

INTERNATIONAL COURT OF JUSTICE

**CASE CONCERNING
APPLICATION OF THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION
OF THE FINANCING OF TERRORISM AND OF THE INTERNATIONAL CONVENTION
ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION**

(UKRAINE V. RUSSIAN FEDERATION)

**VOLUME VIII OF THE ANNEXES
TO THE MEMORIAL
SUBMITTED BY UKRAINE**

12 JUNE 2018

TABLE OF CONTENTS

- Annex 278 U.N. General Assembly Resolution 51/210, U.N. Doc. A/RES/51/210, Measures to Eliminate International Terrorism (17 December 1999)
- Annex 279 Report of the International Law Commission on the Work of Its Fifty-Third Session, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 53rd. Sess., U.N. Doc. No. A/56/10 (23 April-1 June, 2 July-10 August 2001), art. 58 & commentary, pp. 142-143, para. 3, reproduced un Yearbook of the International Law Commission 2001, vol.II (2)
- Annex 280 U.N. Security Council Resolution 1373, U.N. Doc. S/RES/1373 (28 September 2001)
- Annex 281 Letter from J.W Wainwright, Expert Adviser, to the Chairman of the Counter-Terrorism Committee, para. 7 (12 November 2002)
- Annex 282 U.N. G.A. Res. 57/173, Strengthening the United Nations Crime Prevention and Criminal Justice Programme, in Particular its Technical Cooperation Capacity (21 January 2003)
- Annex 283 U.N. Security Council Resolution 1636, U.N. Doc. S/RES/1636 (31 October 2005)
- Annex 284 UNODC, Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols 12-13 (2008)
- Annex 285 UNODC, Legislative Guide to the Universal Legal Regime Against Terrorism 30-31 (2008)
- Annex 286 Committee Against Torture, General Comment No. 2 (28 January 2008)
- Annex 287 International Law Commission, Draft Articles on Effects of Armed Conflicts on Treaties, with Commentaries (2011)
- Annex 288 International Law Commission, The Obligation to Extradite or Prosecute (aut dedere aut judicare): Final Report on the International Law Commission (2014)
- Annex 289 Briefing by ASG Ivan Šimonovic to the UN Security Council (16 April 2014)
- Annex 290 U.N. Security Council, Records of 7165th Meetin, U.N. Doc. S/PV.7165 (29 Apr. 2014)
- Annex 291 Press Statement by the ASG Ivan Simonovic, UN Office of the High Commissioner for Human Rights, Launch of the Second Report on the Human Rights Situation in Ukraine (16 May 2014)
- Annex 292 OHCHR, UN Official Cites 'Worsening' Human Rights Situation in Southern, Eastern Regions (21 May 2014)
- Annex 293 OHCHR, Report on the Human Rights Situation in Ukraine (15 June 2014)
- Annex 294 Statement of the Assistant Secretary General Ivan Simonovic at the Security Council meeting on Ukraine (24 June 2014)

- Annex 295 OHCHR, Intensified Fighting Putting at Risk Lives of People in Donetsk and Luhansk – Pillay (4 July 2014)
- Annex 296 OHCHR, Report on the Human Rights Situation in Ukraine (15 July 2014)
- Annex 297 U.N. Security Council Resolution 2166, U.N. Doc. S/RES/2166, para. 11 (21 July 2014)
- Annex 298 Statement to the Security Council by Ivan Simonovic, Assistant Secretary-General for Human Rights on the human rights situation in Ukraine (8 August 2014)

Annex 278

U.N. General Assembly Resolution 51/210, U.N. Doc. A/RES/51/210, Measures to Eliminate International Terrorism (17 December 1999)



General Assembly

Distr.
GENERAL

A/RES/51/210
16 January 1997

Fifty-first session
Agenda item 151

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY

[on the report of the Sixth Committee (A/51/631)]

51/210. Measures to eliminate international terrorism

The General Assembly,

Recalling its resolution 49/60 of 9 December 1994, by which it adopted the Declaration on Measures to Eliminate International Terrorism, and its resolution 50/53 of 11 December 1995,

Recalling also the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations,¹

Guided by the purposes and principles of the Charter of the United Nations,

Deeply disturbed by the persistence of terrorist acts, which have taken place worldwide,

Stressing the need further to strengthen international cooperation between States and between international organizations and agencies, regional organizations and arrangements and the United Nations in order to prevent, combat and eliminate terrorism in all its forms and manifestations, wherever and by whomsoever committed,

Mindful of the need to enhance the role of the United Nations and the relevant specialized agencies in combating international terrorism,

Noting, in this context, all regional and international efforts to combat international terrorism, including those of the Organization of African Unity, the Organization of American States, the Organization of the Islamic Conference, the South Asian Association for Regional Cooperation, the European Union, the Council of Europe, the Movement of Non-Aligned Countries and the

¹ See resolution 50/6.

countries of the group of seven major industrialized countries and the Russian Federation,

Taking note of the report of the Director-General of the United Nations Educational, Scientific and Cultural Organization on educational activities under the project entitled "Towards a culture of peace",²

Recalling that in the Declaration on Measures to Eliminate International Terrorism the General Assembly encouraged States to review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of ensuring that there was a comprehensive legal framework covering all aspects of the matter,

Bearing in mind the possibility of considering in the future the elaboration of a comprehensive convention on international terrorism,

Noting that terrorist attacks by means of bombs, explosives or other incendiary or lethal devices have become increasingly widespread, and stressing the need to supplement the existing legal instruments in order to address specifically the problem of terrorist attacks carried out by such means,

Recognizing the need to enhance international cooperation to prevent the use of nuclear materials for terrorist purposes and to develop an appropriate legal instrument,

Recognizing also the need to strengthen international cooperation to prevent the use of chemical and biological materials for terrorist purposes,

Convinced of the need to implement effectively and supplement the provisions of the Declaration on Measures to Eliminate International Terrorism,

Having examined the report of the Secretary-General,³

I

1. Strongly condemns all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed;

2. Reiterates that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them;

3. Calls upon all States to adopt further measures in accordance with the relevant provisions of international law, including international standards of human rights, to prevent terrorism and to strengthen international cooperation in combating terrorism and, to that end, to consider the adoption of measures such as those contained in the official document adopted by the group of seven major industrialized countries and the Russian Federation at the Ministerial Conference on Terrorism, held in Paris on

² A/51/395, annex.

³ A/51/336 and Add.1.

30 July 1996,⁴ and the plan of action adopted by the Inter-American Specialized Conference on Terrorism, held at Lima from 23 to 26 April 1996 under the auspices of the Organization of American States,⁵ and in particular calls upon all States:

(a) To recommend that relevant security officials undertake consultations to improve the capability of Governments to prevent, investigate and respond to terrorist attacks on public facilities, in particular means of public transport, and to cooperate with other Governments in this respect;

(b) To accelerate research and development regarding methods of detection of explosives and other harmful substances that can cause death or injury, undertake consultations on the development of standards for marking explosives in order to identify their origin in post-blast investigations, and promote cooperation and transfer of technology, equipment and related materials, where appropriate;

(c) To note the risk of terrorists using electronic or wire communications systems and networks to carry out criminal acts and the need to find means, consistent with national law, to prevent such criminality and to promote cooperation where appropriate;

(d) To investigate, when sufficient justification exists according to national laws, and acting within their jurisdiction and through appropriate channels of international cooperation, the abuse of organizations, groups or associations, including those with charitable, social or cultural goals, by terrorists who use them as a cover for their own activities;

(e) To develop, if necessary, especially by entering into bilateral and multilateral agreements and arrangements, mutual legal assistance procedures aimed at facilitating and speeding investigations and collecting evidence, as well as cooperation between law enforcement agencies in order to detect and prevent terrorist acts;

(f) To take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering, including the exploitation of persons for purposes of funding terrorist activities, and in particular to consider, where appropriate, adopting regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes without impeding in any way the freedom of legitimate capital movements and to intensify the exchange of information concerning international movements of such funds;

4. Also calls upon all States, with the aim of enhancing the efficient implementation of relevant legal instruments, to intensify, as and where appropriate, the exchange of information on facts related to terrorism and, in so doing, to avoid the dissemination of inaccurate or unverified information;

5. Reiterates its call upon States to refrain from financing, encouraging, providing training for or otherwise supporting terrorist activities;

⁴ A/51/261, annex.

⁵ See A/51/336, para. 57.

6. Urges all States that have not yet done so to consider, as a matter of priority, becoming parties to the Convention on Offences and Certain Other Acts Committed on Board Aircraft,⁶ signed at Tokyo on 14 September 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft,⁷ signed at The Hague on 16 December 1970, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,⁸ concluded at Montreal on 23 September 1971, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,⁹ adopted in New York on 14 December 1973, the International Convention against the Taking of Hostages,¹⁰ adopted in New York on 17 December 1979, the Convention on the Physical Protection of Nuclear Material,¹¹ signed at Vienna on 3 March 1980, the 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,¹² signed at Montreal on 24 February 1988, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation,¹³ done at Rome on 10 March 1988, the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf,¹⁴ done at Rome on 10 March 1988, and the Convention on the Marking of Plastic Explosives for the Purpose of Detection,¹⁵ done at Montreal on 1 March 1991, and calls upon all States to enact, as appropriate, domestic legislation necessary to implement the provisions of those Conventions and Protocols, to ensure that the jurisdiction of their courts enables them to bring to trial the perpetrators of terrorist acts and to provide support and assistance to other Governments for those purposes;

II

7. Reaffirms the Declaration on Measures to Eliminate International Terrorism contained in the annex to resolution 49/60;

8. Approves the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, the text of which is annexed to the present resolution;

III

⁶ United Nations, Treaty Series, vol. 704, No. 10106.

⁷ Ibid., vol. 860, No. 12325.

⁸ Ibid., vol. 974, No. 14118.

⁹ Ibid., vol. 1035, No. 15410.

¹⁰ Resolution 34/146, annex.

¹¹ United Nations Treaty Series, vol. 1456, No. 24631.

¹² International Civil Aviation Organization, document DOC 9518.

¹³ International Maritime Organization, document SUA/CONF/15/Rev.1.

¹⁴ Ibid., document SUA/CONF/16/Rev.2.

¹⁵ S/22393, annex I; see Official Records of the Security Council, Forty-sixth year, Supplement for January, February and March 1991.

9. Decides to establish an Ad Hoc Committee, open to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency, to elaborate an international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism, to supplement related existing international instruments, and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism;

10. Decides also that the Ad Hoc Committee will meet from 24 February to 7 March 1997 to prepare the text of a draft international convention for the suppression of terrorist bombings, and recommends that work continue during the fifty-second session of the General Assembly from 22 September to 3 October 1997 in the framework of a working group of the Sixth Committee;

11. Requests the Secretary-General to provide the Ad Hoc Committee with the necessary facilities for the performance of its work;

12. Requests the Ad Hoc Committee to report to the General Assembly at its fifty-second session on progress made towards the elaboration of the draft convention;

13. Recommends that the Ad Hoc Committee be convened in 1998 to continue its work as referred to in paragraph 9 above;

IV

14. Decides to include in the provisional agenda of its fifty-second session the item entitled "Measures to eliminate international terrorism".

88th plenary meeting
17 December 1996

ANNEX

Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations,

Recalling the Declaration on Measures to Eliminate International Terrorism adopted by the General Assembly by its resolution 49/60 of 9 December 1994,

Recalling also the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations,¹

Deeply disturbed by the worldwide persistence of acts of international terrorism in all its forms and manifestations, including those in which States are directly or indirectly involved, which endanger or take innocent lives, have a deleterious effect on international relations and may jeopardize the security of States,

Underlining the importance of States developing extradition agreements or arrangements as necessary in order to ensure that those responsible for terrorist acts are brought to justice,

/...

Noting that the Convention relating to the Status of Refugees,¹⁶ done at Geneva on 28 July 1951, does not provide a basis for the protection of perpetrators of terrorist acts, noting also in this context articles 1, 2, 32 and 33 of the Convention, and emphasizing in this regard the need for States parties to ensure the proper application of the Convention,

Stressing the importance of full compliance by States with their obligations under the provisions of the 1951 Convention¹⁶ and the 1967 Protocol relating to the Status of Refugees,¹⁷ including the principle of non-refoulement of refugees to places where their life or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group or political opinion, and affirming that the present Declaration does not affect the protection afforded under the terms of the Convention and Protocol and other provisions of international law,

Recalling article 4 of the Declaration on Territorial Asylum adopted by the General Assembly by its resolution 2312 (XXII) of 14 December 1967,

Stressing the need further to strengthen international cooperation between States in order to prevent, combat and eliminate terrorism in all its forms and manifestations,

Solemnly declares the following:

1. The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed, including those which jeopardize friendly relations among States and peoples and threaten the territorial integrity and security of States;

2. The States Members of the United Nations reaffirm that acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations; they declare that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;

3. The States Members of the United Nations reaffirm that States should take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not participated in terrorist acts, considering in this regard relevant information as to whether the asylum-seeker is subject to investigation for or is charged with or has been convicted of offences connected with terrorism and, after granting refugee status, for the purpose of ensuring that that status is not used for the purpose of preparing or organizing terrorist acts intended to be committed against other States or their citizens;

4. The States Members of the United Nations emphasize that asylum-seekers who are awaiting the processing of their asylum applications may not thereby avoid prosecution for terrorist acts;

5. The States Members of the United Nations reaffirm the importance of ensuring effective cooperation between Member States so that those who have participated in terrorist acts, including their financing, planning or incitement, are brought to justice; they stress their commitment, in

¹⁶ United Nations, Treaty Series, vol. 189, No. 2545.

¹⁷ *Ibid.*, vol. 606, No. 8791.

conformity with the relevant provisions of international law, including international standards of human rights, to work together to prevent, combat and eliminate terrorism and to take all appropriate steps under their domestic laws either to extradite terrorists or to submit the cases to their competent authorities for the purpose of prosecution;

6. In this context, and while recognizing the sovereign rights of States in extradition matters, States are encouraged, when concluding or applying extradition agreements, not to regard as political offences excluded from the scope of those agreements offences connected with terrorism which endanger or represent a physical threat to the safety and security of persons, whatever the motives which may be invoked to justify them;

7. States are also encouraged, even in the absence of a treaty, to consider facilitating the extradition of persons suspected of having committed terrorist acts, insofar as their national laws permit;

8. The States Members of the United Nations emphasize the importance of taking steps to share expertise and information about terrorists, their movements, their support and their weapons and to share information regarding the investigation and prosecution of terrorist acts.

Annex 279

Report of the International Law Commission on the Work of Its Fifty-Third Session, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 53rd. Sess., U.N. Doc. No. A/56/10 (23 April–1 June, 2 July–10 August 2001), art. 58 & commentary, pp. 142–143, para. 3, reproduced in Yearbook of the International Law Commission 2001, vol.

II(2)

**Draft articles on
Responsibility of States for Internationally Wrongful Acts,
with commentaries
2001**

Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, as corrected.



RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

General commentary

(1) These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantial customary and conventional international law.

(2) Roberto Ago, who was responsible for establishing the basic structure and orientation of the project, saw the articles as specifying:

the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility ... [I]t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation.³²

(3) Given the existence of a primary rule establishing an obligation under international law for a State, and assuming that a question has arisen as to whether that State has complied with the obligation, a number of further issues of a general character arise. These include:

(a) The role of international law as distinct from the internal law of the State concerned in characterizing conduct as unlawful;

(b) Determining in what circumstances conduct is to be attributed to the State as a subject of international law;

(c) Specifying when and for what period of time there is or has been a breach of an international obligation by a State;

(d) Determining in what circumstances a State may be responsible for the conduct of another State which is incompatible with an international obligation of the latter;

(e) Defining the circumstances in which the wrongfulness of conduct under international law may be precluded;

(f) Specifying the content of State responsibility, i.e. the new legal relations that arise from the commission by a State of an internationally wrongful act, in terms of cessation of the wrongful act, and reparation for any injury done;

(g) Determining any procedural or substantive preconditions for one State to invoke the responsibility of

another State, and the circumstances in which the right to invoke responsibility may be lost;

(h) Laying down the conditions under which a State may be entitled to respond to a breach of an international obligation by taking countermeasures designed to ensure the fulfilment of the obligations of the responsible State under these articles.

This is the province of the secondary rules of State responsibility.

(4) A number of matters do not fall within the scope of State responsibility as dealt with in the present articles:

(a) As already noted, it is not the function of the articles to specify the content of the obligations laid down by particular primary rules, or their interpretation. Nor do the articles deal with the question whether and for how long particular primary obligations are in force for a State. It is a matter for the law of treaties to determine whether a State is a party to a valid treaty, whether the treaty is in force for that State and with respect to which provisions, and how the treaty is to be interpreted. The same is true, *mutatis mutandis*, for other “sources” of international obligations, such as customary international law. The articles take the existence and content of the primary rules of international law as they are at the relevant time; they provide the framework for determining whether the consequent obligations of each State have been breached, and with what legal consequences for other States.

(b) The consequences dealt with in the articles are those which flow from the commission of an internationally wrongful act as such.³³ No attempt is made to deal with the consequences of a breach for the continued validity or binding effect of the primary rule (e.g. the right of an injured State to terminate or suspend a treaty for material breach, as reflected in article 60 of the 1969 Vienna Convention). Nor do the articles cover such indirect or additional consequences as may flow from the responses of international organizations to wrongful conduct. In carrying out their functions it may be necessary for international organizations to take a position on whether a State has breached an international obligation. But even where this is so, the consequences will be those determined by or within the framework of the constituent instrument of the organization, and these fall outside the scope of the articles. This is particularly the case with action of the United Nations under the Charter, which is specifically reserved by article 59.

(c) The articles deal only with the responsibility for conduct which is internationally wrongful. There may be cases where States incur obligations to compensate for the injurious consequences of conduct which is not prohibited, and may even be expressly permitted, by international law (e.g. compensation for property duly taken for a public purpose). There may also be cases where a State is obliged to restore the *status quo ante* after some lawful activity has been completed. These requirements of compensation or restoration would involve primary obligations; it would be the failure to pay compensation, or to restore the *status*

³² *Yearbook ... 1970*, vol. II, p. 306, document A/8010/Rev.1, para. 66 (c).

³³ For the purposes of the articles, the term “internationally wrongful act” includes an omission and extends to conduct consisting of several actions or omissions which together amount to an internationally wrongful act. See paragraph (1) of the commentary to article 1.

quo which would engage the international responsibility of the State concerned. Thus for the purposes of these articles, international responsibility results exclusively from a wrongful act contrary to international law. This is reflected in the title of the articles.

(d) The articles are concerned only with the responsibility of States for internationally wrongful conduct, leaving to one side issues of the responsibility of international organizations or of other non-State entities (see articles 57 and 58).

(5) On the other hand, the present articles are concerned with the whole field of State responsibility. Thus they are not limited to breaches of obligations of a bilateral character, e.g. under a bilateral treaty with another State. They apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole. Being general in character, they are also for the most part residual. In principle, States are free, when establishing or agreeing to be bound by a rule, to specify that its breach shall entail only particular consequences and thereby to exclude the ordinary rules of responsibility. This is made clear by article 55.

(6) The present articles are divided into four parts. Part One is entitled “The internationally wrongful act of a State”. It deals with the requirements for the international responsibility of a State to arise. Part Two, “Content of the international responsibility of a State”, deals with the legal consequences for the responsible State of its internationally wrongful act, in particular as they concern cessation and reparation. Part Three is entitled “The implementation of the international responsibility of a State”. It identifies the State or States which may react to an internationally wrongful act and specifies the modalities by which this may be done, including, in certain circumstances, by the taking of countermeasures as necessary to ensure cessation of the wrongful act and reparation for its consequences. Part Four contains certain general provisions applicable to the articles as a whole.

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

Part One defines the general conditions necessary for State responsibility to arise. Chapter I lays down three basic principles for responsibility from which the articles as a whole proceed. Chapter II defines the conditions under which conduct is attributable to the State. Chapter III spells out in general terms the conditions under which such conduct amounts to a breach of an international obligation of the State concerned. Chapter IV deals with certain exceptional cases where one State may be responsible for the conduct of another State not in conformity with an international obligation of the latter. Chapter V defines the circumstances precluding the wrongfulness for conduct not in conformity with the international obligations of a State.

CHAPTER I

GENERAL PRINCIPLES

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

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

Commentary

(1) Article 1 states the basic principle underlying the articles as a whole, which is that a breach of international law by a State entails its international responsibility. An internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both. Whether there has been an internationally wrongful act depends, first, on the requirements of the obligation which is said to have been breached and, secondly, on the framework conditions for such an act, which are set out in Part One. The term “international responsibility” covers the new legal relations which arise under international law by reason of the internationally wrongful act of a State. The content of these new legal relations is specified in Part Two.

(2) PCIJ applied the principle set out in article 1 in a number of cases. For example, in the *Phosphates in Morocco* case, PCIJ affirmed that when a State commits an internationally wrongful act against another State international responsibility is established “immediately as between the two States”.³⁴ ICJ has applied the principle on several occasions, for example in the *Corfu Channel* case,³⁵ in the *Military and Paramilitary Activities in and against Nicaragua* case,³⁶ and in the *Gabčíkovo-Nagymaros Project* case.³⁷ The Court also referred to the principle in its advisory opinions on *Reparation for Injuries*,³⁸ and on the *Interpretation of Peace Treaties (Second Phase)*,³⁹ in which it stated that “refusal to fulfil a treaty obligation involves international responsibility”.⁴⁰ Arbitral tribunals have repeatedly affirmed the principle, for example in the *Claims of Italian Nationals Resident in Peru* cases,⁴¹ in

³⁴ *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74, p. 10, at p. 28. See also S.S. “Wimbledon”, 1923, P.C.I.J., Series A, No. 1, p. 15, at p. 30; Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21; and ibid., Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29.*

³⁵ *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949, p. 4, at p. 23.*

³⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14, at p. 142, para. 283, and p. 149, para. 292.*

³⁷ *Gabčíkovo-Nagymaros Project* (see footnote 27 above), at p. 38, para. 47.

³⁸ *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 174, at p. 184.*

³⁹ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950, p. 221.*

⁴⁰ *Ibid.*, p. 228.

⁴¹ Seven of these awards rendered in 1901 reiterated that “a universally recognized principle of international law states that the State is responsible for the violations of the law of nations committed by its agents” (UNRIAA, vol. XV (Sales No. 66.V.3), pp. 399 (Chiessa claim), 401 (Sessarego claim), 404 (Sanguinetti claim), 407 (Vercelli claim), 408 (Queirolo claim), 409 (Roggero claim), and 411 (Miglia claim)).

the *Dickson Car Wheel Company* case,⁴² in the *International Fisheries Company* case,⁴³ in the *British Claims in the Spanish Zone of Morocco* case⁴⁴ and in the *Armstrong Cork Company* case.⁴⁵ In the “*Rainbow Warrior*” case,⁴⁶ the arbitral tribunal stressed that “any violation by a State of any obligation, of whatever origin, gives rise to State responsibility”.⁴⁷

(3) That every internationally wrongful act of a State entails the international responsibility of that State, and thus gives rise to new international legal relations additional to those which existed before the act took place, has been widely recognized, both before⁴⁸ and since⁴⁹ article 1 was first formulated by the Commission. It is true that there were early differences of opinion over the definition of the legal relationships arising from an internationally wrongful act. One approach, associated with Anzilotti, described the legal consequences deriving from an internationally wrongful act exclusively in terms of a binding bilateral relationship thereby established between the wrongdoing State and the injured State, in which the obligation of the former State to make reparation is set against the “subjective” right of the latter State to require reparation. Another view, associated with Kelsen, started from the idea that the legal order is a coercive order and saw the authorization accorded to the injured State to apply a coercive sanction against the responsible State as the primary legal consequence flowing directly from the wrongful act.⁵⁰ According to this view, general international law empowered the injured State to react to a wrong; the obligation to make reparation was treated as subsidi-

⁴² *Dickson Car Wheel Company (U.S.A.) v. United Mexican States*, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 669, at p. 678 (1931).

⁴³ *International Fisheries Company (U.S.A.) v. United Mexican States*, *ibid.*, p. 691, at p. 701 (1931).

⁴⁴ According to the arbitrator, Max Huber, it is an indisputable principle that “responsibility is the necessary corollary of rights. All international rights entail international responsibility”, UNRIAA, vol. II (Sales No. 1949.V.1), p. 615, at p. 641 (1925).

⁴⁵ According to the Italian-United States Conciliation Commission, no State may “escape the responsibility arising out of the exercise of an illicit action from the viewpoint of the general principles of international law”, UNRIAA, vol. XIV (Sales No. 65.V.4), p. 159, at p. 163 (1953).

⁴⁶ Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the *Rainbow Warrior* affair, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 215 (1990).

⁴⁷ *Ibid.*, p. 251, para. 75.

⁴⁸ See, e.g., D. Anzilotti, *Corso di diritto internazionale*, 4th ed. (Padua, CEDAM, 1955) vol. I, p. 385; W. Wengler, *Völkerrecht* (Berlin, Springer, 1964), vol. I, p. 499; G. I. Tunkin, *Teoriya mezhdunarodnogo prava* (Moscow, Mezhdunarodnye otnosheniya, 1970), p. 470, trans. W. E. Butler, *Theory of International Law* (London, George Allen and Unwin, 1974), p. 415; and E. Jiménez de Aréchaga, “International responsibility”, *Manual of Public International Law*, M. Sørensen, ed. (London, Macmillan, 1968), p. 533.

⁴⁹ See, e.g., I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford University Press, 1998), p. 435; B. Conforti, *Diritto internazionale*, 4th ed. (Milan, Editoriale Scientifica, 1995), p. 332; P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, 6th ed. (Paris, Librairie générale de droit et de jurisprudence, 1999), p. 742; P.-M. Dupuy, *Droit international public*, 4th ed. (Paris, Dalloz, 1998), p. 414; and R. Wolfrum, “Internationally wrongful acts”, *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, North-Holland, 1995), vol. II, p. 1398.

⁵⁰ See H. Kelsen, *Principles of International Law*, 2nd ed., R. W. Tucker, ed. (New York, Holt, Rinehart and Winston, 1966), p. 22.

ary, a way by which the responsible State could avoid the application of coercion. A third view, which came to prevail, held that the consequences of an internationally wrongful act cannot be limited either to reparation or to a “sanction”.⁵¹ In international law, as in any system of law, the wrongful act may give rise to various types of legal relations, depending on the circumstances.

(4) Opinions have also differed on the question whether the legal relations arising from the occurrence of an internationally wrongful act were essentially bilateral, i.e. concerned only the relations of the responsible State and the injured State *inter se*. Increasingly it has been recognized that some wrongful acts engage the responsibility of the State concerned towards several or many States or even towards the international community as a whole. A significant step in this direction was taken by ICJ in the *Barcelona Traction* case when it noted that:

an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.⁵²

Every State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations. Among these the Court instanced “the outlawing of acts of aggression, and of genocide, as also ... the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”.⁵³ In later cases the Court has reaffirmed this idea.⁵⁴ The consequences of a broader conception of international responsibility must necessarily be reflected in the articles which, although they include standard bilateral situations of responsibility, are not limited to them.

(5) Thus the term “international responsibility” in article 1 covers the relations which arise under international law from the internationally wrongful act of a State, whether such relations are limited to the wrongdoing State and one injured State or whether they extend also to other States or indeed to other subjects of international law, and whether they are centred on obligations of restitution or compensation or also give the injured State the possibility of responding by way of countermeasures.

(6) The fact that under article 1 every internationally wrongful act of a State entails the international responsibility of that State does not mean that other States may not also be held responsible for the conduct in question, or for injury caused as a result. Under chapter II the same

⁵¹ See, e.g., R. Ago, “Le délit international”, *Recueil des cours...*, 1939-II (Paris, Sirey, 1947), vol. 68, p. 415, at pp. 430–440; and L. Oppenheim, *International Law: A Treatise*, vol. I, *Peace*, 8th ed., H. Lauterpacht, ed. (London, Longmans, Green and Co., 1955), pp. 352–354.

⁵² *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

⁵³ *Ibid.*, para. 34.

⁵⁴ See *East Timor (Portugal v. Australia)*, *Judgment*, I.C.J. Reports 1995, p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, I.C.J. Reports 1996, p. 226, at p. 258, para. 83; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *Preliminary Objections*, *Judgment*, I.C.J. Reports 1996, p. 595, at pp. 615–616, paras. 31–32.

conduct may be attributable to several States at the same time. Under chapter IV, one State may be responsible for the internationally wrongful act of another, for example if the act was carried out under its direction and control. Nonetheless the basic principle of international law is that each State is responsible for its own conduct in respect of its own international obligations.

(7) The articles deal only with the responsibility of States. Of course, as ICJ affirmed in the *Reparation for Injuries* case, the United Nations “is a subject of international law and capable of possessing international rights and duties ... it has capacity to maintain its rights by bringing international claims”.⁵⁵ The Court has also drawn attention to the responsibility of the United Nations for the conduct of its organs or agents.⁵⁶ It may be that the notion of responsibility for wrongful conduct is a basic element in the possession of international legal personality. Nonetheless, special considerations apply to the responsibility of other international legal persons, and these are not covered in the articles.⁵⁷

(8) As to terminology, the French term *fait internationalement illicite* is preferable to *délit* or other similar expressions which may have a special meaning in internal law. For the same reason, it is best to avoid, in English, such terms as “tort”, “delict” or “delinquency”, or in Spanish the term *delito*. The French term *fait internationalement illicite* is better than *acte internationalement illicite*, since wrongfulness often results from omissions which are hardly indicated by the term *acte*. Moreover, the latter term appears to imply that the legal consequences are intended by its author. For the same reasons, the term *hecho internacionalmente ilícito* is adopted in the Spanish text. In the English text, it is necessary to maintain the expression “internationally wrongful act”, since the French *fait* has no exact equivalent; nonetheless, the term “act” is intended to encompass omissions, and this is made clear in article 2.

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

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

(a) is attributable to the State under international law; and

(b) constitutes a breach of an international obligation of the State.

Commentary

(1) Article 1 states the basic principle that every internationally wrongful act of a State entails its international responsibility. Article 2 specifies the conditions required to establish the existence of an internationally wrong-

ful act of the State, i.e. the constituent elements of such an act. Two elements are identified. First, the conduct in question must be attributable to the State under international law. Secondly, for responsibility to attach to the act of the State, the conduct must constitute a breach of an international legal obligation in force for that State at that time.

(2) These two elements were specified, for example, by PCIJ in the *Phosphates in Morocco* case. The Court explicitly linked the creation of international responsibility with the existence of an “act being attributable to the State and described as contrary to the treaty right[s] of another State”.⁵⁸ ICJ has also referred to the two elements on several occasions. In the *United States Diplomatic and Consular Staff in Tehran* case, it pointed out that, in order to establish the responsibility of the Islamic Republic of Iran:

[f]irst, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.⁵⁹

Similarly in the *Dickson Car Wheel Company* case, the Mexico-United States General Claims Commission noted that the condition required for a State to incur international responsibility is “that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard”.⁶⁰

(3) The element of attribution has sometimes been described as “subjective” and the element of breach as “objective”, but the articles avoid such terminology.⁶¹ Whether there has been a breach of a rule may depend on the intention or knowledge of relevant State organs or agents and in that sense may be “subjective”. For example, article II of the Convention on the Prevention and Punishment of the Crime of Genocide states that: “In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such ...” In other cases, the standard for breach of an obligation may be “objective”, in the sense that the advertence or otherwise of relevant State organs or agents may be irrelevant. Whether responsibility is “objective” or “subjective” in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation. Nor do the articles lay down any presumption in this regard as between the different

⁵⁸ See footnote 34 above.

⁵⁹ *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, at p. 29, para. 56. Cf. page 41, para. 90. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), pp. 117–118, para. 226; and *Gabčikovo-Nagymaros Project* (footnote 27 above), p. 54, para. 78.

⁶⁰ See footnote 42 above.

⁶¹ Cf. *Yearbook ... 1973*, vol. II, p. 179, document A/9010/Rev.1, paragraph (1) of the commentary to article 3.

