had been intractable the Chairperson resorted to the 'green room process', meeting with a small number of delegations to achieve consensus. Following is the summary

of the progress achieved by the Working Groups. This summary is based on the reports presented by the Chairpersons of the Working Groups to the Committee as a whole.

**(a) Agriculture Working Group:** The Working Group was chaired by Minister George Yeo of Singapore. Ministers discussed new paragraphs on agriculture for the draft ministerial declaration, which would launch the new negotiations in agriculture. The discussion broadly took two lines: one group favoured the ultimate goal of complete integration of agricultural trade into the same rules as other products, with the total elimination of export subsidies, and substantial increases in market access; the other group was of the view that agriculture is different from other sectors and hence rejected the ultimate goal of integrating agricultural trade into the same disciplines as other products.

The Chairman of the Working Group introduced a draft, which contained some compromise wording that struck a balance between different views on the key issues. The Chairman cautioned that this was his own draft based on consultations and not a negotiated document. The key issues addressed in the draft were:

(i) Integrating agriculture into the mainstream of WTO Rules;
(ii) The final objective for reducing export subsidies (whether or not to eliminate these);
(iii) Market access;
(iv) Domestic support, and
(v) Developing country issues.

**(b) Working Group on Implementation and Rules:** The Working Group was chaired by Minister Pierre S. Pettigrew of Canada. Many developing countries expressed concern and called for action regarding:

(i) Difficulty in implementing certain WTO Agreements; asked for extension of deadlines in TRIPS, TRIMS, customs Valuation; and
(ii) Imbalance in certain Agreements; called for changes in certain provisions of the Anti-Dumping, Subsidies and Textiles Agreements.

The United States said it is working with Quad Members (United States, Canada, EC and Japan) for a meaningful market access package for least-developed countries (LDCs). It indicated that it could be flexible regarding TRIMs, Customs Valuation, Agriculture, Sanitary and Phytosanitary measures (SPS), rules of origin and on making special and differential treatment (S&D) provisions more operational. The European Communities proposed duty-free treatment of LDC exports and said it will make a substantial contribution to the WTO technical cooperation programme. On rules, the EC supported negotiations on Anti-dumping, subsidies, State trading, technical barriers to trade, TRIMs, regional trade agreements, and environment-related issues. Japan viewed abusive use of anti-dumping, subsidies, State trading, technical barriers

to trade, TRIMs, regional trade agreements, and environment-related issues as of importance. Japan viewed abusive use of anti-dumping measures as a disguised form of protectionism that nullifies tariff reductions. Highlighting similar views expressed by the developing countries, Japan said that improvement of the Anti-dumping Agreement is the linchpin of the new Round.

The Chairperson of the Working Group proposed a draft text, based on his consultations with members of the Working Group. The draft text contains: proposed immediate decisions, subjects for negotiations, a new plan of action for the full and effective integration of LDCs into the multilateral trading system, and the reinforcement of technical cooperation for developing countries.

**(c) Working Group on Market Access:** The Working Group was chaired by Minister Mopho Malie of Lesotho. The deliberations at the Working Group revealed differences on matters relating to reductions in import duties and access to service markets, etc. The consultations included discussion on coverage and scope of the negotiations (whether they should cover all non-agricultural products or whether some could be excluded); the overall objective of the negotiations; non-tariff measures affecting access to markets; how to address developing countries' concerns, etc. Certain major trading countries called for a reference in the draft text to an effective increase in market access.

**(d) Working Group on the Singapore Agenda and other Issues:** The Working Group was headed by Minister Lockwood Smith of New Zealand. At the meeting held on 1 December 1999, Ministers discussed two issues: Investment, and Competition policy. The Chairman asked whether Members could agree to start negotiations on investment and/or competition as part of the round of negotiations that will incorporate agriculture, services and other topics. If not, could they agree to develop elements that might eventually be incorporated in agreements on investment and competition, then return to the question of whether or not to undertake negotiations at the Fourth Ministerial Session?

Positions voiced at the Working Group revealed that views were similar to those expressed at the First and Second Ministerial Conferences. The Chairman reported that while a large number of delegations called for negotiation to be launched at this Ministerial Conference, there were other delegations who said the issue is not yet ripe, and that study and analysis of these issues (investment and competition policy) should continue in the Working Groups set up at the Singapore Ministerial Conference in December 1996.

While briefing on the progress made at the Working Group on 2 December, the Chairman said that on TRIPS, delegations reiterated positions on extending protection of geographical indications to other products. On trade facilitation, many developing countries were reluctant to negotiate new rules on the topic and stressed enhanced technical cooperation.

**(e) Working Group on Systemic Issues:** Minister Juan Gabriel Valdes of Chile chaired this Working Group. Elements raised by Member Governments in this

discussion concerned: the restriction of documents, WTO organizational structure to improve transparency and decision-making, improving information flows, and enhancing public understanding of and participation in the working of the organization.

**(f) Working Group on Trade and Labour Standards:** This working group was established on 2 December with Vice-Minister Anabel Gonzalery of Costa Rica as its Chairperson. The objective of the Working Group to discuss labour standards was to consider proposals for creating a Working Group within the WTO, or a body operated jointly by a number of international organizations. Opinions differed, with a number of developing countries opposing the creation of either type of body.

It had been the practice of the earlier Ministerial Conferences to close with the adoption of a Ministerial Declaration that embodied the decisions arrived at by Ministers as regards the future work programme of the WTO. Contrary to this practice, the Third Ministerial Conference at Seattle adopted no Declaration. The Chairperson of the Conference, Ambassador Charlene Barshefsky, announced at the closing plenary session on 3 December that the Ministers had agreed to suspend the work of the Ministerial. Following are the excerpts from the remarks of Ambassador Barshefsky at the closing plenary session:

> Over the past four days, we engaged in intense discussion and negotiations on one of the core questions facing the world today: the creation of a global trading economy for the next century...
>
> However, the issues before us are diverse, complex and often novel. And together with this, we found that the WTO has outgrown the processes appropriate to all earlier time.
>
> Our collective judgement, shared by the Director-General (WTO), the Working Group Chairs and co-Chairs, and the membership generally, was that it would be best to take a time-out, consult with one another, and finish the job.
>
> Therefore, Ministers have agreed to suspend the work of the Ministerial. During this time, the Director-General can consult with delegations and discuss creative ways in which we might bridge the remaining areas in which consensus does not yet exist, develop an improved process which is both efficient and fully inclusive, and prepare the way for successful conclusion. The Ministerial will then resume its work.

The WTO Director-General Mr. Mike Moore, in his statement to the closing plenary session, referred to the decision to take a 'time out' and said that this is not the first time this sort of thing has happened. Several times, GATT meetings in the earlier days could not quite make it, as the issues were so complex. As regards the

future course he said: "We don't lose the work. We have got an in-built agenda, and we have got a mandate to continue doing some of this work".

**Review of the WTO's Dispute Settlement Understanding**

It may be recalled that the WTO Ministerial Decision on the Application and Review of the Dispute Settlement Understanding on Rules and Procedures governing the Settlement of Disputes (1994) had mandated the Ministerial Conference to "complete a full review of dispute settlement rules and procedures under the World Trade Organization within four years after the entry into force of the Agreement establishing the World Trade Organization and to take a decision on the occasion of its first meeting after the completion of the review, whether to continue, modify or terminate such dispute settlement rules and procedures".

Accordingly, the review process of the WTO's Dispute Settlement Understanding commenced in 1998. The exercise involved WTO Members' discussing a wide gamut of issues relating to the WTO's Dispute Settlement Understanding. The experience accruing from the WTO Members' interaction with the dispute settlement system since 1995 proved crucial in eliciting practical and specific feedback for the review process.

While it would not be possible to capture the whole range of issues discussed at the review, the following list attempts to highlight the broader contours of the issues raised at these meetings.

A. Notification of mutually agreed solution.

B. Consultations
   1. Role of consultations;
   2. Refusal to enter into consultations.
   3. Request for the establishment of a panel and the period of consultations.
   4. Joining in consultations.

C. Request for the establishment of a panel and panel's terms of reference.
   1. Right to join as a respondent.
   2. Specificity of the claims identified in request for the establishment of a panel.
   3. Modification or replacement of the measures at issue during the course of the proceedings.
   4. Third party establishment participation
   5. Selection of panelists.

D. Panel proceedings
   1. Participation of private counsel
   2. Panel's consultations with parties to facilitate a mutually satisfactory solution.
   3. Procedures and organization of the panel proceedings:
   a. Rules parties of verifying evidence presented by parties
   b. Time limit for submission of evidence

    c. Confidentiality of panel proceedings
    d. Proposed time table for panel work.
    e. Interim review.

E. Multiple complaints and third parties:
    1. Right to have recourse to the DSU procedures with regard to a matter previously addressed
    2. Rights of multiple complainants.

F. Appellate Review
    1. Time of appeals
    2. Remand authority
    3. Basis of Appellate review
    4. Time limits.

G. Adoption of panel and appellate body reports.

H. Surveillance of Implementation of Recommendations of the DSB.
    1. Determination of the "reasonable period of time"
    2. Review of implementation.

I. Compensation and Suspension of Concessions.

J. Issues of concern to developing countries.
    1. High cost of preparation and making presentations in WTO disputes.
    2. Increased legal assistance from WTO secretariat.
    3. Creation of a 'Trust Fund' to cover expenses under Article 27.2 of the Dispute Settlement Understanding.

K. Miscellaneous
    1. Standing to bring claims under the WTO Agreement
    2. Standard of review
    3. Payment of Costs.

The General Council of the WTO at its meeting in December 1998 decided to continue and complete the review process by the end of July 1999.[77] It is understood that a consensus has not been reached and that the deadline of July 1999 for the completion of the review process has lapsed. The chairman of the Dispute Settlement Body (DSB) had reported, to the Meeting of the General Council on 3-4 November 1999 that he was undertaking informal consultations with some interested delegations and expressed the hope that "it was still possible that proposals to amend the Dispute Settlement Understanding which might constitute a consensus could emerge in time for a decision at the third Ministerial Conference".[78]

As of 13 December 1999, the AALCC Secretariat is not aware of any progress leading to the completion of the WTO's review process on dispute settlement mechanism.

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[77] See WT /GC/ 15 at paragraph 3.

[78] See WT/GC/28 at p.1.

## General Comments

The fallout of the Seattle Conference has been debated in various fora from varying standpoints – political, legal, social, and economic. Without attempting to make any value judgement as to the role, motivations and compulsions for the anti-climax witnessed at Seattle, the Secretariat comments would be limited to the following two aspects.

While it is generally acknowledged that the Seattle agenda contained many highly contentious issues; the limited period of three days in which to resolve these issues was central to the decision to suspend the work of the Ministerial. Many observers feel that attempts to introduce trade-labour linkages into the WTO were crucial in influencing the outcome of the Conference. The issues of trade and core labour standards had been with the WTO since its inception. At the Ministerial Conference of GATT held at Marrakech in April 1994 to sign the treaty establishing the WTO, nearly all ministers expressed a point of view on the issue. The Chairman of that conference concluded there was no consensus among member governments, and thus no basis for agreement on the issue. At the first WTO Ministerial Conference concluded there was no consensus among member governments; and thus no basis for agreement on the issue. At the first WTO Ministerial Conference in Singapore in December 1996, the Ministers declared that the International Labour Organisation (ILO) is the competent body to set and deal with these standards; it rejected "the use of labour standards for protectionist purposes, and agree[d] that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question". In this regard they noted that the WTO and ILO Secretariats would continue their existing collaboration.

Since the Singapore Ministerial, the ILO has taken two significant steps in addressing the issue of workers' rights. In 1998, ILO Member Governments adopted the ILO Declaration on Fundamental Principles and Rights at Work and its follow-up. Under this Declaration, ILO member governments endorsed some basic principles which are included in the core ILO conventions, and agreed to respect these core conventions even if they have not ratified all of them. In 1999, ILO member governments agreed to prohibit and eliminate the worst forms of child labour.

Against this backdrop, some developed country WTO members had at the Seattle Conference once again demanded that the issue must be taken up by the WTO in some form so as to strengthen the public confidence in the WTO and the global trading system. Moreover, the greater freedom with which multinational companies can switch investment to countries where cheap and skilled labour is available (countries with lower labour standards) is perceived as having a significant effect on the level of investment, output and employment in developed countries. The developed countries see lower labour standards as giving the developing countries an 'unfair' competitive advantage. These members have suggested that the issue be brought into the WTO through the formation of a working group to study the issue of trade and core labour standards. To achieve this, efforts to persuade developing countries to agree to a programme for raising labour standards, in return for offers

of improved market access for their products in developed countries, have also been undertaken.

Such demands have alarmed the developing countries. The inclusion of 'core labour standards' on the agenda of the WTO has been fiercely opposed by developing countries for the following reasons:

(i) This measure is seen as a smokescreen for undermining the comparative advantage of lower-wage developing countries. The theoretical basis for international trade is differences in factor endowments, labour skills and consumer tastes resulting in differences in comparative advantage. Different labour standards, like differences in wage-rates, are seen as a legitimate source of comparative advantage by developing countries.

(ii) Developing countries view 'labour standards' as an inherent feature of the developmental level of a particular country. Hence, the proposal to include labour issues within WTO to achieve harmonization of labour standards and provide a 'level playing field' for internationa1 trade is felt to be unrealistic. They argue that better working conditions and improved labour rights arise through economic growth. Thus, the surest way of bringing about improved labour standards is to increase the prosperity of' developing countries. Increased market access to developing country products in developed country markets could be an important component in raising labour standards.

(iii) Developing countries have also questioned the rationale of using trade policies as a tool to enforce labour standards. The International Labour Organization is the most appropriate body to help improve social conditions in developing countries. It has also been pointed out that if core labour standards become enforceable under WTO rules, any sanctions imposed against countries with lower labour standards would merely perpetuate poverty and delay improvements in labour standards.

In the view of the AALCC Secretariat, the resolution of differences on this matter is a *sine qua non* for the survival and credible functioning of the World Trade Organization. While both viewpoints are plausible from their respective standpoints, what is required is a political will to appreciate the priorities and developmental concerns of the developing country members. A complete departure from existing practice and radical changes are not a common occurrence in the international system, let alone in a complex and nascent international trade system like WTO. The realization that the ongoing process of globalization has woven an intricate web; which unites the destinies of the developed and developing centuries, would hopefully temper the outlook of nations in addressing this problem.

Secondly, an important area that requires unified and sustained efforts from developing countries is the difficulties that arise from the implementation of the Uruguay Round Agreements. It may be noted that many developing countries have

expressed disappointment at the actual benefits accrued to them from trade liberalization over the past five years. In the face of mounting pressure from developed countries, the developing countries have argued for firstly addressing the difficulties arising from the implementation of existing obligations under Uruguay Round Agreements, before launching a new round of negotiations for further trade liberalization. A check-list of proposals that were articulated by developing countries at the Seattle Conference on this matter follows:

- Conversion of special and differential treatment provisions into concrete commitments
- Tighter restrictions on the use of anti-dumping measures
- Allowing developing countries more flexibility in applying food, animal and plant health and safety measures to their products
- Greater participation of developing countries in bodies which set food safety and technical standards
- Speeding up the integration of textile and clothing products into GATT rules
- Allowing developing countries more time and flexibility to implement the agreements on investment measures (TRIMs), and intellectual property (TRIPS)
- Allowing developing countries greater flexibility to subsidize agriculture and tighter restrictions in the use of subsidies by developed countries.

During the Seattle Conference, some developed countries have responded on a positive note as regards addressing the difficulties of least-developed countries (LDCs). However, it is noteworthy that the WTO regime makes a distinction between those concessions extended to developing countries, and those to least-developed countries. Therefore, it is imperative that developing countries evolve appropriate strategies to ensure that their difficulties are suitably addressed. It is in the interests of the developing and least-developed countries that they seek to consolidate the benefits from the existing WTO Agreements before they can undertake new commitments for future trade liberalization.

As to the future course of work that forms part of the unfinished business at Seattle, the built-in agenda as regards agriculture and services would start in January 2000. As for the progress made in Seattle, countries now know each other's positions to a large extent even if not captured in writing, but understood in discussions. Perhaps this could form the basis for basing further progress on the results arrived at Seattle.

The Thirty-ninth session of the AALCC may consider taking note of these developments and engage in exchange of views on the Seattle outcome. The Committee may also direct the Secretariat to continue to monitor the developments of the resumed work of the Third Ministerial Conference and also the completion of the review process of the dispute settlement mechanism.

## G. – Secretariat Study: Electronic Commerce-Legal Issues and Impact on Developing Countries

There is no universally agreed definition of electronic commerce. One of the earliest works on this subject, the UNCITRAL Model Law on Electronic Commerce (1996) does not define the term ‘electronic commerce’. The Model Law employs the term ‘electronic commerce’ as a generic term that would include the following modes of transmission based on the use of electronic techniques:[79]

1. communication by means of electronic data interchange (EDI), i.e., computer-to-computer transmission of data in a standardized format;
2. transmission of electronic messages involving the use of either publicly available standards or proprietary standards;
3. transmission of free-formatted text by electronic means, for example, through the Internet.

A typical business-consumer commercial transaction can be divided into three main stages: advertising and searching, ordering and payment, and delivery. Any or all of these may be carried out electronically and may therefore be covered by the concept of ‘electronic commerce’. Thus, in the WTO’s Programme on Electronic Commerce, the term ‘electronic commerce’ is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means.[80]

The advent of Internet technologies has contributed to the widespread adoption of electronic means of commercial transactions. Internet use worldwide is growing fast. Over the last five years the Internet has evolved from a network of some three million (predominantly United States-based) users into a commercial mass medium of over 100 million users worldwide. From the late 1960s to the early 1990s, the Internet was a communication and research tool used almost exclusively for academic and military purposes. This changed radically with the introduction of the World Wide Web (also called WWW or W3) in 1989. WWW is a set of programmes, standards and protocols governing the way in which multimedia files (documents that may contain text, photographs, graphics, video and audio) are created and displayed on the Internet. The popularity of the Internet in the 1990s is mostly due to the graphics intensive nature of World Wide Web.

Individuals, companies and institutions use the Internet in many ways. Business houses use it to provide access to complex databases, such as financial databases. Companies can carry out commerce on-line, including advertising, selling, buying, distributing products and providing after-sales services. Media and entertainment companies use the Internet to broadcast audio and video, including live radio and television programmes; to offer on-line chat and on-line news and weather pro-

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[79] WTO Committee on Trade and Development, Paper on “Development Implications of Electronic Commerce”, WT/COMTD/W/51, 23 November 1998.

[80] UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, 1996 (United Nations, New York, 1997), p.17.

grammes. Scientists and scholars use the Internet to communicate with colleagues and to carry out research. Individuals use the Internet for communication, entertainment, finding information, and to buy and sell goods and services.

The current populist notion of e-commerce tends to identify it with 'consumer shopping using the Internet', i.e., business-to-consumer transactions. In a business-to-consumer transaction, a potential customer can study the information on the Internet relating to the nature, utility and price of the products that s/he may wish to buy. Payment for the chosen product can be made through electronic fund transfer and in some cases the delivery of the product can be effected on-line. Thus, it is now possible to buy delicacies or auction antiques on the Internet. Music, books, films, etc. can be delivered on-line to the customers.

Despite its portrayal as a popular communications medium (e-mail, games, chat, etc.), there are many more business-to-business transactions. The Internet's greatest impact will come from the improvements in efficiency it introduces within firms that use the Internet to streamline product and market research, to improve production and marketing efforts around the world, to develop business alliances and better to integrate the online value chain, from suppliers to end customers. These business benefits suggest that the impact on trade will continue to grow and outstrip benefits to individuals.

**Electronic Commerce: Implications for Developing Countries**

The rapid growth of electronic commerce would have far-reaching implications for both developed and developing countries in the way that trade is carried out: more so for the developing countries, the exposure to electronic means of commercial transactions could open up in the area of trade new opportunities unavailable or under-utilized. Obviously, the transition to electronic commerce is not without its challenges. To put in place an operational system of e-commerce in developing countries would require far-reaching modifications in the prevailing legal and business structures. Against this backdrop, this part of the study proposes to examine the implications of e-commerce for developing countries.

At a general level, e-commerce offers a unique opportunity for developing nations to leap-frog stages of development and also to improve competitiveness, reduce transaction costs and improve customer service. The dividends of e-commerce are expected to be especially high for the smaller companies and economies, which have traditionally been hampered by limited information, high market entry costs and distance from markets. Its use by small and medium size enterprises (SMEs) in developing countries could result in the elimination of traditional barriers to trade, such as the distance from markets and the difference in size between enterprises. It offers an inexpensive means of soliciting bids, receiving orders, and purchasing goods and tracking sales, thus enabling SMEs to reduce administration costs and broaden their operations.

Emerging trends reveal that some traditionally natural resources and agricultural-based economies have over the years developed a well-educated labour force. With a 1ow-cost and highly skilled work force they have started to move towards 'service-

based' economies. The advent of e-commerce and this shift towards services is a beneficial coincidence for promoting trade in the developing countries. A recent study prepared by UNCTAD shows that developing countries in different geographical regions are presently delivering on-line blueprints, designs, engineering data, drawings and maps, professional and business services, travel and ticketing services, entertainment, computer-related services, and financial services.

For governments the development of e-commerce generates substantial investment opportunities in the public and private sector in the areas of technology, training and infrastructure development.

With more and more major trading companies using electronic means of communication, traders from developing countries are under pressure to adopt the new trading patterns. A study prepared by the UNCTAD Secretariat quotes the following observations of a World Bank Report:

"Already some organizations will only accept new supplies if they can demonstrate an EDI capability. There are cases of companies, particularly traditional, small, older firms who have gone out of business because of inability or unwillingness to comply or disbelief in the need to comply".

In such a scenario, it is mandatory for developing countries rapidly to adopt the emerging patterns of electronic communication, failing which they run the risk of being excluded from participation in international trade in the future.

In the light of the above observation, the following factors can be identified as constraints for growth of e-commerce in developing countries:

**(a) Infrastructure-related difficulties**: A frequently cited constraint is related to infrastructure. The International Telecommunications Union (ITU) notes that developed countries have 312 Internet Service Providers (ISPs) for 10,000 people. In comparison, there are six Internet Service Providers for 10,000 people in developing countries; there are 2.5 telephone lines per 100 people in developing countries as against 54 lines for 100 people in the developed world. Thus, without a critical mass of computers and supporting infrastructure, it would be difficult for firms in a developing country to meet the challenges of the emerging electronic trade.

**(b) Access to a computer**: Access to computers represents a problem in the developing countries, let alone access to the Internet. In developing countries, which have a low *per capita* income, the high cost of the computer renders it a luxury item. The monthly cost of Internet access must be added to the cost of equipment and connection. ITU reports that the average cost of a connection to enable a subscriber to dial up the Internet in Africa is US$ 75 per month, while it costs only US$ 15 in the United Kingdom and US$ 10 in the United States. In addition to the fixed costs of Internet access, the telecommunications operators levy additional charges on use of the telephone lines, on a per minute basis. This reduces the time that users spend on-line, thus hampering meaningful e-commerce activity.

**(c) Lack of an adequate legal frameworks**: An important concern of many countries, more particularly the developing countries, is the inadequacy of existing laws to

regulate electronic commerce. Many of the developing countries have in force laws which contemplated nothing beyond paper-based commercial transactions. Thus, even where the business community is willing to adopt electronic technologies for transacting business, the lack of suitable legal mechanisms for protecting and promoting this practice could act as an inhibiting factor.

**(d) Security concerns**: The issue of business being conducted over the Internet raises important security issues. Companies doing business over the Internet must have sophisticated security measures in place so that information such as that relating to credit cards, bank accounts, and social security numbers cannot be accessed by unauthorized users. A small percentage of the populations in the developing countries use credit cards, with many now regarding even traditional banking institutions with distrust or suspicion. That said, even business institutions in deve1oping countries appear to be using Internet technologies for the purposes of marketing and internal communications rather than for commercial transactions. The lack of an Internet culture and the traditional mind-set of populations which view with mistrust all electronic communications are serious constraints in some developing countries. The development of efficient security systems to preserve the integrity and confidentiality of information on the Internet and sensitizing national institutions to these issues would go a long way in overcoming the problem.

**Legal and Policy Issues**

Efforts to implement e-commerce on a global scale require consensus and agreements on many issues. Several international and regional bodies are currently involved in the structuring of suitable frameworks for facilitating the global adoption of e-commerce. Broad outlines of the issues involved in the smooth and efficient functioning of electronic commerce follow:

1. **General**
   (a) Role of the State; (b) Role of International Organizations
2. **Economic and Social Issues**
   (a) Taxation; (b) Electronic Cash; (c) Banking regulations; (d) Market access; (e) Impact on Workforce; (f) Customs duties; (g) Risks of Monopolization; (h) Cultural issues – content and censorship.
3. **Legal Issues**
   (a) Jurisdiction; (b) Electronic contracts; (c) Privacy and data protection; (d) Consumer and seller protection; (e) Digital signatures, encryption; (f) Intellectual property rights; (g) Fraud, Money Laundering; (h) Liabilities of Internet Service Providers; (i) Dispute settlement
4. **Technology Issues**
   (a) Telecommunications infrastructure; (b) Security; (c) Encryption; (d) Electronic payment systems; (e) Authentication and data integrity; (f) Internet governance – Standards and Domain Names, etc.

## 5. Human Resource Development: Information Technology Training

The above said enumeration reflects the wide range of issues that need to be addressed in the formulation of a functional regime for e-commerce. Efforts to address these issues are at different levels of progress in various international and regional fora. The present study is not aimed at examining the ongoing work on all these issues, but is realistically limited to providing an overview of the current international electronic commerce.

Many countries have expressed concerns that the existing legal frameworks may not adequately accommodate electronic commerce, and perhaps existing law supportive of paper-based systems may prove to be a barrier to increased global electronic trade. In addition to the concern that lack of harmonization in the rules generally applicable to e-commerce work on this area had been the one initiated by the United Nations Commission on International Trade Law (UNCITRAL).

## A. United Nations Commission On International Trade Law (UNCITRAL)

As early as 1985, UNCITRAL called upon all Governments to review legal requirements of a handwritten signature or other paper-based methods of authentication on trade-related documents, with a view to permitting the use of electronic means of authentication. This recommendation was endorsed by the UN General Assembly through Resolution 40/71. On the basis of data obtained by its monitoring activities, the UNCITRAL in 1992 embarked upon the preparation of legal rules on the subject, which culminated in the adoption of the Model Law on Electronic Commerce in June 1996. The UN General Assembly also adopted the Model Law in December 1996.

### (i) UNCITRAL Model Law on Electronic Commerce (Model Law)

In most countries existing national laws do not contemplate the use of modern means of communication. On the contrary: there are national and international laws imposing restrictions on use of electronic communication techniques by requiring "written", "signed" or "original" documents. The Model Law is accompanied by a "Guide to Enactment" and is aimed towards facilitating electronic trade by providing a set of internationally acceptable rules that can be used by States in enacting legislation to overcome the legal obstacles mentioned above. To be more precise, the Model Law provides uniform solutions; these could be applied internationally to various issues on the law of contracts, such as rules on time, place of dispatch, receipt of electronic communications and the use of electronic acknowledgements. As the transition from a paper-based to an electronic environment would involve issues of form and evidence of legal acts, the Model Law seeks to formulate equivalents of those concepts applicable to contracts to those transactions carried out by electronic means of communication.

Delineating the scope of the Model Law, Article 1 provides that this Law applies to any kind of information in the form of a data message used in the context of 'commercial activities'. Secondly, as stated in the introductory part of this study the

Model Law does not define the term 'electronic commerce', but uses it as a generic term including electronic data interchange (EDI), e-mail and the Internet, as well as the less sophisticated techniques of telecopy and fax.

The Model Law is based on the following three fundamental principles:

**(a) Functional Equivalence** involves reference to legal situations familiar in the world of paper documents, such as communication in writing, the expression of intention by means of signed documents, and the distinction between original and copy; also, the determination of how these situations can be initiated or reproduced in the environment of electronic communications. For example, Article 7 of the Model Law identifies the two basic functions of a signature, i.e., to identify the signer and to indicate the signer's approval of the content of a message; it accordingly establishes the equivalent requirements which would have to be met by any electronic signature technique to satisfy the legal requirements of a 'signature'. However, it is important to note that the Model Law does not attempt to define a computer-based equivalent to any kind of paper document. Instead, it singles out basic functions of paper-based form requirements, with a view towards providing criteria which, once they are met by data messages, enable such data messages to enjoy the same level of legal recognition. The functional-equivalent approach has been employed in Articles 6 to 8 of the Model Law with respect to the concepts of 'writing', 'signature' and 'original', but not with respect to the other legal concepts addressed in the Model Law.

**(b) Media or Technology Neutrality**: The rules of the Model Law are 'neutral rules' in the sense that they do not distinguish between types of technology and thus could be applied to the communication and storage of all types of information. One of the consequences of the media-neutrality approach is that it is easier to conceptualize the form of legal acts based on electronic transactions, thus dissociating these from the traditional concepts involved in paper-based transactions. Article 5 of the Model Law embodying the notion of media neutrality reads as follows: "information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message."

**(c) Party Autonomy**: The Model Law recognizes the importance of contract and party autonomy. The non-mandatory provisions of the Model Law, for example, those provisions that relate to formation and validity of contracts, recognition by parities of data messages, attribution of data messages, acknowledgement of receipt, time and place of dispatch and receipt of data messages, leave the parties free to organize the use of electronic commerce among themselves. Article 4 of the Model Law embodies the principle of party autonomy with respect to the provisions contained in Chapter III of Part One.

The Model Law is divided into two parts, one dealing with electronic commerce in general and the other addressing electronic commerce in specific areas. Part Two of the Model Law, dealing with electronic commerce in specific areas, contains only one chapter dealing with e-commerce as it applies to the carriage of goods. Other aspects of e-commerce might need to be dealt with in the future, and hence the Model

Law can be regarded as an open-ended instrument, to be complemented by future work.

Chapter I set out the scope, definition and other interpretative clauses. Chapter II of the Model Law provides for the application of legal requirements to data messages. Under Chapter II, Articles 6, 7 and 8 lay down requirements that a data message should meet in order to be treated as "writing", "signature" and "original". These provisions are essential for removing some of the main obstacles to the development of electronic trading as a result of legal requirement for the use of traditional paper-based documentation. Provisions dealing with the admissibility of data messages as evidence in legal proceedings and provisions regarding the storage of data messages are set out in Article 9 and 10. As the Guide to Enactment of the UNCITRAL Model Law states that the provisions contained in Chapter II should be regarded as stating the minimum acceptable form requirement and are, for that reason, of a mandatory nature.[81]

Chapter III entitled "Communication of Data Messages" contains provisions of the nature usually found in trading partner agreements. Aspects covered by this Chapter include: the formation and validity of contracts, recognition and validity of data messages as between the parties, attribution of data messages, acknowledgement of receipt, and time and place of dispatch and receipt of data messages. These provisions are to apply in cases where trading parties have omitted to address such issues in their communication agreement or, alternatively, for the preparation of such agreements. Therefore, the provisions of Chapter III are non-mandatory in character, meaning thereby that parties are free to modify the provisions of this chapter between themselves, provided that they do not affect the rights and obligations of third parties.

Thus, the Model Law is not intended to cover every aspect of the use of electronic commerce. At the risk of repetition, it is worth restating that the Model Law is aimed at facilitating the use of modern communication techniques and to provide certainty with the use of such techniques in situations where obstacles or uncertainty resulting from statutory provisions could not be avoided by contractual stipulations. The Model Law is a "framework" law requiring additional procedural rules and regulations necessary for implementing such communication techniques in enacting States.

### (ii) UNCITRAL – Current Work on Digital Signatures and Certification Authorities

On the completion of its work on the Model Law, UNCITRAL in 1997 entrusted the Working Group on Electronic Commerce with the preparation of uniform rules on the legal issues of 'digital signatures' and 'certification authorities'. For business and governments to function in the new environment of the Internet, it is widely recognized that a mechanism reliably to authenticate electronic communication is critical.

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[81] See Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996), para 21.

In a simplified form, a digital signature is an encrypted code attached to a message indicating the origin of the message. Each subscriber has a secret, private 'key' (something like a password) and a public key. A digital certification authority will hold the encryption keys.

Alhough work on the preparation of uniform rules began in 1998, the Working Group, given the speed at which technology is developing, has experienced difficulties in coming to an understanding of the new legal issues as they arise, and how these issues could be addressed within an internationally acceptable legal framework.

Besides digital signatures and certification authorities, there are a host of other issues that UNCITRAL may address in the future. These issues include electronic transfer of rights in tangible goods; electronic contracting; jurisdiction and applicable law; and dispute resolution.[82]

## B. World Intellectual Property Organisation (WIPO)

The emerging practice of electronic or on-line delivery of publications, music, films and software demands legislative attention for many areas of intellectual property rights, so as effectively to restrict possible misuses of technology. The sustained and continuous growth of these on-line delivery systems is inextricably tied up with the levels of security that can be extended to artists and companies against the illegal transmission and distribution of creative works. The task of WIPO in formulating standards of intellectual property rights (IPRs) for e-commerce largely relates to policy issues. While the practice on e-commerce is still evolving, the process of addressing IPRs would involve discussions with legal experts, technical and software related personnel, professional and standard-setting organizations, for example, to highlight the complexities involved in this task. The on-going work as regards the protection of databases and on-line delivery mechanisms is briefly stated below:

**(a) Protection or databases** In computer technology, a database is defined as a "systematic organization of files for exploitation, by one or more data processing systems". Compared to this definition, the WIPO Committees defines a database in a broader way: "database" means a collection of independent works, data or other materials arranged in a systematic or methodical way and capable of being individually accessed by electronic or other means. Many experts on this subject[83] have noted that the definition of databases for purposes of protecting intellectual property should fulfil two criteria: (i) the definition must capture and reflect the technological developments in the field of databases; (ii) at the same time, the definition should

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[82] For an elaborate treatment of UNCITRAL's work, see Gerald Herrmann, "Establishing a Legal Framework for Electronic Commerce: The Work of the UNCITRAL", Paper presented at the WIPO International Conference on Electronic Commerce and Intellectual Property in Geneva, September 1999.

[83] See presentation by Antonio Mille on "Protection of Databases" at the International Conference on Electronic Commerce and Intellectual Property, Geneva, September 1999.

be structured in a restrictive manner so as to grant protection only to those database components which involve a legal interest. The most general form of protection is provided by copyrights, but on occasion it may also be provided by performers' rights, trademark law, the law of secrecy, and ordinary contract law. The selection of the legal criteria and form of protection for databases is an area that is currently being debated and may require a number of policy decisions before it can be formulated in legal terms.

**(b) Museums on-line:** Just a few years ago museums viewed web sites as little more than "electronic brochures". Today, museums are mounting "virtual exhibitions", using the most advanced technology to create 3-D environments and multimedia experiences for a global audience. The decision of museums to engage in electronic commerce gives rise to a whole new set of issues, such as whether museums would take steps to limit the risk of unauthorized reproduction, alteration and distribution of their digital assets in cyberspace. Commercial aspects of museums on-line involve issues concerning the direct marketing and pricing of museum merchandise; museum branding; trademark and goodwill in cyberspace; licensing museum branding; trade-mark and goodwill in cyberspace, and licensing museums' digital content. Legal frameworks for any evolving technology have to be based on the lessons gained from their actual application to societal needs. Similarly, the appropriate rules for protection of data relating to museums on-line, currently still evolving, can be consolidated by examining the practical problems that arise in the practice of commercial transactions of museums through the medium of the Internet.

**WIPO Internet Treaties:** The World Intellectual Property Organization (WIPO) is paying particular attention to the implementation of trademark, copyright and patent protection safeguards in electronic commerce. WIPO's work in this area includes the formulation of the two following treaties:

(a) WIPO Copyright Treaty (also known as WCT);
(b) WIPO Performances and Phonograms Treaty (WPPT)

Both treaties, collectively termed as "Internet Treaties", were adopted in December 1996 and require instruments of ratification or accession by 30 countries for them to enter into force. The treaties respond directly to the 'digital agenda' in their provisions dealing with: (i) the application of the reproduction right to the storage of works in digital systems; (ii) the limitations and exceptions applicable in the digital environment, (iii) technological measures of protection; and (iv) rights management information. Other features of the treaties are the grant of distribution rights and rental rights.[84]

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[84] A more detailed enumeration on the treaties can be found in Jean Chin, "International Protection of Copyright and Related Rights: Treaties Administered by WIPO", Paper presented at the "AALCC's Seminar on issues relating to the Implementation of Intellectual Property Right", New Delhi, 15-16 November, 1999.

At a substantive level, the treaties accomplish a number of extremely important economic objectives:[85]

1. The treaties make it clear that copyright holders are able to control the electronic delivery of their works to individual Members of the public.
2. The treaties confirm that existing national copyright laws and the international copyright system apply in a generalized manner to all technologies and media, and not in a technology-specific manner. This has particular relevance with respect to the right of reproduction and its limitations in digital media.
3. The treaties require countries effectively to prevent the circumvention of technical measures and interference with the rights of management information used by copyright holders to protect or identify their works.