⁵⁵ *Reparation for Injuries* (see footnote 38 above), p. 179.

⁵⁶ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at pp. 88–89, para. 66.

⁵⁷ For the position of international organizations, see article 57 and commentary.

possible standards. Establishing these is a matter for the interpretation and application of the primary rules engaged in the given case.

(4) Conduct attributable to the State can consist of actions or omissions. Cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two. Moreover, it may be difficult to isolate an “omission” from the surrounding circumstances which are relevant to the determination of responsibility. For example, in the *Corfu Channel* case, ICJ held that it was a sufficient basis for Albanian responsibility that it knew, or must have known, of the presence of the mines in its territorial waters and did nothing to warn third States of their presence.⁶² In the *United States Diplomatic and Consular Staff in Tehran* case, the Court concluded that the responsibility of the Islamic Republic of Iran was entailed by the “inaction” of its authorities which “failed to take appropriate steps”, in circumstances where such steps were evidently called for.⁶³ In other cases it may be the combination of an action and an omission which is the basis for responsibility.⁶⁴

(5) For particular conduct to be characterized as an internationally wrongful act, it must first be attributable to the State. The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. An “act of the State” must involve some action or omission by a human being or group: “States can act only by and through their agents and representatives.”⁶⁵ The question is which persons should be considered as acting on behalf of the State, i.e. what constitutes an “act of the State” for the purposes of State responsibility.

(6) In speaking of attribution to the State what is meant is the State as a subject of international law. Under many legal systems, the State organs consist of different legal persons (ministries or other legal entities), which are regarded as having distinct rights and obligations for which they alone can be sued and are responsible. For the purposes of the international law of State responsibility the position is different. The State is treated as a unity, consistent with its recognition as a single legal person in international law. In this as in other respects the attribution of conduct to the State is necessarily a normative operation. What is crucial is that a given event is sufficiently

connected to conduct (whether an act or omission) which is attributable to the State under one or other of the rules set out in chapter II.

(7) The second condition for the existence of an internationally wrongful act of the State is that the conduct attributable to the State should constitute a breach of an international obligation of that State. The terminology of breach of an international obligation of the State is long established and is used to cover both treaty and non-treaty obligations. In its judgment on jurisdiction in the *Factory at Chorzów* case, PCIJ used the words “breach of an engagement”.⁶⁶ It employed the same expression in its subsequent judgment on the merits.⁶⁷ ICJ referred explicitly to these words in the *Reparation for Injuries* case.⁶⁸ The arbitral tribunal in the “*Rainbow Warrior*” affair referred to “any violation by a State of any obligation”.⁶⁹ In practice, terms such as “non-execution of international obligations”, “acts incompatible with international obligations”, “violation of an international obligation” or “breach of an engagement” are also used.⁷⁰ All these formulations have essentially the same meaning. The phrase preferred in the articles is “breach of an international obligation” corresponding as it does to the language of Article 36, paragraph 2 (c), of the ICJ Statute.

(8) In international law the idea of breach of an obligation has often been equated with conduct contrary to the rights of others. PCIJ spoke of an act “contrary to the treaty right[s] of another State” in its judgment in the *Phosphates in Morocco* case.⁷¹ That case concerned a limited multilateral treaty which dealt with the mutual rights and duties of the parties, but some have considered the correlation of obligations and rights as a general feature of international law: there are no international obligations of a subject of international law which are not matched by an international right of another subject or subjects, or even of the totality of the other subjects (the international community as a whole). But different incidents may attach to a right which is held in common by all other subjects of international law, as compared with a specific right of a given State or States. Different States may be beneficiaries of an obligation in different ways, or may have different interests in respect of its performance. Multilateral obligations may thus differ from bilateral ones, in view of the diversity of legal rules and institutions and the wide variety of interests sought to be protected by them. But whether any obligation has been breached still raises the two basic questions identified in article 2, and this is so whatever the character or provenance of the obligation breached. It is a separate question who may invoke the responsibility arising from the breach of an obligation: this question is dealt with in Part Three.⁷²

⁶² *Corfu Channel, Merits* (see footnote 35 above), pp. 22–23.

⁶³ *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 31–32, paras. 63 and 67. See also *Velásquez Rodríguez v. Honduras* case, Inter-American Court of Human Rights, Series C, No. 4, para. 170 (1988): “under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions”; and *Affaire relative à l’acquisition de la nationalité polonaise*, UNRIIAA, vol. I (Sales No. 1948.V.2), p. 401, at p. 425 (1924).

⁶⁴ For example, under article 4 of the Convention relative to the Laying of Automatic Submarine Contact Mines (Hague Convention VIII of 18 October 1907), a neutral Power which lays mines off its coasts but omits to give the required notice to other States parties would be responsible accordingly.

⁶⁵ *German Settlers in Poland, Advisory Opinion, 1923, P.C.I.J., Series B, No. 6*, p. 22.

⁶⁶ *Factory at Chorzów, Jurisdiction* (see footnote 34 above).

⁶⁷ *Factory at Chorzów, Merits* (*ibid.*).

⁶⁸ *Reparation for Injuries* (see footnote 38 above), p. 184.

⁶⁹ “*Rainbow Warrior*” (see footnote 46 above), p. 251, para. 75.

⁷⁰ At the Conference for the Codification of International Law, held at The Hague in 1930, the term “any failure ... to carry out the international obligations of the State” was adopted (see *Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3, article 1).

⁷¹ See footnote 34 above.

⁷² See also article 33, paragraph 2, and commentary.

(9) Thus there is no exception to the principle stated in article 2 that there are two necessary conditions for an internationally wrongful act—conduct attributable to the State under international law and the breach by that conduct of an international obligation of the State. The question is whether those two necessary conditions are also sufficient. It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, “damage” to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect. For example, the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure. Whether a particular obligation is breached forthwith upon a failure to act on the part of the responsible State, or whether some further event must occur, depends on the content and interpretation of the primary obligation and cannot be determined in the abstract.⁷³

(10) A related question is whether fault constitutes a necessary element of the internationally wrongful act of a State. This is certainly not the case if by “fault” one understands the existence, for example, of an intention to harm. In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention.

(11) Article 2 introduces and places in the necessary legal context the questions dealt with in subsequent chapters of Part One. Subparagraph (a)—which states that conduct attributable to the State under international law is necessary for there to be an internationally wrongful act—corresponds to chapter II, while chapter IV deals with the specific cases where one State is responsible for the internationally wrongful act of another State. Subparagraph (b)—which states that such conduct must constitute a breach of an international obligation—corresponds to the general principles stated in chapter III, while chapter V deals with cases where the wrongfulness of conduct, which would otherwise be a breach of an obligation, is precluded.

(12) In subparagraph (a), the term “attribution” is used to denote the operation of attaching a given action or omission to a State. In international practice and judicial decisions, the term “imputation” is also used.⁷⁴ But the term “attribution” avoids any suggestion that the legal process of connecting conduct to the State is a fiction, or that the conduct in question is “really” that of someone else.

⁷³ For examples of analysis of different obligations, see *United States Diplomatic and Consular Staff in Tehran* (footnote 59 above), pp. 30–33, paras. 62–68; “*Rainbow Warrior*” (footnote 46 above), pp. 266–267, paras. 107–110; and WTO, Report of the Panel, *United States—Sections 301–310 of the Trade Act of 1974* (WT/DS152/R), 22 December 1999, paras. 7.41 et seq.

⁷⁴ See, e.g., *United States Diplomatic and Consular Staff in Tehran* (footnote 59 above), p. 29, paras. 56 and 58; and *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 51, para. 86.

(13) In subparagraph (b), reference is made to the breach of an international obligation rather than a rule or a norm of international law. What matters for these purposes is not simply the existence of a rule but its application in the specific case to the responsible State. The term “obligation” is commonly used in international judicial decisions and practice and in the literature to cover all the possibilities. The reference to an “obligation” is limited to an obligation under international law, a matter further clarified in article 3.

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

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

Commentary

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

(2) As to the first of these elements, perhaps the clearest judicial decision is that of PCIJ in the *Treatment of Polish Nationals* case.⁷⁵ The Court denied the Polish Government the right to submit to organs of the League of Nations questions concerning the application to Polish nationals of certain provisions of the Constitution of the Free City of Danzig, on the ground that:

according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter’s Constitution, but only on international law and international obligations duly accepted ... [C]onversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force ... The application of the Danzig Constitution may ... result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law ... However, in cases of such a nature, it is not the Constitution and other laws, as such, but the international obligation that gives rise to the responsibility of the Free City.⁷⁶

(3) That conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful is equally well settled. Interna-

⁷⁵ *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44, p. 4.*

⁷⁶ *Ibid.*, pp. 24–25. See also “*Lotus*”, *Judgment No. 9, 1927, P.C.I.J., Series A, No. 10, p. 24.*

tional judicial decisions leave no doubt on that subject. In particular, PCIJ expressly recognized the principle in its first judgment, in the *S.S. "Wimbledon"* case. The Court rejected the argument of the German Government that the passage of the ship through the Kiel Canal would have constituted a violation of the German neutrality orders, observing that:

a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace. ... under Article 380 of the Treaty of Versailles, it was [Germany's] definite duty to allow [the passage of the *Wimbledon* through the Kiel Canal]. She could not advance her neutrality orders against the obligations which she had accepted under this Article.⁷⁷

The principle was reaffirmed many times:

it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty;⁷⁸

... it is certain that France cannot rely on her own legislation to limit the scope of her international obligations;⁷⁹

... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.⁸⁰

A different facet of the same principle was also affirmed in the advisory opinions on *Exchange of Greek and Turkish Populations*⁸¹ and *Jurisdiction of the Courts of Danzig*.⁸²

(4) ICJ has often referred to and applied the principle.⁸³ For example, in the *Reparation for Injuries* case, it noted that "[a]s the claim is based on the breach of an international obligation on the part of the Member held responsible ... the Member cannot contend that this obligation is governed by municipal law".⁸⁴ In the *ELSI* case, a Chamber of the Court emphasized this rule, stating that:

Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.⁸⁵

Conversely, as the Chamber explained:

the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in

international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness ... Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.⁸⁶

The principle has also been applied by numerous arbitral tribunals.⁸⁷

(5) The principle was expressly endorsed in the work undertaken under the auspices of the League of Nations on the codification of State responsibility,⁸⁸ as well as in the work undertaken under the auspices of the United Nations on the codification of the rights and duties of States and the law of treaties. The Commission's draft Declaration on Rights and Duties of States, article 13, provided that:

Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.⁸⁹

(6) Similarly this principle was endorsed in the 1969 Vienna Convention, article 27 of which provides that:

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.⁹⁰

⁸⁶ *Ibid.*, p. 74, para. 124.

⁸⁷ See, e.g., the Geneva Arbitration (the "*Alabama*" case), in Moore, *History and Digest*, vol. IV, p. 4144, at pp. 4156 and 4157 (1872); *Norwegian Shipowners' Claims (Norway v. United States of America)*, UNRIIAA, vol. I (Sales No. 1948.V.2), p. 307, at p. 331 (1922); *Agullar-Amory and Royal Bank of Canada Claims (Tinoco case) (Great Britain v. Costa Rica)*, *ibid.*, p. 369, at p. 386 (1923); *Shufeldt Claim*, *ibid.*, vol. II (Sales No. 1949.V.1), p. 1079, at p. 1098 ("it is a settled principle of international law that a sovereign can not be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter's subject") (1930); *Wollemborg Case*, *ibid.*, vol. XIV (Sales No. 65.V.4), p. 283, at p. 289 (1956); and *Flegenheimer*, *ibid.*, p. 327, at p. 360 (1958).

⁸⁸ In point I of the request for information on State responsibility sent to States by the Preparatory Committee for the 1930 Hague Conference it was stated:

"In particular, a State cannot escape its responsibility under international law, if such responsibility exists, by appealing to the provisions of its municipal law."

In their replies, States agreed expressly or implicitly with this principle (see League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (document C.75.M.69.1929.V), p. 16). During the debate at the 1930 Hague Conference, States expressed general approval of the idea embodied in point I and the Third Committee of the Conference adopted article 5 to the effect that "A State cannot avoid international responsibility by invoking the state of its municipal law" (document C.351(c) M.145(c).1930.V; reproduced in *Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3).

⁸⁹ See General Assembly resolution 375 (IV) of 6 December 1949, annex. For the debate in the Commission, see *Yearbook ... 1949*, pp. 105–106, 150 and 171. For the debate in the Assembly, see *Official Records of the General Assembly, Fourth Session, Sixth Committee*, 168th–173rd meetings, 18–25 October 1949; 175th–183rd meetings, 27 October–3 November 1949; and *ibid.*, *Fourth Session, Plenary Meetings*, 270th meeting, 6 December 1949.

⁹⁰ Article 46 of the Convention provides for the invocation of provisions of internal law regarding competence to conclude treaties in limited circumstances, viz., where the violation of such provisions "was manifest and concerned a rule of ... internal law of fundamental importance".

⁷⁷ *S.S. "Wimbledon"* (see footnote 34 above), pp. 29–30.

⁷⁸ *Greco-Bulgarian "Communities"*, *Advisory Opinion, 1930, P.C.I.J., Series B, No. 17*, p. 32.

⁷⁹ *Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24*, p. 12; and *ibid.*, *Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 96, at p. 167.

⁸⁰ *Treatment of Polish Nationals* (see footnote 75 above), p. 24.

⁸¹ *Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, P.C.I.J., Series B, No. 10*, p. 20.

⁸² *Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928, P.C.I.J., Series B, No. 15*, pp. 26–27. See also the observations of Lord Finlay in *Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7*, p. 26.

⁸³ See *Fisheries, Judgment, I.C.J. Reports 1951*, p. 116, at p. 132; *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 111, at p. 123; *Application of the Convention of 1902 Governing the Guardianship of Infants, Judgment, I.C.J. Reports 1958*, p. 55, at p. 67; and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 12, at pp. 34–35, para. 57.

⁸⁴ *Reparation for Injuries* (see footnote 38 above), at p. 180.

⁸⁵ *Eletronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15, at p. 51, para. 73.

(7) The rule that the characterization of conduct as unlawful in international law cannot be affected by the characterization of the same act as lawful in internal law makes no exception for cases where rules of international law require a State to conform to the provisions of its internal law, for instance by applying to aliens the same legal treatment as to nationals. It is true that in such a case, compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes it relevant, e.g. by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it. Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.

(8) As regards the wording of the rule, the formulation “The municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law”, which is similar to article 5 of the draft adopted on first reading at the 1930 Hague Conference and also to article 27 of the 1969 Vienna Convention, has the merit of making it clear that States cannot use their internal law as a means of escaping international responsibility. On the other hand, such a formulation sounds like a rule of procedure and is inappropriate for a statement of principle. Issues of the invocation of responsibility belong to Part Three, whereas this principle addresses the underlying question of the origin of responsibility. In addition, there are many cases where issues of internal law are relevant to the existence or otherwise of responsibility. As already noted, in such cases it is international law which determines the scope and limits of any reference to internal law. This element is best reflected by saying, first, that the characterization of State conduct as internationally wrongful is governed by international law, and secondly by affirming that conduct which is characterized as wrongful under international law cannot be excused by reference to the legality of that conduct under internal law.

(9) As to terminology, in the English version the term “internal law” is preferred to “municipal law”, because the latter is sometimes used in a narrower sense, and because the 1969 Vienna Convention speaks of “internal law”. Still less would it be appropriate to use the term “national law”, which in some legal systems refers only to the laws emanating from the central legislature, as distinct from provincial, cantonal or local authorities. The principle in article 3 applies to all laws and regulations adopted within the framework of the State, by whatever authority and at whatever level.⁹¹ In the French version the expression *droit interne* is preferred to *législation interne* and *loi interne*, because it covers all provisions of the internal legal order, whether written or unwritten and whether they take the form of constitutional or legislative rules, administrative decrees or judicial decisions.

⁹¹ Cf. *LaGrand (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999, p. 9, at p. 16, para. 28.

CHAPTER II

ATTRIBUTION OF CONDUCT TO A STATE

Commentary

(1) In accordance with article 2, one of the essential conditions for the international responsibility of a State is that the conduct in question is attributable to the State under international law. Chapter II defines the circumstances in which such attribution is justified, i.e. when conduct consisting of an act or omission or a series of acts or omissions is to be considered as the conduct of the State.

(2) In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the Government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority. Thus, the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State.⁹²

(3) As a corollary, the conduct of private persons is not as such attributable to the State. This was established, for example, in the *Tellini* case of 1923. The Council of the League of Nations referred to a Special Commission of Jurists certain questions arising from an incident between Italy and Greece.⁹³ This involved the assassination on Greek territory of the Chairman and several members of an international commission entrusted with the task of delimiting the Greek-Albanian border. In reply to question five, the Commission stated that:

The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.⁹⁴

(4) The attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link

⁹² See, e.g., I. Brownlie, *System of the Law of Nations: State Responsibility*, Part I (Oxford, Clarendon Press, 1983), pp. 132–166; D. D. Caron, “The basis of responsibility: attribution and other trans-substantive rules”, *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility*, R. B. Lillich and D. B. Magraw, eds. (Irvington-on-Hudson, N.Y., Transnational, 1998), p. 109; L. Condorelli, “L'imputation à l'État d'un fait internationallement illicite : solutions classiques et nouvelles tendances”, *Recueil des cours...*, 1984–VI (Dordrecht, Martinus Nijhoff, 1988), vol. 189, p. 9; H. Dipla, *La responsabilité de l'État pour violation des droits de l'homme: problèmes d'imputation* (Paris, Pedone, 1994); A. V. Freeman, “Responsibility of States for unlawful acts of their armed forces”, *Recueil des cours...*, 1955–II (Leiden, Sijthoff, 1956), vol. 88, p. 261; and F. Przetacznik, “The international responsibility of States for the unauthorized acts of their organs”, *Sri Lanka Journal of International Law*, vol. 1 (June 1989), p. 151.

⁹³ League of Nations, *Official Journal*, 4th Year, No. 11 (November 1923), p. 1349.

⁹⁴ *Ibid.*, 5th Year, No. 4 (April 1924), p. 524. See also the *Janes* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 82 (1925).

of factual causality. As a normative operation, attribution must be clearly distinguished from the characterization of conduct as internationally wrongful. Its concern is to establish that there is an act of the State for the purposes of responsibility. To show that conduct is attributable to the State says nothing, as such, about the legality or otherwise of that conduct, and rules of attribution should not be formulated in terms which imply otherwise. But the different rules of attribution stated in chapter II have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. For example, a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it.⁹⁵ In this respect there is often a close link between the basis of attribution and the particular obligation said to have been breached, even though the two elements are analytically distinct.

(5) The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State. Thus the Head of State or Government or the minister of foreign affairs is regarded as having authority to represent the State without any need to produce full powers.⁹⁶ Such rules have nothing to do with attribution for the purposes of State responsibility. In principle, the State's responsibility is engaged by conduct incompatible with its international obligations, irrespective of the level of administration or government at which the conduct occurs.⁹⁷ Thus, the rules concerning attribution set out in this chapter are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its Government.

(6) In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance. The structure of the State and the functions of its organs are not, in general, governed by international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government. But while the State remains free to determine its internal structure and functions through its own law and practice, international law has a distinct role. For example, the conduct of certain institutions performing public functions and exercising public powers (e.g. the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government.⁹⁸ Conduct engaged in by organs of the State in excess of their competence may also be

attributed to the State under international law, whatever the position may be under internal law.⁹⁹

(7) The purpose of this chapter is to specify the conditions under which conduct is attributed to the State as a subject of international law for the purposes of determining its international responsibility. Conduct is thereby attributed to the State as a subject of international law and not as a subject of internal law. In internal law, it is common for the "State" to be subdivided into a series of distinct legal entities. For example, ministries, departments, component units of all kinds, State commissions or corporations may have separate legal personality under internal law, with separate accounts and separate liabilities. But international law does not permit a State to escape its international responsibilities by a mere process of internal subdivision. The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law.

(8) Chapter II consists of eight articles. Article 4 states the basic rule attributing to the State the conduct of its organs. Article 5 deals with conduct of entities empowered to exercise the governmental authority of a State, and article 6 deals with the special case where an organ of one State is placed at the disposal of another State and empowered to exercise the governmental authority of that State. Article 7 makes it clear that the conduct of organs or entities empowered to exercise governmental authority is attributable to the State even if it was carried out outside the authority of the organ or person concerned or contrary to instructions. Articles 8 to 11 then deal with certain additional cases where conduct, not that of a State organ or entity, is nonetheless attributed to the State in international law. Article 8 deals with conduct carried out on the instructions of a State organ or under its direction or control. Article 9 deals with certain conduct involving elements of governmental authority, carried out in the absence of the official authorities. Article 10 concerns the special case of responsibility in defined circumstances for the conduct of insurrectional movements. Article 11 deals with conduct not attributable to the State under one of the earlier articles which is nonetheless adopted by the State, expressly or by conduct, as its own.

(9) These rules are cumulative but they are also limitative. In the absence of a specific undertaking or guarantee (which would be a *lex specialis*¹⁰⁰), a State is not responsible for the conduct of persons or entities in circumstances not covered by this chapter. As the Iran-United States Claims Tribunal has affirmed, "in order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State".¹⁰¹ This follows already from the provisions of article 2.

⁹⁵ See *United States Diplomatic and Consular Staff in Tehran* (footnote 59 above).

⁹⁶ See articles 7, 8, 46 and 47 of the 1969 Vienna Convention.

⁹⁷ The point was emphasized, in the context of federal States, in *LaGrand* (see footnote 91 above). It is not of course limited to federal States. See further article 5 and commentary.

⁹⁸ See paragraph (11) of the commentary to article 4; see also article 5 and commentary.

⁹⁹ See article 7 and commentary.

¹⁰⁰ See article 55 and commentary.

¹⁰¹ *Kenneth P. Yeager v. The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 17, p. 92, at pp. 101–102 (1987).

Article 4. Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

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

Commentary

(1) Paragraph 1 of article 4 states the first principle of attribution for the purposes of State responsibility in international law—that the conduct of an organ of the State is attributable to that State. The reference to a “State organ” covers all the individual or collective entities which make up the organization of the State and act on its behalf. It includes an organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State: this is made clear by the final phrase.

(2) Certain acts of individuals or entities which do not have the status of organs of the State may be attributed to the State in international law, and these cases are dealt with in later articles of this chapter. But the rule is nonetheless a point of departure. It defines the core cases of attribution, and it is a starting point for other cases. For example, under article 8 conduct which is authorized by the State, so as to be attributable to it, must have been authorized by an organ of the State, either directly or indirectly.

(3) That the State is responsible for the conduct of its own organs, acting in that capacity, has long been recognized in international judicial decisions. In the *Moses* case, for example, a decision of a Mexico-United States Mixed Claims Commission, Umpire Lieber said: “An officer or person in authority represents *pro tanto* his government, which in an international sense is the aggregate of all officers and men in authority.”¹⁰² There have been many statements of the principle since then.¹⁰³

(4) The replies by Governments to the Preparatory Committee for the 1930 Hague Conference¹⁰⁴ were unanimously of the view that the actions or omissions of organs of the State must be attributed to it. The Third Committee of the Conference adopted unanimously on first reading an article 1, which provided that international responsibility shall be incurred by a State as a consequence of “any

failure on the part of its organs to carry out the international obligations of the State”.¹⁰⁵

(5) The principle of the unity of the State entails that the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international responsibility. It goes without saying that there is no category of organs specially designated for the commission of internationally wrongful acts, and virtually any State organ may be the author of such an act. The diversity of international obligations does not permit any general distinction between organs which can commit internationally wrongful acts and those which cannot. This is reflected in the closing words of paragraph 1, which clearly reflect the rule of international law in the matter.

(6) Thus, the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs. Thus, in the *Salvador Commercial Company* case, the tribunal said that:

a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity.¹⁰⁶

ICJ has also confirmed the rule in categorical terms. In *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, it said:

According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule ... is of a customary character.¹⁰⁷

In that case the Court was principally concerned with decisions of State courts, but the same principle applies to legislative and executive acts.¹⁰⁸ As PCIJ said in *Certain German Interests in Polish Upper Silesia (Merits)*:

¹⁰⁵ Reproduced in *Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3.

¹⁰⁶ See *Salvador Commercial Company* (footnote 103 above). See also *Chattin* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 282, at pp. 285–286 (1927); and *Dispute concerning the interpretation of article 79 of the Treaty of Peace*, *ibid.*, vol. XIII (Sales No. 64.V.3), p. 389, at p. 438 (1955).

¹⁰⁷ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (see footnote 56 above), p. 87, para. 62, referring to the draft articles on State responsibility, article 6, now embodied in article 4.

¹⁰⁸ As to legislative acts, see, e.g., *German Settlers in Poland* (footnote 65 above), at pp. 35–36; *Treatment of Polish Nationals* (footnote 75 above), at pp. 24–25; *Phosphates in Morocco* (footnote 34 above), at pp. 25–26; and *Rights of Nationals of the United States of America in Morocco, Judgment, I.C.J. Reports 1952*, p. 176, at pp. 193–194. As to executive acts, see, e.g., *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above); and *ELSI* (footnote 85 above). As to judicial acts, see, e.g., “*Lotus*” (footnote 76 above); *Jurisdiction of the Courts of Danzig* (footnote 82 above); and *Ambatielos, Merits, Judgment, I.C.J. Reports 1953*, p. 10, at pp. 21–22. In some cases, the conduct in question may involve both executive and judicial acts; see, e.g., *Application of the Convention of 1902* (footnote 83 above) at p. 65.

¹⁰² Moore, *History and Digest*, vol. III, p. 3127, at p. 3129 (1871).

¹⁰³ See, e.g., *Claims of Italian Nationals* (footnote 41 above); *Salvador Commercial Company*, UNRIAA, vol. XV (Sales No. 66.V.3), p. 455, at p. 477 (1902); and *Finnish Shipowners (Great Britain/Finland)*, *ibid.*, vol. III (Sales No. 1949.V.2), p. 1479, at p. 1501 (1934).

¹⁰⁴ League of Nations, Conference for the Codification of International Law, *Bases of Discussion ...* (see footnote 88 above), pp. 25, 41 and 52; *Supplement to Volume III: Replies made by the Governments to the Schedule of Points; Replies of Canada and the United States of America* (document C.75(a)M.69(a).1929.V), pp. 2–3 and 6.

From the standpoint of International Law and of the Court which is its organ, municipal laws ... express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.¹⁰⁹

Thus, article 4 covers organs, whether they exercise “legislative, executive, judicial or any other functions”. This language allows for the fact that the principle of the separation of powers is not followed in any uniform way, and that many organs exercise some combination of public powers of a legislative, executive or judicial character. Moreover, the term is one of extension, not limitation, as is made clear by the words “or any other functions”.¹¹⁰ It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as “commercial” or as *acta iure gestionis*. Of course, the breach by a State of a contract does not as such entail a breach of international law.¹¹¹ Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4,¹¹² and it might in certain circumstances amount to an internationally wrongful act.¹¹³

(7) Nor is any distinction made at the level of principle between the acts of “superior” and “subordinate” officials, provided they are acting in their official capacity. This is expressed in the phrase “whatever position it holds in the organization of the State” in article 4. No doubt lower-level officials may have a more restricted scope of activity and they may not be able to make final decisions. But conduct carried out by them in their official capacity is nonetheless attributable to the State for the purposes of article 4. Mixed commissions after the Second World War often had to consider the conduct of minor organs of the State, such as administrators of enemy property, mayors and police officers, and consistently treated the acts of such persons as attributable to the State.¹¹⁴

¹⁰⁹ *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, at p. 19.

¹¹⁰ These functions might involve, e.g. the giving of administrative guidance to the private sector. Whether such guidance involves a breach of an international obligation may be an issue, but as “guidance” it is clearly attributable to the State. See, e.g., GATT, Report of the Panel, Japan–Trade in Semi-conductors, 24 March 1988, paras. 110–111; and WTO, Report of the Panel, Japan–Measures affecting Consumer Photographic Film and Paper (WT/DS44/R), paras. 10.12–10.16.

¹¹¹ See article 3 and commentary.

¹¹² See, e.g., the decisions of the European Court of Human Rights in *Swedish Engine Drivers’ Union v. Sweden, Eur. Court H.R., Series A, No. 20* (1976), at p. 14; and *Schmidt and Dahlström v. Sweden, ibid., Series A, No. 21* (1976), at p. 15.

¹¹³ The irrelevance of the classification of the acts of State organs as *iure imperii* or *iure gestionis* was affirmed by all those members of the Sixth Committee who responded to a specific question on this issue from the Commission (see *Yearbook ... 1998*, vol. II (Part Two), p. 17, para. 35).

¹¹⁴ See, e.g., the *Currie* case, UNRIAA, vol. XIV (Sales No. 65.V.4), p. 21, at p. 24 (1954); *Dispute concerning the interpretation of article 79* (footnote 106 above), at pp. 431–432; and *Mossé* case, UNRIAA, vol. XIII (Sales No. 64.V.3), p. 486, at pp. 492–493 (1953). For earlier decisions, see the *Roper* case, *ibid.*, vol. IV (Sales No. 1951.V.1), p. 145 (1927); *Massey, ibid.*, p. 155 (1927); *Way, ibid.*, p. 391, at p. 400 (1928); and *Baldwin, ibid.*, vol. VI (Sales No. 1955.V.3), p. 328 (1933). Cf. the consideration of the requisition of a plant by the Mayor of Palermo in *ELSI* (see footnote 85 above), e.g. at p. 50, para. 70.

(8) Likewise, the principle in article 4 applies equally to organs of the central government and to those of regional or local units. This principle has long been recognized. For example, the Franco-Italian Conciliation Commission in the *Heirs of the Duc de Guise* case said:

For the purposes of reaching a decision in the present case it matters little that the decree of 29 August 1947 was not enacted by the Italian State but by the region of Sicily. For the Italian State is responsible for implementing the Peace Treaty, even for Sicily, notwithstanding the autonomy granted to Sicily in internal relations under the public law of the Italian Republic.¹¹⁵

This principle was strongly supported during the preparatory work for the 1930 Hague Conference. Governments were expressly asked whether the State became responsible as a result of “[a]cts or omissions of bodies exercising public functions of a legislative or executive character (communes, provinces, etc.)”. All answered in the affirmative.¹¹⁶

(9) It does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State’s international obligations. The award in the “*Montijo*” case is the starting point for a consistent series of decisions to this effect.¹¹⁷ The French-Mexican Claims Commission in the *Pellat* case reaffirmed “the principle of the international responsibility ... of a federal State for all the acts of its separate States which give rise to claims by foreign States” and noted specially that such responsibility “... cannot be denied, not even in cases where the federal Constitution denies the central Government the right of control over the separate States or the right to require them to comply, in their conduct, with the rules of international law”.¹¹⁸ That rule has since been consistently applied. Thus, for example, in the *LaGrand* case, ICJ said:

Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States.¹¹⁹

¹¹⁵ UNRIAA, vol. XIII (Sales No. 64.V.3), p. 150, at p. 161 (1951). For earlier decisions, see, e.g., the *Pieri Dominique and Co.* case, *ibid.*, vol. X (Sales No. 60.V.4), p. 139, at p. 156 (1905).

¹¹⁶ League of Nations, Conference for the Codification of International Law, *Bases of Discussion ...* (see footnote 104 above), p. 90; *Supplement to Vol. III ... (ibid.)*, pp. 3 and 18.

¹¹⁷ See Moore, *History and Digest*, vol. II, p. 1440, at p. 1440 (1874). See also *De Brissot and others*, Moore, *History and Digest*, vol. III, p. 2967, at pp. 2970–2971 (1855); *Pieri Dominique and Co.* (footnote 115 above), at pp. 156–157; *Davy* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 467, at p. 468 (1903); *Janes* case (footnote 94 above); *Swinney*, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 101 (1925); *Quintanilla, ibid.*, p. 101, at p. 103 (1925); *Youmans, ibid.*, p. 110, at p. 116 (1925); *Mallén, ibid.*, p. 173, at p. 177 (1927); *Venable, ibid.*, p. 218, at p. 230 (1925); and *Tribolet, ibid.*, p. 598, at p. 601 (1925).