**WIPO's Work in Domain Names:** One of WIPO's main tasks in the area of e-commerce is to resolve the issue of domain name disputes, a critically important area given the contentious relationship between domain names and trademarks. The domain name system facilitates the finding of Internet addresses (e.g., web pages and e-mail accounts) by easy-to-remember and user-friendly names, instead of numbers. Thanks to the domain name system, users can find the server at 140.147.248.209 simply by typing www.congress.gov into their browsers.

WIPO has launched an international process to develop recommendations concerning the intellectual property issues associated with Internet domain names, including dispute resolution. The recommendations resulting from the WIPO Internet Domain Name process will be made available to the Internet Corporation for Assigned Names and Numbers (ICANN), a new organization that has been formed to manage the Internet Domain Name System.

**WIPO E-business environment:** WIPO has taken the lead in successfully employing e-commerce for its institutional activities, thus enabling the transformation of key WIPO business processes through the use of WIPO net and related Internet technologies. It is interesting to note that the WIPO Arbitration and Mediation Centre has developed an Internet-based, on-line dispute resolution system that can provide neutral, speedy and cheap means of resolving disputes arising out of electronic commerce (more generally, disputes relating to domain names, trademarks and intellectual property) without the physical movement of persons or things.

**WIPO's Digital Agenda:** Given the growing importance of e-commerce, WIPO has developed a programme to focus on maintaining a stable and positive environment for the continuing development of electronic commerce. In pursuance of this objective, the Director General of WIPO, H.E. Dr. Kamil Idris presented a nine-point "Digital Agenda" at the close of the WIPO Conference on Electronic Commerce and Intellectual Property held at Geneva in September 1999. WIPO's Digital Agenda is a set

[85] See H.B. Rosen, "From Physical Product to on-line Delivery: Electronic Delivery of Publications, Music, Films and Software", Paper presented at the W1PO International Conference on Electronic Commerce and Intellectual Property, Geneva, September 1999.

of guidelines and goals that reflect the Organization's determination to seek solutions to problems raised by the impact of e-commerce on intellectual property rights.[86] The highlights of the WIPO's nine-point digital agenda are:

(a) Broaden the participation of developing countries through the use of WlPO net and other means:
(b) Entry into force of WIPO Copyright Treaty and WIPO Programmes Treaty before December 2001;
(c) Promote adjustment of the international legislative framework to facilitate e-commerce; and
(d) Establish appropriate principles at the international level for determining the circumstances of intellectual property liability of Online Services Providers (OSPs), etc.

**c. World Trade Organisation (WTO)**

The range of WTO disciplines that could affect electronic commerce is broad, involving services, intellectual property, goods, government procurement, TRIPS and technical barriers to trade. WTO has only recently begun to consider Internet trade as a global trade issue.

The Second WTO Ministerial Conference in May 1998 adopted a Declaration on Global Electronic Commerce.[87] The Declaration mandated the WTO's General Council to establish a comprehensive work programme to examine all trade-related issues relating to global electronic commerce and to submit a report on the progress of the work programme to the Third WTO Ministerial Conference. The Declaration noted the importance of the economic, financial and development needs of developing countries, and reaffirmed the current practice of not imposing customs duties on electronic transmissions. WTO's position is that just as member countries do not impose customs duties on telephone calls, fax messages and e-mail when they pass national boundaries, they should not impose customs duties on electronic transmissions over the Internet.

The General Council had in accordance with the mandate of the second WTO Ministerial Conference adopted a Work Programme on Electronic Commerce in September 1998. The Work Programme directs various subsidiary bodies to examine issues affecting the various WTO legal frameworks, while the General Council itself will consider any crosscutting issues and the issue of imposition of customs duties on electronic transmissions.

The General Council is to report on the progress of the work programme and other recommendations to the Third WTO Ministerial Conference to be held at Seattle in November-December 1999. In the preparatory process to the Seattle meeting a number of proposals have been advanced by WTO Members as to the future work programme on e-commerce. Following are the broad areas that can be gathered from

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[86] For full details of WIPO's Digital Agenda, see «http://commerce.wipo.int/press/ pr 99-185.htm1>.
[87] WT /MIN(98)/DEC/.

the examination of these proposals, which may engage the attention of the WTO in the next few years:

(i) Extension of current practice of enabling cyberspace to remain duty-free;
(ii) The advent of digitized products blurred the boundary between goods and services. Members need to discuss how to classify the contents of such an electronic transmission – whether as goods or services
(iii) Most market access commitments for electronic Commerce activities fall under the Members' service commitments under General Agreement on Trade Services (GATS). As specific market access and national treatment commitments in services depends on WTO Members' explicit schedules to GATS, and since electronic commerce may give importance to a abroad range of services, it may be necessary for Members to review the extent to which the range of their GATS commitments encompass electronic commerce-related services
(iv) Examine the emerging solutions to protect intellectual property rights of content holders in the electronic distribution media and identify means of integrating such solutions into existing international disciplines
(v) Specific issues in relation to Internet Access Service Providers (IASP) may need to be considered. E-commerce requires access to the Internet. IASPs in turn require access to telecommunications network, usually by way of leased circuits. Thus the access to and the use of telecommunication networks may have to be examined under the WTO's Basic Telecommunications Agreement
(vi) As the benefits of e-commerce are directly related to the level of a country's infrastructure development and technology capacity, the WTO in co-ordination with UNCTAD, WIPO and other international agencies could consider providing technical assistance programmes in building infrastructure capabilities and also ensuring access to the requisite technology particularly for developing countries.

**D. United Nations Conference on Trade and Development (UNCTAD)**

The work of UNCTAD on the subject of e-commerce has primarily been addressed by one of its subsidiary bodies – the Commission on Enterprise, Business Facilitation and Development. The focus of the Commission's work on this subject has so far been directed towards:

(a) capacity-building;
(b) the identification of obstacles of developing countries' participation in electronic commerce; and
(c) the exchange of information and experiences in the area of electronic commerce.

A significant part of UNCTAD's work is being developed in the context of the preparation of regional workshops on e-commerce and joint studies with other relevant organizations in areas of particular interest to developing countries (e.g., links between electronic commerce and trade facilitation). In addition a series of background papers has been produced by UNCTAD Secretariat; these offer worthy insights as to the implication of e-commerce for developing countries.[88]

## E. Work in other fora

### (i) Organization for Economic Cooperation and Development (OECD)

OECD has focussed primarily on the economic and social impact of electronic commerce. In October 1998, OCED in conjunction with the Government of Canada held a Ministerial Conference ("the Ottawa Conference") on "A Borderless World: Realizing the Potential of Global Electronic Commerce". The outcomes of the Ottawa Conference were:

(i) OECD Action Plan for Electronic Commerce;
(ii) The Report on International. Bodies: Activities and Initiatives in Electronic Commerce; and
(iii) Global Action Plan for Electronic Commerce prepared by Business with. Recommendations for Governments

In addition Ministerial Declarations were adopted on OECD's further work on privacy, consumer protection, and authentication.

The OECD Action Plan for Electronic Commerce is based on four thematic aspects: (i) building trust for users and consumers; (ii) establishing ground rules for the digital market place; (iii) enhancing the information infrastructure for electronic commerce; and (iv) maximizing the benefits of electronic commerce. As regards legal frameworks, the Conference concluded that legal frameworks should be established only where necessary, should promote a competitive environment, and should be clear, consistent and predictable.

### (ii) The Commission of the European Communities

The European Commission has been very active on this subject and under its Trade Electronic Data Interchange System (TEDIS) programme it has published

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[88] See the following document related to e-commerce, available at website: http://www.unctad.org. "Telecommunications, business facilitation and trade efficiency: Some major implications of the Global information Infrastructure (GII) for trade and development" (TD.B/COM.3/EM.3/2) "Policy issues relating to access to participation in electronic commerce" (TD/B/COM.3/16); "Implications for trade and development of recent proposals to set up a global framework for electronic commerce" (TD/B/COM.3/ 17); "Training in the area of electronic commerce: needs and possibilities" (TD/B/ COM.3/EM.6/2); and "Electronic Commerce: Legal Considerations" (UNCTAD/SDTE/BFB/1).

reports on the legal status of electronic commerce in its Member States, prepared a European Model EDI Agreement, and conducted studies on the recognition within Member States of digital and electronic commerce. In November 1997 the Commission set out its approach to commerce in the document entitled "A European Initiative in Electronic Commerce". In May 1998, the Commission issued a Proposed Directive on a Common Framework for Electronic Signatures. The Commission issued in November 1998 a proposal for a "European and Council Directives on certain legal aspects of electronic commerce in the internal market". In essence the proposal seeks to establish a coherent legal framework for single market concepts of free movement of services and freedom of establishment.

### (iii) Asia-Pacific Economic Cooperation Forum (APEC)

The APEC is devoted to promoting open trade and economic development among the 21 Pacific Rim Countries. In November 1997, the APEC Ministerial Meeting directed the formulation of a Work Programme on Electronic Commerce. An *Ad Hoc* Task Force on Electronic Commerce was established to manage this work programme in February 1998. The work programme as formulated includes:

- identifying impediments to SME utilization of e-commerce;
- identifying the economic costs that inhibit increased uptake of e-commerce, including those imposed by regulatory and market environments;
- establishment of a virtual multimedia resource centre; and
- work on paperless trading

Besides, other bodies like the UN Economic Commission for Europe (ECE), International Chamber of Commerce and a number of other intergovernmental and private, non-profit, promotional bodies are also engaged in examining various aspects of electronic commerce.

## v. Conclusion

The examination of this study reveals that the efforts at fashioning an appropriate international legal and policy framework for electronic commerce are still evolving. Measures to address the promotion and regulation of e-commerce cut across various domains that include legal, trade, intellectual property rights, technology, infrastructure, human resource development, cultural and other regulatory issues. With many bodies working on different aspects of e-commerce the picture is not clear as to what direction the future course of developments may take.

Meanwhile, technological developments in e-commerce are occurring at a rapid pace and the international community cannot afford to wait for all aspects of the subject to be examined and finally articulated in an appropriate legal and regulatory framework. Given the significant opportunities offered by e-commerce to developing countries, States need to start by enacting the appropriate legislation and other policy framework to enable a culture of electronic transactions to take become rooted at

the national level. Refinements and perfecting the existing framework form a continuous process; experience with e-commerce transactions could provide the materials for any further amendments in their endeavours towards facilitating effective e-commerce.

Though a number of issues have been outlined above, it is not assumed that all are of the same nature or importance in facilitating electronic commerce at the national level. While some issues involve policy rather than law, on certain other legal issues there is no consensus how best to proceed. In such a situation, it is necessary to identify the criteria through which countries could legislate on relevant aspects of e-commerce.

In this regard, the UNCTAD Secretariat in one of its studies proposes that developing countries could identify:

(i) those areas in which an international consensus has emerged on how to treat electronic commerce issues;
(ii) those areas where domestic action is absolutely necessary to foster an environment favourable to electronic commerce, and
(iii) those areas where it is possible for developing countries to resolve the legal issues in an expedited manner.

If a particular area falls into one or more of these categories, the UNCTAD study suggests that it would be expedient to act with respect to the particular issue.

In the light of the on-going work in many Asian-African countries towards the enactment of national legislation and the establishment of a regulatory framework for e-commerce, it is suggested that the following measures could be considered:

(a) In the area of commercial law and electronic commerce, the UNCITRAL Model Law embodies a minimalist approach, represents an international consensus and is adaptable to countries with different legal systems. A country wishing to revise its commercial law in order to have these accommodate e-commerce can take advantage of the Model Law.
(b) Governments could take the lead through playing the role of a model user of e-commerce, thus promoting its use by others. There is also a need to foster cooperation among and between the public and private sectors
(c) Developing countries have a stake in helping to shape the emerging international consensus on e-commerce. To this end cooperation and coordination among countries with similar problems and concerns is critical to ensuring that the emerging regime on the subject is truly global and is sensitive to the special needs of the developing countries.
(d) Infrastructure and human resource development form an important area that requires attention by developing countries. In this regard, countries need to work closely and effectively to utilize the technical assistance and capacity-building programmes launched by UNCTAD, WIPO, the World Bank, and other relevant organizations.

It may be noted that while many Asian African countries have started to reform their national laws in this regard, few other AALCC Member States have as yet put in place a fairly well developed legal and regulatory mechanism for the promotion and administration of electronic commerce. The Special Meeting on e-commerce is a timely occasion for the AALCC Member States to take stock of the international and regional developments on the subject; furthermore, they can exchange views and share their national experiences on measures undertaken to improve infrastructure facilities, capacity-building and the reforming of national legislation for the promotion and facilitation of electronic commerce. It is hoped that this background note prepared by the Secretariat may provide the basis for initiating discussion at the Special Meeting.

# CHRONICLE

# CHRONICLE OF EVENTS AND INCIDENTS RELATING TO ASIA WITH RELEVANCE TO INTERNATIONAL LAW
July 1999 – June 2000

Ko Swan Sik*

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* General Editor. For the considerations underlying the Chronicle, see the "Editorial Introduction" in 1 *AsianYIL* (1991) 265.

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## ARMS SALES AND SUPPLIES

*See*: Divided states: China

## ASIA-PACIFIC ECONOMIC COOPERATION FORUM (APEC)

APEC held its annual meeting at Auckland, New Zealand, starting 9 September 1999. The trade ministers agreed to take a stand against farm-export subsidies (aimed at the EU), but on little else, except items such as duties on electronic commerce and government procurement. They did, however, endorse a position advocated by Japan, calling for the next round of WTO global trade talks to be "structured so that the outcomes are finalized, bound and fully implemented as a single package". This was contrary to the preference of the US which called for negotiations on a sector-by-sector basis. (IHT 09-09, 10-09, 11/12-09-99)

## ASSOCIATION OF SOUTHEAST ASIAN NATIONS (ASEAN)

(*See also*: Territorial claims and disputes)

### "Flexible engagement" approach

The notion of "flexible engagement" referred to by the Thai foreign minister in July 1998 (*see* 8 Asian YIL 257) was further specified in a Thai "non-paper" of the same month, as (a) a continued commitment to the establishment of an ASEAN regional community; (b) a continued commitment to non-interference as the cardinal principle for the conduct of relations; (c) *responsibilities* for contributing to the achievement of common regional goals and for managing bilateral differences and improving bilateral relations, and *rights* to preserve one's own identity and to espouse or articulate one's own beliefs and values; (d) a commitment to non-interference that must be subjected to reality tests and must, accordingly, be flexible, because as the region becomes more interdependent, the dividing line between domestic affairs and external or transnational issues is less clear. Many "domestic" affairs have obvious external or transnational dimensions, adversely affecting neighbours, the region and the region's relations with others. In such cases, the affected countries should be able to express their opinions and concerns in an open, frank and constructive manner, which is not, and should not be, considered "interference" in the domestic affairs of fellow member-states. (Courtesy K. Kittichaisaree)

### Annual foreign ministers meeting

The annual meeting was held at Singapore on 23-24 July 1999. (IHT 24/25-07-99)

### East Asian attempts to increased integration

The Third Informal ASEAN Summit Meeting took place on 27-28 November 1999. There were reports about moves to bring South-east and North-east Asia closer together, based on a plan to enlarge the proposed ASEAN Free Trade Area to include

China, Japan, South Korea and eventually other North-east Asian countries. (IHT 26-11-99) (*see infra*, at 398)

## BORDERS, BORDER DISPUTES AND BORDER INCIDENTS
(*See also*: State succession)

### Bangladesh – India

The two countries exchanged fire during three days in August 1999 over a piece of disputed land 210 kilometres southeast of Dhaka. The gun battle ended after talks were conducted between the two sides on a telephone hot line.

The battle began when farmers from the two sides clashed over a disputed shoal on the Muhuri River along the border. Some Indian farmers reportedly intruded into an area and began fencing it, and Bangladeshi farmers tried to push them back.

The disputed 120-acre shoal had been claimed by both countries since the 1960s. Bangladesh and India share a 2,700-mile frontier, and in the last two decades their security forces had traded fire 29 times in border disputes. (IHT 24-08, 26-08-99)

### East Timor – Indonesia

Troops of the multinational force in East Timor (*see*: Self-determination) and Indonesian troops became involved in a shooting incident on 10 October 1999 in the border area between East and West Timor near the town of Motaain which straddles the border. The fighting was apparently triggered by confusion over the exact location of the border, and by the use of different maps. The Indonesians were reported to have used a map based on an old, Dutch, chart, showing Motaain in West Timor. A newer, Indonesian-drawn, map used by the Australians located the town in East Timor. (IHT 11-10-99)

### Laos – Thailand

Boundary disputes began to materialize as early as in 1893 when Laos was still under French rule. In 1984 Laos and Thailand concluded an agreement to settle the disputes, but the efforts in several cases failed to achieve real results.

In 1996 a Thai-Lao Joint Commission agreed to demarcate the 1,100-kilometre-long land boundary. Another 710 kilometres of the boundary is in the Mekong River. By 19 July 1998 the Commission had surveyed 538 kilometres of the boundary and placed boundary pillars along 259 kilometres of land boundary in the northern provinces of Chiang Rai, Phayao and Nan, bordering Laos. (Courtesy K.Kittichaisaree)

### Myanmar – Thailand

Among the boundary issues between the two countries is the disputed boundary at Doi Lang in the Mae Ai District of (the Thai) Chiang Mai Province, Hill 491 in the Tha Sae District of (the Thai) Chumphon Province, as well as the sovereignty over Nok, Lam and Khan islets in the Andaman Sea. (Courtesy K.Kittichaisaree)

**North – South Korea maritime boundary**
(*See also infra* at 392)

The following summary is made on the basis of an account given by experts in maritime policy of the East-West Center at Honolulu:

The "Northern Limit Line" (NLL), a demarcation line delimiting South Korean and North Korean jurisdiction on the sea west of the Korean peninsula (*see also* 8 Asian YIL 265) was unilaterally drawn by the UN Command, equidistant between five islands occupied by South Korea and the North Korean coastline. The US and South Korea held the view that both Koreas must respect the line until a new agreement could be reached. North Korea did not succeed in obtaining a new negotiated boundary line..

Since the NLL veers sharply to the north after leaving land, North Korea claimed that it unfairly allots some of its waters to South Korea. North Korea further argued that its vessels had regularly fished in the waters claimed by South Korea, and that since the 1970s it had claimed, under customary international law, a 12-nautical mile territorial sea in the area which extends well south of the NLL. North Korean fishing boats and naval vessels had crossed the NLL several dozen times a year since the late 1970s.

The immediate cause of the June 1999 confrontation (*see* 8 Asian YIL 264) was the concentration of valuable crabs south of the NLL, in an area where South Korea used to allow South Korean fishing only in the month of June.

From other US sources a following data can be derived: The Korean armistice agreement of 1953 never specifically addressed the contiguous waters between North and South Korea. At the time it was assumed that the boundary established at the cessation of hostilities, the 38th parallel, would extend outward into the sea. This, however, did not apply to the west coast, because of the meandering coastline and the countless islands in the area. The only true boundaries established there were perimeters around each of the UN-controlled and still-disputed north-west islands. A security boundary of three nautical miles was established around each of the UN-occupied islands. These boundaries were recognized though often violated by North Korea. The NLL, however, was set by South Korea in order for its naval ships and patrol boats to conduct routine operations. (IHT 17-12, 29-12-99)

## COLONIES

**Reversion of Macau to Chinese rule**

At midnight of 19 December 1999 the territory of Macau reverted to Chinese rule after being a Portuguese colony for 442 years. It was the last European colony in Asia. (IHT 20-12-99)

## DIPLOMATIC AND CONSULAR IMMUNITY

*See*: Sanctions (For text of Sino-Portuguese Joint Declaration, *see* 5 Asian YIL (1995) 567 et seq.)

## DIPLOMATIC AND CONSULAR RELATIONS
(*See also*: Divided states: China)

### Unofficial papal representative

It was reported that the Vatican was keeping an unofficial envoy in Hong Kong. The bishop was technically stationed at Manila but was in fact working as the papal representative in Hong Kong. The Vatican confirmed his presence in the region but said he was not on a diplomatic mission. (IHT 13-08-99)

### Denial of consular communication with detainee

The British embassy was denied access to a UK national who was sentenced in a Myanmar court to 17 years' imprisonment. Myanmar is not a party to the 1963 Vienna Convention on Consular Relations [and is consequently not bound by its Article 36]. (IHT 08-09-99)

### North Korea

Italy became the first of the Group of Seven leading industrialized countries (and the sixth EU member, after Austria, Denmark, Finland, Portugal and Sweden) to establish diplomatic relations with North Korea, on 4 January 2000. Germany and North Korea, had no full diplomatic relations, but North Korean officials still worked out of their former embassy building in (East) Berlin. Japan had started preparatory talks aimed at eventually normalizing relations (*see infra*, at 401) (IHT 05-01-00)

In April 1999 North Korea expressed its wish to have closer contacts with Australia with which it had had no official relations for the previous twenty-five years. After several talks the two countries decided in May 2000 to establish diplomatic relations. (IHT 12-06-00)

## DIVIDED STATES: CHINA
(For reasons of technological inadequacy a number of data relating to the period 1997-1999 were not included in Vol.8 and have now been included in the current Volume.)

### Taiwanese attitudes

Speaking as chairman of the ruling Nationalist Party the Taiwanese vice-president in August 1997 called for development of a new era where "Chinese people no longer fight Chinese people" and "Chinese people help Chinese people". He emphasized that his government supported reunification with the mainland and would not seek independence. He recalled that Taiwan had instituted a set of guidelines for unification under "reasonable, peaceful, equal and mutually beneficial" conditions. However, he urged the Chinese government to acknowledge that Taiwan was ruled by its own government and that the island could not possibly accept the "one country two systems" formula. (JP 26-08-97)

Accordingly the new Taiwanese premier in his address to parliament called on China to acknowledge the "split" across the Taiwan Strait and thus to stop insisting that it had sovereign powers over Taiwan. (JP 10-09-97)

### Guidelines for National Unification

The chairman of the (Taiwan) Mainland Affairs Council called on both sides to move to the second phase of the [above-mentioned] Guidelines for National Unification, which constituted a blueprint consisting of three stages: In the first stage Beijing needed to recognize Taiwan as a political entity instead of as a province of China, and renounce the use of force against the island. In the second phase, Taiwan would allow official visits as well as direct postal, commercial and transportation links across the Taiwan Strait. The third phase is to form a body to discuss the structure of a unified China. (JP 01-11-97)

### Taiwan-Papua New Guinea diplomatic relations

Papua New Guinea recognized the government at Taiwan and both issued a communique on the establishment of diplomatic relations. China reacted by demanding from PNG that these relations be severed. (IHT 07-07-99) On 14 July 1999 a new prime minister was elected in PNG who announced he would review the decision. (IHT 15-07-99) The recognition accordingly reverted to Beijing sixteen days later. (IHT 22-07-99)

### "State-to-state" relations

The Taiwanese president said in a radio interview on 10 July 1999 that bilateral talks between the island and the mainland could continue only if they were considered "state-to-state" rather than between "political entities": "Since we conducted our constitutional reforms in 1991, we have redefined cross-strait relations as nation-to-nation, or at least as special state-to-state relations."

This was toned down when he stressed on 14 July 1999 that the Taiwanese mainland policy had remained intact. (IHT 15-07-99) Under intense pressure from the US and the Chinese government Taiwan announced it had decided to stop using several expressions such as "two Chinas", "one China two states" and "one nation, two countries", but it would continue to use the formulation "special state-to-state" relations. It was said that this amounts to a restatement of demands issued in 1998, namely, that Taiwan must be treated as Beijing's equal in political talks and that China must begin to democratize in order for reunification to occur. [The governing Nationalist Party in late August 1999 adopted the president's view and included the re-classification of the Sino-Taiwanese relations in one of its resolutions.]

One day later, the Taiwanese president once again reaffirmed his tough position, and the next month he said that Taiwan sought to take part in the regional missile-defence shield being considered by the US. Responding to this idea the Chinese side warned that the inclusion of Taiwan under a US missile shield would be an infringement of Chinese sovereignty. (*see infra*, at 400) (IHT 22-07, 23-07, 19-08, 30-08-99)

### US attitude

(*see also* Inter-state relations: China – US)

The US State Department stated on 15 July 1999: "We would determine and consider any effort to determine the future of Taiwan by other than peaceful means as a threat to the peace and security of the Western Pacific area and of grave concern

to the US." (IHT 17/18-07-99) On the other hand the US president emphasized to the Chinese president over the telephone that the US supported the one-China policy and had been encouraging Taiwan to do the same. (IHT 21-07-99) At the same time it was reported that the US Defense Department had decided to go ahead with the sale of advanced weapons and military equipment to Taiwan. (IHT 03-08-99)

It was reported that some doubt existed about military readiness and public morale in Taiwan to confront Chinese pressures. Concerned about Taiwan's defence capacity, the US Defense Department began a program in 1997 under which a steady stream of advisers had travelled to Taiwan to assess military weaknesses, particularly in the light of technological advances. (IHT 28-07-99)

For the first time in seven years the US in September 1999 took a position opposing the insertion of the issue of UN membership for Taiwan into the UN General Assembly agenda, thus making clear its unchanged "one China" policy. [The UNGA Steering Committee decided without a vote not to include the item on the agenda.] (IHT 17-09-99)

China and Taiwan for the first time asked the US to intervene and play a helpful role in helping China and Taiwan improve relations. Taiwan expressed its wish on 12 May 2000 and Chinese officials were reported to have made a similar request. On the other hand, the US since 1982 had vowed not to mediate between the two sides because of a belief that there was no immediate solution to the problem and because of fear that failed mediation could ruin US relations with either side. (IHT 13/14-05-00)

### New Chinese white paper and its aftermath

Just a month before Taiwanese presidential elections China issued a white paper on 21 February 2000 in which China threatened to attack Taiwan if its leaders indefinitely delayed negotiations on reunification. The white paper also said that China would be justified in attacking Taiwan if the US continued arms sales or if Taiwan abandoned the "one China" theory. Previously such a threat applied only in the event that Taiwan declared independence or if it were occupied by a foreign power. However, the white paper appeared to accept that Taiwan should be treated as an equal of the mainland instead of as a "local government".

The ultimatum was obviously timed to influence the outcome of Taiwan's presidential elections. (IHT 22-02-00)

The US sharply rejected the Chinese threat the next day, viewing it "with great concern" (IHT 23-02-00) and Taiwan started pressing the US to sell it some very advanced defensive weapons, including four elaborately equipped warships. Under the 1979 Taiwan Relations Act the US government is to provide Taiwan with defensive weapons "in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability". (IHT 02-03-00) On 17 April 2000 the US decided not to proceed with the sale of the advanced destroyers, although it did agree to sell Taiwan upgraded versions of three missiles and a long-range radar system. The Chinese foreign ministry reiterated its demand that the US stop all arms transfers to Taiwan "so as not to obstruct the improvement of China-US relations". (IHT 19-04-00)

**New mutual offers**

The newly elected president in Taiwan on 21 May 2000 announced his willingness to consider opening direct trade and transportation links with the mainland. He called the ban on direct postal, trade and transportation links ("Three links policy") "outdated, rigid and inflexible". Under this policy most Taiwan-mainland trade and investment passed through Hong Kong. (IHT 22-05-00)

On 28 June 2000 the new Taiwan president said that he accepted the "one China" principle and would thereby accept a 1992 formulation that both China and Taiwan could have their own definitions of what "one China" means. (IHT 29-06-00) However, the following day already the Chinese foreign ministry assailed the shift as disingenuous, emphasizing that Taiwan must endorse the mailand's claim that "'one China' means there is but one China, of which Taiwan is a part". (IHT 30-06-00)

DIVIDED STATES: KOREA

**Suspension of talks**

Inter-Korean talks which had started on 22 June 1999 at Beijing were suspended on 2 July 1999 because North Korea refused to discuss the issue of reuniting divided families, while South Korea made this a condition for the continuation of the promised aid of 200,000 tons of fertilizer, and also refused to apologize for the sinking of a Northern vessel on 15 June 1999 (*see* 8 Asian YIL 265) (IHT 3/4 -07-99)

**Four-party talks**

The sixth round of the four-party talks between North Korea, South Korea, China and the US (*see* 8 Asian YIL 262) started on 5 August 1999. (IHT 06-08-99)

**North Korean-UN Command talks on sea border**
(*See also supra*, at 388)

The talks following the naval incidents in June 1999 (*see* 8 Asian YIL 265) were resumed for the sixth time on 17 August 1999. North Korea disputed the sea border (the "Northern Limit Line") as claimed by the US-led UN Command and proposed talks with only the US military. It rejected South Korea as a dialogue partner on the issue, while the UN Command held the opinion that the two Koreas should settle the matter within the South-North Joint Military Committee established under Article 12 of the 1991 Reconciliation Agreement between North and South Korea (*see* 2 Asian YIL 410). (IHT 18-08, 01-09-99)

On 2 September 1999 North Korea announced that its military would consider its territorial waters as starting about 65 kilometres south of the line set by the UN Command in 1953. (IHT 03-09-99)

**Use of cancer-causing defoliant**

In response to a furore that arose in South Korea the US recently confirmed that spraying of the cancer-causing defoliant "Agent Orange" had occurred in the late 1960s to clear the demilitarized zone between the two Koreas. There were differences over which country originated the proposal to use this method. (IHT 18-11-99)

**North-South Summit Meeting**

The new president of South Korea had dropped hostilities and had announced pursuing a policy of engagement, popularly known as the "sunshine policy". As part of it he encouraged South Korean business to start business in North Korea. He also lifted South Korean insistence on taking part in negotiations between the US and North Korea.

As a result it was announced on 10 April 2000 that secret negotiations had led to a North-South agreement for a summit meeting, with the South Korean president to visit North Korea in June 2000. It was to be the second such visit, the first being in 1948, after the division of the peninsula but before the creation of the separate states.

[The 1948 meeting, aimed at general elections in the whole country and a North-South coalition government, was without success. Consequently, separate elections were held in South Korea.]

In preparing the meeting the parties agreed on merely a vague agenda, referring to the "three principles" contained in the North-South joint communique on national unity of 4 July 1972. Under these principles the parties would discuss "ways of realizing national reconciliation, peace and reunification". The three-day visit started on 13 June 2000. (IHT 11-04, 19-05, 13-06-00)

The meeting resulted in an agreement that was signed on 14 June 2000 and that contained a multipoint-program of national reconciliation. It was more a general statement of common principles than a detailed proposal. It included reconciliation and unification; establishment of peace; exchange visits of members of separated families, and increased cultural exchanges. It was also agreed that the North Korean leader would visit Seoul "at the earliest appropriate moment". (IHT 15-06-00)

## INSURGENTS

**Indonesian Province of Aceh**

In the course of the past decades an insurgent movement had been active in the north-western Indonesian province of Aceh in the northern tip of the Island of Sumatra. The territory is strategically placed on the Strait of Malacca shipping lane, is rich in oil and natural gas deposits, and is staunchly Muslim. Aceh has a long history of resisting central authority, dating from Dutch colonial rule. It was an independent sultanate when Dutch colonial forces occupied it in the early twentieth century after a 30-year struggle. It played an important role in the establishment of the Indonesian republic in 1945 and in 1961 Aceh was designated a special territory with autonomy in religion, culture and education. Since the 1970s the insurgents were

organized in the so-called Free Aceh Movement (*Gerakan Aceh Merdeka*, GAM) which declared Acehnese independence on 4 December 1976. Because of its historically determined features the province was promised the status of a special autonomous region since the country had achieved independence, but this was never followed through.

The conflict worsened from the late 1980s, when the rebels began to attack the military and non-Acehnese migrants to the region. The army responded with indiscriminate force, and in the period from 1989 till 1998 Aceh was declared a "military operations area". The spiral of insurgency and repression had claimed numerous victims in terms of lives as well as other factors.

Prospects for negotiations to end the fighting were not hopeful. The rebels said that the government had first to withdraw its troops, whereupon the army said the rebels should stop their campaign of violence before talks could begin. (IHT 17-08, 19-08, 23-08-99)

On 8 November 1999 hundreds of thousands of residents of the province joined in the largest independence protest in Indonesian history, demanding a referendum, which was rejected by the government. Many people, among whom the armed forces, were said to fear that granting a referendum to Aceh could lead to the break-up of Indonesia. (IHT 09-11, 10-11-99) Nevertheless, the Indonesian president announced on 16 November 1999 that Aceh could hold its referendum seven months hence, but only to choose between the *status quo* and greater autonomy; the latter choice would grant the provincial government the right to its own laws based on Islamic teachings and to retain a major part of the revenues originating from the region. (IHT 17-11-99)

It was reported in early May 2000 that the Indonesian government and the rebels would sign a memorandum of understanding, containing an agreement not to continue the violence and start negotiations to resolve the conflict. The agreement was the result of several meetings at Geneva with the assistance of the (Swiss) *Henri Dunant Center for Humanitarian Dialogue* as 'facilitator'. (IHT 05-05-00) The "humanitarian pause" agreement was signed on 12 May (IHT 02-06-00) but although the cease-fire went into effect on 2 June it had not brought about significant improvement in the security situation. (IHT 14-06-00)

### Indonesian province of Irian Jaya

A "people's congress" held in early June 2000 in this furthest-eastern Indonesian province closed with a resolution "affirming sovereignty". It made no formal declaration of independence, nor did it set up a government; it thus avoided a crackdown by the Indonesian government. Instead the resolution called for a dialogue on autonomy with the government. (IHT 05-06-00) However, a few days after the event fighting broke out between pro-Indonesian and pro-independence militias.

Responding to the sovereignty declaration the Indonesian president approved the appointment of four new local deputy governors for the province, allowed the Irianese flag to fly alongside the Indonesian flag, and set up a commission to investigate charges of human rights abuses. (IHT 19-06-00)

### Philippine Communists

The peace talks between the government and the Communist rebels broke down because, as the government peace negotiating panel said, the rebels' demands undermined the country's political and constitutional sovereignty. (IHT 13-07-99)

### Islamic insurgents in the Philippines

In the context of peace negotiations that had started in1999 the Philippine government threatened the insurgents of the Moro Islamic Liberation Front (MILF) with all-out war if they failed to sign a peace agreement by 30 June 2000. As a result the Front, whose aim it was to turn large portions of Mindanao Island into a separate Muslim country, walked out of the talks and embarked on a spate of activities causing terror at Mindanao in early May 2000, setting off bombs, firing grenades at an airport and taking hostages. A last session of the talks took place on 1 June and the latter were scheduled to be resumed later that month but the Front preferred to postpone them indefinitely.

A similarly forceful stance was taken by the government with members of another Islamic separatist organization, *Abu Sayyaf*, who on 23 April 2000 had abducted persons from the nearby Malaysian diving resort island of Sipadan, and held them hostage on (Philippine) Jolo Island.

The insurgents demanded a return to barter trading in the southern Philippines, a ban on large (mostly foreign-owned) fishing boats from traditional fishing grounds, the full implementation of a 1976 agreement that called for a thirteen-province autonomous Muslim region, and the formation of a commission to examine the problems of Filipino Muslims living in neighbouring Malaysia. However, in early June 2000 the MILF agreed to consider a government-proposed political settlement involving autonomy. (IHT 05-05, 06/07-05, 02-06, 13-06, 20-06-00)

### Tamil rebellion in Sri Lanka

It was reported in early May 2000 that the Tamil Tiger rebels ("Liberation Tigers of Tamil Eelam") had made significant advances in their offensive to recapture the city of Jaffna, the cultural capital of the Hindu Tamil-dominated part of the country, which they controlled between 1990 and 1995 (*see* 6 Asian YIL 391; *see also* 5 Asian YIL 424). Confronted with this threat the country was under the Public Security Act put on war status, for the first time in Sri Lanka's 51 years of independence, from its previous emergency rule.

India ruled out Indian arms assistance to the Sri Lankan government but offered food and medicine if needed (IHT 05-05-00), while hosting Norwegian efforts to broker a peace agreement. (IHT 12-05-00) An Indian offer to mediate, but only at the request of both parties, was unlikely to materialize since the Tamil Tigers were officially banned in India as a terrorist group. The Indian prime minister was assassinated in May 1991 by a suicide bomber from the Tamil Tigers.

India had sent peace-keeping troops in 1987, but these were withdrawn in 1990 after heavy losses and after the leadership in Sri Lanka changed, and an agreement brokered by India was not implemented. (IHT 23-05-00)

In late May 2000 the Indian government said that the Indian navy was prepared to evacuate 30,000 Sri Lankan troops from the Jaffna Peninsula at the request of Sri Lanka, if a cease-fire were declared. (IHT 26-05-00)

### Hmong insurgents in Laos

Remnants of an anti-Communist militia consisting of Hmong minority people, who populate both sides of the Lao-Thai border, had remained active in Laos after the Vietnam War. This militia was originally recruited by the US CIA, and the US had later granted asylum to tens of thousands of its members. In the late 1970s and 1980s they were with Vietnamese support largely eliminated, but an influx of weapons smuggled in across the Thai border by Hmong emigrés from the US had enabled the group to escalate their activities again in 2000.

It was reported in early June 2000 that Vietnam was intervening militarily to help the Laotian government in its fight against the rebels. (IHT 03/04-06-00)

## INTERNATIONAL COURT OF JUSTICE

### Pakistan v. India: Aerial Incident of 10 August 1999

The Court on 21 June 2000 declared that it had no jurisdiction to adjudicate upon the dispute brought before it by Pakistan against India.