¹¹⁸ UNRIAA, vol. V (Sales No. 1952.V.3), p. 534, at p. 536 (1929).

¹¹⁹ *LaGrand, Provisional Measures* (see footnote 91 above). See also *LaGrand (Germany v. United States of America), Judgment, I.C.J.Reports 2001*, p. 466, at p. 495, para. 81.

(10) The reasons for this position are reinforced by the fact that federal States vary widely in their structure and distribution of powers, and that in most cases the constituent units have no separate international legal personality of their own (however limited), nor any treaty-making power. In those cases where the constituent unit of a federation is able to enter into international agreements on its own account,¹²⁰ the other party may well have agreed to limit itself to recourse against the constituent unit in the event of a breach. In that case the matter will not involve the responsibility of the federal State and will fall outside the scope of the present articles. Another possibility is that the responsibility of the federal State under a treaty may be limited by the terms of a federal clause in the treaty.¹²¹ This is clearly an exception to the general rule, applicable solely in relations between the States parties to the treaty and in the matters which the treaty covers. It has effect by virtue of the *lex specialis* principle, dealt with in article 55.

(11) Paragraph 2 explains the relevance of internal law in determining the status of a State organ. Where the law of a State characterizes an entity as an organ, no difficulty will arise. On the other hand, it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading. The internal law of a State may not classify, exhaustively or at all, which entities have the status of “organs”. In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an “organ”, internal law will not itself perform the task of classification. Even if it does so, the term “organ” used in internal law may have a special meaning, and not the very broad meaning it has under article 4. For example, under some legal systems the term “government” refers only to bodies at the highest level such as the Head of State and the cabinet of ministers. In others, the police have a special status, independent of the executive; this cannot mean that for international law purposes they are not organs of the State.¹²² Accordingly, a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law. This result is achieved by the use of the word “includes” in paragraph 2.

(12) The term “person or entity” is used in article 4, paragraph 2, as well as in articles 5 and 7. It is used in a broad sense to include any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority, etc. The term “entity” is used in a similar sense¹²³ in the draft articles

¹²⁰ See, e.g., articles 56, paragraph 3, and 172, paragraph 3, of the Constitution of the Swiss Confederation of 18 April 1999.

¹²¹ See, e.g., article 34 of the Convention for the Protection of the World Cultural and Natural Heritage.

¹²² See, e.g., the *Church of Scientology* case, Germany, Federal Supreme Court, Judgment of 26 September 1978, case No. VI ZR 267/76, *Neue Juristische Wochenschrift*, No. 21 (May 1979), p. 1101; ILR, vol. 65, p. 193; and *Propend Finance Pty Ltd. v. Sing*, England, Court of Appeal, ILR, vol. 111, p. 611 (1997). These were State immunity cases, but the same principle applies in the field of State responsibility.

¹²³ See *Yearbook ... 1991*, vol. II (Part Two), pp. 14–18.

on jurisdictional immunities of States and their property, adopted in 1991.

(13) Although the principle stated in article 4 is clear and undoubted, difficulties can arise in its application. A particular problem is to determine whether a person who is a State organ acts in that capacity. It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State. The distinction between unauthorized conduct of a State organ and purely private conduct has been clearly drawn in international arbitral decisions. For example, the award of the Mexico-United States General Claims Commission in the *Mallén* case involved, first, the act of an official acting in a private capacity and, secondly, another act committed by the same official in his official capacity, although in an abusive way.¹²⁴ The latter action was, and the former was not, held attributable to the State. The French-Mexican Claims Commission in the *Caire* case excluded responsibility only in cases where “the act had no connexion with the official function and was, in fact, merely the act of a private individual”.¹²⁵ The case of purely private conduct should not be confused with that of an organ functioning as such but acting *ultra vires* or in breach of the rules governing its operation. In this latter case, the organ is nevertheless acting in the name of the State: this principle is affirmed in article 7.¹²⁶ In applying this test, of course, each case will have to be dealt with on the basis of its own facts and circumstances.

Article 5. Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Commentary

(1) Article 5 deals with the attribution to the State of conduct of bodies which are not State organs in the sense of article 4, but which are nonetheless authorized to exercise governmental authority. The article is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.

¹²⁴ *Mallén* (see footnote 117 above), at p. 175.

¹²⁵ UNRIIA, vol. V (Sales No. 1952.V.3), p. 516, at p. 531 (1929). See also the *Bensley* case in Moore, *History and Digest*, vol. III, p. 3018 (1850) (“a wanton trespass ... under no color of official proceedings, and without any connection with his official duties”); and the *Castelain* case *ibid.*, p. 2999 (1880). See further article 7 and commentary.

¹²⁶ See paragraph (7) of the commentary to article 7.

(2) The generic term “entity” reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned. For example, in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations. Private or State-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine. In one case before the Iran-United States Claims Tribunal, an autonomous foundation established by the State held property for charitable purposes under close governmental control; its powers included the identification of property for seizure. It was held that it was a public and not a private entity, and therefore within the tribunal’s jurisdiction; with respect to its administration of allegedly expropriated property, it would in any event have been covered by article 5.¹²⁷

(3) The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity’s conduct to the State. Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority.

(4) Parastatal entities may be considered a relatively modern phenomenon, but the principle embodied in article 5 has been recognized for some time. For example, the replies to the request for information made by the Preparatory Committee for the 1930 Hague Conference indicated strong support from some Governments for the attribution to the State of the conduct of autonomous bodies exercising public functions of an administrative or legislative character. The German Government, for example, asserted that:

when, by delegation of powers, bodies act in a public capacity, e.g., police an area ... the principles governing the responsibility of the State for its organs apply with equal force. From the point of view of international law, it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or less extent, to autonomous bodies.¹²⁸

The Preparatory Committee accordingly prepared the following basis of discussion, though the Third Commit-

tee of the Conference was unable in the time available to examine it:

A State is responsible for damage suffered by a foreigner as the result of acts or omissions of such ... autonomous institutions as exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State.¹²⁹

(5) The justification for attributing to the State under international law the conduct of “parastatal” entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority. If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage. Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling stock).

(6) Article 5 does not attempt to identify precisely the scope of “governmental authority” for the purpose of attribution of the conduct of an entity to the State. Beyond a certain limit, what is regarded as “governmental” depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.

(7) The formulation of article 5 clearly limits it to entities which are empowered by internal law to exercise governmental authority. This is to be distinguished from situations where an entity acts under the direction or control of the State, which are covered by article 8, and those where an entity or group seizes power in the absence of State organs but in situations where the exercise of governmental authority is called for: these are dealt with in article 9. For the purposes of article 5, an entity is covered even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the State. On the other hand, article 5 does not extend to cover, for example, situations where internal law authorizes or justifies certain conduct by way of self-help or self-defence; i.e. where it confers powers upon or authorizes conduct by citizens or residents generally. The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category.

Article 6. Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is

¹²⁷ *Hyatt International Corporation v. The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 9, p. 72, at pp. 88–94 (1985).

¹²⁸ League of Nations, Conference for the Codification of International Law, *Bases of Discussion* ... (see footnote 88 above), p. 90. The German Government noted that these remarks would extend to the situation where “the State, as an exceptional measure, invests private organisations with public powers and duties or authorities [*sic*] them to exercise sovereign rights, as in the case of private railway companies permitted to maintain a police force”, *ibid.*

¹²⁹ *Ibid.*, p. 92.

acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Commentary

(1) Article 6 deals with the limited and precise situation in which an organ of a State is effectively put at the disposal of another State so that the organ may temporarily act for its benefit and under its authority. In such a case, the organ, originally that of one State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone.

(2) The words “placed at the disposal of” in article 6 express the essential condition that must be met in order for the conduct of the organ to be regarded under international law as an act of the receiving and not of the sending State. The notion of an organ “placed at the disposal of” the receiving State is a specialized one, implying that the organ is acting with the consent, under the authority of and for the purposes of the receiving State. Not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed, but in performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State. Thus article 6 is not concerned with ordinary situations of inter-State cooperation or collaboration, pursuant to treaty or otherwise.¹³⁰

(3) Examples of situations that could come within this limited notion of a State organ “placed at the disposal” of another State might include a section of the health service or some other unit placed under the orders of another country to assist in overcoming an epidemic or natural disaster, or judges appointed in particular cases to act as judicial organs of another State. On the other hand, mere aid or assistance offered by organs of one State to another on the territory of the latter is not covered by article 6. For example, armed forces may be sent to assist another State in the exercise of the right of collective self-defence or for other purposes. Where the forces in question remain under the authority of the sending State, they exercise elements of the governmental authority of that State and not of the receiving State. Situations can also arise where the organ of one State acts on the joint instructions of its own and another State, or there may be a single entity which is a joint organ of several States. In these cases, the conduct in question is attributable to both States under other articles of this chapter.¹³¹

(4) Thus, what is crucial for the purposes of article 6 is the establishment of a functional link between the organ in question and the structure or authority of the receiving

State. The notion of an organ “placed at the disposal” of another State excludes the case of State organs, sent to another State for the purposes of the former State or even for shared purposes, which retain their own autonomy and status: for example, cultural missions, diplomatic or consular missions, foreign relief or aid organizations. Also excluded from the ambit of article 6 are situations in which functions of the “beneficiary” State are performed without its consent, as when a State placed in a position of dependence, territorial occupation or the like is compelled to allow the acts of its own organs to be set aside and replaced to a greater or lesser extent by those of the other State.¹³²

(5) There are two further criteria that must be met for article 6 to apply. First, the organ in question must possess the status of an organ of the sending State; and secondly its conduct must involve the exercise of elements of the governmental authority of the receiving State. The first of these conditions excludes from the ambit of article 6 the conduct of private entities or individuals which have never had the status of an organ of the sending State. For example, experts or advisers placed at the disposal of a State under technical assistance programmes do not usually have the status of organs of the sending State. The second condition is that the organ placed at the disposal of a State by another State must be “acting in the exercise of elements of the governmental authority” of the receiving State. There will only be an act attributable to the receiving State where the conduct of the loaned organ involves the exercise of the governmental authority of that State. By comparison with the number of cases of cooperative action by States in fields such as mutual defence, aid and development, article 6 covers only a specific and limited notion of “transferred responsibility”. Yet, in State practice the situation is not unknown.

(6) In the *Chevreau* case, a British consul in Persia, temporarily placed in charge of the French consulate, lost some papers entrusted to him. On a claim being brought by France, Arbitrator Beichmann held that: “the British Government cannot be held responsible for negligence by its Consul in his capacity as the person in charge of the Consulate of another Power.”¹³³ It is implicit in the Arbitrator’s finding that the agreed terms on which the British Consul was acting contained no provision allocating responsibility for the Consul’s acts. If a third State had brought a claim, the proper respondent in accordance with article 6 would have been the State on whose behalf the conduct in question was carried out.

(7) Similar issues were considered by the European Commission of Human Rights in two cases relating to the exercise by Swiss police in Liechtenstein of “delegated” powers.¹³⁴ At the relevant time Liechtenstein was not

¹³⁰ Thus, the conduct of Italy in policing illegal immigration at sea pursuant to an agreement with Albania was not attributable to Albania: *Xhavara and Others v. Italy and Albania*, application No. 39473/98, *Eur. Court H.R.*, decision of 11 January 2001. Conversely, the conduct of Turkey taken in the context of the Turkey-European Communities customs union was still attributable to Turkey: see WTO, Report of the Panel, Turkey: Restrictions on Imports of Textile and Clothing Products (WT/DS34/R), 31 May 1999, paras. 9.33–9.44.

¹³¹ See also article 47 and commentary.

¹³² For the responsibility of a State for directing, controlling or coercing the internationally wrongful act of another, see articles 17 and 18 and commentaries.

¹³³ UNRIIAA, vol. II (Sales No. 1949.V.1), p. 1113, at p. 1141 (1931).

¹³⁴ *X and Y v. Switzerland*, application Nos. 7289/75 and 7349/76, decision of 14 July 1977; Council of Europe, European Commission of Human Rights, *Decisions and Reports*, vol. 9, p. 57; and *Yearbook of the European Convention on Human Rights*, 1977, vol. 20 (1978), p. 372, at pp. 402–406.

a party to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), so that if the conduct was attributable only to Liechtenstein no breach of the Convention could have occurred. The Commission held the case admissible, on the basis that under the treaty governing the relations between Switzerland and Liechtenstein of 1923, Switzerland exercised its own customs and immigration jurisdiction in Liechtenstein, albeit with the latter's consent and in their mutual interest. The officers in question were governed exclusively by Swiss law and were considered to be exercising the public authority of Switzerland. In that sense, they were not "placed at the disposal" of the receiving State.¹³⁵

(8) A further, long-standing example of a situation to which article 6 applies is the Judicial Committee of the Privy Council, which has acted as the final court of appeal for a number of independent States within the Commonwealth. Decisions of the Privy Council on appeal from an independent Commonwealth State will be attributable to that State and not to the United Kingdom. The Privy Council's role is paralleled by certain final courts of appeal acting pursuant to treaty arrangements.¹³⁶ There are many examples of judges seconded by one State to another for a time: in their capacity as judges of the receiving State, their decisions are not attributable to the sending State, even if it continues to pay their salaries.

(9) Similar questions could also arise in the case of organs of international organizations placed at the disposal of a State and exercising elements of that State's governmental authority. This is even more exceptional than the inter-State cases to which article 6 is limited. It also raises difficult questions of the relations between States and international organizations, questions which fall outside the scope of these articles. Article 57 accordingly excludes from the ambit of the articles all questions of the responsibility of international organizations or of a State for the acts of an international organization. By the same token, article 6 does not concern those cases where, for example, accused persons are transferred by a State to an international institution pursuant to treaty.¹³⁷ In cooperating with international institutions in such a case, the State concerned does not assume responsibility for their subsequent conduct.

Article 7. Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the

¹³⁵ See also *Droz and Janousek v. France and Spain*, Eur. Court H.R., Series A, No. 240 (1992), paras. 96 and 110. See also *Controller and Auditor-General v. Davison* (New Zealand, Court of Appeal), ILR, vol. 104 (1996), p. 526, at pp. 536–537 (Cooke, P.) and pp. 574–576 (Richardson, J.). An appeal to the Privy Council on other grounds was dismissed, *Brannigan v. Davison*, *ibid.*, vol. 108, p. 622.

¹³⁶ For example, Agreement relating to Appeals to the High Court of Australia from the Supreme Court of Nauru (Nauru, 6 September 1976) (United Nations, *Treaty Series*, vol. 1216, No. 19617, p. 151).

¹³⁷ See, e.g., article 89 of the Rome Statute of the International Criminal Court.

State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Commentary

(1) Article 7 deals with the important question of unauthorized or *ultra vires* acts of State organs or entities. It makes it clear that the conduct of a State organ or an entity empowered to exercise elements of the governmental authority, acting in its official capacity, is attributable to the State even if the organ or entity acted in excess of authority or contrary to instructions.

(2) The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence. It is so even if other organs of the State have disowned the conduct in question.¹³⁸ Any other rule would contradict the basic principle stated in article 3, since otherwise a State could rely on its internal law in order to argue that conduct, in fact carried out by its organs, was not attributable to it.

(3) The rule evolved in response to the need for clarity and security in international relations. Despite early equivocal statements in diplomatic practice and by arbitral tribunals,¹³⁹ State practice came to support the proposition, articulated by the British Government in response to an Italian request, that "all Governments should always be held responsible for all acts committed by their agents by virtue of their official capacity".¹⁴⁰ As the Spanish Government pointed out: "If this were not the case, one would end by authorizing abuse, for in most cases there would be no practical way of proving that the agent had or had not acted on orders received."¹⁴¹ At this time the United States supported "a rule of international law that sovereigns are not liable, in diplomatic procedure, for damages to a foreigner when arising from the misconduct of agents acting out of the range not only of their real but

¹³⁸ See, e.g., the "Star and Herald" controversy, Moore, *Digest*, vol. VI, p. 775.

¹³⁹ In a number of early cases, international responsibility was attributed to the State for the conduct of officials without making it clear whether the officials had exceeded their authority: see, e.g., the following cases: "*Only Son*", Moore, *History and Digest*, vol. IV, pp. 3404–3405; "*William Lee*", *ibid.*, p. 3405; and *Donougho's*, *ibid.*, vol. III, p. 3012. Where the question was expressly examined, tribunals did not consistently apply any single principle: see, e.g., the *Lewis's* case, *ibid.*, p. 3019; the *Gadino* case, UNRIIAA, vol. XV (Sales No. 66.V.3), p. 414 (1901); the *Lacaze* case, *Lapradelle-Politis*, vol. II, p. 290, at pp. 297–298; and the "*William Yeaton*" case, Moore, *History and Digest*, vol. III, p. 2944, at p. 2946.

¹⁴⁰ For the opinions of the British and Spanish Governments given in 1898 at the request of Italy in respect of a dispute with Peru, see *Archivio del Ministero degli Affari esteri italiano*, serie politica P, No. 43.

¹⁴¹ Note verbale by Duke Almodóvar del Río, 4 July 1898, *ibid.*

of their apparent authority".¹⁴² It is probable that the different formulations had essentially the same effect, since acts falling outside the scope of both real and apparent authority would not be performed "by virtue of ... official capacity". In any event, by the time of the 1930 Hague Conference, a majority of States responding to the Preparatory Committee's request for information were clearly in favour of the broadest formulation of the rule, providing for attribution to the State in the case of "[a]cts of officials in the national territory in their public capacity (*actes de fonction*) but exceeding their authority".¹⁴³ The Basis of Discussion prepared by the Committee reflected this view. The Third Committee of the Conference adopted an article on first reading in the following terms:

International responsibility is ... incurred by a State if damage is sustained by a foreigner as a result of unauthorised acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State.¹⁴⁴

(4) The modern rule is now firmly established in this sense by international jurisprudence, State practice and the writings of jurists.¹⁴⁵ It is confirmed, for example, in article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), which provides that: "A Party to the conflict ... shall be responsible for all acts committed by persons forming part of its armed forces": this clearly covers acts committed contrary to orders or instructions. The commentary notes that article 91 was adopted by consensus and "correspond[s] to the general principles of law on international responsibility".¹⁴⁶

(5) A definitive formulation of the modern rule is found in the *Caire* case. The case concerned the murder of a French national by two Mexican officers who, after failing to extort money, took Caire to the local barracks and shot him. The Commission held:

that the two officers, even if they are deemed to have acted outside their competence ... and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status.¹⁴⁷

¹⁴² "American Bible Society" incident, statement of United States Secretary of State, 17 August 1885, Moore, *Digest*, vol. VI, p. 743; "Shine and Milligen", G. H. Hackworth, *Digest of International Law* (Washington, D.C., United States Government Printing Office, 1943), vol. V, p. 575; and "Miller", *ibid.*, pp. 570–571.

¹⁴³ League of Nations, Conference for the Codification of International Law, *Bases of Discussion* ... (see footnote 88 above), point V, No. 2 (b), p. 74, and *Supplement to Vol. III* ... (see footnote 104 above), pp. 3 and 17.

¹⁴⁴ League of Nations, Conference for the Codification of International Law, *Bases of Discussion* ..., document C.351(c)M.145(c).1930. V (see footnote 88 above), p. 237. For a more detailed account of the evolution of the modern rule, see *Yearbook* ... 1975, vol. II, pp. 61–70.

¹⁴⁵ For example, the 1961 revised draft by the Special Rapporteur, Mr. García Amador, provided that "an act or omission shall likewise be imputable to the State if the organs or officials concerned exceeded their competence but purported to be acting in their official capacity" (*Yearbook* ... 1961, vol. II, p. 53).

¹⁴⁶ ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Martinus Nijhoff, 1987), pp. 1053–1054.

¹⁴⁷ *Caire* (see footnote 125 above). For other statements of the rule, see *Maal*, UNRIAA, vol. X (Sales No. 60.V.4), pp. 732–733 (1903); *La Masica*, *ibid.*, vol. XI (Sales No. 61.V.4), p. 560 (1916); *Youmans* (footnote 117 above); *Mallén*, *ibid.*; *Stephens*, UNRIAA,

(6) International human rights courts and tribunals have applied the same rule. For example, the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case said:

This conclusion [of a breach of the Convention] is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.¹⁴⁸

(7) The central issue to be addressed in determining the applicability of article 7 to unauthorized conduct of official bodies is whether the conduct was performed by the body in an official capacity or not. Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State. In the words of the Iran-United States Claims Tribunal, the question is whether the conduct has been "carried out by persons cloaked with governmental authority".¹⁴⁹

(8) The problem of drawing the line between unauthorized but still "official" conduct, on the one hand, and "private" conduct on the other, may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it. However, the distinction between the two situations still needs to be made in some cases, for example when considering isolated instances of outrageous conduct on the part of persons who are officials. That distinction is reflected in the expression "if the organ, person or entity acts in that capacity" in article 7. This indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State.¹⁵⁰ In short, the question is whether they were acting with apparent authority.

(9) As formulated, article 7 only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, i.e.

vol. IV (Sales No. 1951.V.1), pp. 267–268 (1927); and *Way* (footnote 114 above), pp. 400–401. The decision of the United States Court of Claims in *Royal Holland Lloyd v. United States*, 73 Ct. Cl. 722 (1931) (*Annual Digest of Public International Law Cases* (London, Butterworth, 1938), vol. 6, p. 442) is also often cited.

¹⁴⁸ *Velásquez Rodríguez* (see footnote 63 above); see also ILR, vol. 95, p. 232, at p. 296.

¹⁴⁹ *Petrolane, Inc. v. The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 27, p. 64, at p. 92 (1991). See also paragraph (13) of the commentary to article 4.

¹⁵⁰ One form of *ultra vires* conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction. The articles are not concerned with questions that would then arise as to the validity of the transaction (cf. the 1969 Vienna Convention, art. 50). So far as responsibility for the corrupt conduct is concerned, various situations could arise which it is not necessary to deal with expressly in the present articles. Where one State bribes an organ of another to perform some official act, the corrupting State would be responsible either under article 8 or article 17. The question of the responsibility of the State whose official had been bribed towards the corrupting State in such a case could hardly arise, but there could be issues of its responsibility towards a third party, which would be properly resolved under article 7.

only to those cases of attribution covered by articles 4, 5 and 6. Problems of unauthorized conduct by other persons, groups or entities give rise to distinct problems, which are dealt with separately under articles 8, 9 and 10.

(10) As a rule of attribution, article 7 is not concerned with the question whether the conduct amounted to a breach of an international obligation. The fact that instructions given to an organ or entity were ignored, or that its actions were *ultra vires*, may be relevant in determining whether or not the obligation has been breached, but that is a separate issue.¹⁵¹ Equally, article 7 is not concerned with the admissibility of claims arising from internationally wrongful acts committed by organs or agents acting *ultra vires* or contrary to their instructions. Where there has been an unauthorized or invalid act under local law and as a result a local remedy is available, this will have to be resorted to, in accordance with the principle of exhaustion of local remedies, before bringing an international claim.¹⁵²

Article 8. Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Commentary

(1) As a general principle, the conduct of private persons or entities is not attributable to the State under international law. Circumstances may arise, however, where such conduct is nevertheless attributable to the State because there exists a specific factual relationship between the person or entity engaging in the conduct and the State. Article 8 deals with two such circumstances. The first involves private persons acting on the instructions of the State in carrying out the wrongful conduct. The second deals with a more general situation where private persons act under the State's direction or control.¹⁵³ Bearing in mind the important role played by the principle of effectiveness in international law, it is necessary to take into account in both cases the existence of a real link between the person or group performing the act and the State machinery.

(2) The attribution to the State of conduct in fact authorized by it is widely accepted in international jurisprudence.¹⁵⁴ In such cases it does not matter that the person or persons involved are private individuals nor whether

their conduct involves "governmental activity". Most commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as "auxiliaries" while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as "volunteers" to neighbouring countries, or who are instructed to carry out particular missions abroad.

(3) More complex issues arise in determining whether conduct was carried out "under the direction or control" of a State. Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control.

(4) The degree of control which must be exercised by the State in order for the conduct to be attributable to it was a key issue in the *Military and Paramilitary Activities in and against Nicaragua* case. The question was whether the conduct of the *contras* was attributable to the United States so as to hold the latter generally responsible for breaches of international humanitarian law committed by the *contras*. This was analysed by ICJ in terms of the notion of "control". On the one hand, it held that the United States was responsible for the "planning, direction and support" given by the United States to Nicaraguan operatives.¹⁵⁵ But it rejected the broader claim of Nicaragua that all the conduct of the *contras* was attributable to the United States by reason of its control over them. It concluded that:

[D]espite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.

...

All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.¹⁵⁶

Thus while the United States was held responsible for its own support for the *contras*, only in certain individual instances were the acts of the *contras* themselves held attributable to it, based upon actual participation of and directions given by that State. The Court confirmed that a general situation of dependence and support would be

¹⁵¹ See *ELSI* (footnote 85 above), especially at pp. 52, 62 and 74.

¹⁵² See further article 44, subparagraph (b), and commentary.

¹⁵³ Separate issues are raised where one State engages in internationally wrongful conduct at the direction or under the control of another State: see article 17 and commentary, and especially paragraph (7) for the meaning of the words "direction" and "control" in various languages.

¹⁵⁴ See, e.g., the *Zafiro* case, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 160 (1925); the *Stephens* case (footnote 147 above), p. 267; and *Lehigh Valley Railroad Company and Others (U.S.A.) v. Germany (Sabotage cases): "Black Tom" and "Kingsland" incidents*, *ibid.*, vol. VIII (Sales No. 58.V.2), p. 84 (1930) and p. 458 (1939).

¹⁵⁵ *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 51, para. 86.

¹⁵⁶ *Ibid.*, pp. 62 and 64–65, paras. 109 and 115. See also the concurring opinion of Judge Ago, *ibid.*, p. 189, para. 17.

insufficient to justify attribution of the conduct to the State.

(5) The Appeals Chamber of the International Tribunal for the Former Yugoslavia has also addressed these issues. In the *Tadić*, case, the Chamber stressed that:

The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.¹⁵⁷

The Appeals Chamber held that the requisite degree of control by the Yugoslavian “authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations”.¹⁵⁸ In the course of their reasoning, the majority considered it necessary to disapprove the ICJ approach in the *Military and Paramilitary Activities in and against Nicaragua* case. But the legal issues and the factual situation in the *Tadić* case were different from those facing the Court in that case. The tribunal’s mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitarian law.¹⁵⁹ In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.¹⁶⁰

(6) Questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled. If such corporations act inconsistently with the international obligations of the State concerned the question arises whether such conduct is attributable to the State. In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the “corporate veil” is a mere device or a vehicle for fraud or evasion.¹⁶¹ The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity.¹⁶² Since

corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5. This was the position taken, for example, in relation to the *de facto* seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property.¹⁶³ On the other hand, where there was evidence that the corporation was exercising public powers,¹⁶⁴ or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result,¹⁶⁵ the conduct in question has been attributed to the State.¹⁶⁶

(7) It is clear then that a State may, either by specific directions or by exercising control over a group, in effect assume responsibility for their conduct. Each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of. In the text of article 8, the three terms “instructions”, “direction” and “control” are disjunctive; it is sufficient to establish any one of them. At the same time it is made clear that the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act.

(8) Where a State has authorized an act, or has exercised direction or control over it, questions can arise as to the State’s responsibility for actions going beyond the scope of the authorization. For example, questions might arise if the agent, while carrying out lawful instructions or directions, engages in some activity which contravenes both the instructions or directions given and the international obligations of the instructing State. Such cases can be resolved by asking whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it. In general a State, in giving lawful instructions to persons who are not its organs, does not assume the risk that the instructions will be carried out in an internationally unlawful way. On the other hand, where persons or groups have committed acts under the effective control of a State, the condition for attribution will still be met even if particular instructions may have been ignored.

¹⁵⁷ *Prosecutor v. Duško Tadić*, International Tribunal for the Former Yugoslavia, Case IT-94-1-A (1999), ILM, vol. 38, No. 6 (November 1999), p. 1518, at p. 1541, para. 117. For the judgment of the Trial Chamber (Case IT-94-1-T (1997)), see ILR, vol. 112, p. 1.

¹⁵⁸ ILM, vol. 38, No. 6 (November 1999), p. 1546, para. 145.

¹⁵⁹ See the explanation given by Judge Shahabuddeen, *ibid.*, pp. 1614–1615.

¹⁶⁰ The problem of the degree of State control necessary for the purposes of attribution of conduct to the State has also been dealt with, for example, by the Iran-United States Claims Tribunal and the European Court of Human Rights: *Yeager* (see footnote 101 above), p. 103. See also *Starrett Housing Corporation v. Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 4, p. 122, at p. 143 (1983); *Loizidou v. Turkey*, *Merits*, *Eur. Court H.R., Reports*, 1996–VI, p. 2216, at pp. 2235–2236, para. 56, also p. 2234, para. 52; and *ibid.*, *Preliminary Objections*, *Eur. Court H.R., Series A, No. 310*, p. 23, para. 62 (1995).

¹⁶¹ *Barcelona Traction* (see footnote 25 above), p. 39, paras. 56–58.

¹⁶² For example, the Workers’ Councils considered in *Schering Corporation v. The Islamic Republic of Iran*, Iran-U.S. C.T.R.,

vol. 5, p. 361 (1984); *Otis Elevator Company v. The Islamic Republic of Iran*, *ibid.*, vol. 14, p. 283 (1987); and *Eastman Kodak Company v. The Government of Iran*, *ibid.*, vol. 17, p. 153 (1987).

¹⁶³ *SEDCO, Inc. v. National Iranian Oil Company*, *ibid.*, vol. 15, p. 23 (1987). See also *International Technical Products Corporation v. The Government of the Islamic Republic of Iran*, *ibid.*, vol. 9, p. 206 (1985); and *Flexi-Van Leasing, Inc. v. The Government of the Islamic Republic of Iran*, *ibid.*, vol. 12, p. 335, at p. 349 (1986).

¹⁶⁴ *Phillips Petroleum Company Iran v. The Islamic Republic of Iran*, *ibid.*, vol. 21, p. 79 (1989); and *Petrolane* (see footnote 149 above).

¹⁶⁵ *Foremost Tehran, Inc. v. The Government of the Islamic Republic of Iran*, Iran-U.S. *ibid.*, vol. 10, p. 228 (1986); and *American Bell International Inc. v. The Islamic Republic of Iran*, *ibid.*, vol. 12, p. 170 (1986).

¹⁶⁶ See *Hertzberg et al. v. Finland* (*Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*), annex XIV, communication No. R.14/61, p. 161, at p. 164, para. 9.1) (1982). See also *X v. Ireland*, application No. 4125/69, *Yearbook of the European Convention on Human Rights*, 1971, vol. 14 (1973), p. 199; and *Young, James and Webster v. the United Kingdom*, *Eur. Court H.R., Series A, No. 44* (1981).

The conduct will have been committed under the control of the State and it will be attributable to the State in accordance with article 8.

(9) Article 8 uses the words “person or group of persons”, reflecting the fact that conduct covered by the article may be that of a group lacking separate legal personality but acting on a *de facto* basis. Thus, while a State may authorize conduct by a legal entity such as a corporation, it may also deal with aggregates of individuals or groups that do not have legal personality but are nonetheless acting as a collective.

Article 9. Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Commentary

(1) Article 9 deals with the exceptional case of conduct in the exercise of elements of the governmental authority by a person or group of persons acting in the absence of the official authorities and without any actual authority to do so. The exceptional nature of the circumstances envisaged in the article is indicated by the phrase “in circumstances such as to call for”. Such cases occur only rarely, such as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative. They may also cover cases where lawful authority is being gradually restored, e.g. after foreign occupation.