In founding the jurisdiction of the Court Pakistan relied on the General Act for Pacific Settlement of International Disputes of 1928, on the declarations of acceptance of the compulsory jurisdiction of the Court made by the parties, and on Article 36 paragraph 1 of the Court's Statute, particularly where the provision refers to "matters specially provided for in the Charter of the United Nations".

As to the 1928 Act the Court concluded that India could not be regarded as having been party to that Act. Concerning the declaration under Article 36 paragraph 2 of the Statute, the Court observed that India's declaration contained a reservation according to which "disputes with the government of any state which is or has been a Member of the Commonwealth of Nations" were excluded from the Court's jurisdiction. It followed that the Court had no jurisdiction on the basis of the declarations made. With regard to the third basis for jurisdiction relied on by Pakistan, the Court stated that the UN Charter contained no specific provision of itself conferring compulsory jurisdiction on the Court, and, consequently, the Court did not accept Article 36 paragraph 1 as a basis for its jurisdiction. (Press Communiqué 2000/19)

## INTERNATIONAL CRIMES AND THEIR ADJUDICATION

*See also*: Self-determination, *infra* at 413)

### Cambodia

The UN and Cambodia had been negotiating for some time about the setting up of a genocide tribunal for Khmer Rouge leaders. No agreement had been reached because according to the UN assistant secretary-general for legal affairs there was

a conceptual difference between the Cambodian notion of a tribunal for the purpose, on the one hand, and the international legitimacy that could be obtained with it on the other. The UN had agreed to hold a joint trial in Cambodia but wanted firm control of the proceedings because the courts in Cambodia were "obviously lacking" international standards of justice. On the other hand, Cambodia was against a majority of foreign judges, which would constitute a threat to its sovereignty, and insisted that UN appointees should play only a supporting role in Cambodian-controlled proceedings.

On another point the UN had demanded that no one be exempt from trial, but several Khmer Rouge leaders had defected to the government and there were moves to limit the number of indictments so as not to disturb the hard-won peace. (IHT 01-09-99)

In order to salvage UN involvement the US proposed a tribunal with three Cambodian judges and two UN-appointed judges, of whom one would have to agree with any verdict passed by the tribunal. The Cambodian prime minister agreed in principle to the proposal. (IHT 20-10-99) A law on the matter was drafted by the government in early January 2000. The law would allow foreign judges and prosecutors in "extraordinary chambers" in Cambodian courts, but would leave the Cambodian counterparts firmly in charge.

Initially the UN Secretary-General remained firm, urging the creation of an independent public prosecutor and a majority of UN-appointed judges, but in May 2000 the UN conceded to Cambodia the right to appoint one of two prosecutors and agreed that the panel of judges would comprise three members from Cambodia and two nominated by the UN. If the two prosecutors were unable to agree on an indictment, the five judges would act as arbitrators. For an indictment to be overturned, four of the five judges would have to agree. (IHT 22-12-99, 07-01, 03-02, 10-02, 26-05-00)

A military court in Cambodia charged the former Khmer Rouge guerrilla chief TA MOK with genocide on 7 September 1999. The charge was brought under a new law enabling the authorities to hold suspects in detention without trial for longer than the usual six-month limit. The law allowed detention for up to three years if the person were charged with genocide, war crimes or crimes against humanity. (IHT 08-09-99)

## INTERNATIONAL ECONOMIC AND TRADE RELATIONS

(*see also:* Inter-state relations: Vietnam – US)

### Sino-Japanese agreement on China's bid to WTO membership

The Japanese prime minister met his Chinese colleague in Beijing on 9 July 1999, at which meeting a formal agreement was signed on the issue of China's application for WTO membership. The agreement effectively affirmed Japan's endorsement. (IHT 09-07-99)

**Sino-US comprehensive agreement**

After thirteen years of negotiations China and the US on 15 November 1999 reached a comprehensive agreement to open China's economy to foreign competitors in return for China's entry into the WTO. In order to obtain membership China still had to reach agreement with the EU, Canada and a number of developing countries.

Alhough the US Congress did not need to give its approval for China to proceed with its application for WTO membership, such approval by way of the grant of "normal trading status" (formerly known as most-favoured nation status) would be necessary for the agreement to take full effect in the bilateral relations of the two countries. (IHT 16-11-99) On 24 May 2000 the US House of Representatives granted this status to China by voting in favour of the so-called China Trade Bill. (IHT 26-05-00)

**Sino-EU accord on China's application for WTO membership**

China and the EU on 19 May 2000 reached a market-opening agreement that removed the last obstacle to China's fourteen-year effort to obtain admission to the WTO. (IHT 20/21-05-00)

## INTER-STATE RELATIONS: GENERAL ASPECTS

**East Asian cooperation**

The heads of state/government of ASEAN member states and China, Japan and South Korea, meeting on 28 November 1999 for the third time since 1997 (*see* 7 Asian YIL 441, 8 Asian YIL 256), agreed on a framework for wide-ranging cooperation and, consequently, issued a Joint Statement on East Asian Cooperation. (IHT 29-11-99) (text *infra* at **XXX**)

**North-east Asian summit talks**

On the sidelines of the third ASEAN Informal Summit Meeting at Manila the leaders of China, Japan and South Korea held their first trilateral summit talks on 28 November 1999. They agreed on a proposal from the South Korean president for research institutes in the three countries to undertake a joint study to establish a framework for cooperation. (IHT 29-11-99)

**Afghanistan**

Russia and the US issued a joint statement in early June 2000, expressing concern over the "growing influence of extremist groups" in the region of Afghanistan. They urged the Taleban, which was in control of the country, to hand over OSAMA BIN LADEN to the US and to "dismantle the terrorist infrastructure" that allegedly was sending Islamic fighters to unsettled areas such as Kashmir and Chechnya. At the same time Russian officials warned that they might launch preventive air strikes against suspected military training camps in Afghanistan. The US had bombed several such targets in August 1998, in retaliation for the bombings of the US embassies

in Kenya and Tanzania. (*see* 8 Asian YIL 284) China, Kazakhstan, Kyrgyzstan and Tajikistan joined Russia in calling for strict implementation of the UN Security Council resolution 1267 (1999) which banned international flights and froze official Afghan assets abroad.

The Taleban dismissed the charges that it was training or arming Islamic terrorists. It had also repeatedly refused to hand over USAMA BIN LADEN to Western authorities, saying he was its guest and it had seen no proof of his involvement in terrorism abroad. Instead, it offered to have him tried in Islamic courts in Afghanistan or another Muslim country.

Pakistan's attitude was rather ambiguous. It made several statements in early June 2000 to the effect that friendly relations with the Taleban were important to Pakistan's security and that Pakistan was reluctant to interfere with Afghan internal affairs. Pakistan was one of three countries that had recognized the Taleban government. (IHT 07-06-00)

### China – India

The two states held their first two-day formal talks on global and regional security issues at Beijing in early March 2000. (IHT 08-03-00)

### China – Israel

The Chinese president paid the first official visit to Israel by a Chinese leader on 12 April 2000.

Israel had agreed in 1997 to equip a Chinese-owned aircraft with an advanced Israeli "Phalcon" early warning system to monitor the movement and communications of planes, ships and ground troops over an area of 250 miles. It was similar to the US AWACS system. The US had strongly objected to the deal although it had not raised objections when Israel gave notification of its plans in 1996.

It was said that Israel had several goals with its arms sales to China, which started after the two countries began to have unofficial contact in the late 1970s. One was to woo China away from support for the Palestinian cause, including the sale of arms. A second goal was to ensure China's support for the Middle East peace process, and a third was to minimize Chinese arms exports to countries hostile to Israel, such as Iran and Syria. It was said that the effort had borne fruit, as China had allegedly dropped support for UN resolutions damaging to Israel, and had allegedly curtailed direct transfers of technology to such countries. (IHT 12-04, 13-04-00)

### China – Japan

Against the backdrop of the result of the Taiwanese presidential election in March 2000 the Japanese foreign minister said that Japan would continue to maintain "its exchanges of a private and regional nature with Taiwan as non-governmental working relations", while indicating that it expected China to respond in kind to the new Taiwanese president's conciliatory overtures. (IHT 20-03-00)

**China – US**
(*see also:* Divided states: China: US attitude)

Military contacts were frozen from the 7 May 1999 bombing of the Chinese embassy in Belgrade (*see* 8 Asian YIL 287) and were said to be unlikely to resume in the near future. China remained unconvinced by US explanations and wanted to see further details and progress on economic issues before resuming military contacts. (IHT 01-07-99)

The US government agreed 30 July 1999 to pay $4.5 million to the families of those killed and wounded by the US bombing of the Chinese embassy in Belgrade on 7 May 1999. The money would be given to the Chinese government which would decide how to divide the funds among those involved. In an effort to avoid setting a precedent, it was said that "the payment will be entirely voluntary and does not acknowledge any legal liability". (IHT 31-07/01-08-99)

On 16 December 1999 the two sides reached agreement on compensation for the destruction of the embassy building and the damage done to US diplomatic facilities in China resulting from demonstrations against the Belgrade incident. The US would pay $28 million and China $2.87 million. (IHT 17-12-99)

It was reported on 10 April 2000 that the US Central Intelligence Agency had sacked an intelligence officer and reprimanded six managers for errors that led to the bombing. (IHT 10-04-00)

In early February 2000 China launched a strong protest against the passing by the US House of Representatives of a bill under the name of Taiwan Security Enhancement Act, despite the fact that the bill still had to pass the Senate and that the US government had already made it known that the president would veto the bill. The act would establish direct military communications between the the US and Taiwan, expand US training of Taiwanese military officers and force the US government to make public Taiwanese requests for weapons. (IHT 03-02-00)

In early June 2000 China agreed to start formal discussions with the US on arms control and non-proliferation issues. (IHT 07-06-00) Meanwhile US officials rejected China's warning of a new arms race if the US proceeds with plans to build a missile defence system, with the US claiming that this was needed for stability in Asia and enabling the US to support and defend its friends and allies in the region; it referred to possible attacks by countries such as Iran and North Korea. China held the opinion that the system would upset the strategic balance between the US and China. (IHT 08-06, 23-06-00)

**China – Vatican**

In a move that publicly snubbed the Roman Catholic Church, the Chinese Patriotic Catholic Association on 6 January 2000 ordained new bishops on the same day that the Vatican ordained theirs, but not Chinese). The Chinese Patriotic Catholic Association does not recognize the Pope's authority to appoint bishops and had about seventy bishops of its own. Some of them had also been ordained by the Vatican. (IHT 05-01-00)

**Iran – US**

The US government announced on 3 December 1999 that it would waive US sanctions against Iran by allowing the Boeing Corporation to supply parts needed by Iran's national airline. (IHT 06-12-99)

US intelligence reports said that Iran was increasing deliveries of arms to so-called "terrorist groups", such as the Palestinian *Hamas* and the Lebanese *Hezbollah*, as well as coordinating activities among such organizations "and may be plotting attacks on Israel or Jewish targets abroad". Against this backdrop it was said that the US had no plans to change their policy of "containing" Iran through economic sanctions, though at the same time seeking dialogue and promoting "people-to-people exchanges". Besides, a classified FBI report of spring 1999 advanced long-held US suspicions of Iranian involvement in the June 1996 bombing of a US military housing complex ("Khobar Towers") in Saudi Arabia. (IHT 06-12-99)

However, on 17 March 2000 the US Secretary of State announced in a speech that the US would lift a ban on the import of Iranian luxury goods, would seek a legal settlement that could free Iranian assets frozen since the 1979 Islamic revolution and, it was reported, even "essentially apologized for past policy toward Iran, including the CIA-backed coup in 1953" [against the MOSSADEQ government]. The Iranian government responded by saying that it found the speech positive and that Iran would reciprocate by opening its borders to US food and medicines. However, official talks were considered unrealistic. (IHT 20-03-00)

**Japan – North Korea**

In early August 1999 the Japanese foreign minister said that Japan might respond to a new North Korean missile test by severing money transfers from Koreans living in Japan. (IHT 09-08-99)

The North Korean pledge to refrain from launching another missile (*see infra*, at 408) brought the two countries to agreement on 2 December 1999 to resume talks on setting up diplomatic relations as well as on restarting Japanese food aid. Food aid was stopped after North Korea fired a missile over Japan in 1998 (*see* 8 Asian YIL 292) but the Japanese government stated on 14 December 1999 that it would lift the restrictions. Earlier talks on normalizing relations started in early 1991 (*see* 2 Asian YIL 330) but stalled in November 1992 after Japan accused North Korea of kidnapping a Japanese woman. (IHT 03-12, 10-12, 15-12-99)

Talks involving Red Cross and foreign ministry officials started 20 December. (IHT 21-12-99) The Red Cross officials reached agreement on food aid and other humanitarian issues, such as the fate of a number of Japanese missing persons believed to be held in North Korea and that of Koreans who had disappeared from the northern part of Korea before 1945. (IHT 22-12-99) During the inter-Red Cross talks in Beijing North Korea pledged on 13 March 2000 that it would help search for missing Japanese allegedly abducted by North Korean agents in the late 1970s.

The talks on establishing diplomatic relations were resumed in Pyongyang in early April 2000, but suffered a setback on 5 April when North Korea demanded that Japan first discuss paying compensation for abuses committed when it was ruling Korea as a colony, which was refused by Japan. (IHT 31-01, 08-03, 14-03, 06-04-00)

On 19 June 2000 North Korea said it was prepared to resume the talks. (IHT 20-06-00)

**North Korea – Europe**

North Korea proposed holding foreign ministers' meetings with European countries on the sidelines of the UN General Assembly meeting in the autumn of 1999. North Korea had held a working-level "political dialogue" with the European Union in December 1998, during which it had asked increased humanitarian aid. However, the dialogue reached deadlock as the EU urged North Korea to improve its human rights record and to reduce missile threats. (IHT 26-08-99)

In March 2000 diplomatic relations were established with Italy, the first of the Group of Seven countries to do so. [Italy had started to opening up to countries which in Western political parlance have been called "rogue states", such as Libya and Iran.] (IHT 17-03, 18/19-03-00)

**North Korea – Russia**

The two countries signed a friendship treaty on 9 February 2000 which sought to heal relations that were strained after the then Soviet Union established diplomatic relations with South Korea in 1990. The treaty replaced a mutual aid agreement and omitted previous provisions on political and military alliance. (IHT 10-02-00)

It was announced in June 2000 that the Russian president would visit North Korea in July, the first ever visit by a Soviet or Russian leader. The announcement followed a meeting of the Russian and US presidents, and caught the US by surprise. (IHT 10/11-06-00)

**North Korea – US**

(*See also*: Missile technology – North Korea; Sanctions)

The US in late June 1999 expressed its suspicion of renewed North Korean preparations "indicating a potential launch of a ballistic missile in the future". The Deputy Assistant Defense Secretary said that "we would view any potential launch of either a satellite or a missile [as] a very serious act with very real consequences for US foreign policy towards North Korea".

The US and South Korea had earlier in late August of 1998 warned North Korea not to repeat the alleged firing of a missile with a potential range of more than 4,000 miles. (*see* 8 Asian YIL 292) (IHT 01-07-99)

Nevertheless, North Korea said, as it had on 3 August 1999, that it would push ahead with test-firing a missile if the US stepped up its pressure. The spokesman of the foreign ministry said, *inter alia*, that "whether we test-fire a satellite or a missile is a legitimate, independent right to be exercised by a sovereign state". (IHT 04-08-99)

On 27 July 1999 a report on Korea was issued by a task force of the (US) Council on Foreign Relations. The report emphasized the necessity for the continuation of a policy of engagement with North Korea in order to influence the latter. Even if North Korea conducted a new missile test, it should not be considered a departure

from the past, but rather an attempt by a fearful regime to assert its ability to protect itself. Moreover, such a test would not violate any existing US-North Korean agreements. The report also urged that humanitarian food aid be continued, that the so-called PERRY proposals be left on the table, that the implementation of the 'agreed framework' of 1994 (*see* 5 Asian YIL 545) should go on, and that channels for four-party talks should be kept open. (IHT 28-07-99)

The PERRY proposals referred to WILLIAM PERRY, the former Secretary of Defense who was assigned by the US president to oversee a full review of policy toward North Korea and sent on a mission to North Korea in May 1999 (*see* 8 Asian YIL 282). The proposals were presented by a committee led by Mr. PERRY as late as September 1999 and released on 12 October 1999. They recommended that the US and its Asian allies try to coexist with North Korea rather than seek to undermine its government or to promote internal reform. An attempt to achieve the demise of the North Korean government would take too long and had no guarantee of success. The proposals included, *inter alia*, the lifting of trade sanctions and the beginning of a formal recognition of North Korea at a "markedly faster rate" in return for a halt to its testing of missiles and an end to its export of missile technology to the Middle East and Pakistan. The recommended strategy included the following points:

- to seek assurance that North Korea had no nuclear weapons program and cease testing, production, deployment and export of long-range missiles;
- to normalize relations and relax trade sanctions;
- to preserve the 1994 Agreed Framework;
- to continue to act in concert with Japan and South Korea.

(IHT 27-08, 16-09, 14-10-99)

In return for the 1999 trip to Pyongyang by Mr. PERRY, a visit by a high-ranking North Korean official to the US was to take place, preparations for which took place in early March 2000. (IHT 09-03-00) Later in the month, however, North Korea said it would not send a high-level delegation unless the US removed it from a list of countries allegedly sponsoring terrorism. (IHT 29-03-00)

In late May 2000 it was announced by the US president that US-North Korean talks would be resumed in June at Kuala Lumpur, *inter alia* on the issue of more than 8,100 US soldiers listed as missing in action in the Korean War. Since 1996 joint operations had resulted in the identification and repatriation of the remains of about 40 US soldiers. (IHT 30-05-00) [It was later reported that the resumption of talks would take place in July instead of June. (IHT 29-06-00)]

On 17 September 1999 the US announced that it was to lift much of the more than four-decade-old US trade embargo in response to what the US said was a North Korean pledge not to proceed with a planned missile test-firing (*see infra*, at 408). This ranked among the most dramatic US gestures of conciliation since the end of the war in 1953. (IHT 18/19-09-99) The sanctions were actually eased on 19 June 2000. US restrictions would remain on sales of military materiel, some high-technology goods and items with "dual" use. The classification as a supporter of terrorism would remain, and the US would continue to oppose loans by global financial institutions. (IHT 16-06, 20-06-00)

Despite the conciliatory spirit of the inter-Korean summit meeting shortly before (*see supra*, at 393) North Korea on 18 June 2000 accused the US of increasing the danger of war on the Korean Peninsula. The accusation was in response to a US statement immediately after the summit meeting that it had no plans to withdraw its forces from South Korea. The accusation apparently referred both to the 37,000 US troops stationed in South Korea and to the US plans to set up a missile defence shield. (IHT 19-06-00) The South Korean foreign minister stated that even after an official peace had been agreed between North and South Korea, American troops would "continue to play their role as a guarantor of the balance of power". (IHT 24/25-06-00)

**South Korea – Japan**

A process of reconciliation, driven by a variety of factors, such as shared economic interests and a shared feeling of threat from North Korea, had set in between the two countries. The first major step in the reconciliation was the written Japanese apology for its 36-year colonization of Korea (*see* 8 Asian YIL 281). In August 1999 the two countries held a joint naval drill, and in August 1999 the Japanese prime minister for the first time visited a stone tower in Hiroshima, built in 1970, dedicated to Korean victims of the atom bomb. Besides, there were the growing exchanges in various fields. However, Japan still refused to compensate Korean women who worked as "comfort women" during the Pacific War (*see* 8 Asian YIL 314) and it had not yet agreed to compensate Koreans who had fought for Japan in that war. Many among the 600,000 people in Japan of recent Korean descent kept feeling discriminated against in various areas and prejudices against Koreans persisted. (IHT 21-09-99)

**South Korea – US**

The South Korean president met the US president on 2 July 1999. (IHT 01-07-99) Among other items, South Korea hoped it would achieve US approval for its missile program including a missile with a 300-kilometre range.