(2) The principle underlying article 9 owes something to the old idea of the *levée en masse*, the self-defence of the citizenry in the absence of regular forces:¹⁶⁷ in effect it is a form of agency of necessity. Instances continue to occur from time to time in the field of State responsibility. Thus, the position of the Revolutionary Guards or “Komitehs” immediately after the revolution in the Islamic Republic of Iran was treated by the Iran-United States Claims Tribunal as covered by the principle expressed in article 9. *Yeager* concerned, *inter alia*, the action of performing immigration, customs and similar functions at Tehran airport in the immediate aftermath of the revolution. The tribunal held the conduct attributable to the Islamic Republic of Iran, on the basis that, if it was not actually authorized by the Government, then the Guards:

¹⁶⁷ This principle is recognized as legitimate by article 2 of the Regulations respecting the Laws and Customs of War on Land (annexed to the Hague Conventions II of 1899 and IV of 1907 respecting the Laws and Customs of War on Land); and by article 4, paragraph A (6), of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

at least exercised elements of governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object.¹⁶⁸

(3) Article 9 establishes three conditions which must be met in order for conduct to be attributable to the State: first, the conduct must effectively relate to the exercise of elements of the governmental authority, secondly, the conduct must have been carried out in the absence or default of the official authorities, and thirdly, the circumstances must have been such as to call for the exercise of those elements of authority.

(4) As regards the first condition, the person or group acting must be performing governmental functions, though they are doing so on their own initiative. In this respect, the nature of the activity performed is given more weight than the existence of a formal link between the actors and the organization of the State. It must be stressed that the private persons covered by article 9 are not equivalent to a general *de facto* Government. The cases envisaged by article 9 presuppose the existence of a Government in office and of State machinery whose place is taken by irregulars or whose action is supplemented in certain cases. This may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances. A general *de facto* Government, on the other hand, is itself an apparatus of the State, replacing that which existed previously. The conduct of the organs of such a Government is covered by article 4 rather than article 9.¹⁶⁹

(5) In respect of the second condition, the phrase “in the absence or default of” is intended to cover both the situation of a total collapse of the State apparatus as well as cases where the official authorities are not exercising their functions in some specific respect, for instance, in the case of a partial collapse of the State or its loss of control over a certain locality. The phrase “absence or default” seeks to capture both situations.

(6) The third condition for attribution under article 9 requires that the circumstances must have been such as to call for the exercise of elements of the governmental authority by private persons. The term “call for” conveys the idea that some exercise of governmental functions was called for, though not necessarily the conduct in question. In other words, the circumstances surrounding the exercise of elements of the governmental authority by private persons must have justified the attempt to exercise police or other functions in the absence of any constituted authority. There is thus a normative element in the form of agency entailed by article 9, and this distinguishes these situations from the normal principle that conduct of private parties, including insurrectionary forces, is not attributable to the State.¹⁷⁰

¹⁶⁸ *Yeager* (see footnote 101 above), p. 104, para. 43.

¹⁶⁹ See, e.g., the award of 18 October 1923 by Arbitrator Taft in the *Tinoco* case (footnote 87 above), pp. 381–382. On the responsibility of the State for the conduct of *de facto* Governments, see also J. A. Frowein, *Das de facto-Regime im Völkerrecht* (Cologne, Heymanns, 1968), pp. 70–71. Conduct of a Government in exile might be covered by article 9, depending on the circumstances.

¹⁷⁰ See, e.g., the *Sambiaggio* case, UNRIIAA, vol. X (Sales No. 60.V.4), p. 499, at p. 512 (1904); see also article 10 and commentary.

Article 10. Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Commentary

(1) Article 10 deals with the special case of attribution to a State of conduct of an insurrectional or other movement which subsequently becomes the new Government of the State or succeeds in establishing a new State.

(2) At the outset, the conduct of the members of the movement presents itself purely as the conduct of private individuals. It can be placed on the same footing as that of persons or groups who participate in a riot or mass demonstration and it is likewise not attributable to the State. Once an organized movement comes into existence as a matter of fact, it will be even less possible to attribute its conduct to the State, which will not be in a position to exert effective control over its activities. The general principle in respect of the conduct of such movements, committed during the continuing struggle with the constituted authority, is that it is not attributable to the State under international law. In other words, the acts of unsuccessful insurrectional movements are not attributable to the State, unless under some other article of chapter II, for example in the special circumstances envisaged by article 9.

(3) Ample support for this general principle is found in arbitral jurisprudence. International arbitral bodies, including mixed claims commissions¹⁷¹ and arbitral tribunals¹⁷² have uniformly affirmed what Commissioner Nielsen in the *Solis* case described as a “well-established principle of international law”, that no Government can be held responsible for the conduct of rebellious groups committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection.¹⁷³ Diplomatic practice is remarkably consistent in recognizing that the conduct of an

insurrectional movement cannot be attributed to the State. This can be seen, for example, from the preparatory work for the 1930 Hague Conference. Replies of Governments to point IX of the request for information addressed to them by the Preparatory Committee indicated substantial agreement that: (a) the conduct of organs of an insurrectional movement could not be attributed as such to the State or entail its international responsibility; and (b) only conduct engaged in by organs of the State in connection with the injurious acts of the insurgents could be attributed to the State and entail its international responsibility, and then only if such conduct constituted a breach of an international obligation of that State.¹⁷⁴

(4) The general principle that the conduct of an insurrectional or other movement is not attributable to the State is premised on the assumption that the structures and organization of the movement are and remain independent of those of the State. This will be the case where the State successfully puts down the revolt. In contrast, where the movement achieves its aims and either installs itself as the new Government of the State or forms a new State in part of the territory of the pre-existing State or in a territory under its administration, it would be anomalous if the new regime or new State could avoid responsibility for conduct earlier committed by it. In these exceptional circumstances, article 10 provides for the attribution of the conduct of the successful insurrectional or other movement to the State. The basis for the attribution of conduct of a successful insurrectional or other movement to the State under international law lies in the continuity between the movement and the eventual Government. Thus the term “conduct” only concerns the conduct of the movement as such and not the individual acts of members of the movement, acting in their own capacity.

(5) Where the insurrectional movement, as a new Government, replaces the previous Government of the State, the ruling organization of the insurrectional movement becomes the ruling organization of that State. The continuity which thus exists between the new organization of the State and that of the insurrectional movement leads naturally to the attribution to the State of conduct which the insurrectional movement may have committed during the struggle. In such a case, the State does not cease to exist as a subject of international law. It remains the same State, despite the changes, reorganizations and adaptations which occur in its institutions. Moreover, it is the only subject of international law to which responsibility can be attributed. The situation requires that acts committed during the struggle for power by the apparatus of the insurrectional movement should be attributable to the State, alongside acts of the then established Government.

(6) Where the insurrectional or other movement succeeds in establishing a new State, either in part of the territory of the pre-existing State or in a territory which was previously under its administration, the attribution to the new State of the conduct of the insurrectional or other movement is again justified by virtue of the continuity be-

¹⁷¹ See the decisions of the various mixed commissions: *Zuloaga and Miramon Governments*, Moore, *History and Digest*, vol. III, p. 2873; *McKenny case*, *ibid.*, p. 2881; *Confederate States*, *ibid.*, p. 2886; *Confederate Debt*, *ibid.*, p. 2900; and *Maximilian Government*, *ibid.*, p. 2902, at pp. 2928–2929.

¹⁷² See, e.g., *British Claims in the Spanish Zone of Morocco* (footnote 44 above), p. 642; and the *Iloilo Claims*, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 158, at pp. 159–160 (1925).

¹⁷³ UNRIAA, vol. IV (Sales No. 1951.V.1), p. 358, at p. 361 (1928) (referring to *Home Frontier and Foreign Missionary Society*, *ibid.*, vol. VI (Sales No. 1955.V.3), p. 42 (1920)); cf. the *Sambiaggio case* (footnote 170 above), p. 524.

¹⁷⁴ League of Nations, Conference for the Codification of International Law, *Bases of Discussion ...* (see footnote 88 above), p. 108; and *Supplement to Volume III ...* (see footnote 104 above), pp. 3 and 20.

tween the organization of the movement and the organization of the State to which it has given rise. Effectively the same entity which previously had the characteristics of an insurrectional or other movement has become the Government of the State it was struggling to establish. The predecessor State will not be responsible for those acts. The only possibility is that the new State be required to assume responsibility for conduct committed with a view to its own establishment, and this represents the accepted rule.

(7) *Paragraph 1* of article 10 covers the scenario in which the insurrectional movement, having triumphed, has substituted its structures for those of the previous Government of the State in question. The phrase “which becomes the new Government” is used to describe this consequence. However, the rule in paragraph 1 should not be pressed too far in the case of Governments of national reconciliation, formed following an agreement between the existing authorities and the leaders of an insurrectional movement. The State should not be made responsible for the conduct of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed Government. Thus, the criterion of application of paragraph 1 is that of a real and substantial continuity between the former insurrectional movement and the new Government it has succeeded in forming.

(8) *Paragraph 2* of article 10 addresses the second scenario, where the structures of the insurrectional or other revolutionary movement become those of a new State, constituted by secession or decolonization in part of the territory which was previously subject to the sovereignty or administration of the predecessor State. The expression “or in a territory under its administration” is included in order to take account of the differing legal status of different dependent territories.

(9) A comprehensive definition of the types of groups encompassed by the term “insurrectional movement” as used in article 10 is made difficult by the wide variety of forms which insurrectional movements may take in practice, according to whether there is relatively limited internal unrest, a genuine civil war situation, an anti-colonial struggle, the action of a national liberation front, revolutionary or counter-revolutionary movements and so on. Insurrectional movements may be based in the territory of the State against which the movement’s actions are directed, or on the territory of a third State. Despite this diversity, the threshold for the application of the laws of armed conflict contained in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) may be taken as a guide. Article 1, paragraph 1, refers to “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the relevant State’s] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”, and it contrasts such groups with “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” (art. 1, para. 2). This definition of “dissident armed forces” reflects, in the context of the Protocols, the essential idea of an “insurrectional movement”.

(10) As compared with paragraph 1, the scope of the attribution rule articulated by paragraph 2 is broadened to include “insurrectional or other” movements. This terminology reflects the existence of a greater variety of movements whose actions may result in the formation of a new State. The words do not, however, extend to encompass the actions of a group of citizens advocating separation or revolution where these are carried out within the framework of the predecessor State. Nor does it cover the situation where an insurrectional movement within a territory succeeds in its agitation for union with another State. This is essentially a case of succession, and outside the scope of the articles, whereas article 10 focuses on the continuity of the movement concerned and the eventual new Government or State, as the case may be.

(11) No distinction should be made for the purposes of article 10 between different categories of movements on the basis of any international “legitimacy” or of any illegality in respect of their establishment as a Government, despite the potential importance of such distinctions in other contexts.¹⁷⁵ From the standpoint of the formulation of rules of law governing State responsibility, it is unnecessary and undesirable to exonerate a new Government or a new State from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin.¹⁷⁶ Rather, the focus must be on the particular conduct in question, and on its lawfulness or otherwise under the applicable rules of international law.

(12) Arbitral decisions, together with State practice and the literature, indicate a general acceptance of the two positive attribution rules in article 10. The international arbitral decisions, e.g. those of the mixed commissions established in respect of Venezuela (1903) and Mexico (1920–1930), support the attribution of conduct by insurgents where the movement is successful in achieving its revolutionary aims. For example, in the *Bolívar Railway Company* claim, the principle is stated in the following terms:

The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented ab initio a changing national will, crystallizing in the finally successful result.¹⁷⁷

The French-Venezuelan Mixed Claims Commission in its decision concerning the *French Company of Venezuelan Railroads* case emphasized that the State cannot be held responsible for the acts of revolutionaries “unless the revolution was successful”, since such acts then involve the responsibility of the State “under the well-recognized rules of public law”.¹⁷⁸ In the *Pinson* case, the French-Mexican Claims Commission ruled that:

¹⁷⁵ See H. Atlam, “National liberation movements and international responsibility”, *United Nations Codification of State Responsibility*, B. Simma and M. Spinedi, eds. (New York, Oceana, 1987), p. 35.

¹⁷⁶ As ICJ said, “[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States”, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion I.C.J. Reports 1971*, p. 16, at p. 54, para. 118.

¹⁷⁷ UNRIAA, vol. IX (Sales No. 59.V.5), p. 445, at p. 453 (1903). See also *Puerto Cabello and Valencia Railway Company*, *ibid.*, p. 510, at p. 513 (1903).

¹⁷⁸ *Ibid.*, vol. X (Sales No. 60.V.4), p. 285, at p. 354 (1902). See also the *Dix* case, *ibid.*, vol. IX (Sales No. 59.V.5), p. 119 (1902).

if the injuries originated, for example, in requisitions or forced contributions demanded ... by revolutionaries before their final success, or if they were caused ... by offences committed by successful revolutionary forces, the responsibility of the State ... cannot be denied.¹⁷⁹

(13) The possibility of holding the State responsible for the conduct of a successful insurrectional movement was brought out in the request for information addressed to Governments by the Preparatory Committee for the 1930 Hague Conference. On the basis of replies received from a number of Governments, the Preparatory Committee drew up the following Basis of Discussion: "A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government *de jure* or its officials or troops."¹⁸⁰ Although the proposition was never discussed, it may be considered to reflect the rule of attribution now contained in paragraph 2.

(14) More recent decisions and practice do not, on the whole, give any reason to doubt the propositions contained in article 10. In one case, the Supreme Court of Namibia went even further in accepting responsibility for "anything done" by the predecessor administration of South Africa.¹⁸¹

(15) Exceptional cases may occur where the State was in a position to adopt measures of vigilance, prevention or punishment in respect of the movement's conduct but improperly failed to do so. This possibility is preserved by paragraph 3 of article 10, which provides that the attribution rules of paragraphs 1 and 2 are without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of other provisions in chapter II. The term "however related to that of the movement concerned" is intended to have a broad meaning. Thus, the failure by a State to take available steps to protect the premises of diplomatic missions, threatened from attack by an insurrectional movement, is clearly conduct attributable to the State and is preserved by paragraph 3.

(16) A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces. The topic of the international responsibility of unsuccessful insurrectional or other movements, however, falls outside the scope of the present articles, which are concerned only with the responsibility of States.

¹⁷⁹ *Ibid.*, vol. V (Sales No. 1952.V.3), p. 327, at p. 353 (1928).

¹⁸⁰ League of Nations, Conference for the Codification of International Law, *Bases of Discussion ...* (see footnote 88 above), pp. 108 and 116; and Basis of discussion No. 22 (c), *ibid.*, p. 118; reproduced in *Yearbook ... 1956*, vol. II, p. 223, at p. 224, document A/CN.4/96.

¹⁸¹ Guided in particular by a constitutional provision, the Supreme Court of Namibia held that "the new government inherits responsibility for the acts committed by the previous organs of the State", *Minister of Defence, Namibia v. Mwandighi*, *South African Law Reports*, 1992 (2), p. 355, at p. 360; and ILR, vol. 91, p. 341, at p. 361. See, on the other hand, *44123 Ontario Ltd. v. Crispus Kiyonga and Others*, 11 *Kampala Law Reports* 14, pp. 20–21 (1992); and ILR, vol. 103, p. 259, at p. 266 (High Court, Uganda).

Article 11. Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

Commentary

(1) All the bases for attribution covered in chapter II, with the exception of the conduct of insurrectional or other movements under article 10, assume that the status of the person or body as a State organ, or its mandate to act on behalf of the State, are established at the time of the alleged wrongful act. Article 11, by contrast, provides for the attribution to a State of conduct that was not or may not have been attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the State as its own.

(2) In many cases, the conduct which is acknowledged and adopted by a State will be that of private persons or entities. The general principle, drawn from State practice and international judicial decisions, is that the conduct of a person or group of persons not acting on behalf of the State is not considered as an act of the State under international law. This conclusion holds irrespective of the circumstances in which the private person acts and of the interests affected by the person's conduct.

(3) Thus, like article 10, article 11 is based on the principle that purely private conduct cannot as such be attributed to a State. But it recognizes "nevertheless" that conduct is to be considered as an act of a State "if and to the extent that the State acknowledges and adopts the conduct in question as its own". Instances of the application of the principle can be found in judicial decisions and State practice. For example, in the *Lighthouses* arbitration, a tribunal held Greece liable for the breach of a concession agreement initiated by Crete at a period when the latter was an autonomous territory of the Ottoman Empire, partly on the basis that the breach had been "endorsed by [Greece] as if it had been a regular transaction ... and eventually continued by her, even after the acquisition of territorial sovereignty over the island".¹⁸² In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory.¹⁸³ However, if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it.

(4) Outside the context of State succession, the *United States Diplomatic and Consular Staff in Tehran* case provides a further example of subsequent adoption by a

¹⁸² *Affaire relative à la concession des phares de l'Empire ottoman*, UNRIAA, vol. XII (Sales No. 63.V.3), p. 155, at p. 198 (1956).

¹⁸³ The matter is reserved by article 39 of the Vienna Convention on Succession of States in respect of Treaties (hereinafter "the 1978 Vienna Convention").

State of particular conduct. There ICJ drew a clear distinction between the legal situation immediately following the seizure of the United States embassy and its personnel by the militants, and that created by a decree of the Iranian State which expressly approved and maintained the situation. In the words of the Court:

The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.¹⁸⁴

In that case it made no difference whether the effect of the “approval” of the conduct of the militants was merely prospective, or whether it made the Islamic Republic of Iran responsible for the whole process of seizure of the embassy and detention of its personnel *ab initio*. The Islamic Republic of Iran had already been held responsible in relation to the earlier period on a different legal basis, viz. its failure to take sufficient action to prevent the seizure or to bring it to an immediate end.¹⁸⁵ In other cases no such prior responsibility will exist. Where the acknowledgement and adoption is unequivocal and unqualified there is good reason to give it retroactive effect, which is what the tribunal did in the *Lighthouses* arbitration.¹⁸⁶ This is consistent with the position established by article 10 for insurrectional movements and avoids gaps in the extent of responsibility for what is, in effect, the same continuing act.

(5) As regards State practice, the capture and subsequent trial in Israel of Adolf Eichmann may provide an example of the subsequent adoption of private conduct by a State. On 10 May 1960, Eichmann was captured by a group of Israelis in Buenos Aires. He was held in captivity in Buenos Aires in a private home for some weeks before being taken by air to Israel. Argentina later charged the Israeli Government with complicity in Eichmann’s capture, a charge neither admitted nor denied by Israeli Foreign Minister Golda Meir, during the discussion in the Security Council of the complaint. She referred to Eichmann’s captors as a “volunteer group”.¹⁸⁷ Security Council resolution 138 (1960) of 23 June 1960 implied a finding that the Israeli Government was at least aware of, and consented to, the successful plan to capture Eichmann in Argentina. It may be that Eichmann’s captors were “in fact acting on the instructions of, or under the direction or control of” Israel, in which case their conduct was more properly attributed to the State under article 8. But where there are doubts about whether certain conduct falls within article 8, these may be resolved by the subsequent adoption of the conduct in question by the State.

¹⁸⁴ *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 35, para. 74.

¹⁸⁵ *Ibid.*, pp. 31–33, paras. 63–68.

¹⁸⁶ *Lighthouses* arbitration (see footnote 182 above), pp. 197–198.

¹⁸⁷ *Official Records of the Security Council, Fifteenth Year*, 866th meeting, 22 June 1960, para. 18.

(6) The phrase “acknowledges and adopts the conduct in question as its own” is intended to distinguish cases of acknowledgement and adoption from cases of mere support or endorsement.¹⁸⁸ ICJ in the *United States Diplomatic and Consular Staff in Tehran* case used phrases such as “approval”, “endorsement”, “the seal of official governmental approval” and “the decision to perpetuate [the situation]”.¹⁸⁹ These were sufficient in the context of that case, but as a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In international controversies, States often take positions which amount to “approval” or “endorsement” of conduct in some general sense but do not involve any assumption of responsibility. The language of “adoption”, on the other hand, carries with it the idea that the conduct is acknowledged by the State as, in effect, its own conduct. Indeed, provided the State’s intention to accept responsibility for otherwise non-attributable conduct is clearly indicated, article 11 may cover cases where a State has accepted responsibility for conduct of which it did not approve, which it had sought to prevent and which it deeply regretted. However such acceptance may be phrased in the particular case, the term “acknowledges and adopts” in article 11 makes it clear that what is required is something more than a general acknowledgement of a factual situation, but rather that the State identifies the conduct in question and makes it its own.

(7) The principle established by article 11 governs the question of attribution only. Where conduct has been acknowledged and adopted by a State, it will still be necessary to consider whether the conduct was internationally wrongful. For the purposes of article 11, the international obligations of the adopting State are the criterion for wrongfulness. The conduct may have been lawful so far as the original actor was concerned, or the actor may have been a private party whose conduct in the relevant respect was not regulated by international law. By the same token, a State adopting or acknowledging conduct which is lawful in terms of its own international obligations does not thereby assume responsibility for the unlawful acts of any other person or entity. Such an assumption of responsibility would have to go further and amount to an agreement to indemnify for the wrongful act of another.

(8) The phrase “if and to the extent that” is intended to convey a number of ideas. First, the conduct of, in particular, private persons, groups or entities is not attributable to the State unless under some other article of chapter II or unless it has been acknowledged and adopted by the State. Secondly, a State might acknowledge and adopt conduct only to a certain extent. In other words, a State may elect to acknowledge and adopt only some of the conduct in question. Thirdly, the act of acknowledgment and adoption, whether it takes the form of words or conduct, must be clear and unequivocal.

(9) The conditions of acknowledgement and adoption are cumulative, as indicated by the word “and”. The order of the two conditions indicates the normal sequence of

¹⁸⁸ The separate question of aid or assistance by a State to internationally wrongful conduct of another State is dealt with in article 16.

¹⁸⁹ See footnote 59 above.

events in cases in which article 11 is relied on. Acknowledgement and adoption of conduct by a State might be express (as for example in the *United States Diplomatic and Consular Staff in Tehran* case), or it might be inferred from the conduct of the State in question.

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

Commentary

(1) There is a breach of an international obligation when conduct attributed to a State as a subject of international law amounts to a failure by that State to comply with an international obligation incumbent upon it or, to use the language of article 2, subparagraph (b), when such conduct constitutes “a breach of an international obligation of the State”. This chapter develops the notion of a breach of an international obligation, to the extent that this is possible in general terms.

(2) It must be stressed again that the articles do not purport to specify the content of the primary rules of international law, or of the obligations thereby created for particular States.¹⁹⁰ In determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned. It is this which has to be interpreted and applied to the situation, determining thereby the substance of the conduct required, the standard to be observed, the result to be achieved, etc. There is no such thing as a breach of an international obligation in the abstract, and chapter III can only play an ancillary role in determining whether there has been such a breach, or the time at which it occurred, or its duration. Nonetheless, a number of basic principles can be stated.

(3) The essence of an internationally wrongful act lies in the non-conformity of the State’s actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation. Such conduct gives rise to the new legal relations which are grouped under the common denomination of international responsibility. Chapter III, therefore, begins with a provision specifying in general terms when it may be considered that there is a breach of an international obligation (art. 12). The basic concept having been defined, the other provisions of the chapter are devoted to specifying how this concept applies to various situations. In particular, the chapter deals with the question of the intertemporal law as it applies to State responsibility, i.e. the principle that a State is only responsible for a breach of an international obligation if the obligation is in force for the State at the time of the breach (art. 13), with the equally important question of continuing breaches (art. 14), and with the special problem of determining whether and when there has been a breach of an obligation which is directed not at single but at composite acts, i.e. where the essence of the breach lies in a series of acts defined in aggregate as wrongful (art. 15).

(4) For the reason given in paragraph (2) above, it is neither possible nor desirable to deal in the framework of this Part with all the issues that can arise in determining whether there has been a breach of an international obligation. Questions of evidence and proof of such a breach fall entirely outside the scope of the articles. Other questions concern rather the classification or typology of international obligations. These have only been included in the text where they can be seen to have distinct consequences within the framework of the secondary rules of State responsibility.¹⁹¹

Article 12. Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Commentary

(1) As stated in article 2, a breach by a State of an international obligation incumbent upon it gives rise to its international responsibility. It is first necessary to specify what is meant by a breach of an international obligation. This is the purpose of article 12, which defines in the most general terms what constitutes a breach of an international obligation by a State. In order to conclude that there is a breach of an international obligation in any specific case, it will be necessary to take account of the other provisions of chapter III which specify further conditions relating to the existence of a breach of an international obligation, as well as the provisions of chapter V dealing with circumstances which may preclude the wrongfulness of an act of a State. But in the final analysis, whether and when there has been a breach of an obligation depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case.

(2) In introducing the notion of a breach of an international obligation, it is necessary again to emphasize the autonomy of international law in accordance with the principle stated in article 3. In the terms of article 12, the breach of an international obligation consists in the disconformity between the conduct required of the State by that obligation and the conduct actually adopted by the State—i.e. between the requirements of international law and the facts of the matter. This can be expressed in different ways. For example, ICJ has used such expressions as “incompatibility with the obligations” of a State,¹⁹² acts “contrary to” or “inconsistent with” a given rule,¹⁹³ and

¹⁹¹ See, e.g., the classification of obligations of conduct and results, paragraphs (11) to (12) of the commentary to article 12.

¹⁹² *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 29, para. 56.

¹⁹³ *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 64, para. 115, and p. 98, para. 186, respectively.

¹⁹⁰ See paragraphs (2) to (4) of the general commentary.

“failure to comply with its treaty obligations”.¹⁹⁴ In the *ELSI* case, a Chamber of the Court asked the “question whether the requisition was in conformity with the requirements ... of the FCN Treaty”.¹⁹⁵ The expression “not in conformity with what is required of it by that obligation” is the most appropriate to indicate what constitutes the essence of a breach of an international obligation by a State. It allows for the possibility that a breach may exist even if the act of the State is only partly contrary to an international obligation incumbent upon it. In some cases precisely defined conduct is expected from the State concerned; in others the obligation only sets a minimum standard above which the State is free to act. Conduct proscribed by an international obligation may involve an act or an omission or a combination of acts and omissions; it may involve the passage of legislation, or specific administrative or other action in a given case, or even a threat of such action, whether or not the threat is carried out, or a final judicial decision. It may require the provision of facilities, or the taking of precautions or the enforcement of a prohibition. In every case, it is by comparing the conduct in fact engaged in by the State with the conduct legally prescribed by the international obligation that one can determine whether or not there is a breach of that obligation. The phrase “is not in conformity with” is flexible enough to cover the many different ways in which an obligation can be expressed, as well as the various forms which a breach may take.

(3) Article 12 states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation “regardless of its origin”. As this phrase indicates, the articles are of general application. They apply to all international obligations of States, whatever their origin may be. International obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order. States may assume international obligations by a unilateral act.¹⁹⁶ An international obligation may arise from provisions stipulated in a treaty (a decision of an organ of an international organization competent in the matter, a judgment given between two States by ICJ or another tribunal, etc.). It is unnecessary to spell out these possibilities in article 12, since the responsibility of a State is engaged by the breach of an international obligation whatever the particular origin of the obligation concerned. The formula “regardless of its origin” refers to all possible sources of international obligations, that is to say, to all processes for creating legal obligations recognized by international law. The word “source” is sometimes used in this context, as in the preamble to the Charter of the United Nations which stresses the need to respect “the obligations arising from treaties and other sources of international law”. The word

¹⁹⁴ *Gabčikovo-Nagymaros Project* (see footnote 27 above), p. 46, para. 57.

¹⁹⁵ *ELSI* (see footnote 85 above), p. 50, para. 70.

¹⁹⁶ Thus, France undertook by a unilateral act not to engage in further atmospheric nuclear testing: *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253; *Nuclear Tests (New Zealand v. France), ibid.*, p. 457. The extent of the obligation thereby undertaken was clarified in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, Order of 22 September 1995, I.C.J. Reports 1995*, p. 288.

“origin”, which has the same meaning, is not attended by the doubts and doctrinal debates the term “source” has provoked.

(4) According to article 12, the origin or provenance of an obligation does not, as such, alter the conclusion that responsibility will be entailed if it is breached by a State, nor does it, as such, affect the regime of State responsibility thereby arising. Obligations may arise for a State by a treaty and by a rule of customary international law or by a treaty and a unilateral act.¹⁹⁷ Moreover, these various grounds of obligation interact with each other, as practice clearly shows. Treaties, especially multilateral treaties, can contribute to the formation of general international law; customary law may assist in the interpretation of treaties; an obligation contained in a treaty may be applicable to a State by reason of its unilateral act, and so on. Thus, international courts and tribunals have treated responsibility as arising for a State by reason of any “violation of a duty imposed by an international juridical standard”.¹⁹⁸ In the “*Rainbow Warrior*” arbitration, the tribunal said that “any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation”.¹⁹⁹ In the *Gabčikovo-Nagymaros Project* case, ICJ referred to the relevant draft article provisionally adopted by the Commission in 1976 in support of the proposition that it is “well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect”.²⁰⁰

(5) Thus, there is no room in international law for a distinction, such as is drawn by some legal systems, between the regime of responsibility for breach of a treaty and for breach of some other rule, i.e. for responsibility arising *ex contractu* or *ex delicto*. In the “*Rainbow Warrior*” arbitration, the tribunal affirmed that “in the field of international law there is no distinction between contractual and tortious responsibility”.²⁰¹ As far as the origin of the obligation breached is concerned, there is a single general regime of State responsibility. Nor does any distinction exist between the “civil” and “criminal” responsibility as is the case in internal legal systems.

(6) State responsibility can arise from breaches of bilateral obligations or of obligations owed to some States

¹⁹⁷ ICJ has recognized “[t]he existence of identical rules in international treaty law and customary law” on a number of occasions, *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 95, para. 177; see also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 38–39, para. 63.

¹⁹⁸ *Dickson Car Wheel Company* (see footnote 42 above); cf. the *Goldenberg* case, UNRIAA, vol. II (Sales No. 1949.V.1), p. 901, at pp. 908–909 (1928); *International Fisheries Company* (footnote 43 above), p. 701 (“some principle of international law”); and *Armstrong Cork Company* (footnote 45 above), p. 163 (“any rule whatsoever of international law”).

¹⁹⁹ “*Rainbow Warrior*” (see footnote 46 above), p. 251, para. 75. See also *Barcelona Traction* (footnote 25 above), p. 46, para. 86 (“breach of an international obligation arising out of a treaty or a general rule of law”).

²⁰⁰ *Gabčikovo-Nagymaros Project* (see footnote 27 above), p. 38, para. 47. The qualification “likely to be involved” may have been inserted because of possible circumstances precluding wrongfulness in that case.

²⁰¹ “*Rainbow Warrior*” (see footnote 46 above), p. 251, para. 75.

or to the international community as a whole. It can involve relatively minor infringements as well as the most serious breaches of obligations under peremptory norms of general international law. Questions of the gravity of the breach and the peremptory character of the obligation breached can affect the consequences which arise for the responsible State and, in certain cases, for other States also. Certain distinctions between the consequences of certain breaches are accordingly drawn in Parts Two and Three of these articles.²⁰² But the regime of State responsibility for breach of an international obligation under Part One is comprehensive in scope, general in character and flexible in its application: Part One is thus able to cover the spectrum of possible situations without any need for further distinctions between categories of obligation concerned or the category of the breach.

(7) Even fundamental principles of the international legal order are not based on any special source of law or specific law-making procedure, in contrast with rules of constitutional character in internal legal systems. In accordance with article 53 of the 1969 Vienna Convention, a peremptory norm of general international law is one which is “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. Article 53 recognizes both that norms of a peremptory character can be created and that the States have a special role in this regard as *par excellence* the holders of normative authority on behalf of the international community. Moreover, obligations imposed on States by peremptory norms necessarily affect the vital interests of the international community as a whole and may entail a stricter regime of responsibility than that applied to other internationally wrongful acts. But this is an issue belonging to the content of State responsibility.²⁰³ So far at least as Part One of the articles is concerned, there is a unitary regime of State responsibility which is general in character.

(8) Rather similar considerations apply with respect to obligations arising under the Charter of the United Nations. Since the Charter is a treaty, the obligations it contains are, from the point of view of their origin, treaty obligations. The special importance of the Charter, as reflected in its Article 103,²⁰⁴ derives from its express provisions as well as from the virtually universal membership of States in the United Nations.

(9) The general scope of the articles extends not only to the conventional or other origin of the obligation breached but also to its subject matter. International awards and decisions specifying the conditions for the existence of an internationally wrongful act speak of the breach of an international obligation without placing any restriction on

the subject matter of the obligation breached.²⁰⁵ Courts and tribunals have consistently affirmed the principle that there is no *a priori* limit to the subject matters on which States may assume international obligations. Thus, PCIJ stated in its first judgment, in the *S.S. “Wimbledon”* case, that “the right of entering into international engagements is an attribute of State sovereignty”.²⁰⁶ That proposition has often been endorsed.²⁰⁷

(10) In a similar perspective, it has sometimes been argued that an obligation dealing with a certain subject matter could only have been breached by conduct of the same description. That proposition formed the basis of an objection to the jurisdiction of ICJ in the *Oil Platforms* case. It was argued that a treaty of friendship, commerce and navigation could not in principle have been breached by conduct involving the use of armed force. The Court responded in the following terms:

The Treaty of 1955 imposes on each of the Parties various obligations on a variety of matters. Any action by one of the Parties that is incompatible with those obligations is unlawful, regardless of the means by which it is brought about. A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means. Matters relating to the use of force are therefore not *per se* excluded from the reach of the Treaty of 1955.²⁰⁸

Thus, the breach by a State of an international obligation constitutes an internationally wrongful act, whatever the subject matter or content of the obligation breached, and whatever description may be given to the non-conforming conduct.

(11) Article 12 also states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation, “regardless of its ... character”. In practice, various classifications of international obligations have been adopted. For example, a distinction is commonly drawn between obligations of conduct and obligations of result. That distinction may assist in ascertaining when a breach has occurred. But it is not exclusive,²⁰⁹ and it does not seem to bear specific or direct consequences as far as the present articles are concerned. In the *Colozza* case, for example, the European Court of Human Rights was concerned with the trial in absentia of a person who, without actual notice of his trial, was sentenced to six years’ imprisonment and was not allowed subsequently to contest his conviction.

²⁰⁵ See, e.g., *Factory at Chorzów, Jurisdiction* (footnote 34 above); *Factory at Chorzów, Merits* (*ibid.*); and *Reparation for Injuries* (footnote 38 above). In these decisions it is stated that “any breach of an international engagement” entails international responsibility. See also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (footnote 39 above), p. 228.

²⁰⁶ *S.S. “Wimbledon”* (see footnote 34 above), p. 25.

²⁰⁷ See, e.g., *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 4, at pp. 20–21; *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 6, at p. 33; and *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 131, para. 259.

²⁰⁸ *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at pp. 811–812, para. 21.

²⁰⁹ Cf. *Gabčíkovo-Nagymaros Project* (footnote 27 above), p. 77, para. 135, where the Court referred to the parties having accepted “obligations of conduct, obligations of performance, and obligations of result”.

²⁰² See Part Three, chapter II and commentary; see also article 48 and commentary.

²⁰³ See articles 40 and 41 and commentaries.

²⁰⁴ According to which “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

He claimed that he had not had a fair hearing, contrary to article 6, paragraph 1, of the European Convention on Human Rights. The Court noted that:

The Contracting States enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of article 6 § 1 in this field. The Court's task is not to indicate those means to the States, but to determine whether the result called for by the Convention has been achieved ... For this to be so, the resources available under domestic law must be shown to be effective and a person "charged with a criminal offence" ... must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to *force majeure*.²¹⁰

The Court thus considered that article 6, paragraph 1, imposed an obligation of result.²¹¹ But, in order to decide whether there had been a breach of the Convention in the circumstances of the case, it did not simply compare the result required (the opportunity for a trial in the accused's presence) with the result practically achieved (the lack of that opportunity in the particular case). Rather, it examined what more Italy could have done to make the applicant's right "effective".²¹² The distinction between obligations of conduct and result was not determinative of the actual decision that there had been a breach of article 6, paragraph 1.²¹³

(12) The question often arises whether an obligation is breached by the enactment of legislation by a State, in cases where the content of the legislation *prima facie* conflicts with what is required by the international obligation, or whether the legislation has to be implemented in the given case before the breach can be said to have occurred. Again, no general rule can be laid down that is applicable to all cases.²¹⁴ Certain obligations may be breached by the mere passage of incompatible legislation.²¹⁵ Where this is so, the passage of the legislation without more entails the international responsibility of the enacting State, the

²¹⁰ *Colozza v. Italy*, Eur. Court H.R., Series A, No. 89 (1985), pp. 15–16, para. 30, citing *De Cubber v. Belgium*, *ibid.*, No. 86 (1984), p. 20, para. 35.

²¹¹ Cf. *Plattform "Ärzte für das Leben" v. Austria*, in which the Court gave the following interpretation of article 11:

"While it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used ... In this area the obligation they enter into under article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved" (*Eur. Court H.R., Series A, No. 139*, p. 12, para. 34 (1988)).

In the *Colozza* case (see footnote 210 above), the Court used similar language but concluded that the obligation was an obligation of result. Cf. C. Tomuschat, "What is a 'breach' of the European Convention on Human Rights?", *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers*, Lawson and de Blois, eds. (Dordrecht, Martinus Nijhoff, 1994), vol. 3, p. 315, at p. 328.

²¹² *Colozza* case (see footnote 210 above), para. 28.

²¹³ See also *The Islamic Republic of Iran v. The United States of America*, cases A15 (IV) and A24, Iran-U.S. C.T.R., vol. 32, p. 115 (1996).

²¹⁴ Cf. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (footnote 83 above), p. 30, para. 42.

²¹⁵ A uniform law treaty will generally be construed as requiring immediate implementation, i.e. as embodying an obligation to make the provisions of the uniform law a part of the law of each State party: see, e.g., B. Conforti, "Obblighi di mezzi e obblighi di risultato nelle convenzioni di diritto uniforme", *Rivista di diritto internazionale privato e processuale*, vol. 24 (1988), p. 233.

legislature itself being an organ of the State for the purposes of the attribution of responsibility.²¹⁶ In other circumstances, the enactment of legislation may not in and of itself amount to a breach,²¹⁷ especially if it is open to the State concerned to give effect to the legislation in a way which would not violate the international obligation in question. In such cases, whether there is a breach will depend on whether and how the legislation is given effect.²¹⁸

Article 13. International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Commentary

(1) Article 13 states the basic principle that, for responsibility to exist, the breach must occur at a time when the State is bound by the obligation. This is but the application in the field of State responsibility of the general principle of intertemporal law, as stated by Judge Huber in another context in the *Island of Palmas* case:

[A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.²¹⁹

Article 13 provides an important guarantee for States in terms of claims of responsibility. Its formulation ("does not constitute ... unless ...") is in keeping with the idea of a guarantee against the retrospective application of international law in matters of State responsibility.

(2) International tribunals have applied the principle stated in article 13 in many cases. An instructive example is provided by the decision of Umpire Bates of the United States-Great Britain Mixed Commission concerning the

²¹⁶ See article 4 and commentary. For illustrations, see, e.g., the findings of the European Court of Human Rights in *Norris v. Ireland*, Eur. Court H.R., Series A, No. 142, para. 31 (1988), citing *Klass and Others v. Germany*, *ibid.*, No. 28, para. 33 (1978); *Marckx v. Belgium*, *ibid.*, No. 31, para. 27 (1979); *Johnston and Others v. Ireland*, *ibid.*, No. 112, para. 42 (1986); *Dudgeon v. the United Kingdom*, *ibid.*, No. 45, para. 41 (1981); and *Modinos v. Cyprus*, *ibid.*, No. 259, para. 24 (1993). See also *International responsibility for the promulgation and enforcement of laws in violation of the Convention (arts. 1 and 2 American Convention on Human Rights)*, Advisory Opinion OC-14/94, Inter-American Court of Human Rights, Series A, No. 14 (1994). The Inter-American Court also considered it possible to determine whether draft legislation was compatible with the provisions of human rights treaties: *Restrictions to the Death Penalty (arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC-3/83, Series A, No. 3 (1983).

²¹⁷ As ICJ held in *LaGrand, Judgment* (see footnote 119 above), p. 497, paras. 90–91.

²¹⁸ See, e.g., WTO, Report of the Panel (footnote 73 above), paras. 7.34–7.57.

²¹⁹ *Island of Palmas* (Netherlands/United States of America), UNRIIAA, vol. II (Sales No. 1949.V.1), p. 829, at p. 845 (1928). Generally on intertemporal law, see resolution I adopted in 1975 by the Institute of International Law at its Wiesbaden session, *Annuaire de l'Institut de droit international*, vol. 56 (1975), pp. 536–540; for the debate, *ibid.*, pp. 339–374; for M. Sørensen's reports, *ibid.*, vol. 55 (1973), pp. 1–116. See further W. Karl, "The time factor in the law of State responsibility", Spinedi and Simma, eds., *op. cit.* (footnote 175 above), p. 95.

conduct of British authorities who had seized United States vessels engaged in the slave trade and freed slaves belonging to United States nationals. The incidents referred to the Commission had taken place at different times and the umpire had to determine whether, at the time each incident took place, slavery was “contrary to the law of nations”. Earlier incidents, dating back to a time when the slave trade was considered lawful, amounted to a breach on the part of the British authorities of the international obligation to respect and protect the property of foreign nationals.²²⁰ The later incidents occurred when the slave trade had been “prohibited by all civilized nations” and did not involve the responsibility of Great Britain.²²¹

(3) Similar principles were applied by Arbitrator Asser in deciding whether the seizure and confiscation by Russian authorities of United States vessels engaged in seal hunting outside Russia’s territorial waters should be considered internationally wrongful. In his award in the “*James Hamilton Lewis*” case, he observed that the question had to be settled “according to the general principles of the law of nations and the spirit of the international agreements in force and binding upon the two High Parties at the time of the seizure of the vessel”.²²² Since, under the principles in force at the time, Russia had no right to seize the United States vessel, the seizure and confiscation of the vessel were unlawful acts for which Russia was required to pay compensation.²²³ The same principle has consistently been applied by the European Commission and the European Court of Human Rights to deny claims relating to periods during which the European Convention on Human Rights was not in force for the State concerned.²²⁴

(4) State practice also supports the principle. A requirement that arbitrators apply the rules of international law in force at the time when the alleged wrongful acts took place is a common stipulation in arbitration agreements,²²⁵ and undoubtedly is made by way of explicit confirmation of a generally recognized principle. International law writers who have dealt with the question recognize that the wrongfulness of an act must be established on the ba-

sis of the obligations in force at the time when the act was performed.²²⁶

(5) State responsibility can extend to acts of the utmost seriousness, and the regime of responsibility in such cases will be correspondingly stringent. But even when a new peremptory norm of general international law comes into existence, as contemplated by article 64 of the 1969 Vienna Convention, this does not entail any retrospective assumption of responsibility. Article 71, paragraph 2 (b), provides that such a new peremptory norm “does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm”.

(6) Accordingly, it is appropriate to apply the intertemporal principle to all international obligations, and article 13 is general in its application. It is, however, without prejudice to the possibility that a State may agree to compensate for damage caused as a result of conduct which was not at the time a breach of any international obligation in force for that State. In fact, cases of the retrospective assumption of responsibility are rare. The *lex specialis* principle (art. 55) is sufficient to deal with any such cases where it may be agreed or decided that responsibility will be assumed retrospectively for conduct which was not a breach of an international obligation at the time it was committed.²²⁷

(7) In international law, the principle stated in article 13 is not only a necessary but also a sufficient basis for responsibility. In other words, once responsibility has accrued as a result of an internationally wrongful act, it is not affected by the subsequent termination of the obligation, whether as a result of the termination of the treaty which has been breached or of a change in international law. Thus, as ICJ said in the *Northern Cameroons* case:

[I]f during the life of the Trusteeship the Trustee was responsible for some act in violation of the terms of the Trusteeship Agreement which resulted in damage to another Member of the United Nations or to one of its nationals, a claim for reparation would not be liquidated by the termination of the Trust.²²⁸

Similarly, in the “*Rainbow Warrior*” arbitration, the arbitral tribunal held that, although the relevant treaty obli-

²²⁰ See the “*Enterprize*” case, Lapradelle-Politis (footnote 139 above), vol. I, p. 703 (1855); and Moore, *History and Digest*, vol. IV, p. 4349, at p. 4373. See also the “*Hermosa*” and “*Créole*” cases, Lapradelle-Politis, *op. cit.*, p. 704 (1855); and Moore, *History and Digest*, vol. IV, pp. 4374–4375.

²²¹ See the “*Lawrence*” case, Lapradelle-Politis, *op. cit.*, p. 741; and Moore, *History and Digest*, vol. III, p. 2824. See also the “*Volusia*” case, Lapradelle-Politis, *op. cit.*, p. 741.

²²² *Affaire des navires Cape Horn Pigeon, James Hamilton Lewis, C. H. White et Kate and Anna*, UNRIAA, vol. IX (Sales No. 59.V.5), p. 66, at p. 69 (1902).

²²³ See also the “*C. H. White*” case, *ibid.*, p. 74. In these cases the arbitrator was required by the arbitration agreement itself to apply the law in force at the time the acts were performed. Nevertheless, the intention of the parties was clearly to confirm the application of the general principle in the context of the arbitration agreement, not to establish an exception. See further the *S.S. “Lisman”* case, *ibid.*, vol. III (Sales No. 1949.V.2), p. 1767, at p. 1771 (1937).

²²⁴ See, e.g., *X v. Germany*, application No. 1151/61, Council of Europe, European Commission of Human Rights, *Recueil des décisions*, No. 7 (March 1962), p. 119 (1961) and many later decisions.

²²⁵ See, e.g., Declarations exchanged between the Government of the United States of America and the Imperial Government of Russia, for the submission to arbitration of certain disputes concerning the international responsibility of Russia for the seizure of American ships, UNRIAA, vol. IX (Sales No. 59.V.5), p. 57 (1900).

²²⁶ See, e.g., P. Tavernier, *Recherches sur l’application dans le temps des actes et des règles en droit international public: problèmes de droit intertemporel ou de droit transitoire* (Paris, Librairie générale de droit et de jurisprudence, 1970), pp. 119, 135 and 292; D. Bindschedler-Robert, “De la rétroactivité en droit international public”, *Recueil d’études de droit international en hommage à Paul Guggenheim* (University of Geneva Law Faculty/Graduate Institute of International Studies, 1968), p. 184; M. Sørensen, “Le problème intertemporel dans l’application de la Convention européenne des droits de l’homme”, *Mélanges offerts à Polys Modinos* (Paris, Pedone, 1968), p. 304; T. O. Elias, “The doctrine of intertemporal law”, *AJIL*, vol. 74, No. 2 (April 1980), p. 285; and R. Higgins, “Time and the law: international perspectives on an old problem”, *International and Comparative Law Quarterly*, vol. 46 (July 1997), p. 501.

²²⁷ As to the retroactive effect of the acknowledgement and adoption of conduct by a State, see article 11 and commentary, especially paragraph (4). Such acknowledgement and adoption would not, without more, give retroactive effect to the obligations of the adopting State.

²²⁸ *Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 15, at p. 35.

gation had terminated with the passage of time, France's responsibility for its earlier breach remained.²²⁹

(8) Both aspects of the principle are implicit in the ICJ decision in the *Certain Phosphate Lands in Nauru* case. Australia argued there that a State responsibility claim relating to the period of its joint administration of the Trust Territory for Nauru (1947–1968) could not be brought decades later, even if the claim had not been formally waived. The Court rejected the argument, applying a liberal standard of laches or unreasonable delay.²³⁰ But it went on to say that:

[I]t will be for the Court, in due time, to ensure that Nauru's delay in seising [*sic*] it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law.²³¹

Evidently, the Court intended to apply the law in force at the time the claim arose. Indeed that position was necessarily taken by Nauru itself, since its claim was based on a breach of the Trusteeship Agreement, which terminated at the date of its accession to independence in 1968. Its claim was that the responsibility of Australia, once engaged under the law in force at a given time, continued to exist even if the primary obligation had subsequently terminated.²³²

(9) The basic principle stated in article 13 is thus well established. One possible qualification concerns the progressive interpretation of obligations, by a majority of the Court in the *Namibia* case.²³³ But the intertemporal principle does not entail that treaty provisions are to be interpreted as if frozen in time. The evolutionary interpretation of treaty provisions is permissible in certain cases,²³⁴ but this has nothing to do with the principle that a State can only be held responsible for breach of an obligation which was in force for that State at the time of its conduct. Nor does the principle of the intertemporal law mean that facts occurring prior to the entry into force of a particular obligation may not be taken into account where these are otherwise relevant. For example, in dealing with the obligation to ensure that persons accused are tried without undue delay, periods of detention prior to the entry into force of that obligation may be relevant as facts, even though no compensation could be awarded in respect of the period prior to the entry into force of the obligation.²³⁵

²²⁹ *Rainbow Warrior* (see footnote 46 above), pp. 265–266.

²³⁰ *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, at pp. 253–255, paras. 31–36. See article 45, subparagraph (b), and commentary.

²³¹ *Certain Phosphate Lands in Nauru, ibid.*, p. 255, para. 36.

²³² The case was settled before the Court had the opportunity to consider the merits: *Certain Phosphate Lands in Nauru, Order of 13 September 1993, I.C.J. Reports 1993*, p. 322; for the settlement agreement, see Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice concerning Certain Phosphate Lands in Nauru (Nauru, 10 August 1993) (United Nations, *Treaty Series*, vol. 1770, No. 30807, p. 379).

²³³ *Namibia* case (see footnote 176 above), pp. 31–32, para. 53.

²³⁴ See, e.g., *Tyrer v. the United Kingdom, Eur. Court H.R., Series A, No. 26*, pp. 15–16 (1978).

²³⁵ See, e.g., *Zana v. Turkey, Eur. Court H.R., Reports, 1997–VII*, p. 2533 (1997); and J. Pauwelyn, "The concept of a 'continuing violation' of an international obligation: selected problems", *BYBIL, 1995*, vol. 66, p. 415, at pp. 443–445.

Article 14. Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Commentary

(1) The problem of identifying when a wrongful act begins and how long it continues is one which arises frequently²³⁶ and has consequences in the field of State responsibility, including the important question of cessation of continuing wrongful acts dealt with in article 30. Although the existence and duration of a breach of an international obligation depends for the most part on the existence and content of the obligation and on the facts of the particular breach, certain basic concepts are established. These are introduced in article 14. Without seeking to be comprehensive in its treatment of the problem, article 14 deals with several related questions. In particular, it develops the distinction between breaches not extending in time and continuing wrongful acts (see paragraphs (1) and (2) respectively), and it also deals with the application of that distinction to the important case of obligations of prevention. In each of these cases it takes into account the question of the continuance in force of the obligation breached.

(2) Internationally wrongful acts usually take some time to happen. The critical distinction for the purpose of article 14 is between a breach which is continuing and one which has already been completed. In accordance with *paragraph 1*, a completed act occurs "at the moment when the act is performed", even though its effects or consequences may continue. The words "at the moment" are intended to provide a more precise description of the time frame when a completed wrongful act is performed,

²³⁶ See, e.g., *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 35; *Phosphates in Morocco* (footnote 34 above), pp. 23–29; *Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77*, p. 64, at pp. 80–82; and *Right of Passage over Indian Territory* (footnote 207 above), pp. 33–36. The issue has often been raised before the organs of the European Convention on Human Rights. See, e.g., the decision of the European Commission of Human Rights in the *De Becker v. Belgium* case, application No. 214/56, *Yearbook of the European Convention on Human Rights, 1958–1959*, p. 214, at pp. 234 and 244; and the Court's judgments in *Ireland v. the United Kingdom, Eur. Court H.R., Series A, No. 25*, p. 64 (1978); *Papamichalopoulos and Others v. Greece, ibid., No. 260–B*, para. 40 (1993); and *Agrotexim and Others v. Greece, ibid., No. 330–A*, p. 22, para. 58 (1995). See also E. Wyler, "Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite", *RGDIP*, vol. 95, p. 881 (1991).

without requiring that the act necessarily be completed in a single instant.

(3) In accordance with *paragraph 2*, a continuing wrongful act, on the other hand, occupies the entire period during which the act continues and remains not in conformity with the international obligation, provided that the State is bound by the international obligation during that period.²³⁷ Examples of continuing wrongful acts include the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent.

(4) Whether a wrongful act is completed or has a continuing character will depend both on the primary obligation and the circumstances of the given case. For example, the Inter-American Court of Human Rights has interpreted forced or involuntary disappearance as a continuing wrongful act, one which continues for as long as the person concerned is unaccounted for.²³⁸ The question whether a wrongful taking of property is a completed or continuing act likewise depends to some extent on the content of the primary rule said to have been violated. Where an expropriation is carried out by legal process, with the consequence that title to the property concerned is transferred, the expropriation itself will then be a completed act. The position with a *de facto*, “creeping” or disguised occupation, however, may well be different.²³⁹ Exceptionally, a tribunal may be justified in refusing to recognize a law or decree at all, with the consequence that the resulting denial of status, ownership or possession may give rise to a continuing wrongful act.²⁴⁰

(5) Moreover, the distinction between completed and continuing acts is a relative one. A continuing wrongful act itself can cease: thus a hostage can be released, or the body of a disappeared person returned to the next of kin. In essence, a continuing wrongful act is one which has been commenced but has not been completed at the relevant time. Where a continuing wrongful act has ceased, for example by the release of hostages or the withdrawal of forces from territory unlawfully occupied, the act is considered for the future as no longer having a continuing character, even though certain effects of the act may continue. In this respect, it is covered by paragraph 1 of article 14.

(6) An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues. In many cases of internationally wrongful acts, their consequences may be prolonged. The pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue even though the torture has ceased or title to the property has passed. Such

consequences are the subject of the secondary obligations of reparation, including restitution, as required by Part Two of the articles. The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable. They do not, however, entail that the breach itself is a continuing one.

(7) The notion of continuing wrongful acts is common to many national legal systems and owes its origins in international law to Triepel.²⁴¹ It has been repeatedly referred to by ICJ and by other international tribunals. For example, in the *United States Diplomatic and Consular Staff in Tehran* case, the Court referred to “successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963”.²⁴²

(8) The consequences of a continuing wrongful act will depend on the context, as well as on the duration of the obligation breached. For example, the “*Rainbow Warrior*” arbitration involved the failure of France to detain two agents on the French Pacific island of Hao for a period of three years, as required by an agreement between France and New Zealand. The arbitral tribunal referred with approval to the Commission’s draft articles (now amalgamated in article 14) and to the distinction between instantaneous and continuing wrongful acts, and said:

Applying this classification to the present case, it is clear that the breach consisting in the failure of returning to Hao the two agents has been not only a material but also a continuous breach. And this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparation which is adequate for a violation presenting these two features.²⁴³

The tribunal went on to draw further legal consequences from the distinction in terms of the duration of French obligations under the agreement.²⁴⁴

(9) The notion of continuing wrongful acts has also been applied by the European Court of Human Rights to establish its jurisdiction *ratione temporis* in a series of cases. The issue arises because the Court’s jurisdiction may be limited to events occurring after the respondent State became a party to the Convention or the relevant Protocol and accepted the right of individual petition. Thus, in the *Papamichalopoulos* case, a seizure of property not involving formal expropriation occurred some eight years before Greece recognized the Court’s competence. The Court held that there was a continuing breach of the right to peaceful enjoyment of property under article 1 of the Protocol to the European Convention on Human Rights,

²⁴¹ H. Triepel, *Völkerrecht und Landesrecht* (Leipzig, Hirschfeld, 1899), p. 289. The concept was subsequently taken up in various general studies on State responsibility as well as in works on the interpretation of the formula “situations or facts prior to a given date” used in some declarations of acceptance of the compulsory jurisdiction of ICJ.

²⁴² *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 37, para. 80. See also pages 36–37, paras. 78–79.

²⁴³ “*Rainbow Warrior*” (see footnote 46 above), p. 264, para. 101.

²⁴⁴ *Ibid.*, pp. 265–266, paras. 105–106. But see the separate opinion of Sir Kenneth Keith, *ibid.*, p. 279–284.

²³⁷ See article 13 and commentary, especially para. (2).

²³⁸ *Blake*, Inter-American Court of Human Rights, Series C, No. 36, para. 67 (1998).

²³⁹ *Papamichalopoulos* (see footnote 236 above).

²⁴⁰ *Loizidou, Merits* (see footnote 160 above), p. 2216.

which continued after the Protocol had come into force; it accordingly upheld its jurisdiction over the claim.²⁴⁵

(10) In the *Loizidou* case,²⁴⁶ similar reasoning was applied by the Court to the consequences of the Turkish invasion of Cyprus in 1974, as a result of which the applicant was denied access to her property in northern Cyprus. Turkey argued that under article 159 of the Constitution of the Turkish Republic of Northern Cyprus of 1985, the property in question had been expropriated, and this had occurred prior to Turkey's acceptance of the Court's jurisdiction in 1990. The Court held that, in accordance with international law and having regard to the relevant Security Council resolutions, it could not attribute legal effect to the 1985 Constitution so that the expropriation was not completed at that time and the property continued to belong to the applicant. The conduct of the Turkish Republic and of Turkish troops in denying the applicant access to her property continued after Turkey's acceptance of the Court's jurisdiction, and constituted a breach of article 1 of the Protocol to the European Convention on Human Rights after that time.²⁴⁷

(11) The Human Rights Committee has likewise endorsed the idea of continuing wrongful acts. For example, in *Lovelace*, it held it had jurisdiction to examine the continuing effects for the applicant of the loss of her status as a registered member of an Indian group, although the loss had occurred at the time of her marriage in 1970 and Canada only accepted the Committee's jurisdiction in 1976. The Committee noted that it was:

not competent, as a rule, to examine allegations relating to events having taken place before the entry into force of the Covenant and the Optional Protocol ... In the case of Sandra Lovelace it follows that the Committee is not competent to express any view on the original cause of her loss of Indian status ... at the time of her marriage in 1970 ...

The Committee recognizes, however, that the situation may be different if the alleged violations, although relating to events occurring before 19 August 1976, continue, or have effects which themselves constitute violations, after that date.²⁴⁸

It found that the continuing impact of Canadian legislation, in preventing Lovelace from exercising her rights as a member of a minority, was sufficient to constitute a breach of article 27 of the International Covenant on Civil and Political Rights after that date. Here the notion of a continuing breach was relevant not only to the Committee's jurisdiction but also to the application of article 27 as the most directly relevant provision of the Covenant to the facts in hand.

(12) Thus, conduct which has commenced some time in the past, and which constituted (or, if the relevant primary rule had been in force for the State at the time, would have

constituted) a breach at that time, can continue and give rise to a continuing wrongful act in the present. Moreover, this continuing character can have legal significance for various purposes, including State responsibility. For example, the obligation of cessation contained in article 30 applies to continuing wrongful acts.

(13) A question common to wrongful acts whether completed or continuing is when a breach of international law occurs, as distinct from being merely apprehended or imminent. As noted in the context of article 12, that question can only be answered by reference to the particular primary rule. Some rules specifically prohibit threats of conduct,²⁴⁹ incitement or attempt,²⁵⁰ in which case the threat, incitement or attempt is itself a wrongful act. On the other hand, where the internationally wrongful act is the occurrence of some event—e.g. the diversion of an international river—mere preparatory conduct is not necessarily wrongful.²⁵¹ In the *Gabčíkovo-Nagymaros Project* case, the question was when the diversion scheme ("Variant C") was put into effect. ICJ held that the breach did not occur until the actual diversion of the Danube. It noted:

that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied.

Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act".²⁵²

Thus, the Court distinguished between the actual commission of a wrongful act and conduct of a preparatory character. Preparatory conduct does not itself amount to a

²⁴⁹ Notably, Article 2, paragraph 4, of the Charter of the United Nations prohibits "the threat or use of force against the territorial integrity or political independence of any state". For the question of what constitutes a threat of force, see *Legality of the Threat or Use of Nuclear Weapons* (footnote 54 above), pp. 246–247, paras. 47–48; see also R. Sadurska, "Threats of force", *AJIL*, vol. 82, No. 2 (April 1988), p. 239.

²⁵⁰ A particularly comprehensive formulation is that of article III of the Convention on the Prevention and Punishment of the Crime of Genocide which prohibits conspiracy, direct and public incitement, attempt and complicity in relation to genocide. See also article 2 of the International Convention for the Suppression of Terrorist Bombings and article 2 of the International Convention for the Suppression of the Financing of Terrorism.

²⁵¹ In some legal systems, the notion of "anticipatory breach" is used to deal with the definitive refusal by a party to perform a contractual obligation, in advance of the time laid down for its performance. Confronted with an anticipatory breach, the party concerned is entitled to terminate the contract and sue for damages. See K. Zweigert and H. Kötz, *Introduction to Comparative Law*, 3rd rev. ed., trans. T. Weir (Oxford, Clarendon Press, 1998), p. 508. Other systems achieve similar results without using this concept, e.g. by construing a refusal to perform in advance of the time for performance as a "positive breach of contract", *ibid.*, p. 494 (German law). There appears to be no equivalent in international law, but article 60, paragraph 3 (a), of the 1969 Vienna Convention defines a material breach as including "a repudiation ... not sanctioned by the present Convention". Such a repudiation could occur in advance of the time for performance.

²⁵² *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 54, para. 79, citing the draft commentary to what is now article 30.

²⁴⁵ See footnote 236 above.

²⁴⁶ *Loizidou, Merits* (see footnote 160 above), p. 2216.

²⁴⁷ *Ibid.*, pp. 2230–2232 and 2237–2238, paras. 41–47 and 63–64. See, however, the dissenting opinion of Judge Bernhardt, p. 2242, para. 2 (with whom Judges Lopes Rocha, Jambrek, Pettiti, Baka and Gölcüklü in substance agreed). See also *Loizidou, Preliminary Objections* (footnote 160 above), pp. 33–34, paras. 102–105; and *Cyprus v. Turkey*, application No. 25781/94, judgement of 10 May 2001, *Eur. Court H.R., Reports*, 2001–IV.

²⁴⁸ *Lovelace v. Canada, Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40)*, annex XVIII, communication No. R.6/24, p. 172, paras. 10–11 (1981).

breach if it does not “predetermine the final decision to be taken”. Whether that is so in any given case will depend on the facts and on the content of the primary obligation. There will be questions of judgement and degree, which it is not possible to determine in advance by the use of any particular formula. The various possibilities are intended to be covered by the use of the term “occurs” in paragraphs 1 and 3 of article 14.

(14) *Paragraph 3* of article 14 deals with the temporal dimensions of a particular category of breaches of international obligations, namely the breach of obligations to prevent the occurrence of a given event. Obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur. The breach of an obligation of prevention may well be a continuing wrongful act, although, as for other continuing wrongful acts, the effect of article 13 is that the breach only continues if the State is bound by the obligation for the period during which the event continues and remains not in conformity with what is required by the obligation. For example, the obligation to prevent transboundary damage by air pollution, dealt with in the *Trail Smelter* arbitration,²⁵³ was breached for as long as the pollution continued to be emitted. Indeed, in such cases the breach may be progressively aggravated by the failure to suppress it. However, not all obligations directed to preventing an act from occurring will be of this kind. If the obligation in question was only concerned to prevent the happening of the event in the first place (as distinct from its continuation), there will be no continuing wrongful act.²⁵⁴ If the obligation in question has ceased, any continuing conduct by definition ceases to be wrongful at that time.²⁵⁵ Both qualifications are intended to be covered by the phrase in paragraph 3, “and remains not in conformity with that obligation”.

Article 15. Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

²⁵³ *Trail Smelter*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1905 (1938, 1941).

²⁵⁴ An example might be an obligation by State A to prevent certain information from being published. The breach of such an obligation will not necessarily be of a continuing character, since it may be that once the information is published, the whole point of the obligation is defeated.

²⁵⁵ See the “*Rainbow Warrior*” case (footnote 46 above), p. 266.