The current understanding with the US, dating from the time of US recognition of the CHUN DOO HWAN government in 1979, was that South Korea would not produce missiles with a range of more than 180 kilometres, or up to 20 kilometres from the North Korean capital Pyongyang (see 7 Asian YIL 462). South Korea had expressed its desire to join the 32-country Missile Technology Control Regime (*see* 1 Asian YIL 270) by which it had already pledged to abide. Under this Regime the maximum allowed range of missiles is 300 kilometres and a 500-kilogram payload.

Initially there was a feeling in South Korea that the US wanted to avoid antagonizing North Korea, which was confirmed by a response from the US State Department, insisting that diplomacy was the answer to regional tensions. Later, however, the US supported the South Korean desire and promised to work help "to accommodate their needs as far as their missile capabilities [are concerned]". (IHT 02-07, 30-07-99)

**Sri Lanka – Israel**

It was reported in early May 2000 that Sri Lanka had decided to re-establish diplomatic ties with Israel which had been severed in the early 1970s. It was said that the move would help Sri Lanka benefit from the expertise of the Israeli arms industry. (IHT 05-05-00)

**Vietnam – US**

Twenty-four years after the end of the Vietnam War, agreement was reached on 25 July 1999 on a Bilateral Trade Agreement establishing fully normalized trade relations, after three years of negotiations. It would be signed later in the year. The agreement addressed trade in goods and services, protection of intellectual property and investment relations between the two countries, and conferred "normal trading status" (formerly called "most favoured nation status") to Vietnam *vis-à-vis* the US.

The agreement was due to be signed during the APEC meeting in September in New Zealand, yet the Vietnamese government failed to obtain the necessary approval to proceed. (IHT 11/12-09-99)

The US did not lift a trade embargo against Vietnam until 1994 and did not establish diplomatic relations until 1995. (IHT 22-07, 26-07-99)

## (NON-)INTERVENTION

**Meeting with Dalai Lama**

China on 21 June 2000 protested at the fact that a meeting had taken place between the US president and the Dalai Lama. China considers Tibetan matters to be an internal Chinese affair, and therefore considered the meeting to be meddling in these affairs. (IHT 22-06-00)

## JAPAN'S MILITARY ROLE

**Japan-US missile defence**

The US and Japan in July 1999 agreed on measures to intensify cooperation on defence against ballistic missiles in the face of the North Korean apparent plans to test-fire another long-range missile (*see also* 8 Asian YIL 291). A memorandum of understanding was signed on 16 August 1999 on jointly developing the means for spotting and shooting down missiles flying within a 1,860 mile radius, before they could hit Japanese territory. The cooperation was described by the Americans as an element of "theater missile defence", a term referring to defence of a wide expanse of territory extending beyond Japan, whereas Japan preferred to use the term "ballistic missile defence", referring to the just defence of Japan and the waters around it. (IHT 29-07, 17-08-99)

According to a senior Japanese official, a strike against foreign bases from which missiles were aimed at Japan would not be a violation of Article 9 Japan's "Peace Constitution" forbidding the country from waging war overseas. It would be the

exercise of the right to self-defence when it was confirmed that the other side had embarked on an action to attack Japan. (IHT 29-07-99)

## LAW OF THE SEA

### Indonesian archipelagic sea lanes

On 19 May 1998 the 69th Session of the Maritime Safety Committee of the International Maritime Organisation adopted the Indonesian proposals for the designation of three sea lanes (Archepelagic Sea Lanes, *Alur Laut Kepulauan Indonesia* or ALKI) through the Indonesian archipelago for transit between the Indian Ocean and the South China Sea, the Sulawesi Sea and the Pacific Ocean respectively.

## MARITIME DELIMITATION

*See*: Borders, border disputes and border incidents

## MIGRANT WORKERS

### Filipino workers in Taiwan

Taiwan put a three-month hold on labour permits for new Filipino workers on 1 June 2000. There were 112,000 Filipino workers in Taiwan, accounting for 37 per cent of foreign workers in Taiwan, second only to Thai labourers. (IHT 02-06-00)

## MILITARY ALLIANCE

(*See also*: Japan's military role)

### Japan-US cooperation in missile development

The two countries expected to reach agreement in August 1999 on research toward developing a ballistic missile as part of a joint defence system. Under the draft memorandum of understanding the parties would jointly design a missile with a kinetic warhead capable of shattering an enemy missile without exploding. Military analysts even speculated about a future US-Japan joint command and saw the new "Guidelines" for US-Japanese defence cooperation (*see* 6 Asian YIL 426; 7 Asian YIL 458) as possibly providing a basis for such a development. (IHT 07/08-08-99)

## MILITARY COOPERATION

### Japan – South Korea

In early August 1999 Japanese and South Korean navy ships and air force participated in joint manœuvres, the first joint military operations since Japanese colonial rule. The exercise was apparently intended as a warning to North Korea

in connection with the latter's alleged plan to carry out a new missile test-launching (*see infra*, at 407). South Korea was persuaded to participate after Japan had issued a written apology for Japan's colonial past. (see 8 Asian YIL 281). In order not to provoke North Korea the manœuvres were held as far away from North Korea as possible: in the straits between the southern Japanese island of Kyushu and the Korean island of Cheju. (IHT 06-08-99)

**Indonesia – US**

It was reported in February 2000 that the US had quietly resumed training Indonesian military officers in the US, which was suspended in 1999 after the violence that engulfed East Timor (*see infra* at 413) While US officials stressed that they had not resumed full military-to-military relations with Indonesia (IHT 19/20-02-00), the commander-in-chief of the US forces in the Pacific went to Indonesia on 2 April 2000 to discuss this full resumption. Two conditions were, on the one hand, accountability for the actions of elements of the Indonesian military in East Timor and on the other ensuring that those among the refugee population in West Timor who wanted to return to East Timor could do so, and that the others were moved into a more permanent situation in Indonesian territory in order to prevent the development of a breeding ground for trans-border militia activity. (IHT 01/02-04-00)

The resumption was confirmed in May 2000 when Indonesian military observers were invited to participate in joint exercises in Thailand and by completing plans to hold the first joint exercises between US and Indonesian armed forces in July 2000. (IHT 25-05-00)

MISSILE TECHNOLOGY
(*See also*: Japan's military role; Military alliance)

**North Korea**
(*See also*: Regional security)

In early July 1999 there were rumours about North Korean plans to carry out another missile test (see for previous incidents: 8 Asian YIL 291). In response to these reports the South Korean and US presidents delivered a joint warning to North Korea on 2 July 1999 not to proceed with the plans which were not, however, confirmed by North Korea. While pronouncing itself against the possibility of North Korean missile tests US sources also commented that the North Korean missiles were believed to be fairly inaccurate and would thus not be very useful militarily. (IHT 05-07-99) Later in the month "diplomatic and security officials" were reported as saying that North Korea was proceeding with its plans, and that these involve a long-range missile ("Taepo Dong-2") with a range of up to 6,000 kilometres. (IHT 23-07-99)

On the occasion of the meeting of the ASEAN Regional Forum (*see* 3 Asian YIL 440; 4 Asian YIL 505) on 26 July 1999 the foreign ministers of the US, South Korea and Japan said that North Korea would be hit with punitive economic sanctions

and lose a major opportunity to improve relations with the three countries if North Korea proceeded in testing another, new type of ballistic missile. They warned that the consequences of missile proliferation for peace and stability in Asia and the Pacific were so grave that North Korea would have to be punished, despite the possible risk of war. The US Secretary of State said that this applied irrespective of "whether [the launch be] declared … a missile test or an attempt to place a satellite in orbit". (IHT 28-07-99)

The diplomatic measures to discourage North Korea were not to prevent an immediate threat, yet the test would subtly but significantly change the existing pattern of relations that had kept the region stable. (IHT 12-08-99)

On 18 August 1999 North Korea, rather unexpectedly, said that "[a]s regards the missile issue, we are always ready for negotiations if the hostile nations honestly ask for it out of an intention to alleviate our concern". The foreign ministry said that North Korea had developed missiles by way of self-defensive measure because the US posed a threat by keeping military forces in South Korea and because it still harbored intentions to invade North Korea. The position taken was phrased by a North Korean politician as follows: "If the visitor comes and offers us a cake, we'll respond with a cake. But if somebody comes with a sword or knife, we'll respond with a knife." (IHT 19-08-99) The two sides, possibly as a response to appeals by the US envoy PERRY (*see supra*, at 403) agreed in late August 1999 to meet and talk in Berlin for four days, beginning 8 September. (IHT 27-08, 30-08-99)

After five days of discussions North Korea informally agreed to a *de facto* freeze of its missile-testing programme. In exchange, the US agreed to encourage the process of developing normal relations and of eventually removing sanctions that had banned commercial and other exchanges (*see supra*, at 403). The two delegations announced in a brief statement that their countries had pledged "to preserve a positive atmosphere conducive to improved bilateral relations and to peace and security in North-east Asia and the Asia-Pacific region". This marked the second time (with the 1994 Agreed Framework) that the US offered a situation valued by North Korea in exchange for commitments to back off from a potentially dangerous programme. (IHT 13-09, 18/19-09-99) On 24 September the North Korean government announced publicly that it would refrain from further missile tests while talks with the US were under way, "in order to create a more favourable atmosphere".

The North Korean-US talks would be resumed in early October 1999. (IHT 25/26-09-99).

## China

China launched a long-range "Dong Feng-31" missile on 2 August 1999. According to "military experts" this missile could carry a single nuclear warhead about 8,000 kilometres. The launch occurred during a most delicate period of Mainland-Taiwan relations (*see supra*, at 390). (IHT 03-08-99)

## MONETARY MATTERS

### Asian cooperation

On the sidelines of the annual meeting of the Asian Development Bank in Thailand in early May 2000, a broad grouping of East Asian states, including ASEAN and Japan, South Korea and China, agreed to work toward curbing economic turmoil in the region by defending one another's currencies from speculative attack. For that purpose they expanded an existing network of arrangements (*see* 8 Asian YIL 293) and named it the *Chiang Mai Initiative*.

The plan called for a network of bilateral currency swap-and-repurchase arrangements and implied the establishment of a system of pooled reserves from which a central bank could draw when its currency comes under attack from speculators. However, the plan did not specify concrete mechanisms or deadlines for implementation and was, therefore, essentially outmoded and inadequate. In fact Hong Kong had already set up a network of bilateral repurchase agreements among eleven central banks in 1995 (*see* ibid.).

While efforts were made to distinguish the plan from the aborted attempt to set up an Asian Monetary Fund (*see* ibid.) this latter idea received strong support from, *inter alia*, Malaysia. A Japanese former deputy finance minister made an impassioned call for the establishment of such a fund, saying "If unaffected countries do not have a political incentive to contribute their own money, they should say so instead of using the 'moral hazard' argument as an excuse". (IHT 08-05-00)

## NATIONALITY

*See*: Refugees

## NUCLEAR ENERGY MATTERS

### Implementation of the 1994 North Korean-US agreement

South Korea on 2 July 1999 signed an agreement with Korean Peninsula Energy Development Organization (KEDO, *see* 5 Asian YIL 547) providing for a contribution of $3.22 billion in the financing of two nuclear reactors for North Korea under the 1994 Agreed Framework between North Korea and the US. (*see* 5 Asian YIL 545) The agreement acquired parliamentary approval on 12 August 1999. The consortium agreement on the construction of the power plants was signed on 15 December 1999.

Japan agreed to contribute $1 billion to the same project, and the European Union $87.7 million. (IHT 3/4-07, 13-08, 16-12-99) Meanwhile Japan had threatened to freeze its contribution if North Korea proceeded with plans for a new missile test (*see supra*, at 407), and North Korea itself threatened on 26 July 1999 to pull out of the agreement unless the US began to "show good faith" in the issue by lifting economic sanctions. It also rejected US moves to link the North Korean missile development programme to the provision of funds for the nuclear project. The foreign ministry was quoted as saying: "We, who are exposed to constant threat due to the

US policy of isolating and stifling the DPRK, are left with no option but to increase our own defence capabilities and develop missiles as its means." (IHT 27-07-99)

**North Korean nuclear facility**

The South Korean daily *Chosun Ilbo* reported on 7 July 1999 that according to an unidentified South Korean government source North Korea was building a new nuclear facility at Yongjudong, 20 kilometres from the Chinese border. (IHT 08-07-99)

**Denial of North Korean uranium imports**

North Korea on 7 February 2000 denied media reports (*Washington Times*) that it might be importing uranium from the Democratic Republic of the Congo to manufacture nuclear weapons. (IHT 08-02-00)

**North Korean complex at Kumchangri**

Under a March 1999 agreement (*see* 8 Asian YIL 297) the US announced on 15 May 2000 that a US team would visit an underground site at Kumchangri, North Korea for a second time as of 23 May 2000. The aim of the visit would be to confirm the findings of the first visit of May 1999 that the complex did not constitute a violation of the 1994 accords (*see* 5 Asian YIL 471, 545) (IHT 16-05-00)

**Taiwan radioactive wastes**

It was reported that China (the China Nuclear Energy Industry Corporation) and Taiwan (Taiwan Power Co.) were negotiating a multi-billion dollar deal under which radioactive wastes from Taiwanese nuclear power plants would be disposed of on the mainland against payment and technical aid to the mainland nuclear power industry. The proposed deal would involve low-level wastes, such as power-plant equipment that had become radioactive, and not spent nuclear fuel rods that could possibly be reprocessed into bomb-grade materials.

In 1997 Taipower announced an agreement with North Korea, but this deal was cancelled after concerns were raised by South Korea, and the US and North Korea became uncooperative. (IHT 14-03-00)

## ORGANIZATION OF THE ISLAMIC CONFERENCE (OIC)

**Summit Conference, Tehran 9 November 1997**

The Conference produced a *Tehran Declaration* in which it condemned Israel as a "terrorist state", demanded the surrender of all occupied Arab land, and condemned the US 1996 Iran-Libya Sanctions Act, declaring that the Muslim countries "reject unilateralism and the implementation of extra-territorial laws, and call on all states to consider the so-called D'AMATO law null and void" (*see* 8 Asian YIL 213 *et seq*.).

It reaffirmed their commitment to a code of conduct to fight terrorism as approved at the OIC summit at Casablanca in 1994 and called for an international conference on terrorism under UN auspices [cf. the later International Convention for the Suppression of Terrorist Bombings of 1998]. The OIC states "strongly condemn terrorism in all its forms and manifestations, while at the same time recognizing the right of self-determination of those peoples living under colonial or foreign domination, or under foreign occupation". The emphasis on terrorism followed recent massacres in Algeria and the killing of 62 people at a tourist site in Egypt in November 1997.

The conference approved 142 political, cultural and economic resolutions. (JP 12-12-97) [The OIC is based in Jeddah, Saudi Arabia.]

## PIRACY

### Cooperation on combating piracy

Senior maritime officials from sixteen Asian countries met in Tokyo in late April 2000 to discuss piracy. The idea of cooperation on combating piracy was raised by the Japanese prime minister at the ASEAN summit meeting at Manila in November 1999. Japan proposed a regional coast guard to combat piracy in the Strait of Malacca and Singapore as well as in the South China Sea, consisting of China, South Korea, Indonesia, Malaysia, Singapore and Japan. The force would conduct joint monitoring activities to protect the environment and resources in waters beyond state control, as well as to combat illegal activities that span international maritime boundaries, including illegal fishing, illegal entry and piracy. Examples of bilateral cooperation of a similar type are those between the US and Russia in the Bering Sea, and between Indonesia and Malaysia and Singapore in the Strait of Malacca.

The meeting adopted two initiatives in which the regional maritime authorities pledged to share information on pirate attacks. (IHT 28-04, 29/30-04-00)

## REFUGEES

### Bhutanese refugees in Nepal

(*See also*: 2 Asian YIL 349; 6 Asian YIL 442)

After more than three years the two sides resumed their talks and reached agreement on a way to identify Bhutanese citizens from among nearly 100,000 refugees who had been in UN-run camps in Nepal for the past nine years. (IHT 17-09-99)

### Chinese policy on North Korean refugees

It was reported that Chinese policy toward North Korean refugees had tightened since 1999. Chinese border units had stepped up patrols, and the number of persons forcibly repatriated to North Korea had increased. In the year 2000, by late April 1,000 people had already been sent back to North Korea. China had been arguing

that the North Koreans who came to China were not refugees but economic migrants. (IHT 29/30-04-00)

## REGIONAL SECURITY

### ASEAN Regional Forum statement on North Korea

In the context of the Sixth ASEAN Regional Forum meeting on 26 July 1999, following the annual ASEAN foreign ministers conference, the participating ministers of the 22 Asian, Pacific (Canada, US, Australia, and New Zealand) and European countries (represented by the EU) issued a statement expressing concern that North Korean missile testing and development could "heighten tensions and have serious consequences for stability in the Korean Peninsula and the region".