Commentary

(1) Within the basic framework established by the distinction between completed and continuing acts in article 14, article 15 deals with a further refinement, viz. the notion of a composite wrongful act. Composite acts give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct.

(2) Composite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words, their focus is “a series of acts or omissions defined in aggregate as wrongful”. Examples include the obligations concerning genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement, etc. Some of the most serious wrongful acts in international law are defined in terms of their composite character. The importance of these obligations in international law justifies special treatment in article 15.²⁵⁶

(3) Even though it has special features, the prohibition of genocide, formulated in identical terms in the Convention on the Prevention and Punishment of the Crime of Genocide and in later instruments,²⁵⁷ may be taken as an illustration of a “composite” obligation. It implies that the responsible entity (including a State) will have adopted a systematic policy or practice. According to article II, subparagraph (a), of the Convention, the prime case of genocide is “[k]illing members of the [national, ethnical, racial or religious] group” with the intent to destroy that group as such, in whole or in part. Both limbs of the definition contain systematic elements. Genocide has also to be carried out with the relevant intention, aimed at physically eliminating the group “as such”. Genocide is not committed until there has been an accumulation of acts of killing, causing harm, etc., committed with the relevant intent, so as to satisfy the definition in article II. Once that threshold is crossed, the time of commission extends over the whole period during which any of the acts was committed, and any individual responsible for any of them with the relevant intent will have committed genocide.²⁵⁸

(4) It is necessary to distinguish composite obligations from simple obligations breached by a “composite” act. Composite acts may be more likely to give rise to

²⁵⁶ See further J. J. A. Salmon, “Le fait étatique complexe: une notion contestable”, *Annuaire français de droit international*, vol. 28 (1982), p. 709.

²⁵⁷ See, e.g., article 4 of the statute of the International Tribunal for the Former Yugoslavia, originally published as an annex to document S/25704 and Add.1, approved by the Security Council in its resolution 827 (1993) of 25 May 1993, and amended on 13 May 1998 by resolution 1166 (1998) and on 30 November 2000 by resolution 1329 (2000); article 2 of the statute of the International Tribunal for Rwanda, approved by the Security Council in its resolution 955 (1994) of 8 November 1994; and article 6 of the Rome Statute of the International Criminal Court.

²⁵⁸ The intertemporal principle does not apply to the Convention, which according to its article I is declaratory. Thus, the obligation to prosecute relates to genocide whenever committed. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (footnote 54 above), p. 617, para. 34.

continuing breaches, but simple acts can cause continuing breaches as well. The position is different, however, where the obligation itself is defined in terms of the cumulative character of the conduct, i.e. where the cumulative conduct constitutes the essence of the wrongful act. Thus, apartheid is different in kind from individual acts of racial discrimination, and genocide is different in kind from individual acts even of ethnically or racially motivated killing.

(5) In *Ireland v. the United Kingdom*, Ireland complained of a practice of unlawful treatment of detainees in Northern Ireland which was said to amount to torture or inhuman or degrading treatment, and the case was held to be admissible on that basis. This had various procedural and remedial consequences. In particular, the exhaustion of local remedies rule did not have to be complied with in relation to each of the incidents cited as part of the practice. But the Court denied that there was any separate wrongful act of a systematic kind involved. It was simply that Ireland was entitled to complain of a practice made up by a series of breaches of article VII of the Convention on the Prevention and Punishment of the Crime of Genocide, and to call for its cessation. As the Court said:

A practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system; *a practice does not of itself constitute a violation separate from such breaches** ...

The concept of practice is of particular importance for the operation of the rule of exhaustion of domestic remedies. This rule, as embodied in Article 26 of the Convention, applies to State applications ... in the same way as it does to "individual" applications ... On the other hand and in principle, the rule does not apply where the applicant State complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Commission or the Court to give a decision on each of the cases put forward as proof or illustrations of that practice.²⁵⁹

In the case of crimes against humanity, the composite act is a violation separate from the individual violations of human rights of which it is composed.

(6) A further distinction must be drawn between the necessary elements of a wrongful act and what might be required by way of evidence or proof that such an act has occurred. For example, an individual act of racial discrimination by a State is internationally wrongful,²⁶⁰ even though it may be necessary to adduce evidence of a series of acts by State officials (involving the same person or other persons similarly situated) in order to show that any one of those acts was discriminatory rather than actuated by legitimate grounds. In its essence such discrimination is not a composite act, but it may be necessary for the purposes of proving it to produce evidence of a practice amounting to such an act.

²⁵⁹ *Ireland v. the United Kingdom* (see footnote 236 above), p. 64, para. 159; see also page 63, para. 157. See further the United States counterclaim in *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998, p. 190, which likewise focuses on a general situation rather than specific instances.

²⁶⁰ See, e.g., article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination; and article 26 of the International Covenant on Civil and Political Rights.

(7) A consequence of the character of a composite act is that the time when the act is accomplished cannot be the time when the first action or omission of the series takes place. It is only subsequently that the first action or omission will appear as having, as it were, inaugurated the series. Only after a series of actions or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, i.e. an act defined in aggregate as wrongful.

(8) Paragraph 1 of article 15 defines the time at which a composite act "occurs" as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last in the series. Similar considerations apply as for completed and continuing wrongful acts in determining when a breach of international law exists; the matter is dependent upon the precise facts and the content of the primary obligation. The number of actions or omissions which must occur to constitute a breach of the obligation is also determined by the formulation and purpose of the primary rule. The actions or omissions must be part of a series but the article does not require that the whole series of wrongful acts has to be committed in order to fall into the category of a composite wrongful act, provided a sufficient number of acts has occurred to constitute a breach. At the time when the act occurs which is sufficient to constitute the breach it may not be clear that further acts are to follow and that the series is not complete. Further, the fact that the series of actions or omissions was interrupted so that it was never completed will not necessarily prevent those actions or omissions which have occurred being classified as a composite wrongful act if, taken together, they are sufficient to constitute the breach.

(9) While composite acts are made up of a series of actions or omissions defined in aggregate as wrongful, this does not exclude the possibility that every single act in the series could be wrongful in accordance with another obligation. For example, the wrongful act of genocide is generally made up of a series of acts which are themselves internationally wrongful. Nor does it affect the temporal element in the commission of the acts: a series of acts or omissions may occur at the same time or sequentially, at different times.

(10) Paragraph 2 of article 15 deals with the extension in time of a composite act. Once a sufficient number of actions or omissions has occurred, producing the result of the composite act as such, the breach is dated to the first of the acts in the series. The status of the first action or omission is equivocal until enough of the series has occurred to constitute the wrongful act; but at that point the act should be regarded as having occurred over the whole period from the commission of the first action or omission. If this were not so, the effectiveness of the prohibition would thereby be undermined.

(11) The word "remain" in paragraph 2 is inserted to deal with the intertemporal principle set out in article 13. In accordance with that principle, the State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. In

cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the “first” of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence. This need not prevent a court taking into account earlier actions or omissions for other purposes (e.g. in order to establish a factual basis for the later breaches or to provide evidence of intent).

CHAPTER IV

RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF ANOTHER STATE

Commentary

(1) In accordance with the basic principles laid down in chapter I, each State is responsible for its own internationally wrongful conduct, i.e. for conduct attributable to it under chapter II which is in breach of an international obligation of that State in accordance with chapter III.²⁶¹ The principle that State responsibility is specific to the State concerned underlies the present articles as a whole. It will be referred to as the principle of independent responsibility. It is appropriate since each State has its own range of international obligations and its own correlative responsibilities.

(2) However, internationally wrongful conduct often results from the collaboration of several States rather than of one State acting alone.²⁶² This may involve independent conduct by several States, each playing its own role in carrying out an internationally wrongful act. Or it may be that a number of States act through a common organ to commit a wrongful act.²⁶³ Internationally wrongful conduct can also arise out of situations where a State acts on behalf of another State in carrying out the conduct in question.

(3) Various forms of collaborative conduct can coexist in the same case. For example, three States, Australia, New Zealand and the United Kingdom, together constituted the Administering Authority for the Trust Territory of Nauru. In the *Certain Phosphate Lands in Nauru* case, proceedings were commenced against Australia alone in respect of acts performed on the “joint behalf” of the

three States.²⁶⁴ The acts performed by Australia involved both “joint” conduct of several States and day-to-day administration of a territory by one State acting on behalf of other States as well as on its own behalf. By contrast, if the relevant organ of the acting State is merely “placed at the disposal” of the requesting State, in the sense provided for in article 6, only the requesting State is responsible for the act in question.

(4) In certain circumstances the wrongfulness of a State’s conduct may depend on the independent action of another State. A State may engage in conduct in a situation where another State is involved and the conduct of the other State may be relevant or even decisive in assessing whether the first State has breached its own international obligations. For example, in the *Soering* case the European Court of Human Rights held that the proposed extradition of a person to a State not party to the European Convention on Human Rights where he was likely to suffer inhuman or degrading treatment or punishment involved a breach of article 3 of the Convention by the extraditing State.²⁶⁵ Alternatively, a State may be required by its own international obligations to prevent certain conduct by another State, or at least to prevent the harm that would flow from such conduct. Thus, the basis of responsibility in the *Corfu Channel* case²⁶⁶ was Albania’s failure to warn the United Kingdom of the presence of mines in Albanian waters which had been laid by a third State. Albania’s responsibility in the circumstances was original and not derived from the wrongfulness of the conduct of any other State.

(5) In most cases of collaborative conduct by States, responsibility for the wrongful act will be determined according to the principle of independent responsibility referred to in paragraph (1) above. But there may be cases where conduct of the organ of one State, not acting as an organ or agent of another State, is nonetheless chargeable to the latter State, and this may be so even though the wrongfulness of the conduct lies, or at any rate primarily lies, in a breach of the international obligations of the former. Chapter IV of Part One defines these exceptional cases where it is appropriate that one State should assume responsibility for the internationally wrongful act of another.

(6) Three situations are covered in chapter IV. Article 16 deals with cases where one State provides aid or assistance to another State with a view to assisting in the commission of a wrongful act by the latter. Article 17 deals with cases where one State is responsible for the internationally wrongful act of another State because it has exercised powers of direction and control over the commission of an internationally wrongful act by the latter. Article 18 deals with the extreme case where one State deliberately coerces another into committing an act which is, or but for

²⁶¹ See, in particular, article 2 and commentary.

²⁶² See M. L. Padelletti, *Pluralità di Stati nel Fatto Illecito Internazionale* (Milan, Giuffrè, 1990); Brownlie, *System of the Law of Nations* ... (footnote 92 above), pp. 189–192; J. Quigley, “Complicity in international law: a new direction in the law of State responsibility”, *BYBIL*, 1986, vol. 57, p. 77; J. E. Noyes and B. D. Smith, “State responsibility and the principle of joint and several liability”, *Yale Journal of International Law*, vol. 13 (1988), p. 225; and B. Graefrath, “Complicity in the law of international responsibility”, *Revue belge de droit international*, vol. 29 (1996), p. 370.

²⁶³ In some cases, the act in question may be committed by the organs of an international organization. This raises issues of the international responsibility of international organizations which fall outside the scope of the present articles. See article 57 and commentary.

²⁶⁴ *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 258, para. 47; see also the separate opinion of Judge Shahabuddeen, *ibid.*, p. 284.

²⁶⁵ *Soering v. the United Kingdom*, *Eur. Court H.R., Series A, No. 161*, pp. 33–36, paras. 85–91 (1989). See also *Cruz Varas and Others v. Sweden*, *ibid.*, No. 201, p. 28, paras. 69–70 (1991); and *Vilvarajah and Others v. the United Kingdom*, *ibid.*, No. 215, p. 37, paras. 115–116 (1991).

²⁶⁶ *Corfu Channel, Merits* (see footnote 35 above), p. 22.

the coercion would be,²⁶⁷ an internationally wrongful act on the part of the coerced State. In all three cases, the act in question is still committed, voluntarily or otherwise, by organs or agents of the acting State, and is, or but for the coercion would be, a breach of that State's international obligations. The implication of the second State in that breach arises from the special circumstance of its willing assistance in, its direction and control over or its coercion of the acting State. But there are important differences between the three cases. Under article 16, the State primarily responsible is the acting State and the assisting State has a mere supporting role. Similarly under article 17, the acting State commits the internationally wrongful act, albeit under the direction and control of another State. By contrast, in the case of coercion under article 18, the coercing State is the prime mover in respect of the conduct and the coerced State is merely its instrument.

(7) A feature of this chapter is that it specifies certain conduct as internationally wrongful. This may seem to blur the distinction maintained in the articles between the primary or substantive obligations of the State and its secondary obligations of responsibility.²⁶⁸ It is justified on the basis that responsibility under chapter IV is in a sense derivative.²⁶⁹ In national legal systems, rules dealing, for example, with conspiracy, complicity and inducing breach of contract may be classified as falling within the "general part" of the law of obligations. Moreover, the idea of the implication of one State in the conduct of another is analogous to problems of attribution, dealt with in chapter II.

(8) On the other hand, the situations covered in chapter IV have a special character. They are exceptions to the principle of independent responsibility and they only cover certain cases. In formulating these exceptional cases where one State is responsible for the internationally wrongful acts of another, it is necessary to bear in mind certain features of the international system. First, there is the possibility that the same conduct may be internationally wrongful so far as one State is concerned but not for another State having regard to its own international obligations. Rules of derived responsibility cannot be allowed to undermine the principle, stated in article 34 of the 1969 Vienna Convention, that a "treaty does not create either obligations or rights for a third State without its consent"; similar issues arise with respect to unilateral obligations and even, in certain cases, rules of general international law. Hence it is only in the extreme case of coercion that a State may become responsible under this chapter for conduct which would not have been internationally wrongful if performed by that State. Secondly, States engage in a wide variety of activities through a multiplicity of organs and agencies. For example, a State providing financial or other aid to another State should not be required to assume the risk that the latter will divert the aid for purposes which may be internationally unlawful. Thus, it is

necessary to establish a close connection between the action of the assisting, directing or coercing State on the one hand and that of the State committing the internationally wrongful act on the other. Thus, the articles in this chapter require that the former State should be aware of the circumstances of the internationally wrongful act in question, and establish a specific causal link between that act and the conduct of the assisting, directing or coercing State. This is done without prejudice to the general question of "wrongful intent" in matters of State responsibility, on which the articles are neutral.²⁷⁰

(9) Similar considerations dictate the exclusion of certain situations of "derived responsibility" from chapter IV. One of these is incitement. The incitement of wrongful conduct is generally not regarded as sufficient to give rise to responsibility on the part of the inciting State, if it is not accompanied by concrete support or does not involve direction and control on the part of the inciting State.²⁷¹ However, there can be specific treaty obligations prohibiting incitement under certain circumstances.²⁷² Another concerns the issue which is described in some systems of internal law as being an "accessory after the fact". It seems that there is no general obligation on the part of third States to cooperate in suppressing internationally wrongful conduct of another State which may already have occurred. Again it is a matter for specific treaty obligations to establish any such obligation of suppression after the event. There are, however, two important qualifications here. First, in some circumstances assistance given by one State to another after the latter has committed an internationally wrongful act may amount to the adoption of that act by the former State. In such cases responsibility for that act potentially arises pursuant to article 11. Secondly, special obligations of cooperation in putting an end to an unlawful situation arise in the case of serious breaches of obligations under peremptory norms of general international law. By definition, in such cases States will have agreed that no derogation from such obligations is to be permitted and, faced with a serious breach of such an obligation, certain obligations of cooperation arise. These are dealt with in article 41.

Article 16. Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

²⁷⁰ See above, the commentary to paragraphs (3) and (10) of article 2.

²⁷¹ See the statement of the United States-French Commissioners relating to the *French Indemnity of 1831* case in Moore, *History and Digest*, vol. V, p. 4447, at pp. 4473–4476. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 129, para. 255, and the dissenting opinion of Judge Schwebel, p. 389, para. 259.

²⁷² See, e.g., article III (c) of the Convention on the Prevention and Punishment of the Crime of Genocide; and article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.

²⁶⁷ If a State has been coerced, the wrongfulness of its act may be precluded by *force majeure*: see article 23 and commentary.

²⁶⁸ See paras. (1)–(2) and (4) of the general commentary for an explanation of the distinction.

²⁶⁹ Cf. the term *responsabilité dérivée* used by Arbitrator Huber in *British Claims in the Spanish Zone of Morocco* (footnote 44 above), p. 648.

Commentary

(1) Article 16 deals with the situation where one State provides aid or assistance to another with a view to facilitating the commission of an internationally wrongful act by the latter. Such situations arise where a State voluntarily assists or aids another State in carrying out conduct which violates the international obligations of the latter, for example, by knowingly providing an essential facility or financing the activity in question. Other examples include providing means for the closing of an international waterway, facilitating the abduction of persons on foreign soil, or assisting in the destruction of property belonging to nationals of a third country. The State primarily responsible in each case is the acting State, and the assisting State has only a supporting role. Hence the use of the term “by the latter” in the *chapeau* to article 16, which distinguishes the situation of aid or assistance from that of co-perpetrators or co-participants in an internationally wrongful act. Under article 16, aid or assistance by the assisting State is not to be confused with the responsibility of the acting State. In such a case, the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act. Thus, in cases where that internationally wrongful act would clearly have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself.

(2) Various specific substantive rules exist, prohibiting one State from providing assistance in the commission of certain wrongful acts by other States or even requiring third States to prevent or repress such acts.²⁷³ Such provisions do not rely on any general principle of derived responsibility, nor do they deny the existence of such a principle, and it would be wrong to infer from them the non-existence of any general rule. As to treaty provisions such as Article 2, paragraph 5, of the Charter of the United Nations, again these have a specific rationale which goes well beyond the scope and purpose of article 16.

(3) Article 16 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.

(4) The requirement that the assisting State be aware of the circumstances making the conduct of the assisted State internationally wrongful is reflected by the phrase “knowledge of the circumstances of the internationally wrongful act”. A State providing material or financial assistance or aid to another State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act. If the assisting or aid-

ing State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.

(5) The second requirement is that the aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so. This limits the application of article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct. A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State. There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.

(6) The third condition limits article 16 to aid or assistance in the breach of obligations by which the aiding or assisting State is itself bound. An aiding or assisting State may not deliberately procure the breach by another State of an obligation by which both States are bound; a State cannot do by another what it cannot do by itself. On the other hand, a State is not bound by obligations of another State *vis-à-vis* third States. This basic principle is also embodied in articles 34 and 35 of the 1969 Vienna Convention. Correspondingly, a State is free to act for itself in a way which is inconsistent with the obligations of another State *vis-à-vis* third States. Any question of responsibility in such cases will be a matter for the State to whom assistance is provided *vis-à-vis* the injured State. Thus, it is a necessary requirement for the responsibility of an assisting State that the conduct in question, if attributable to the assisting State, would have constituted a breach of its own international obligations.

(7) State practice supports assigning international responsibility to a State which deliberately participates in the internationally wrongful conduct of another through the provision of aid or assistance, in circumstances where the obligation breached is equally opposable to the assisting State. For example, in 1984 the Islamic Republic of Iran protested against the supply of financial and military aid to Iraq by the United Kingdom, which allegedly included chemical weapons used in attacks against Iranian troops, on the ground that the assistance was facilitating acts of aggression by Iraq.²⁷⁴ The Government of the United Kingdom denied both the allegation that it had chemical weapons and that it had supplied them to Iraq.²⁷⁵ In 1998, a similar allegation surfaced that the Sudan had assisted Iraq to manufacture chemical weapons by allowing Sudanese installations to be used by Iraqi technicians for steps in the production of nerve gas. The allegation was denied by Iraq’s representative to the United Nations.²⁷⁶

(8) The obligation not to use force may also be breached by an assisting State through permitting the use of its territory by another State to carry out an armed attack against a third State. An example is provided by a statement made by the Government of the Federal Republic of Germany

²⁷³ See, e.g., the first principle of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex); and article 3 (f) of the Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex).

²⁷⁴ *The New York Times*, 6 March 1984, p. A1.

²⁷⁵ *Ibid.*, 5 March 1984, p. A3.

²⁷⁶ *Ibid.*, 26 August 1998, p. A8.

in response to an allegation that Germany had participated in an armed attack by allowing United States military aircraft to use airfields in its territory in connection with the United States intervention in Lebanon. While denying that the measures taken by the United States and the United Kingdom in the Near East constituted intervention, the Federal Republic of Germany nevertheless seems to have accepted that the act of a State in placing its own territory at the disposal of another State in order to facilitate the commission of an unlawful use of force by that other State was itself an internationally wrongful act.²⁷⁷ Another example arises from the Tripoli bombing incident in April 1986. The Libyan Arab Jamahiriya charged the United Kingdom with responsibility for the event, based on the fact that the United Kingdom had allowed several of its air bases to be used for the launching of United States fighter planes to attack Libyan targets.²⁷⁸ The Libyan Arab Jamahiriya asserted that the United Kingdom “would be held partly responsible” for having “supported and contributed in a direct way” to the raid.²⁷⁹ The United Kingdom denied responsibility on the basis that the raid by the United States was lawful as an act of self-defence against Libyan terrorist attacks on United States targets.²⁸⁰ A proposed Security Council resolution concerning the attack was vetoed, but the General Assembly issued a resolution condemning the “military attack” as “a violation of the Charter of the United Nations and of international law”, and calling upon all States “to refrain from extending any assistance or facilities for perpetrating acts of aggression against the Libyan Arab Jamahiriya”.²⁸¹

(9) The obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State is not limited to the prohibition on the use of force. For instance, a State may incur responsibility if it assists another State to circumvent sanctions imposed by the Security Council²⁸² or provides material aid to a State that uses the aid to commit human rights violations. In this respect, the General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations.²⁸³ Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.

²⁷⁷ For the text of the note from the Federal Government, see *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 20 (August 1960), pp. 663–664.

²⁷⁸ See United States of America, *Department of State Bulletin*, No. 2111 (June 1986), p. 8.

²⁷⁹ See the statement of Ambassador Hamed Houdeiry, Libyan People's Bureau, Paris, *The Times*, 16 April 1986, p. 6.

²⁸⁰ Statement of Mrs. Margaret Thatcher, Prime Minister, *House of Commons Debates*, 6th series, vol. 95, col. 737 (15 April 1986), reprinted in *BYBIL*, 1986, vol. 57, pp. 637–638.

²⁸¹ General Assembly resolution 41/38 of 20 November 1986, paras. 1 and 3.

²⁸² See, e.g., Report by President Clinton, *AJIL*, vol. 91, No. 4 (October 1997), p. 709.

²⁸³ Report of the Economic and Social Council, Report of the Third Committee of the General Assembly, draft resolution XVII (A/37/745), p. 50.

(10) In accordance with article 16, the assisting State is responsible for its own act in deliberately assisting another State to breach an international obligation by which they are both bound. It is not responsible, as such, for the act of the assisted State. In some cases this may be a distinction without a difference: where the assistance is a necessary element in the wrongful act in absence of which it could not have occurred, the injury suffered can be concurrently attributed to the assisting and the acting State.²⁸⁴ In other cases, however, the difference may be very material: the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered. By assisting another State to commit an internationally wrongful act, a State should not necessarily be held to indemnify the victim for all the consequences of the act, but only for those which, in accordance with the principles stated in Part Two of the articles, flow from its own conduct.

(11) Article 16 does not address the question of the admissibility of judicial proceedings to establish the responsibility of the aiding or assisting State in the absence of or without the consent of the aided or assisted State. ICJ has repeatedly affirmed that it cannot decide on the international responsibility of a State if, in order to do so, “it would have to rule, as a prerequisite, on the lawfulness”²⁸⁵ of the conduct of another State, in the latter's absence and without its consent. This is the so-called *Monetary Gold* principle.²⁸⁶ That principle may well apply to cases under article 16, since it is of the essence of the responsibility of the aiding or assisting State that the aided or assisted State itself committed an internationally wrongful act. The wrongfulness of the aid or assistance given by the former is dependent, *inter alia*, on the wrongfulness of the conduct of the latter. This may present practical difficulties in some cases in establishing the responsibility of the aiding or assisting State, but it does not vitiate the purpose of article 16. The *Monetary Gold* principle is concerned with the admissibility of claims in international judicial proceedings, not with questions of responsibility as such. Moreover, that principle is not all-embracing, and the *Monetary Gold* principle may not be a barrier to judicial proceedings in every case. In any event, wrongful assistance given to another State has frequently led to diplomatic protests. States are entitled to assert complicity in the wrongful conduct of another State even though no international court may have jurisdiction to rule on the charge, at all or in the absence of the other State.

Article 17. Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

²⁸⁴ For the question of concurrent responsibility of several States for the same injury, see article 47 and commentary.

²⁸⁵ *East Timor* (see footnote 54 above), p. 105, para. 35.

²⁸⁶ *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 19, at p. 32; *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 261, para. 55.

(b) the act would be internationally wrongful if committed by that State.

Commentary

(1) Article 17 deals with a second case of derived responsibility, the exercise of direction and control by one State over the commission of an internationally wrongful act by another. Under article 16, a State providing aid or assistance with a view to the commission of an internationally wrongful act incurs international responsibility only to the extent of the aid or assistance given. By contrast, a State which directs and controls another in the commission of an internationally wrongful act is responsible for the act itself, since it controlled and directed the act in its entirety.

(2) Some examples of international responsibility flowing from the exercise of direction and control over the commission of a wrongful act by another State are now largely of historical significance. International dependency relationships such as “suzerainty” or “protectorate” warranted treating the dominant State as internationally responsible for conduct formally attributable to the dependent State. For example, in *Rights of Nationals of the United States of America in Morocco*,²⁸⁷ France commenced proceedings under the Optional Clause in respect of a dispute concerning the rights of United States nationals in Morocco under French protectorate. The United States objected that any eventual judgment might not be considered as binding upon Morocco, which was not a party to the proceedings. France confirmed that it was acting both in its own name and as the protecting power over Morocco, with the result that the Court’s judgment would be binding both on France and on Morocco,²⁸⁸ and the case proceeded on that basis.²⁸⁹ The Court’s judgment concerned questions of the responsibility of France in respect of the conduct of Morocco which were raised both by the application and by the United States counterclaim.

(3) With the developments in international relations since 1945, and in particular the process of decolonization, older dependency relationships have been terminated. Such links do not involve any legal right to direction or control on the part of the representing State. In cases of representation, the represented entity remains responsible for its own international obligations, even though diplomatic communications may be channelled through another State. The representing State in such cases does not, merely because it is the channel through which communications pass, assume any responsibility for their content. This is not in contradiction to the *British Claims in the Spanish Zone of Morocco* arbitration, which affirmed that “the responsibility of the protecting State ... proceeds ... from the fact that the protecting State alone represents

the protected territory in its international relations”,²⁹⁰ and that the protecting State is answerable “in place of the protected State”.²⁹¹ The principal concern in the arbitration was to ensure that, in the case of a protectorate which put an end to direct international relations by the protected State, international responsibility for wrongful acts committed by the protected State was not erased to the detriment of third States injured by the wrongful conduct. The acceptance by the protecting State of the obligation to answer in place of the protected State was viewed as an appropriate means of avoiding that danger.²⁹² The justification for such an acceptance was not based on the relationship of “representation” as such but on the fact that the protecting State was in virtually total control over the protected State. It was not merely acting as a channel of communication.

(4) Other relationships of dependency, such as dependent territories, fall entirely outside the scope of article 17, which is concerned only with the responsibility of one State for the conduct of another State. In most relationships of dependency between one territory and another, the dependent territory, even if it may possess some international personality, is not a State. Even in cases where a component unit of a federal State enters into treaties or other international legal relations in its own right, and not by delegation from the federal State, the component unit is not itself a State in international law. So far as State responsibility is concerned, the position of federal States is no different from that of any other State: the normal principles specified in articles 4 to 9 of the draft articles apply, and the federal State is internationally responsible for the conduct of its component units even though that conduct falls within their own local control under the federal constitution.²⁹³

(5) Nonetheless, instances exist or can be envisaged where one State exercises the power to direct and control the activities of another State, whether by treaty or as a result of a military occupation or for some other reason. For example, during the belligerent occupation of Italy by Germany in the Second World War, it was generally acknowledged that the Italian police in Rome operated under the control of the occupying Power. Thus, the protest by the Holy See in respect of wrongful acts committed by Italian police who forcibly entered the Basilica of St. Paul in Rome in February 1944 asserted the responsibility of the German authorities.²⁹⁴ In such cases the occupying State is responsible for acts of the occupied State which it directs and controls.

(6) Article 17 is limited to cases where a dominant State actually directs and controls conduct which is a breach of an international obligation of the dependent State. International tribunals have consistently refused to infer responsibility on the part of a dominant State merely because

²⁸⁷ *Rights of Nationals of the United States of America in Morocco* (see footnote 108 above), p. 176.

²⁸⁸ *Ibid.*, *I.C.J. Pleadings*, vol. I, p. 235; and vol. II, pp. 431–433; the United States thereupon withdrew its preliminary objection: *ibid.*, p. 434.

²⁸⁹ See *Rights of Nationals of the United States of America in Morocco* (footnote 108 above), p. 179.

²⁹⁰ *British Claims in the Spanish Zone of Morocco* (see footnote 44 above), p. 649.

²⁹¹ *Ibid.*, p. 648.

²⁹² *Ibid.*

²⁹³ See, e.g., *LaGrand, Provisional Measures* (footnote 91 above).

²⁹⁴ See R. Ago, “L’occupazione bellica di Roma e il Trattato lateranense”, *Comunicazioni e Studi* (Milan, Giuffrè, 1945), vol. II, pp. 167–168.

the latter may have the power to interfere in matters of administration internal to a dependent State, if that power is not exercised in the particular case. In the *Brown* case, for example, the arbitral tribunal held that the authority of Great Britain, as suzerain over the South African Republic prior to the Boer War, “fell far short of what would be required to make her responsible for the wrong inflicted upon Brown”.²⁹⁵ It went on to deny that Great Britain possessed power to interfere in matters of internal administration and continued that there was no evidence “that Great Britain ever did undertake to interfere in this way”.²⁹⁶ Accordingly, the relation of suzerainty “did not operate to render Great Britain liable for the acts complained of”.²⁹⁷ In the *Heirs of the Duc de Guise* case, the Franco-Italian Conciliation Commission held that Italy was responsible for a requisition carried out by Italy in Sicily at a time when it was under Allied occupation. Its decision was not based on the absence of Allied power to requisition the property, or to stop Italy from doing so. Rather, the majority pointed to the absence in fact of any “intermeddling on the part of the Commander of the Occupation forces or any Allied authority calling for the requisition decrees”.²⁹⁸ The mere fact that a State may have power to exercise direction and control over another State in some field is not a sufficient basis for attributing to it any wrongful acts of the latter State in that field.²⁹⁹

(7) In the formulation of article 17, the term “controls” refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern. Similarly, the word “directs” does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind. Both direction and control must be exercised over the wrongful conduct in order for a dominant State to incur responsibility. The choice of the expression, common in English, “*direction and control*”, raised some problems in other languages, owing in particular to the ambiguity of the term “*direction*” which may imply, as is the case in French, complete power, whereas it does not have this implication in English.

(8) Two further conditions attach to responsibility under article 17. First, the dominant State is only responsible if it has knowledge of the circumstances making the conduct of the dependent State wrongful. Secondly, it has to be shown that the completed act would have been wrongful had it been committed by the directing and controlling State itself. This condition is significant in the context of bilateral obligations, which are not opposable to the directing State. In cases of multilateral obligations and

especially of obligations to the international community, it is of much less significance. The essential principle is that a State should not be able to do through another what it could not do itself.

(9) As to the responsibility of the directed and controlled State, the mere fact that it was directed to carry out an internationally wrongful act does not constitute an excuse under chapter V of Part One. If the conduct in question would involve a breach of its international obligations, it is incumbent upon it to decline to comply with the direction. The defence of “superior orders” does not exist for States in international law. This is not to say that the wrongfulness of the directed and controlled State’s conduct may not be precluded under chapter V, but this will only be so if it can show the existence of a circumstance precluding wrongfulness, e.g. *force majeure*. In such a case it is to the directing State alone that the injured State must look. But as between States, genuine cases of *force majeure* or coercion are exceptional. Conversely, it is no excuse for the directing State to show that the directed State was a willing or even enthusiastic participant in the internationally wrongful conduct, if in truth the conditions laid down in article 17 are met.