North Korea is the only Asian country that has refused to join the forum and take part in regional talks to reduce tensions and build confidence. (IHT 27-07-99)

## SANCTIONS

(*see also* Missile technology: North Korea, Organization of the Islamic Conference)

### Kazakhstan-North Korea jet fighter sale

Kazakhstan had sold about forty jet fighters to North Korea. The US government was reviewing the matter and the possibility existed that sanctions would be applied through the reduction of economic aid. North Korea is one of seven countries labeled by the US as sponsors of terrorism, and US law prescribes sanctions against countries that provide "lethal military assistance" to any of them. (IHT 28/29-08-99)

### Myanmarese sanctions on Thailand

In early October 1999 political dissidents from Myanmar occupied the Myanmarese embassy in Bangkok and took hostages. After a while the Thai authorities decided to release these dissidents. In reprisal Myanmar closed its border and suspended fishing rights, and said it would not lift the sanctions until the dissidents were arrested and prosecuted. The sanctions imposed a heavy burden on Myanmar itself as the cost of fuel and food in those parts of Myanmar that were dependent on trade with Thailand had risen sharply. (IHT 24-11-99)

### US state sanctions against Myanmar declared void

(*See also* 8 Asian YIL 240-242)

The US Supreme Court in its ruling of 19 June 2000 overturned a 1996 Massachusetts law that barred most state purchases from companies doing business with Myanmar ("Burma Law"), ruling that it impinged improperly on federal government authority to make foreign policy. The court held that since the US Congress had specifically authorized the president to negotiate sanctions against Myanmar, such authority should not be limited by local action. (IHT 20-06-00)

SELF-DEFENCE
*See*: Japan's military role

SELF-DETERMINATION
(*See also*: Organization of the Islamic Conference, *supra* at 410)

**East Timor**
(*See also* 8 Asian YIL 306-307)

In the context of the UN-sponsored vote to be held in August 1999 (*see* 8 Asian YIL 307) more than 300 unarmed UN police advisers and military liaison officers were deployed to the territory, in addition to some 600 polling officials (United Nations Assistance Mission to East Timor – UNAMET). Since the end of June pro-Indonesian militia had harassed and attacked UN mission personnel and outposts in several towns. (IHT 07-07-99) While Indonesian ministers tried to create a level playing field for the referendum by coming to East Timor and calling rival factions to stop escalating violence (IHT 13-07-99), one of the main East Timorese leaders urged the UN on 26 July 1999 to consider sending armed peacekeepers for the scheduled vote. (IHT 27-07-99) On the other hand the Indonesian foreign minister on 27 July 1999 accused the UN of bias in favour of independence for East Timor, citing that almost all of the 4,000 East Timorese recruited by UNAMET as its personnel were from the ranks of pro-independence supporters. (IHT 28-07-99)

In early August it was reported that the US, Australia and some European countries had started discussions with the UN on a contingency plan to send an armed peacekeeping force to East Timor. Such a move would, however, occur only if an Indonesian withdrawal triggered a conflict that could not be controlled by the unarmed UN mission. (IHT 03-08-99) Under the May 1999 agreement the UN was to be responsible for organizing the vote, but security was to remain an Indonesian responsibility. (IHT 28-07-99)] On 13 August 1999 the UN special envoy on East Timor told that the UN had endorsed a plan by leaders of rival East Timorese factions to set up a special council to promote "cooperation and reconciliation" in the territory after the vote. (IHT 14/15-08-99) Meanwhile, UN officials in East Timor warned that army-backed pro-Indonesian militias were planning for full-scale war if they lost the referendum on independence for East Timor. (IHT 24-08-99)

Even before the referendum the militias had already run wild in the capital Dili on 26 August, firing guns and setting fire to several buildings. Violence and bloodshed was also reported from other places. The Indonesian police, responsible for security during the campaign and on polling day, seemed unable to control the violence and in some cases even failed to intervene. As a result the UN Security Council on 27 August 1999 unanimously adopted a resolution increasing the police contingent and the military liaison group of the UN mission, and extending the mission's mandate. (IHT 27-08, 28/29-08-99)

One day before the vote was held representatives of the pro-independence guerrillas and the anti-independence militias announced a new peace agreement calling

for a limitation in carrying firearms in public and calling on the police to arrest violators. However, on the same day the Indonesian military said that it might not be able to control the situation, despite the fact that under the agreement of 5 May 1999 Indonesia was committed to holding primary responsibility for security in the run-up to the vote. (IHT 30-08-99)

The referendum was held on 30 August 1999, with about 450,000 registered voters, but with one of the main independence leaders still held in detention at Jakarta and thus an absentee voter, and another still banned by Indonesia from setting foot in East Timor and also an absentee voter, in Australia. Against expectations the voting proceeded relatively smoothly, with the Indonesian police effectively enforcing security, and a turn-out estimated to be 90% or more. The result was certified by the UN Secretary-General and announced on 4 September 1999: 78.5 per cent had voted against the Indonesian autonomy offer, which implied a vote for independence. (IHT 31-08, 03-09, 06-09-99)

In contrast to the quiet on referendum day, the militias seemed to reappear on the scene with various acts of violence the following days, escalating calls for an international peace-keeping force. (IHT 01-09, 02-09-99) In a surprising turn-around Indonesian military officials suggested they would accept an international peacekeeping force if the voting results showed that the majority had voted for independence; civil war erupted. Meanwhile, the situation continued to deteriorate and Indonesia sent additional troops to restore order. There were an estimated 6,000 East Timorese in the Indonesian army in the territory, and in addition there were about 1,000 East Timorese serving in the Indonesian police force based in the territory. There were fears that desertions took place among these East Timorese who then joined forces with the anti-independence militias. (IHT 03-09, 4/5-09, 07-09-99) The situation led the UN special envoy for East Timor, JAMSHEED MARKER, to observe: "It is very clear today that the Indonesian government has failed in its responsibility to maintain adequate security." In a vain attempt to retain control over the situation Indonesia imposed martial law on the territory on 7 September 1999.

Pressure for international intervention mounted, with Portugal apparently taking the leading role and Australia putting troops on emergency alert for the purpose. The UN Secretary-General gave Indonesia 48 hours in which to restore order in Timor before international measures would be considered. Besides, a five-member delegation from the UN Security Council arrived in Indonesia on 8 September to press for quick action.The general opinion was that if Indonesia was not able to quell the chaos, it should ask the international community to step in, thus avoiding an uninvited "invasion". Moreover, the size and importance of East Timor in the world compared with those of Indonesia clearly played a role in the consideration of measures. (IHT 07-09, 08-09-99) The situation meanwhile deteriorated further, the imposition of martial law appeared to have no effect, and there was mounting suspicion of the complicity of the Indonesian forces in the violence. Nevertheless Indonesia kept resisting the idea of foreign peacekeeping forces entering the territory before it had ratified the vote for independence as the result of the referendum. The clear impression was that the Indonesian perception of what was going on in the territory was quite different from that of the outside world. (IHT 09-09, 10-09-99)

On 10 September 1999 the Indonesian chief of the armed forces admitted that he had lost control of some troops who were emotionally committed to retaining East Timor. On the same day the UN Secretary-General urged Indonesia to accept a peace-keeping force lest it face responsibility for "what could amount to crimes against humanity", and recalled that several states in the region, including Australia, New Zealand, the Philippines and Malaysia had assured him of their willingness to take part in an international force to help Indonesia fulfill its responsibility to bring order and security. (IHT 11/12-09-99) On 11 September the Indonesian president conceded that Indonesian forces were unable to control the continuing violence and invited the UN to send a peace-keeping force to the territory, to work together with the Indonesian armed forces. (IHT 13-09-99) This coincided with moves to ensure that the force would be under Asian command and have a majority of Asian troops. (IHT 14-09-99)

The next day, 12 September, the Indonesian president also accepted a proposal from the UN High Commissioner for Human Rights for the creation of an international commission of inquiry consisting of Indonesian and foreign members, to investigate possible atrocities and look for evidence of human rights violations in East Timor. Such an inquiry could lead to the creation of a war crimes tribunal. (IHT 14-09, 20-09-99)

The UN Security Council, invoking Chapter VII of the UN Charter, finally adopted resolution 1264 on 15 September, authorizing a multinational force to "use all necessary means" to restore peace and ensure that the territory moves toward independence. It also demanded that those responsible for the violence be brought to justice. (IHT 16-09-99) The multinational (not "UN"-) force ("Interfet", International Force in East Timor) was to be replaced as soon as possible by a UN peacekeeping operation. Australia was to lead the multinational force, with a Thai and a Malaysian officer as deputy commanders. The following offers for contribution were made: Australia (troops and navy ships), Argentina (troops), Bangladesh (troops), Brazil (policemen), the UK (troops, destroyer, aircraft and funds), Canada (troops), China (civilian policemen), EU (funds), Fiji (troops), Finland (funds), France (troops and a frigate), Italy (troops, aircraft and a hospital vessel), Japan (funds), South Korea (troops), Malaysia (officers and a few soldiers, after initial opposition to Australia's role but consenting after Indonesian and UN request), New Zealand (troops, navy vessels and aircraft), Norway (officers), Pakistan (troops), the Philippines (troops and non-combat personnel), South Korea (troops), Singapore (medical personnel and logistics support), Sweden (civilian police officers and funds), the US (troops and navy support). (IHT 17-09, 18/19-09-99) It was later reported that Japan had allocated $100 million to supporting Interfet and the future UN peacekeeping force, in order to help developing (Asian) countries to take part. Other UN members would have to agree to pay the remaining $500 million of the estimated cost of the future UN operation. (IHT 05-10, 07-10-99)

The intervention force started to enter the territory on 20 September 1999, with the Indonesian forces handing over factual control of the territory a week later. A token force of 1,500 Indonesian soldiers was left behind pending formal transfer of the territory to UN jurisdiction after endorsement of the referendum result by the

Indonesian People's Consultative Assembly ("MPR") (IHT 28-09, 05-10-99) which took place on 20 October 1999. These troops departed on 31 October 1999. (IHT 01-11-99)

According to the International Federation of Red Cross and Red Crescent Societies on 19 September 1999 about 600,000 people, or almost three-quarters of the population of East Timor, had been displaced by the violence. According to the International Committee of the Red Cross another 200,000 were said to be refugees in (Indonesian) West Timor. (IHT 20-09-99)

In accordance with the UN decisions on the matter discussions started on the replacement of the multinational force by a UN peacekeeping force when Indonesia formally relinquished its claim to East Timor on 20 October 1999 and a period of UN interim administration set in. The questions to be dealt with were, particularly, who was to be part of it and who was to take command of it. (IHT 21-10-99)

The UN Security Council on 25 October 1999 voted unanimously under Chapter 7 of the UN Charter to set up the UN Transitional Administration in East Timor which would replace the international force (Res.1272). The UNTAET would comprise troops, military observers, police officers and civilian officials, and was given an initial mandate until 31 January 2001. On Chinese insistence the resolution made no direct mention of an inquiry set up by the UN High Commissioner for Human Rights. (IHT 26-10-99)

A proposal to put command of the UN force in the hands of Malaysia was rejected by the East Timorese leadership, who also objected to any other member of ASEAN for that post, and who preferred a continuation of an Australian commander. (IHT 03-11-99). In late December it was announced that a Philippine major-general would command the UN force. (IHT 30-12-99) The transition to peacekeeping by the UN force would be completed by the end of February 2000. (IHT 03-02-00)

The idea of an inquiry into possible atrocities and human rights violations was later supported by the UN Commission on Human Rights which on 27 September 1999 called on the UN Secretary-General to establish a mechanism to "gather and compile systematically information on possible violations of human rights and acts which may constitute breaches of international humanitarian law committed in East Timor since the January 1999 announcement of the vote". Backed by many of its neighbours, Indonesia said it did not accept the resolution, as it had already decided earlier to set up a fact-finding body of its own on human rights violations in East Timor. The Asian members of the Commission voted against the resolution, except Japan which abstained. (IHT 28-09-99) Meanwhile, around mid-October, the UN Office for the Coordination of Humanitarian Assistance (OCHA) had stated there was no evidence to support allegations of occurrences of mass murder in East Timor. (IHT 14-10-99)

On the occasion of the visit by a UN-mandated five-member investigation team in December 1999 the Indonesian government rejected the idea of an international court in East Timor. The Indonesian foreign minister said: "Any effort whatsoever to pressure those that evidence suggests were involved in human rights abuses should

also reflect the strategic importance of forming good relations and cooperation between Indonesia and East Timor in the future.” (IHT 10-12-99)

It was reported in late January 2000 that the UN investigators would recommend the creation of an international tribunal. Meanwhile the Indonesian independent commission of inquiry had found that the Indonesian armed forces and the militias supported by them had been implicated in criminal actions in East Timor and had recommended that further investigation be conducted into the role of 20 to 30 persons, including some high-ranking and middle-ranking Indonesian military officers and civilians. The Indonesian government called on the UN to delay any move for an international tribunal until after Indonesia had had a chance to take its own action. A premature action by the UN could cause a nationalist backlash that would make it more difficult to bring military officers to justice. (IHT 31-01-00) During a visit to Indonesia and East Timor in February 2000 the UN Secretary-General stressed that it was up to Indonesia to punish those responsible for the violence and destruction in East Timor. He said there would be no need for an international court if Indonesia went through with its commitment to bring the offenders to justice. (IHT 18-02-00) [See for Indonesian legislation, *supra* at 236.]

The Indonesian president paid a brief visit to East Timor on 29 February 2000, where he apologized for the harsh 24-year Indonesian government. He laid a wreath on the site of a violent incident on 11 November 1991 and at a neighbouring Indonesian military cemetry. A communiqué was signed during the visit, calling, *inter alia*, for a corridor between East Timor and its coastal enclave of Ambeno. (IHT 01-03-00)

## SETTLEMENT OF DISPUTES

*See*: Territorial claims and disputes

## SPECIAL TERRITORIES WITHIN A STATE: KASHMIR

### Armed clashes and Pakistan-US agreement

It was reported that separatist violence in the Indian state of Jammu and Kashmir had increased since India had begun its offensive against infiltrators in the Kargil area. (*see* 8 Asian YIL 308) The reason seemed to be that many troops earlier engaged in counter-insurgency operations had to be moved to Kargil. (IHT 01-07-99)

On 4 July 1999 Indian sources issued a report (denied by Pakistan) that Indian troops had recaptured a strategic mountain peak, just within the Indian side of the Line of Control.

Both India and Pakistan communicated with the US president on the issue and there was a flurry of signals that Pakistan might be willing to negotiate while insisting that they were not directly involved in the conflict. (IHT 05-07-99) The Pakistani prime minister flew to the US and an agreement was reached with the US president.

A joint statement was issued, according to which Pakistan would withdraw its support for the armed groups who had occupied parts of Indian-held Kashmir since April 1999. The agreement also stated that concrete steps would be taken for the restoration of the 1972 Line of Control. The Pakistani chief of army staff accordingly said that the militants ("mujahidin") would be asked to "change their position". In exchange the US president pledged to take a "personal interest" in solving the Kashmir problem. The Pakistani prime minister defended his policy by arguing that it helped to usher the issue onto the world stage.

Although being the beneficiary of the agreement, the India through its foreign minister felt compelled, in view of its traditional attitude of not accepting "third-party mediation" in the Kashmir issue, to insist that the US role was no foreign mediation at all. (IHT 06, 07-07-99)

The Directors of military operations from both sides met and agreed to the terms and timetable for the pull-out of forces that Pakistan insisted were Islamic militants and that India maintained were mostly Pakistani soldiers or at least militants sponsored by the Pakistani military. Later, the Pakistani army chief acknowledged – for the first time – that Pakistani troops had indeed crossed the Line of Control into India during the fighting. (IHT 06-07, 07-07,13-07, 14-07, 17/18-07-99)

**Kashmir vote for autonomy**

The provincial assembly of the Indian state of Jammu and Kashmir approved a plan on 26 June 2000 to implement autonomy, against the wishes of the central government. The autonomy meant a return to the pre-1953 status when Kashmir had its own president and prime minister. In those first few years after the incorporation of Kashmir into India in 1947, all state activities except defence, foreign affairs and telecommunications were under local control. (IHT 27-06-00)

## STATE SUCCESSION

**Timor Gap Treaty**

The Indonesian responsibilities and competences under the Indonesian-Australian "zone of cooperation" treaty ("Timor Gap Treaty") of 1989 were taken over by the United Nations upon the transfer of power over East Timor by Indonesia, pending the establishment of a state of East Timor.

The new state would have to determine its policy relating to the continuation or re-negotiation of the treaty as the successor state of Indonesia. It was reported that the East Timorese leadership was aiming at a seabed boundary halfway between the East Timorese shoreline and Australia, instead of the existing treaty arrangement, under which the zone in question was divided into three areas: area C, at the northern end, administered by Indonesia (now: UN), area B, at the southern end, under Australian control, and a central area A, to be administered jointly. (IHT 14-12-99)

On 10 February 2000 the UN, on behalf of East Timor, and Australia signed a treaty (the "Timor Gap Oil and Gas Exploration Treaty") that continued the terms

of the Indonesian-Australian treaty of 1989. It thus enabled an offshore oil and gas project for the tapping of the Bayu-Undan field to go ahead.

It was said that Indonesia had agreed that the zone included in the 1989 treaty was no longer within its jurisdiction. (IHT 12/13-02-00)

## TERRITORIAL CLAIMS AND DISPUTES

### Malaysian occupation of Spratly reefs

The Philippines and Vietnam protested at an alleged recent Malaysian occupation of several reefs in the Spratly Archipelago. It was said that Malaysia had built a radar tower, a two-storey building and a platform with a helicopter landing pad on one of the reefs called "Investigator Shoal". Defending the move, Malaysia said it sent scientists to two reefs that were on Malaysia's continental shelf as well as within its exclusive economic zone. (IHT 23-07-99)

### Code of conduct

To try to preserve the peace, the Philippines had presented a draft regional code of conduct for the South China Sea, to be discussed in the annual ASEAN foreign ministers conference held in Singapore in July 1999. The draft was, however, referred to a working group which would not meet until October 1999. It was said that Malaysia had opposed the inclusion of an explanatory note in the code that called for China to join negotiations at an early stage to make the agreement final. (IHT 23-07-99) The Malaysian prime minister, however, on the eve of his visit to China in August, said that he would press the Chinese leadership to back the code. (IHT 13-08-99)

In November 1999 the Philippine foreign minister admitted that no agreement had been reached by ASEAN and Chinese officials on the code, and that negotiations on the code would be continued. (IHT 26-11-99) With regard to the same matter the Philippine president during the third "ASEAN+3" meeting in late November 1999 had spoken of the possibility of setting up an East Asia security forum to manage and resolve tensions in the region. (IHT 29-11-99) On the other hand, a Chinese spokesman said that if the dispute among Asian countries over the Spratly Islands could not be resolved, the countries involved should jointly develop the islands. (IHT 30-11-99)

## TERRORISM

(*See also*: Organization of the Islamic Conference, *supra* at 410)

### UN Security Council on rendition of terrorism suspect

The UN Security Council on 15 October 1999 voted to impose limited sanctions on the Taleban movement that ruled Afghanistan (Res.1267) to pressure it to turn over USAMA BIN LADEN "to appropriate authorities in a country where he has been indicted [such as the US], or to appropriate authorities in a country where he will

be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice" for masterminding the US embassy bombings in Kenya and Tanzania in 1998. The expulsion had to be carried on 14 November at the latest.The sanctions consisted of freezing the Taleban's overseas assets and banning Taleban-operated aircraft from taking off and landing outside Afghanistan. (IHT 16/17-10-99)

In late October the Taleban, through its representative in New York, offered to convene an international panel of Islamic scholars or *Ulama*, to judge USAMA BIN LADEN's fate. (IHT 01-11-99)

**US accusations**

The US in its latest annual report on US efforts to combat terrorism for the first time identified South Asia as a major hub of international terrorism, accusing Pakistan and Afghanistan of providing a haven and support for international terrorist groups.

Since 1993 the US had accused Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria of harbouring and aiding ("sponsoring") "terrorists", but had stopped short of adding either Pakistan or Afghanistan to the list. This was explained, according to the US State Department, by the fact that the US did not recognize the current Afghanistan (Taleban) government and, in the case of Pakistan, because "it is a friendly state that is trying to tackle the problem".

Pakistan denied the US accusation. (IHT 02-05-00)

WEAPONS

**Use of nuclear weapons by India**

The government on 17 August 1999 publicized a proposal for a national nuclear doctrine, made by the National Security Advisory Board. The proposal read, *inter alia*, that "Any adversary must know that India can and will retaliate with sufficient nuclear weapons to inflict destruction and punishment if nuclear weapons are used against India and its forces. … India will not be the first to initiate a nuclear strike ["no first use"], but will respond with punitive retaliation should deterrence fail". This was the government's first formal declaration on the subject. Up to then it had been said that nuclear weapons would be used as a "minimum credible deterrent" to nuclear war, but it had not been spelled out what that meant. (IHT 18-08-99)

# LITERATURE

# BOOK REVIEWS*

*Korea and the United Nations,* by CHI YOUNG PAK, Kluwer Law International, The Hague/London/Boston, 2000, ISBN 90-411-1382-7, pp xvi, 242 (including notes and appendices)

In the author's preface, the book is described as 'the first systematic and in depth study on the Korean question in the United Nations' and that 'it attempts a comprehensive analysis of the political and legal issues of the Korean question in the United Nations'(xiii). It covers a broad spectrum of political and legal issues spanning half a century, from the origins and development of the Korean problem in the context of the Cold War, at one end, to current problems concerning refugees and the North Korean nuclear programme at the other. It includes a consideration of the roles of the United States, the Soviet Union and China, and the influence of Third World states, against the background of UN politics. Having identified the Korean War as a turning point in the development of the United Nations, this is considered to merit detailed analysis, including an examination of the UN resolutions on the Korean question. Finally, the book aims to assess the United Nations participation of both Koreas in the light of their roles in the new world order of peace, prosperity and humanity.

This is undoubtedly an area that offers tremendous scope for scrutiny and analysis. The Korean problem has been a consistent feature in international relations in the second half of the twentieth century; it has been on the agenda of the United Nations for most of that time. It has been played out in the context of the development of the United Nations itself and against the backcloth of a changing international environment, both affecting and being affected by international politics on the wider stage. Korea has been one of the most complex and difficult of problems for the United Nations, one that still has contemporary relevance since not all of the tensions there have been resolved. It has particular relevance for any study of the United Nations, as the Korean War represented the first major case to test the capacity of the UN to enforce peace. The topic is therefore a pertinent one, and the relationship with Korea an excellent medium in which to discuss the history of the UN. As the author points out, the Korean question has shown both the potential and the limits of action by the United Nations.

This is indeed an ambitious project for a text amounting to a mere 177 pages. The scope of the attempted coverage is thus substantial, and arguably far wider than can adequately be considered in such a short volume. Within the scope of such a brief work, depth of analysis inevitably suffers, with the result that the book raises more questions than it can answer. In-depth analysis is sacrificed for a synthesis that at times inevitably appears merely superficial.

Part I of the book covers the origin and development of the Korean problem. After briefly sketching the origins and nature of the problem, the main chapter concentrates, in the context of the United Nations, on the rivalry between South and North Korea; it traces the development of the relationship from a quest for political legitimacy to the current concern with prosperity and humanity. The author leaves the reader in no doubt where his sympathies lie. An underlying theme in this chapter goes beyond the confines of the Korean problem itself. The history of the relationship between Korea and

* Edited by Surya P. Subedi, General Editor.

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the United Nations is played out in the context of a major theme in the late-twentieth-century world: a changing political milieu, where the rise of the Third World eroded the dominant position of the United States and the Western bloc.

This theme is explored further in the next two chapters, discussing the role of Korea in the Cold War, as regards both the US role in the Korea War and its repercussions for Sino-Soviet relations. This is a section where the disadvantages of the brevity of the book become tantalisingly apparent. The author makes reference to the various interpretations of the events surrounding the outbreak of the war, but does not have the opportunity to expand the argument. The final chapter of this section considers the position of the non-aligned countries. In contrast to the previous chapter, it is full of detailed primary information regarding the voting of the non-aligned countries in the UN, leading to the conclusion that they comprise a relatively cohesive group, especially in the earlier part of the years under consideration.

Part II of the book considers political and legal issues. This section of the book arrives at the heart of the title, assessing a number of aspects of the relationship between Korea and the United Nations. The political significance of the question of UN membership for both Koreas is considered, followed an analysis of the role of the UN in the Korean War. This latter is identified as a pivotal point in the political development of the UN, testing both the potential and possibilities of for the United Nations as the instrument of international peace. The role of the Secretary-General developed and was strengthened during this time: a development that owes much to the UN's intervention in the Korean problem.

Part III of the book raises further interesting issues concerning the present day, presenting a chapter each on the problem of refugees and on the North Korean nuclear weapons development programme. In discussing the international status of Korean refugees, this is put in the context of a shift in emphasis in the UN, marked by an evolution from concern with mechanical or procedural peace and security towards a greater focus on distributive justice, and from the 1990s to an emerging vital concern with human rights.

The issue of refugees is again one deserving of much deeper analysis than can be provided here. In the context of Indo-China the blurring of the distinction between refugees under the Geneva Convention definition, on the one hand, and economic migrants on the other, becomes acute. This is far from a localised problem, but one that has occupied politicians in many parts of the world. The legal analysis is this section is less than convincing. The author sees no difficulty in categorising the escapees from North Korea (tens of thousands of whom are estimated to be in Russia and China) as Convention Refugees: 'An escape from poverty has become an act of a political nature, even if the motive is economic'. In practical terms this may well be the case, and the distinction between the two is notoriously difficult to draw; however, the extension of Convention status where the motive is economic is less satisfactory in terms of legal, rather than moral, status. The discussion of the politics surrounding the question of nuclear weapons is stronger, as is the final chapter of this section, highlighting the participation of Korea in the UN system. This latter contains details of activities and voting patterns as well as an analysis of areas of North-South confrontation. The conclusion is that 'North Korea's political system has inhibited a meaningful participation in the UN', in contrast to South Korea, which 'has been active in the UN programs for peace, prosperity and humanity'.

Part VI of the book 'An Evaluation of the Korean Question' sums up in a few pages the themes of the book and also looks to the future, ultimately ending on a positive note that relations between North and South Korea will ultimately improve.

The book lacks a bibliography; although there are footnoted references, it would have benefited from a full bibliography. It usefully includes in the Appendices (which amount to around 40 pages) a number of documents, including UN General Assembly and Security Council resolutions as well as a number of communiqués and statements.

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*Yearbook: Law and Legal Practice in East Asia* by A.J. DE ROO and R.W. JAGTENBERG (Editors-in-Chief), Kluwer Law International, The Hague/London/Boston, 1999, Vol. 4, pp. xvi and 260, ISBN 90-411-1349-5, hardback.

The series of books entitled *Yearbook: Law and Legal Practice in East Asia* aims to provide 'the business community and the legal professions with accessible, up to date information and insight into legal issues arising in this region' (p. ix), and this is the fourth volume in this series. Due to the important events of 1999, this volume focuses primarily on the laws and regulations of the People's Republic of China (PRC). Only three of the eleven articles deal with India, Taiwan, and the law of Asia in general.

Three important themes, Constitutionalism, Legal Profession, and Business Law, are selected to be the main foci for this volume. The order of these three themes is interesting, as the editors attempt to cover all important topics to give an insight into the law of East Asia for readers who have very little knowledge of it. The first theme strikes the readers' interest effectively by discussing the fundament of law, Constitution, and how it emerges and plays a supportive or negative role for the character and vigour of legal systems. This theme begins with an informative article by R. Cullen and H.L. Fu. Although this article does not well reflect the opinion of the Chinese towards their Constitution (p. 4 and 6), it provides comprehensive information on the Chinese Constitution both from 'Western' legal and political points of view. The following article by K. Zou and Y. Zheng engages in a deeper investigation of the Chinese Constitution and its third amendment. It has very clear objectives and represents stronger views of the Chinese towards this amendment (for example, at p. 36). It is well written, very easy to follow; their analysis very much answers the questions posed earlier. In addition, M.J.A. Cooray examines the experience of Hong Kong and Human Rights, which emphasises the relevance of this theme.

The second theme gives an in-depth analysis, revealing the importance of the structure of the profession, specialisation and professional attitude to foreign investors and lawyers who would like to work in the target countries. This topic is less exciting as there is only one paper – by K. Wong and C. Hui – and it offers a deeply critical opinion concerning the legal profession in Hong Kong Special Administrative Region (Hong Kong SPR), also discussing how this has developed since the handover in 1997. The authors also suggest the way in which foreign lawyers should prepare for a move, and what functions they would be expected to perform in the future, particularly after the amendment of the law relating to the admission of foreign lawyers (p. 134).

The third theme – Business Law – attempts to provide a review of the current development of this area of law. S. Kumar provides an excellent contribution to this book, as his analysis on doing business in India is most clear, critical, and comprehensive. It is very well written; it demonstrates that the author has done much research on this topic and has analysed the issues thoroughly. R. Xia also provides useful information on financial reforms in China and the laws on Commercial Banking, yet provides no further analysis of the extent to which the reforms have positive or negative impacts upon the current Chinese financial market.

This book is particularly useful for anyone who would like to study the details of domestic legal issues of the law of East Asia, as it covers a wide range of interesting topics and presents them well in a logical manner. The form of 'yearbook' allows the editors to choose particular areas of law on which they wish to focus in each volume, a method indeed aimed of benefit to readers.

Yet this *Yearbook* is disappointing for a reader who looks for deeper and wider legal analysis of international law, particularly of the developments emerging from this region of the world. One cannot deny that China and Japan are two of the most powerful countries, playing very important roles in the international community. In particular, they are both members of the United Nations Security Council. Their views and practices regarding international law can, therefore, not be disregarded. This *Yearbook* would thus be more useful and draw greater attention from a wider group of lawyers if it could focus more closely on international issues, such as international financial law, international economic law, and international environmental law. In addition, as S. Kumar contributes a very good article concerning India, this might be an indication that the readers may expect more writings from other jurisdictions

as well as that from East Asian countries. If it does not go against the objectives of the *Yearbook*, this should be of value to researchers.

Having said which, the *Yearbook: Law and Legal Practice in East Asia* can be regarded as the definitive work, providing extensive information on and investigation into the law and legal practice of the countries in this region. It is therefore highly recommended not only for students and researchers who would like to study further on the law of East Asia, but also for foreign lawyers who seek to practise in those target countries.

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*The Razor's Edge: International Boundaries and Political Geography,* edited by Clive Schofield *et al.,* Kluwer Law International, London/The Hague/New York, 2002, ISBN 90-411-9874-1, Euro 200, USD 184, GBP126.

This is a collection of essays published by a group of academics working in the International Boundaries Research Unit of the University of Durham in honour of Professor Gerald Blake, to mark his retirement from the University. Indeed, it was Professor Blake who established the Research Unit in the late 1980s to promote research into international boundaries, both maritime and land. Since its inception, the Unit has been at the forefront of research activities in this area, and a number of useful publications have been published as a result of the work carried out by this Unit. As stated by Newman in the first chapter of this book, "political geography has undergone a major renaissance" in recent years; this book makes an attempt to present this renaissance in the study of the area of international boundaries.

Altogether there are 27 chapters, grouped under four subject areas with a special focus on the Middle East. The first six chapters deal with political geography and territorial issues; the next set of seven chapters is devoted to the examination of maritime boundaries. The third part of the book contains eight chapters all dealing with international land boundaries. The final part of the volume, consisting of six chapters, examines various boundary issues in the Middle East. Although the title of the book gives the impression that this is a book dealing with international boundary issues from the perspectives of political geography, it is an interdisciplinary book consisting of chapters examining the legal, political, geographical, and economic aspects of international boundaries. Indeed, a number of chapters deal with the boundary issues in international law. While Newman's chapter deals with the development of political geography as a sub-discipline within human geography, McHugo's chapter explores the extent to which Islamic States have adopted international law in the field of title to territory. In doing so, this chapter examines the existence of a regional Islamic international law.

Another chapter, by Carleton, provides a fascinating survey of the development of maritime zones and boundaries in international law from 1964 to the present. Similarly, the chapter by Judge Anderson contains useful material on both the techniques and the process of the negotiation of maritime boundaries. The chapter on "Evidence before International Tribunals in Maritime Delimitation Disputes" by Bundy is the third chapter dealing with boundary issues from a legal point of view. There are a number of other chapters dealing with regional seas such as the Adriatic Sea, the Aral Sea, and the Arabian Gulf, or certain bilateral boundaries such as the demarcation of the northern sector of the Burma-Thai Boundary or the Israeli-Palestinian boundary; these provide interesting legal, political, geological, and geographical insights into boundary disputes. Of course, the quality of chapters in as large a collection of essays as this varies; the current volume is no exception. While some chapters provide an in-depth analysis of the theme or subject area chosen for examination, others provide merely a rather brief overview of the subject matter.

However, what is interesting about this volume is the interdisciplinary approach to international boundaries. Although this collection is not only about boundary disputes, most of the chapters devote attention to analysing such disputes in different parts of the world from different perspectives. All in all, the volume as a whole provides a wealth of valuable information and insight into international boundaries. It especially represents a rich source of information for those interested in the Middle East, Africa, and South East Asia, as well as for those interested in the treatment of land and maritime

boundaries in international law. The editors of the volume have done a superb job of assembling such a wide range of interesting essays in a single volume such as this, designed to honour a leading political geographer of our time, Professor Blake, who transcended his boundaries in advancing the study of international boundaries.

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*The World Court Reference Guide: Judgments, Advisory Opinions and Orders of the Permanent Court of International Justice and the International Court of Justice (1922-2000),* compiled and edited by BIMAL N. PATEL, with an Introduction by SHABTAI ROSENNE; Kluwer Law International, The Hague/London/New York, 2002; ISBN 90-411-1907-8.

This is a monumental work prepared with care and skill by Bimal Patel, and a very useful tool for anyone interested in the work of the World Court. This single-volume compilation provides a comprehensive overview of procedural aspects of the jurisprudence of both the Permanent Court of International Justice (PCIJ) and its successor, the International Court of Justice (ICJ). This reference guide includes information in chronological order about both the advisory and contentious cases dealt with by the PCIJ and the ICJ. It contains all of the basic information on all of the cases referred to the PCIJ and the ICJ between 1922 and 2000. A typical entry on a particular case includes statements of the initial claims and counter-claims of the contentious cases, and questions submitted for the advisory opinions; it summarizes details of all orders, the duration of the oral and written proceedings, and the coverage of requests for extension of time-limits, summaries and headnotes, as well as the texts of the operative and final paragraphs of all judicial decisions, the composition of the Court and declarations and opinions, separate or dissenting, of its Members; there is also a systematic reference to legal instruments, and the coverage of information on litigation teams.

As stated by Professor Shabtai Rosenne in his introduction to this Reference Guide, Bimal Patel "photographs" the procedural history of each and every case dealt with by the PCIJ and the ICJ, from the institution of the proceedings to the final decision. Indeed, this book fills an important gap in the reference materials for both the PCIJ and the ICJ. Patel has demonstrated the organizational, methodical and meticulous skills that he possesses, and that are necessary in editing and compiling such a book. The Reference Guide is an important reference tool for international and national judicial and quasi-judicial bodies, legal advisors to government departments, and for other legal practitioners as well as for teachers of and researchers into international law. This is a very useful publication for any law library or a diplomatic office. It tells the reader what a case before the World Court was about, what the Court decided, and who were the personalities involved, both on the Bench and at the Bar. The present reviewer can happily recommend this Reference Guide to everybody interested in the work of the International Court.

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# SURVEY OF INTERNATIONAL LAW LITERATURE PUBLISHED IN 2002 RELEVANT TO ASIAN AFFAIRS

Bimal N. Patel*

**Areas of international law:**

1. Air and space
2. Arbitration
3. Arms control and disarmament
4. Conflict and disputes
5. Criminal law and terrorism
6. Decolonization and self-determination
7. Development
8. Diplomatic and consular relations
9. Economic relations and International Finance
10. Environment
11. General
12. Individuals, groups of persons – human rights
13. Information and communication
14. Peace-keeping, peace-making and peace-building
15. Peaceful settlement of international disputes
16. Sea, rivers and water-resources
17. States and groups of states
18. Territory and jurisdiction
19. United Nations and other international/regional organisations and regional laws
20. War, peace and neutrality, armed conflict, international humanitarian law

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| **ALQ** | Arab Law Quarterly |
| **ASL** | Air Space Law |
| **AUILR** | The American University International Law Review |
| **CJIL** | Chinese Journal of International Law |
| **CLP** | China Law and Practice |
| **CLYIB** | Comparative Law Yearbook of International Business |
| **DJCIL** | Duke Journal of Comparative and International Law |
| **EJIL** | European Journal of International Law |
| **ETL** | European Transport Law |
| **FILJ** | Fordham International Law Journal |

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| **GIELR** | Georgetown International Environmental Law Review |
| **GLJ** | The Georgetown Law Journal |
| **IBL** | International Business Lawyer |
| **ICAB** | International Court of Arbitration Bulletin |
| **ICLQ** | International Comparative Law Quarterly |
| **ICLR** | The International Construction Law Review |
| **JALC** | Journal of Air Law and Commerce |
| **JCSL** | Journal of Conflict and Security Law |
| **JIA** | Journal of International Arbitration |
| **JWT** | Journal of World Trade |
| **LJIL** | Leiden Journal of International Law |
| **NLR** | Nepal Law Review |
| **OCDIL** | Ocean Development and International Law |
| **OCULR** | Oklahoma City University Law Review |
| **TMLJ** | Tulane Maritime Law Journal |
| **VJTL** | Vanderbilt Journal of Transnational Law |

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