Article 18. Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

(a) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(b) the coercing State does so with knowledge of the circumstances of the act.

Commentary

(1) The third case of derived responsibility dealt with by chapter IV is that of coercion of one State by another. Article 18 is concerned with the specific problem of coercion deliberately exercised in order to procure the breach of one State’s obligation to a third State. In such cases the responsibility of the coercing State with respect to the third State derives not from its act of coercion, but rather from the wrongful conduct resulting from the action of the coerced State. Responsibility for the coercion itself is that of the coercing State *vis-à-vis* the coerced State, whereas responsibility under article 18 is the responsibility of the coercing State *vis-à-vis* a victim of the coerced act, in particular a third State which is injured as a result.

(2) Coercion for the purpose of article 18 has the same essential character as *force majeure* under article 23. Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State. It is not sufficient that compliance with the obligation is made more difficult or onerous, or that the acting State is assisted or directed in its conduct: such questions are covered by the preceding articles. Moreover, the coercing State must coerce the very act which is internationally wrongful. It is not enough that the consequences of the

²⁹⁵ *Robert E. Brown (United States) v. Great Britain*, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 120, at p. 130 (1923).

²⁹⁶ *Ibid.*, p. 131.

²⁹⁷ *Ibid.*

²⁹⁸ *Heirs of the Duc de Guise* (see footnote 115 above). See also, in another context, *Drozd and Janousek v. France and Spain* (footnote 135 above); see also *Iribarne Pérez v. France*, *Eur. Court H.R., Series A, No. 325-C*, pp. 62–63, paras. 29–31 (1995).

²⁹⁹ It may be that the fact of the dependence of one State upon another is relevant in terms of the burden of proof, since the mere existence of a formal State apparatus does not exclude the possibility that control was exercised in fact by an occupying Power. Cf. *Restitution of Household Effects Belonging to Jews Deported from Hungary (Germany)*, Kammergericht of Berlin, ILR, vol. 44, p. 301, at pp. 340–342 (1965).

coerced act merely make it more difficult for the coerced State to comply with the obligation.

(3) Though coercion for the purpose of article 18 is narrowly defined, it is not limited to unlawful coercion.³⁰⁰ As a practical matter, most cases of coercion meeting the requirements of the article will be unlawful, e.g. because they involve a threat or use of force contrary to the Charter of the United Nations, or because they involve intervention, i.e. coercive interference, in the affairs of another State. Such is also the case with countermeasures. They may have a coercive character, but as is made clear in article 49, their function is to induce a wrongdoing State to comply with obligations of cessation and reparation towards the State taking the countermeasures, not to coerce that State to violate obligations to third States.³⁰¹ However, coercion could possibly take other forms, e.g. serious economic pressure, provided that it is such as to deprive the coerced State of any possibility of conforming with the obligation breached.

(4) The equation of coercion with *force majeure* means that in most cases where article 18 is applicable, the responsibility of the coerced State will be precluded *vis-à-vis* the injured third State. This is reflected in the phrase “but for the coercion” in subparagraph (a) of article 18. Coercion amounting to *force majeure* may be the reason why the wrongfulness of an act is precluded *vis-à-vis* the coerced State. Therefore, the act is not described as an internationally wrongful act in the opening clause of the article, as is done in articles 16 and 17, where no comparable circumstance would preclude the wrongfulness of the act of the assisted or controlled State. But there is no reason why the wrongfulness of that act should be precluded *vis-à-vis* the coercing State. On the contrary, if the coercing State cannot be held responsible for the act in question, the injured State may have no redress at all.

(5) It is a further requirement for responsibility under article 18 that the coercing State must be aware of the circumstances which would, but for the coercion, have entailed the wrongfulness of the coerced State’s conduct. The reference to “circumstances” in subparagraph (b) is understood as reference to the factual situation rather than to the coercing State’s judgement of the legality of the act. This point is clarified by the phrase “circumstances of the act”. Hence, while ignorance of the law is no excuse, ignorance of the facts is material in determining the responsibility of the coercing State.

(6) A State which sets out to procure by coercion a breach of another State’s obligations to a third State will be held responsible to the third State for the consequences, regardless of whether the coercing State is also bound by the obligation in question. Otherwise, the injured State would potentially be deprived of any redress, because the acting State may be able to rely on *force majeure* as a circumstance precluding wrongfulness. Article 18 thus differs from articles 16 and 17 in that it does not allow for an exemption from responsibility for the act of

the coerced State in circumstances where the coercing State is not itself bound by the obligation in question.

(7) State practice lends support to the principle that a State bears responsibility for the internationally wrongful conduct of another State which it coerces. In the *Romano-Americana* case, the claim of the United States Government in respect of the destruction of certain oil storage and other facilities owned by a United States company on the orders of the Government of Romania during the First World War was originally addressed to the British Government. At the time the facilities were destroyed, Romania was at war with Germany, which was preparing to invade the country, and the United States claimed that the Romanian authorities had been “compelled” by Great Britain to take the measures in question. In support of its claim, the United States Government argued that the circumstances of the case revealed “a situation where a strong belligerent for a purpose primarily its own arising from its defensive requirements at sea, compelled a weaker Ally to acquiesce in an operation which it carried out on the territory of that Ally”.³⁰² The British Government denied responsibility, asserting that its influence over the conduct of the Romanian authorities “did not in any way go beyond the limits of persuasion and good counsel as between governments associated in a common cause”.³⁰³ The point of disagreement between the Governments of the United States and of Great Britain was not as to the responsibility of a State for the conduct of another State which it has coerced, but rather the existence of “compulsion” in the particular circumstances of the case.³⁰⁴

Article 19. Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

Commentary

(1) Article 19 serves three purposes. First, it preserves the responsibility of the State which has committed the internationally wrongful act, albeit with the aid or assistance, under the direction and control or subject to the coercion of another State. It recognizes that the attribution of international responsibility to an assisting, directing or coercing State does not preclude the responsibility of the assisted, directed or coerced State.

(2) Secondly, the article makes clear that the provisions of chapter IV are without prejudice to any other basis for establishing the responsibility of the assisting, directing or coercing State under any rule of international law defining particular conduct as wrongful. The phrase “under

³⁰² Note from the United States Embassy in London, dated 16 February 1925, in Hackworth, *op. cit.* (footnote 142 above), p. 702.

³⁰³ Note from the British Foreign Office dated 5 July 1928, *ibid.*, p. 704.

³⁰⁴ For a different example involving the coercion of a breach of contract in circumstances amounting to a denial of justice, see C. L. Bouvé, “Russia’s liability in tort for Persia’s breach of contract”, *AJIL*, vol. 6, No. 2 (April 1912), p. 389.

³⁰⁰ P. Reuter, *Introduction to the Law of Treaties*, 2nd rev. ed. (London, Kegan Paul International, 1995), paras. 271–274.

³⁰¹ See article 49, para. 2, and commentary.

other provisions of these articles” is a reference, *inter alia*, to article 23 (*Force majeure*), which might affect the question of responsibility. The phrase also draws attention to the fact that other provisions of the draft articles may be relevant to the State committing the act in question, and that chapter IV in no way precludes the issue of its responsibility in that regard.

(3) Thirdly, article 19 preserves the responsibility “of any other State” to whom the internationally wrongful conduct might also be attributable under other provisions of the articles.

(4) Thus, article 19 is intended to avoid any contrary inference in respect of responsibility which may arise from primary rules, precluding certain forms of assistance, or from acts otherwise attributable to any State under chapter II. The article covers both the implicated and the acting State. It makes it clear that chapter IV is concerned only with situations in which the act which lies at the origin of the wrong is an act committed by one State and not by the other. If both States commit the act, then that situation would fall within the realm of co-perpetrators, dealt with in chapter II.

CHAPTER V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Commentary

(1) Chapter V sets out six circumstances precluding the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the State concerned. The existence in a given case of a circumstance precluding wrongfulness in accordance with this chapter provides a shield against an otherwise well-founded claim for the breach of an international obligation. The six circumstances are: consent (art. 20), self-defence (art. 21), countermeasures (art. 22), *force majeure* (art. 23), distress (art. 24) and necessity (art. 25). Article 26 makes it clear that none of these circumstances can be relied on if to do so would conflict with a peremptory norm of general international law. Article 27 deals with certain consequences of the invocation of one of these circumstances.

(2) Consistent with the approach of the present articles, the circumstances precluding wrongfulness set out in chapter V are of general application. Unless otherwise provided,³⁰⁵ they apply to any internationally wrongful act whether it involves the breach by a State of an obligation arising under a rule of general international law, a treaty, a unilateral act or from any other source. They do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists. This was emphasized by ICJ in the *Gabčíkovo-Nagymaros Project* case. Hungary sought to argue that the wrongfulness of its conduct in discontinuing work on the Project in breach of its obliga-

tions under the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System was precluded by necessity. In dealing with the Hungarian plea, the Court said:

The state of necessity claimed by Hungary—supposing it to have been established—thus could not permit of the conclusion that ... it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did.³⁰⁶

Thus a distinction must be drawn between the effect of circumstances precluding wrongfulness and the termination of the obligation itself. The circumstances in chapter V operate as a shield rather than a sword. As Fitzmaurice noted, where one of the circumstances precluding wrongfulness applies, “the non-performance is not only justified, but ‘looks towards’ a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present”.³⁰⁷

(3) This distinction emerges clearly from the decisions of international tribunals. In the “*Rainbow Warrior*” arbitration, the tribunal held that both the law of treaties and the law of State responsibility had to be applied, the former to determine whether the treaty was still in force, the latter to determine what the consequences were of any breach of the treaty while it was in force, including the question whether the wrongfulness of the conduct in question was precluded.³⁰⁸ In the *Gabčíkovo-Nagymaros Project* case, the Court noted that:

[E]ven if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but—unless the parties by mutual agreement terminate the treaty—it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.³⁰⁹

(4) While the same facts may amount, for example, to *force majeure* under article 23 and to a supervening impossibility of performance under article 61 of the 1969 Vienna Convention, the two are distinct. *Force majeure* justifies non-performance of the obligation for so long as the circumstance exists; supervening impossibility justifies the termination of the treaty or its suspension in accordance with the conditions laid down in article 61. The former operates in respect of the particular obligation, the latter with respect to the treaty which is the source of that obligation. Just as the scope of application of the two doctrines is different, so is their mode of application. *Force majeure* excuses non-performance for the time being, but a treaty is not automatically terminated by supervening impossibility: at least one of the parties must decide to terminate it.

(5) The concept of circumstances precluding wrongfulness may be traced to the work of the Preparatory

³⁰⁶ *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 39, para. 48.

³⁰⁷ *Yearbook ... 1959*, vol. II, p. 41, document A/CN.4/120.

³⁰⁸ “*Rainbow Warrior*” (see footnote 46 above), pp. 251–252, para. 75.

³⁰⁹ *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 63, para. 101; see also page 38, para. 47.

³⁰⁵ For example, by a treaty to the contrary, which would constitute a *lex specialis* under article 55.

Committee of the 1930 Hague Conference. Among its Bases of discussion,³¹⁰ it listed two “[c]ircumstances under which States can decline their responsibility”, self-defence and reprisals.³¹¹ It considered that the extent of a State’s responsibility in the context of diplomatic protection could also be affected by the “provocative attitude” adopted by the injured person (Basis of discussion No. 19) and that a State could not be held responsible for damage caused by its armed forces “in the suppression of an insurrection, riot or other disturbance” (Basis of discussion No. 21). However, these issues were not taken to any conclusion.

(6) The category of circumstances precluding wrongfulness was developed by ILC in its work on international responsibility for injuries to aliens³¹² and the performance of treaties.³¹³ In the event, the subject of excuses for the non-performance of treaties was not included within the scope of the 1969 Vienna Convention.³¹⁴ It is a matter for the law on State responsibility.

(7) Circumstances precluding wrongfulness are to be distinguished from other arguments which may have the effect of allowing a State to avoid responsibility. They have nothing to do with questions of the jurisdiction of a court or tribunal over a dispute or the admissibility of a claim. They are to be distinguished from the constituent requirements of the obligation, i.e. those elements which have to exist for the issue of wrongfulness to arise in the first place and which are in principle specified by the obligation itself. In this sense the circumstances precluding wrongfulness operate like defences or excuses in internal legal systems, and the circumstances identified in chapter V are recognized by many legal systems, often under the same designation.³¹⁵ On the other hand, there is no common approach to these circumstances in internal law, and the conditions and limitations in chapter V have been developed independently.

(8) Just as the articles do not deal with questions of the jurisdiction of courts or tribunals, so they do not deal with issues of evidence or the burden of proof. In a bilateral dispute over State responsibility, the onus of establishing responsibility lies in principle on the claimant State. Where conduct in conflict with an international obligation is attributable to a State and that State seeks to avoid its responsibility by relying on a circumstance under chapter V, however, the position changes and the onus lies on that State to justify or excuse its conduct. Indeed, it is often the case that only that State is fully aware of the facts which might excuse its non-performance.

³¹⁰ *Yearbook ... 1956*, vol. II, pp. 219–225, document A/CN.4/96.

³¹¹ *Ibid.*, pp. 224–225. Issues raised by the Calvo clause and the exhaustion of local remedies were dealt with under the same heading.

³¹² *Yearbook ... 1958*, vol. II, p. 72. For the discussion of the circumstances by Special Rapporteur García Amador, see his first report on State responsibility, *Yearbook ... 1956*, vol. II, pp. 203–209, document A/CN.4/96, and his third report on State responsibility, *Yearbook ... 1958*, vol. II, pp. 50–55, document A/CN.4/111.

³¹³ See the fourth report on the law of treaties of Special Rapporteur Fitzmaurice (footnote 307 above), pp. 44–47, and his comments, *ibid.*, pp. 63–74.

³¹⁴ See article 73 of the Convention.

³¹⁵ See the comparative review by C. von Bar, *The Common European Law of Torts* (Oxford University Press, 2000), vol. 2, pp. 499–592.

(9) Chapter V sets out the circumstances precluding wrongfulness presently recognized under general international law.³¹⁶ Certain other candidates have been excluded. For example, the exception of non-performance (*exceptio inadimpleti contractus*) is best seen as a specific feature of certain mutual or synallagmatic obligations and not a circumstance precluding wrongfulness.³¹⁷ The principle that a State may not benefit from its own wrongful act is capable of generating consequences in the field of State responsibility but it is rather a general principle than a specific circumstance precluding wrongfulness.³¹⁸ The so-called “clean hands” doctrine has been invoked principally in the context of the admissibility of claims before international courts and tribunals, though rarely applied. It also does not need to be included here.³¹⁹

Article 20. Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Commentary

(1) Article 20 reflects the basic international law principle of consent in the particular context of Part One. In accordance with this principle, consent by a State to particular conduct by another State precludes the wrongfulness of that act in relation to the consenting State, provided the consent is valid and to the extent that the conduct remains within the limits of the consent given.

(2) It is a daily occurrence that States consent to conduct of other States which, without such consent, would constitute a breach of an international obligation. Simple examples include transit through the airspace or internal waters of a State, the location of facilities on its territory or the conduct of official investigations or inquiries there. But a distinction must be drawn between consent in relation to a particular situation or a particular course of

³¹⁶ For the effect of contribution to the injury by the injured State or other person or entity, see article 39 and commentary. This does not preclude wrongfulness but is relevant in determining the extent and form of reparation.

³¹⁷ Cf. *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*, p. 4, especially at pp. 50 and 77. See also the fourth report on the law of treaties of Special Rapporteur Fitzmaurice (footnote 307 above), pp. 43–47; D. W. Greig, “Reciprocity, proportionality and the law of treaties”, *Virginia Journal of International Law*, vol. 34 (1994), p. 295; and for a comparative review, G. H. Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford, Clarendon Press, 1988), pp. 245–317. For the relationship between the exception of non-performance and countermeasures, see below, paragraph (5) of commentary to Part Three, chap. II.

³¹⁸ See, e.g., *Factory at Chorzów, Jurisdiction* (footnote 34 above), p. 31; cf. *Gabčíkovo-Nagyymaros Project* (footnote 27 above), p. 67, para. 110.

³¹⁹ See J. J. A. Salmon, “Des ‘mains propres’ comme condition de recevabilité des réclamations internationales”, *Annuaire français de droit international*, vol. 10 (1964), p. 225; A. Miaja de la Muela, “Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux”, *Mélanges offerts à Juraj Andrassy* (The Hague, Martinus Nijhoff, 1968), p. 189, and the dissenting opinion of Judge Schwebel in *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), pp. 392–394.

conduct, and consent in relation to the underlying obligation itself. In the case of a bilateral treaty, the States parties can at any time agree to terminate or suspend the treaty, in which case obligations arising from the treaty will be terminated or suspended accordingly.³²⁰ But quite apart from that possibility, States have the right to dispense with the performance of an obligation owed to them individually, or generally to permit conduct to occur which (absent such permission) would be unlawful so far as they are concerned. In such cases, the primary obligation continues to govern the relations between the two States, but it is displaced on the particular occasion or for the purposes of the particular conduct by reason of the consent given.

(3) Consent to the commission of otherwise wrongful conduct may be given by a State in advance or even at the time it is occurring. By contrast, cases of consent given after the conduct has occurred are a form of waiver or acquiescence, leading to loss of the right to invoke responsibility. This is dealt with in article 45.

(4) In order to preclude wrongfulness, consent dispensing with the performance of an obligation in a particular case must be “valid”. Whether consent has been validly given is a matter addressed by international law rules outside the framework of State responsibility. Issues include whether the agent or person who gave the consent was authorized to do so on behalf of the State (and if not, whether the lack of that authority was known or ought to have been known to the acting State), or whether the consent was vitiated by coercion or some other factor.³²¹ Indeed there may be a question whether the State could validly consent at all. The reference to a “valid consent” in article 20 highlights the need to consider these issues in certain cases.

(5) Whether a particular person or entity had the authority to grant consent in a given case is a separate question from whether the conduct of that person or entity was attributable to the State for the purposes of chapter II. For example, the issue has arisen whether consent expressed by a regional authority could legitimize the sending of foreign troops into the territory of a State, or whether such consent could only be given by the central Government, and such questions are not resolved by saying that the acts of the regional authority are attributable to the State under article 4.³²² In other cases, the “legitimacy” of the Government which has given the consent has been questioned. Sometimes the validity of consent has been questioned because the consent was expressed in violation of relevant provisions of the State’s internal law. These questions depend on the rules of international law relating to the

expression of the will of the State, as well as rules of internal law to which, in certain cases, international law refers.

(6) Who has authority to consent to a departure from a particular rule may depend on the rule. It is one thing to consent to a search of embassy premises, another to the establishment of a military base on the territory of a State. Different officials or agencies may have authority in different contexts, in accordance with the arrangements made by each State and general principles of actual and ostensible authority. But in any case, certain modalities need to be observed for consent to be considered valid. Consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked. Consent may be vitiated by error, fraud, corruption or coercion. In this respect, the principles concerning the validity of consent to treaties provide relevant guidance.

(7) Apart from drawing attention to prerequisites to a valid consent, including issues of the authority to consent, the requirement for consent to be valid serves a further function. It points to the existence of cases in which consent may not be validly given at all. This question is discussed in relation to article 26 (compliance with peremptory norms), which applies to chapter V as a whole.³²³

(8) Examples of consent given by a State which has the effect of rendering certain conduct lawful include commissions of inquiry sitting on the territory of another State, the exercise of jurisdiction over visiting forces, humanitarian relief and rescue operations and the arrest or detention of persons on foreign territory. In the *Savarkar* case, the arbitral tribunal considered that the arrest of Savarkar was not a violation of French sovereignty as France had implicitly consented to the arrest through the conduct of its gendarme, who aided the British authorities in the arrest.³²⁴ In considering the application of article 20 to such cases it may be necessary to have regard to the relevant primary rule. For example, only the head of a diplomatic mission can consent to the receiving State’s entering the premises of the mission.³²⁵

(9) Article 20 is concerned with the relations between the two States in question. In circumstances where the consent of a number of States is required, the consent of one State will not preclude wrongfulness in relation to another.³²⁶ Furthermore, where consent is relied on to

³²⁰ 1969 Vienna Convention, art. 54 (b).

³²¹ See, e.g., the issue of Austrian consent to the *Anschluss* of 1938, dealt with by the Nuremberg Tribunal. The tribunal denied that Austrian consent had been given; even if it had, it would have been coerced and did not excuse the annexation. See “International Military Tribunal (Nuremberg), judgment and sentences October 1, 1946: judgment”, reprinted in AJIL, vol. 41, No. 1 (January 1947) p. 172, at pp. 192–194.

³²² This issue arose with respect to the dispatch of Belgian troops to the Republic of the Congo in 1960. See *Official Records of the Security Council, Fifteenth Year*, 873rd meeting, 13–14 July 1960, particularly the statement of the representative of Belgium, paras. 186–188 and 209.

³²³ See paragraph (6) of the commentary to article 26.

³²⁴ UNRIIAA, vol. XI (Sales No. 61.V.4), p. 243, at pp. 252–255 (1911).

³²⁵ Vienna Convention on Diplomatic Relations, art. 22, para. 1.

³²⁶ Austrian consent to the proposed customs union of 1931 would not have precluded its wrongfulness in regard of the obligation to respect Austrian independence owed by Germany to all the parties to the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles). Likewise, Germany’s consent would not have precluded the wrongfulness of the customs union in respect of the obligation of the maintenance of its complete independence imposed on Austria by the Treaty of Peace between the Allied and Associated Powers and Austria (Peace Treaty of Saint-Germain-en-Laye). See *Customs Régime between Germany and Austria, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 41*, p. 37, at pp. 46 and 49.

preclude wrongfulness, it will be necessary to show that the conduct fell within the limits of the consent. Consent to overflight by commercial aircraft of another State would not preclude the wrongfulness of overflight by aircraft transporting troops and military equipment. Consent to the stationing of foreign troops for a specific period would not preclude the wrongfulness of the stationing of such troops beyond that period.³²⁷ These limitations are indicated by the words “given act” in article 20 as well as by the phrase “within the limits of that consent”.

(10) Article 20 envisages only the consent of States to conduct otherwise in breach of an international obligation. International law may also take into account the consent of non-State entities such as corporations or private persons. The extent to which investors can waive the rules of diplomatic protection by agreement in advance has long been controversial, but under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (art. 27, para. 1), consent by an investor to arbitration under the Convention has the effect of suspending the right of diplomatic protection by the investor’s national State. The rights conferred by international human rights treaties cannot be waived by their beneficiaries, but the individual’s free consent may be relevant to their application.³²⁸ In these cases the particular rule of international law itself allows for the consent in question and deals with its effect. By contrast, article 20 states a general principle so far as enjoyment of the rights and performance of the obligations of States are concerned.

Article 21. Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Commentary

(1) The existence of a general principle admitting self-defence as an exception to the prohibition against the use of force in international relations is undisputed. Article 51 of the Charter of the United Nations preserves a State’s “inherent right” of self-defence in the face of an armed attack and forms part of the definition of the obligation to refrain from the threat or use of force laid down in Article 2, paragraph 4. Thus, a State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph 4.³²⁹

³²⁷ The non-observance of a condition placed on the consent will not necessarily take conduct outside of the limits of the consent. For example, consent to a visiting force on the territory of a State may be subject to a requirement to pay rent for the use of facilities. While the non-payment of the rent would no doubt be a wrongful act, it would not transform the visiting force into an army of occupation.

³²⁸ See, e.g., International Covenant on Civil and Political Rights, arts. 7; 8, para. 3; 14, para. 3 (g); and 23, para. 3.

³²⁹ Cf. *Legality of the Threat or Use of Nuclear Weapons* (footnote 54 above), p. 244, para. 38, and p. 263, para. 96, emphasizing the lawfulness of the use of force in self-defence.

(2) Self-defence may justify non-performance of certain obligations other than that under Article 2, paragraph 4, of the Charter of the United Nations, provided that such non-performance is related to the breach of that provision. Traditional international law dealt with these problems by instituting a separate legal regime of war, defining the scope of belligerent rights and suspending most treaties in force between the belligerents on the outbreak of war.³³⁰ In the Charter period, declarations of war are exceptional and military actions proclaimed as self-defence by one or both parties occur between States formally at “peace” with each other.³³¹ The 1969 Vienna Convention leaves such issues to one side by providing in article 73 that the Convention does not prejudice “any question that may arise in regard to a treaty ... from the outbreak of hostilities between States”.

(3) This is not to say that self-defence precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations. The Geneva Conventions for the protection of war victims of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) apply equally to all the parties in an international armed conflict, and the same is true of customary international humanitarian law.³³² Human rights treaties contain derogation provisions for times of public emergency, including actions taken in self-defence. As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct.

(4) ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* provided some guidance on this question. One issue before the Court was whether a use of nuclear weapons would necessarily be a breach of environmental obligations because of the massive and long-term damage such weapons can cause. The Court said:

[T]he issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.

The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment

³³⁰ See further Lord McNair and A. D. Watts, *The Legal Effects of War*, 4th ed. (Cambridge University Press, 1966).

³³¹ In *Oil Platforms, Preliminary Objection* (see footnote 208 above), it was not denied that the 1955 Treaty of Amity, Economic Relations and Consular Rights remained in force, despite many actions by United States naval forces against the Islamic Republic of Iran. In that case both parties agreed that to the extent that any such actions were justified by self-defence they would be lawful.

³³² As the Court said of the rules of international humanitarian law in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* (see footnote 54 above), p. 257, para. 79, “they constitute intransgressible principles of international customary law”. On the relationship between human rights and humanitarian law in time of armed conflict, see page 240, para. 25.

is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.³³³

A State acting in self-defence is “totally restrained” by an international obligation if that obligation is expressed or intended to apply as a definitive constraint even to States in armed conflict.³³⁴

(5) The essential effect of article 21 is to preclude the wrongfulness of conduct of a State acting in self-defence *vis-à-vis* an attacking State. But there may be effects *vis-à-vis* third States in certain circumstances. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court observed that:

[A]s in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used.³³⁵

The law of neutrality distinguishes between conduct as against a belligerent and conduct as against a neutral. But neutral States are not unaffected by the existence of a state of war. Article 21 leaves open all issues of the effect of action in self-defence *vis-à-vis* third States.

(6) Thus, article 21 reflects the generally accepted position that self-defence precludes the wrongfulness of the conduct taken within the limits laid down by international law. The reference is to action “taken in conformity with the Charter of the United Nations”. In addition, the term “lawful” implies that the action taken respects those obligations of total restraint applicable in international armed conflict, as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence. Article 21 simply reflects the basic principle for the purposes of chapter V, leaving questions of the extent and application of self-defence to the applicable primary rules referred to in the Charter.

Article 22. Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.

Commentary

(1) In certain circumstances, the commission by one State of an internationally wrongful act may justify another State injured by that act in taking non-forcible countermeasures in order to procure its cessation and to achieve reparation for the injury. Article 22 deals with this situation from the perspective of circumstances precluding

wrongfulness. Chapter II of Part Three regulates countermeasures in further detail.

(2) Judicial decisions, State practice and doctrine confirm the proposition that countermeasures meeting certain substantive and procedural conditions may be legitimate. In the *Gabčíkovo-Nagymaros Project* case, ICJ clearly accepted that countermeasures might justify otherwise unlawful conduct “taken in response to a previous international wrongful act of another State and ... directed against that State”,³³⁶ provided certain conditions are met. Similar recognition of the legitimacy of measures of this kind in certain cases can be found in arbitral decisions, in particular the “*Naulilaa*”,³³⁷ “*Cysne*”,³³⁸ and *Air Service Agreement*³³⁹ awards.

(3) In the literature concerning countermeasures, reference is sometimes made to the application of a “sanction”, or to a “reaction” to a prior internationally wrongful act; historically the more usual terminology was that of “legitimate reprisals” or, more generally, measures of “self-protection” or “self-help”. The term “sanctions” has been used for measures taken in accordance with the constituent instrument of some international organization, in particular under Chapter VII of the Charter of the United Nations—despite the fact that the Charter uses the term “measures”, not “sanctions”. The term “reprisals” is now no longer widely used in the present context, because of its association with the law of belligerent reprisals involving the use of force. At least since the *Air Service Agreement* arbitration,³⁴⁰ the term “countermeasures” has been preferred, and it has been adopted for the purposes of the present articles.

(4) Where countermeasures are taken in accordance with article 22, the underlying obligation is not suspended, still less terminated; the wrongfulness of the conduct in question is precluded for the time being by reason of its character as a countermeasure, but only provided that and for so long as the necessary conditions for taking countermeasures are satisfied. These conditions are set out in Part Three, chapter II, to which article 22 refers. As a response to internationally wrongful conduct of another State, countermeasures may be justified only in relation to that State. This is emphasized by the phrases “if and to the extent” and “countermeasures taken against” the responsible State. An act directed against a third State would not fit this definition and could not be justified as a countermeasure. On the other hand, indirect or consequential effects of countermeasures on third parties, which do not involve an independent breach of any obligation to those third parties, will not take a countermeasure outside the scope of article 22.

(5) Countermeasures may only preclude wrongfulness in the relations between an injured State and the State which has committed the internationally wrongful act.

³³⁶ *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 83.

³³⁷ *Portuguese Colonies* case (Naulilaa incident), UNRIIAA, vol. II (Sales No. 1949.V.1), p. 1011, at pp. 1025–1026 (1928).

³³⁸ *Ibid.*, p. 1035, at p. 1052 (1930).

³³⁹ *Air Service Agreement* (see footnote 28 above).

³⁴⁰ *Ibid.*, especially pp. 443–446, paras. 80–98.

³³³ *Ibid.*, p. 242, para. 30.

³³⁴ See, e.g., the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques.

³³⁵ *I.C.J. Reports 1996* (see footnote 54 above), p. 261, para. 89.

The principle is clearly expressed in the “*Cysne*” case, where the tribunal stressed that:

reprisals, which constitute an act in principle contrary to the law of nations, are defensible only insofar as they were *provoked* by some other act likewise contrary to that law. *Only reprisals taken against the provoking State are permissible.* Admittedly, it can happen that legitimate reprisals taken against an offending State may affect the nationals of an innocent State. But that would be an indirect and unintentional consequence which, in practice, the injured State will always endeavour to avoid or to limit as far as possible.³⁴¹

Accordingly, the wrongfulness of Germany’s conduct *vis-à-vis* Portugal was not precluded. Since it involved the use of armed force, this decision concerned belligerent reprisals rather than countermeasures in the sense of article 22. But the same principle applies to countermeasures, as the Court confirmed in the *Gabčíkovo-Nagymaros Project* case when it stressed that the measure in question must be “directed against” the responsible State.³⁴²

(6) If article 22 had stood alone, it would have been necessary to spell out other conditions for the legitimacy of countermeasures, including in particular the requirement of proportionality, the temporary or reversible character of countermeasures and the status of certain fundamental obligations which may not be subject to countermeasures. Since these conditions are dealt with in Part Three, chapter II, it is sufficient to make a cross reference to them here. Article 22 covers any action which qualifies as a countermeasure in accordance with those conditions. One issue is whether countermeasures may be taken by third States which are not themselves individually injured by the internationally wrongful act in question, although they are owed the obligation which has been breached.³⁴³ For example, in the case of an obligation owed to the international community as a whole ICJ has affirmed that all States have a legal interest in compliance.³⁴⁴ Article 54 leaves open the question whether any State may take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest as an injured State. While article 22 does not cover measures taken in such a case to the extent that these do not qualify as countermeasures, neither does it exclude that possibility.

Article 23. Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(a) the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(b) the State has assumed the risk of that situation occurring.

Commentary

(1) *Force majeure* is quite often invoked as a ground for precluding the wrongfulness of an act of a State.³⁴⁵ It involves a situation where the State in question is in effect compelled to act in a manner not in conformity with the requirements of an international obligation incumbent upon it. *Force majeure* differs from a situation of distress (art. 24) or necessity (art. 25) because the conduct of the State which would otherwise be internationally wrongful is involuntary or at least involves no element of free choice.

(2) A situation of *force majeure* precluding wrongfulness only arises where three elements are met: (a) the act in question must be brought about by an irresistible force or an unforeseen event; (b) which is beyond the control of the State concerned; and (c) which makes it materially impossible in the circumstances to perform the obligation. The adjective “irresistible” qualifying the word “force” emphasizes that there must be a constraint which the State was unable to avoid or oppose by its own means. To have been “unforeseen” the event must have been neither foreseen nor of an easily foreseeable kind. Further the “irresistible force” or “unforeseen event” must be causally linked to the situation of material impossibility, as indicated by the words “due to *force majeure* ... making it materially impossible”. Subject to paragraph 2, where these elements are met, the wrongfulness of the State’s conduct is precluded for so long as the situation of *force majeure* subsists.

(3) Material impossibility of performance giving rise to *force majeure* may be due to a natural or physical event (e.g. stress of weather which may divert State aircraft into the territory of another State, earthquakes, floods or drought) or to human intervention (e.g. loss of control over a portion of the State’s territory as a result of an insurrection or devastation of an area by military operations carried out by a third State), or some combination of the two. Certain situations of duress or coercion involving force imposed on the State may also amount to *force majeure* if they meet the various requirements of article 23. In particular, the situation must be irresistible, so that the State concerned has no real possibility of escaping its effects. *Force majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis. Nor does it cover situations brought about by the neglect or

³⁴¹ “*Cysne*” (see footnote 338 above), pp. 1056–1057.

³⁴² *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 83.

³⁴³ For the distinction between injured States and other States entitled to invoke State responsibility, see articles 42 and 48 and commentaries.

³⁴⁴ *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

³⁴⁵ “‘*Force majeure*’ and ‘fortuitous event’ as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine”, study prepared by the Secretariat (*Yearbook ... 1978*, vol. II (Part One), p. 61, document A/CN.4/315).

default of the State concerned,³⁴⁶ even if the resulting injury itself was accidental and unintended.³⁴⁷

(4) In drafting what became article 61 of the 1969 Vienna Convention, ILC took the view that *force majeure* was a circumstance precluding wrongfulness in relation to treaty performance, just as supervening impossibility of performance was a ground for termination of a treaty.³⁴⁸ The same view was taken at the United Nations Conference on the Law of Treaties.³⁴⁹ But in the interests of the stability of treaties, the Conference insisted on a narrow formulation of article 61 so far as treaty termination is concerned. The degree of difficulty associated with *force majeure* as a circumstance precluding wrongfulness, though considerable, is less than is required by article 61 for termination of a treaty on grounds of supervening impossibility, as ICJ pointed out in the *Gabčíkovo-Nagymaros Project* case:

Article 61, paragraph 1, requires the “permanent disappearance or destruction of an object indispensable for the execution” of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties ... Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.³⁵⁰

(5) In practice, many of the cases where “impossibility” has been relied upon have not involved actual impossibility as distinct from increased difficulty of performance and the plea of *force majeure* has accordingly failed. But cases of material impossibility have occurred, e.g. where a State aircraft is forced, due to damage or loss of control of the aircraft owing to weather, into the airspace of another State without the latter’s authorization. In such cases

³⁴⁶ For example, in relation to occurrences such as the bombing of La Chaux-de-Fonds by German airmen on 17 October 1915, and of Porrentruy by a French airman on 26 April 1917, ascribed to negligence on the part of the airmen, the belligerent undertook to punish the offenders and make reparation for the damage suffered (study prepared by the Secretariat, *ibid.*, paras. 255–256).

³⁴⁷ For example, in 1906 an American officer on the USS *Chattanooga* was mortally wounded by a bullet from a French warship as his ship entered the Chinese harbour of Chefoo. The United States Government obtained reparation, having maintained that:

“While the killing of Lieutenant England can only be viewed as an accident, it cannot be regarded as belonging to the unavoidable class whereby no responsibility is entailed. Indeed, it is not conceivable how it could have occurred without the contributory element of lack of proper precaution on the part of those officers of the *Dupetit Thouars* who were in responsible charge of the rifle firing practice and who failed to stop firing when the *Chattanooga*, in the course of her regular passage through the public channel, came into the line of fire.”

M. M. Whiteman, *Damages in International Law* (Washington, D.C., United States Government Printing Office, 1937), vol. I, p. 221. See also the study prepared by the Secretariat (footnote 345 above), para. 130.

³⁴⁸ *Yearbook ... 1966*, vol. II, p. 255.

³⁴⁹ See, e.g., the proposal of the representative of Mexico, *United Nations Conference on the Law of Treaties, First and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), Report of the Committee of the Whole on its work at the first session of the Conference, document A/CONF.39/14, p. 182, para. 531 (a).

³⁵⁰ *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 63, para. 102.

the principle that wrongfulness is precluded has been accepted.³⁵¹

(6) Apart from aerial incidents, the principle in article 23 is also recognized in relation to ships in innocent passage by article 14, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone (the United Nations Convention on the Law of the Sea, art. 18, para. 2), as well as in article 7, paragraph 1, of the Convention on Transit Trade of Land-locked States. In these provisions, *force majeure* is incorporated as a constituent element of the relevant primary rule; nonetheless, its acceptance in these cases helps to confirm the existence of a general principle of international law to similar effect.

(7) The principle has also been accepted by international tribunals. Mixed claims commissions have frequently cited the unforeseeability of attacks by rebels in denying the responsibility of the territorial State for resulting damage suffered by foreigners.³⁵² In the *Lighthouses* arbitration, a lighthouse owned by a French company had been requisitioned by the Government of Greece in 1915 and was subsequently destroyed by enemy action. The arbitral tribunal denied the French claim for restoration of the lighthouse on grounds of *force majeure*.³⁵³ In the *Russian Indemnity* case, the principle was accepted but the plea of *force majeure* failed because the payment of the debt was not materially impossible.³⁵⁴ *Force majeure* was acknowledged as a general principle of law (though again the plea was rejected on the facts of the case) by PCIJ in the *Serbian Loans* and *Brazilian Loans* cases.³⁵⁵ More recently, in the “*Rainbow Warrior*” arbitration, France relied on *force majeure* as a circumstance precluding the wrongfulness of its conduct in removing the officers from Hao and not returning them following medical treatment. The tribunal dealt with the point briefly:

New Zealand is right in asserting that the excuse of *force majeure* is not of relevance in this case because the test of its applicability is of

³⁵¹ See, e.g., the cases of accidental intrusion into airspace attributable to weather, and the cases of accidental bombing of neutral territory attributable to navigational errors during the First World War discussed in the study prepared by the Secretariat (footnote 345 above), paras. 250–256. See also the exchanges of correspondence between the States concerned in the incidents involving United States military aircraft entering the airspace of Yugoslavia in 1946, United States of America, *Department of State Bulletin* (Washington, D.C.), vol. XV, No. 376 (15 September 1946), p. 502, reproduced in the study prepared by the Secretariat, para. 144, and the incident provoking the application to ICJ in 1954, *I.C.J. Pleadings, Treatment in Hungary of Aircraft and Crew of the United States of America*, p. 14 (note to the Hungarian Government of 17 March 1953). It is not always clear whether these cases are based on distress or *force majeure*.

³⁵² See, e.g., the decision of the American-British Claims Commission in the *Saint Albans Raid* case, Moore, *History and Digest*, vol. IV, p. 4042 (1873), and the study prepared by the Secretariat (footnote 345 above), para. 339; the decisions of the United States-Venezuela Claims Commission in the *Wipperman* case, Moore, *History and Digest*, vol. III, p. 3039, and the study prepared by the Secretariat, paras. 349–350; *De Brissot and others* case (footnote 117 above), and the study prepared by the Secretariat, para. 352; and the decision of the British-Mexican Claims Commission in the *Gill* case, UNRIAA, vol. V (Sales No. 1952.V.3), p. 157 (1931), and the study prepared by the Secretariat, para. 463.

³⁵³ *Lighthouses* arbitration (see footnote 182 above), pp. 219–220.

³⁵⁴ UNRIAA, vol. XI (Sales No. 61.V.4), p. 421, at p. 443 (1912).

³⁵⁵ *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, pp. 39–40; *Brazilian Loans, Judgment No. 15, ibid., No. 21*, p. 120.

absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*.³⁵⁶

(8) In addition to its application in inter-State cases as a matter of public international law, *force majeure* has substantial currency in the field of international commercial arbitration, and may qualify as a general principle of law.³⁵⁷

(9) A State may not invoke *force majeure* if it has caused or induced the situation in question. In *Libyan Arab Foreign Investment Company and The Republic of Burundi*, the arbitral tribunal rejected a plea of *force majeure* because “the alleged impossibility [was] not the result of an irresistible force or an unforeseen external event beyond the control of Burundi. In fact, the impossibility is the result of a unilateral decision of that State ...”³⁵⁸ Under the equivalent ground for termination of a treaty in article 61 of the 1969 Vienna Convention, material impossibility cannot be invoked “if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty”. By analogy with this provision, paragraph 2 (a) excludes the plea in circumstances where *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it. For paragraph 2 (a) to apply it is not enough that the State invoking *force majeure* has contributed to the situation of material impossibility; the situation of *force majeure* must be “due” to the conduct of the State invoking it. This allows for *force majeure* to be invoked in situations in which a State may have unwittingly contributed to the occurrence of material impossibility by something which, in hindsight, might have been done differently but which was done in good faith and did not itself make the event any less unforeseen. Paragraph 2 (a) requires that the State’s role in the occurrence of *force majeure* must be substantial.

(10) Paragraph 2 (b) deals with situations in which the State has already accepted the risk of the occurrence of *force majeure*, whether it has done so in terms of the obligation itself or by its conduct or by virtue of some unilateral act. This reflects the principle that *force majeure* should not excuse performance if the State has undertaken to prevent the particular situation arising or has otherwise assumed that risk.³⁵⁹ Once a State accepts the responsibility

for a particular risk it cannot then claim *force majeure* to avoid responsibility. But the assumption of risk must be unequivocal and directed towards those to whom the obligation is owed.

Article 24. Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author’s life or the lives of other persons entrusted to the author’s care.

2. Paragraph 1 does not apply if:

(a) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(b) the act in question is likely to create a comparable or greater peril.

Commentary

(1) Article 24 deals with the specific case where an individual whose acts are attributable to the State is in a situation of peril, either personally or in relation to persons under his or her care. The article precludes the wrongfulness of conduct adopted by the State agent in circumstances where the agent had no other reasonable way of saving life. Unlike situations of *force majeure* dealt with in article 23, a person acting under distress is not acting involuntarily, even though the choice is effectively nullified by the situation of peril.³⁶⁰ Nor is it a case of choosing between compliance with international law and other legitimate interests of the State, such as characterize situations of necessity under article 25. The interest concerned is the immediate one of saving people’s lives, irrespective of their nationality.

(2) In practice, cases of distress have mostly involved aircraft or ships entering State territory under stress of weather or following mechanical or navigational failure.³⁶¹ An example is the entry of United States military aircraft into Yugoslavia’s airspace in 1946. On two occasions, United States military aircraft entered Yugoslav airspace without authorization and were attacked by Yugoslav air defences. The United States Government protested the Yugoslav action on the basis that the aircraft had entered Yugoslav airspace solely in order to escape extreme danger. The Yugoslav Government responded by denouncing the systematic violation of its airspace, which it claimed could only be intentional in view of its frequency. A later note from the Yugoslav chargé d’affaires informed the United States Department of State that Marshal Tito had

an agreement or obligation assuming in advance the risk of the particular *force majeure* event.

³⁶⁰ For this reason, writers who have considered this situation have often defined it as one of “relative impossibility” of complying with the international obligation. See, e.g., O. J. Lissitzyn, “The treatment of aerial intruders in recent practice and international law”, *AJIL*, vol. 47, No. 4 (October 1953), p. 588.

³⁶¹ See the study prepared by the Secretariat (footnote 345 above), paras. 141–142 and 252.

³⁵⁶ “Rainbow Warrior” (see footnote 46 above), p. 253.

³⁵⁷ On *force majeure* in the case law of the Iran-United States Claims Tribunal, see G. H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), pp. 306–320. *Force majeure* has also been recognized as a general principle of law by the European Court of Justice: see, e.g., case 145/85, *Denkavit v. Belgium*, *Eur. Court H.R., Reports* 1987–2, p. 565; case 101/84, *Commission of the European Communities v. Italian Republic*, *ibid.*, *Reports* 1985–6, p. 2629. See also article 79 of the United Nations Convention on Contracts for the International Sale of Goods; P. Schlechtriem, ed., *Commentary on the UN Convention on the International Sale of Goods*, 2nd ed. (trans. G. Thomas) (Oxford, Clarendon Press, 1998), pp. 600–626; and article 7.1.7 of the UNIDROIT Principles, *Principles of International Commercial Contracts* (Rome, Unidroit, 1994), pp. 169–171.

³⁵⁸ ILR, vol. 96 (1994), p. 318, para. 55.

³⁵⁹ As the study prepared by the Secretariat (footnote 345 above), para. 31, points out, States may renounce the right to rely on *force majeure* by agreement. The most common way of doing so would be by

forbidden any firing on aircraft which flew over Yugoslav territory without authorization, presuming that, for its part, the United States Government “would undertake the steps necessary to prevent these flights, except in the case of emergency or bad weather, for which arrangements could be made by agreement between American and Yugoslav authorities”.³⁶² The reply of the United States Acting Secretary of State reiterated the assertion that no United States planes had flown over Yugoslavia intentionally without prior authorization from Yugoslav authorities “unless forced to do so in an emergency”. However, the Acting Secretary of State added:

I presume that the Government of Yugoslavia recognizes that *in case a plane and its occupants are jeopardized, the aircraft may change its course so as to seek safety, even though such action may result in flying over Yugoslav territory without prior clearance.*³⁶³

(3) Claims of distress have also been made in cases of violation of maritime boundaries. For example, in December 1975, after British naval vessels entered Icelandic territorial waters, the British Government claimed that the vessels in question had done so in search of “shelter from severe weather, as they have the right to do under customary international law”.³⁶⁴ Iceland maintained that British vessels were in its waters for the sole purpose of provoking an incident, but did not contest the point that if the British vessels had been in a situation of distress, they could enter Icelandic territorial waters.

(4) Although historically practice has focused on cases involving ships and aircraft, article 24 is not limited to such cases.³⁶⁵ The “*Rainbow Warrior*” arbitration involved a plea of distress as a circumstance precluding wrongfulness outside the context of ships or aircraft. France sought to justify its conduct in removing the two officers from the island of Hao on the ground of “circumstances of distress in a case of extreme urgency involving elementary humanitarian considerations affecting the acting organs of the State”.³⁶⁶ The tribunal unanimously accepted that this plea was admissible in principle, and by majority that it was applicable to the facts of one of the two cases. As to the principle, the tribunal required France to show three things:

(1) The existence of very exceptional circumstances of extreme urgency involving medical or other considerations of an elementary nature, provided always that a prompt recognition of the existence of those exceptional circumstances is subsequently obtained from the other interested party or is clearly demonstrated.

³⁶² United States of America, *Department of State Bulletin* (see footnote 351 above), reproduced in the study prepared by the Secretariat (see footnote 345 above), para. 144.

³⁶³ Study prepared by the Secretariat (see footnote 345 above), para. 145. The same argument is found in the Memorial of 2 December 1958 submitted by the United States Government to ICJ in relation to another aerial incident (*I.C.J. Pleadings, Aerial Incident of 27 July 1955*, pp. 358–359).

³⁶⁴ *Official Records of the Security Council, Thirtieth Year*, 1866th meeting, 16 December 1975, para. 24; see the study prepared by the Secretariat (footnote 345 above), para. 136.

³⁶⁵ There have also been cases involving the violation of a land frontier in order to save the life of a person in danger. See, e.g., the case of violation of the Austrian border by Italian soldiers in 1862, study prepared by the Secretariat (footnote 345 above), para. 121.

³⁶⁶ “*Rainbow Warrior*” (see footnote 46 above), pp. 254–255, para. 78.

(2) The reestablishment of the original situation of compliance with the assignment in Hao as soon as the reasons of emergency invoked to justify the repatriation had disappeared.

(3) The existence of a good faith effort to try to obtain the consent of New Zealand in terms of the 1986 Agreement.³⁶⁷

In fact, the danger to one of the officers, though perhaps not life-threatening, was real and might have been imminent, and it was not denied by the New Zealand physician who subsequently examined him. By contrast, in the case of the second officer, the justifications given (the need for medical examination on grounds of pregnancy and the desire to see a dying father) did not justify emergency action. The lives of the agent and the child were at no stage threatened and there were excellent medical facilities nearby. The tribunal held that:

[C]learly these circumstances entirely fail to justify France’s responsibility for the removal of Captain Prieur and from the breach of its obligations resulting from the failure to return the two officers to Hao (in the case of Major Mafart once the reasons for their removal had disappeared). There was here a clear breach of its obligations.³⁶⁸

(5) The plea of distress is also accepted in many treaties as a circumstance justifying conduct which would otherwise be wrongful. Article 14, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone permits stopping and anchoring by ships during their passage through foreign territorial seas insofar as this conduct is rendered necessary by distress. This provision is repeated in much the same terms in article 18, paragraph 2, of the United Nations Convention on the Law of the Sea.³⁶⁹ Similar provisions appear in the international conventions on the prevention of pollution at sea.³⁷⁰

(6) Article 24 is limited to cases where human life is at stake. The tribunal in the “*Rainbow Warrior*” arbitration appeared to take a broader view of the circumstances justifying a plea of distress, apparently accepting that a serious health risk would suffice. The problem with extending article 24 to less than life-threatening situations is where to place any lower limit. In situations of distress involving aircraft there will usually be no difficulty in establishing that there is a threat to life, but other cases present a wide range of possibilities. Given the context of chapter V and the likelihood that there will be other solutions available for cases which are not apparently life-threatening, it does

³⁶⁷ *Ibid.*, p. 255, para. 79.

³⁶⁸ *Ibid.*, p. 263, para. 99.

³⁶⁹ See also articles 39, paragraph 1 (c), 98 and 109, of the Convention.

³⁷⁰ See, e.g., the International Convention for the Prevention of Pollution of the Sea by Oil, article IV, paragraph 1 (a) of which provides that the prohibition on the discharge of oil into the sea does not apply if the discharge takes place “for the purpose of securing the safety of the ship, preventing damage to the ship or cargo, or saving life at sea”. See also the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, article V, paragraph 1 of which provides that the prohibition on dumping of wastes does not apply when it is “necessary to secure the safety of human life or of vessels, aircraft, platforms or other man-made structures at sea ... in any case which constitutes a danger to human life or a real threat to vessels, aircraft, platforms or other man-made structures at sea, if dumping appears to be the only way of averting the threat”. See also the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (art. 8, para. 1); and the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL Convention), annex I, regulation 11 (a).

not seem necessary to extend the scope of distress beyond threats to life itself. In situations in which a State agent is in distress and has to act to save lives, there should however be a certain degree of flexibility in the assessment of the conditions of distress. The “no other reasonable way” criterion in article 24 seeks to strike a balance between the desire to provide some flexibility regarding the choices of action by the agent in saving lives and the need to confine the scope of the plea having regard to its exceptional character.

(7) Distress may only be invoked as a circumstance precluding wrongfulness in cases where a State agent has acted to save his or her own life or where there exists a special relationship between the State organ or agent and the persons in danger. It does not extend to more general cases of emergencies, which are more a matter of necessity than distress.

(8) Article 24 only precludes the wrongfulness of conduct so far as it is necessary to avoid the life-threatening situation. Thus, it does not exempt the State or its agent from complying with other requirements (national or international), e.g. the requirement to notify arrival to the relevant authorities, or to give relevant information about the voyage, the passengers or the cargo.³⁷¹

(9) As in the case of *force majeure*, a situation which has been caused or induced by the invoking State is not one of distress. In many cases the State invoking distress may well have contributed, even if indirectly, to the situation. Priority should be given to necessary life-saving measures, however, and under *paragraph 2 (a)*, distress is only excluded if the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it. This is the same formula as that adopted in respect of article 23, *paragraph 2 (a)*.³⁷²

(10) Distress can only preclude wrongfulness where the interests sought to be protected (e.g. the lives of passengers or crew) clearly outweigh the other interests at stake in the circumstances. If the conduct sought to be excused endangers more lives than it may save or is otherwise likely to create a greater peril it will not be covered by the plea of distress. For instance, a military aircraft carrying explosives might cause a disaster by making an emergency landing, or a nuclear submarine with a serious breakdown might cause radioactive contamination to a port in which it sought refuge. *Paragraph 2 (b)* stipulates that distress does not apply if the act in question is likely to create a comparable or greater peril. This is consistent with *paragraph 1*, which in asking whether the agent had “no other reasonable way” to save life establishes an objective test.

³⁷¹ See *Cashin and Lewis v. The King, Canada Law Reports* (1935), p. 103 (even if a vessel enters a port in distress, it is not exempted from the requirement to report on its voyage). See also the “*Rebecca*”, Mexico-United States General Claims Commission, AJIL, vol. 23, No. 4 (October 1929), p. 860 (vessel entered port in distress; merchandise seized for customs offence: held, entry reasonably necessary in the circumstances and not a mere matter of convenience; seizure therefore unlawful); the “*May*” v. *The King, Canada Law Reports* (1931), p. 374; the “*Queen City*” v. *The King, ibid.*, p. 387; and *Rex v. Flahaut, Dominion Law Reports* (1935), p. 685 (test of “real and irresistible distress” applied).

³⁷² See *paragraph (9)* of the commentary to article 23.

The words “comparable or greater peril” must be assessed in the context of the overall purpose of saving lives.

Article 25. Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) the international obligation in question excludes the possibility of invoking necessity; or

(b) the State has contributed to the situation of necessity.

Commentary

(1) The term “necessity” (*état de nécessité*) is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency. Under conditions narrowly defined in article 25, such a plea is recognized as a circumstance precluding wrongfulness.

(2) The plea of necessity is exceptional in a number of respects. Unlike consent (art. 20), self-defence (art. 21) or countermeasures (art. 22), it is not dependent on the prior conduct of the injured State. Unlike *force majeure* (art. 23), it does not involve conduct which is involuntary or coerced. Unlike distress (art. 24), necessity consists not in danger to the lives of individuals in the charge of a State official but in a grave danger either to the essential interests of the State or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.³⁷³

(3) There is substantial authority in support of the existence of necessity as a circumstance precluding wrongfulness.

³⁷³ Perhaps the classic case of such an abuse was the occupation of Luxembourg and Belgium by Germany in 1914, which Germany sought to justify on the ground of necessity. See, in particular, the note presented on 2 August 1914 by the German Minister in Brussels to the Belgian Minister for Foreign Affairs, in J. B. Scott, ed., *Diplomatic Documents relating to the Outbreak of the European War* (New York, Oxford University Press, 1916), part I, pp. 749–750, and the speech in the Reichstag by the German Chancellor von Bethmann-Hollweg, on 4 August 1914, containing the well-known words: *wir sind jetzt in der Notwehr; und Not kennt kein Gebot!* (we are in a state of self-defence and necessity knows no law), *Jahrbuch des Völkerrechts*, vol. III (1916), p. 728.

ness. It has been invoked by States and has been dealt with by a number of international tribunals. In these cases the plea of necessity has been accepted in principle, or at least not rejected.

(4) In an Anglo-Portuguese dispute of 1832, the Portuguese Government argued that the pressing necessity of providing for the subsistence of certain contingents of troops engaged in quelling internal disturbances had justified its appropriation of property owned by British subjects, notwithstanding a treaty stipulation. The British Government was advised that:

the Treaties between this Country and Portugal are [not] of so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever, or that their stipulations ought to be so strictly adhered to, as to deprive the Government of Portugal of the right of using those means, which may be absolutely and indispensably necessary to the safety, and even to the very existence of the State.

The extent of the necessity, which will justify such an appropriation of the Property of British Subjects, must depend upon the circumstances of the particular case, but it must be imminent and urgent.³⁷⁴

(5) The “*Caroline*” incident of 1837, though frequently referred to as an instance of self-defence, really involved the plea of necessity at a time when the law concerning the use of force had a quite different basis than it has at present. In that case, British armed forces entered United States territory and attacked and destroyed a vessel owned by United States citizens which was carrying recruits and military and other material to Canadian insurgents. In response to the protests by the United States, the British Minister in Washington, Fox, referred to the “necessity of self-defence and self-preservation”; the same point was made by counsel consulted by the British Government, who stated that “the conduct of the British Authorities” was justified because it was “absolutely necessary as a measure of precaution”.³⁷⁵ Secretary of State Webster replied to Minister Fox that “nothing less than a clear and absolute necessity can afford ground of justification” for the commission “of hostile acts within the territory of a Power at Peace”, and observed that the British Government must prove that the action of its forces had really been caused by “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation”.³⁷⁶ In his message to Congress of 7 December 1841, President Tyler reiterated that:

This Government can never concede to any foreign Government the power, except in a case of the most urgent and extreme necessity, of invading its territory, either to arrest the persons or destroy the property of those who may have violated the municipal laws of such foreign Government.³⁷⁷

The incident was not closed until 1842, with an exchange of letters in which the two Governments agreed that “a strong overpowering necessity may arise when this great principle may and must be suspended”. “It must be so”,

³⁷⁴ Lord McNair, ed., *International Law Opinions* (Cambridge University Press, 1956), vol. II, Peace, p. 232.

³⁷⁵ See respectively W. R. Manning, ed., *Diplomatic Correspondence of the United States: Canadian Relations 1784–1860* (Washington, D.C., Carnegie Endowment for International Peace, 1943), vol. III, p. 422; and Lord McNair, ed., *International Law Opinions* (footnote 374 above), p. 221, at p. 228.

³⁷⁶ *British and Foreign State Papers, 1840–1841* (London, Ridgway, 1857), vol. 29, p. 1129.

³⁷⁷ *Ibid.*, 1841–1842, vol. 30, p. 194.

added Lord Ashburton, the British Government’s *ad hoc* envoy to Washington, “for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity”.³⁷⁸

(6) In the *Russian Fur Seals* controversy of 1893, the “essential interest” to be safeguarded against a “grave and imminent peril” was the natural environment in an area not subject to the jurisdiction of any State or to any international regulation. Facing the danger of extermination of a fur seal population by unrestricted hunting, the Russian Government issued a decree prohibiting sealing in an area of the high seas. In a letter to the British Ambassador dated 12 February (24 February) 1893, the Russian Minister for Foreign Affairs explained that the action had been taken because of the “absolute necessity of immediate provisional measures” in view of the imminence of the hunting season. He “emphasize[d] the essentially precautionary character of the above-mentioned measures, which were taken under the pressure of exceptional circumstances”³⁷⁹ and declared his willingness to conclude an agreement with the British Government with a view to a longer-term settlement of the question of sealing in the area.

(7) In the *Russian Indemnity* case, the Government of the Ottoman Empire, to justify its delay in paying its debt to the Russian Government, invoked among other reasons the fact that it had been in an extremely difficult financial situation, which it described as “*force majeure*” but which was more like a state of necessity. The arbitral tribunal accepted the plea in principle:

The exception of force majeure, invoked in the first place, is arguable in international public law, as well as in private law; international law must adapt itself to political exigencies. The Imperial Russian Government expressly admits ... that the obligation for a State to execute treaties may be weakened “if the very existence of the State is endangered, if observation of the international duty is ... *self-destructive*”.³⁸⁰

It considered, however, that:

It would be a manifest exaggeration to admit that the payment (or the contracting of a loan for the payment) of the relatively small sum of 6 million francs due to the Russian claimants would have imperilled the existence of the Ottoman Empire or seriously endangered its internal or external situation.³⁸¹

In its view, compliance with an international obligation must be “self-destructive” for the wrongfulness of the conduct not in conformity with the obligation to be precluded.³⁸²

³⁷⁸ *Ibid.*, p. 195. See Secretary of State Webster’s reply on page 201.

³⁷⁹ *Ibid.*, 1893–1894 (London, HM Stationery Office, 1899), vol. 86, p. 220; and the study prepared by the Secretariat (see footnote 345 above), para. 155.

³⁸⁰ See footnote 354 above; see also the study prepared by the Secretariat (footnote 345 above), para. 394.

³⁸¹ *Ibid.*

³⁸² A case in which the parties to the dispute agreed that very serious financial difficulties could justify a different mode of discharging the obligation other than that originally provided for arose in connection with the enforcement of the arbitral award in *Forests of Central Rhodopia*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1405 (1933); see League of Nations, *Official Journal*, 15th Year, No. 11 (part I) (November 1934), p. 1432.

(8) In *Société commerciale de Belgique*,³⁸³ the Greek Government owed money to a Belgian company under two arbitral awards. Belgium applied to PCIJ for a declaration that the Greek Government, in refusing to carry out the awards, was in breach of its international obligations. The Greek Government pleaded the country's serious budgetary and monetary situation.³⁸⁴ The Court noted that it was not within its mandate to declare whether the Greek Government was justified in not executing the arbitral awards. However, the Court implicitly accepted the basic principle, on which the two parties were in agreement.³⁸⁵

(9) In March 1967 the Liberian oil tanker *Torrey Canyon* went aground on submerged rocks off the coast of Cornwall outside British territorial waters, spilling large amounts of oil which threatened the English coastline. After various remedial attempts had failed, the British Government decided to bomb the ship to burn the remaining oil. This operation was carried out successfully. The British Government did not advance any legal justification for its conduct, but stressed the existence of a situation of extreme danger and claimed that the decision to bomb the ship had been taken only after all other means had failed.³⁸⁶ No international protest resulted. A convention was subsequently concluded to cover future cases where intervention might prove necessary to avert serious oil pollution.³⁸⁷

(10) In the "*Rainbow Warrior*" arbitration, the arbitral tribunal expressed doubt as to the existence of the excuse of necessity. It noted that the Commission's draft article "allegedly authorizes a State to take unlawful action invoking a state of necessity" and described the Commission's proposal as "controversial".³⁸⁸

(11) By contrast, in the *Gabčikovo-Nagymaros Project* case, ICJ carefully considered an argument based on the Commission's draft article (now article 25), expressly accepting the principle while at the same time rejecting its invocation in the circumstances of that case. As to the

³⁸³ *Société commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 160.

³⁸⁴ *P.C.I.J., Series C, No. 87*, pp. 141 and 190; study prepared by the Secretariat (footnote 345 above), para. 278. See generally paragraphs 276–287 for the Greek arguments relative to the state of necessity.

³⁸⁵ See footnote 383 above; and the study prepared by the Secretariat (footnote 345 above), para. 288. See also the *Serbian Loans* case, where the positions of the parties and the Court on the point were very similar (footnote 355 above); the *French Company of Venezuelan Railroads* case (footnote 178 above) p. 353; and the study prepared by the Secretariat (footnote 345 above), paras. 263–268 and 385–386. In his separate opinion in the *Oscar Chim* case, Judge Anzilotti accepted the principle that "necessity may excuse the non-observance of international obligations", but denied its applicability on the facts (*Judgment, 1934, P.C.I.J., Series A/B, No. 63*, p. 65, at pp. 112–114).

³⁸⁶ *The "Torrey Canyon"*, Cmnd. 3246 (London, HM Stationery Office, 1967).

³⁸⁷ International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties.

³⁸⁸ "*Rainbow Warrior*" (see footnote 46 above), p. 254. In *Libyan Arab Foreign Investment Company and The Republic of Burundi* (see footnote 358 above), p. 319, the tribunal declined to comment on the appropriateness of codifying the doctrine of necessity, noting that the measures taken by Burundi did not appear to have been the only means of safeguarding an essential interest "against a grave and imminent peril".

principle itself, the Court noted that the parties had both relied on the Commission's draft article as an appropriate formulation, and continued:

The Court considers ... that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words ...

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.

... In the present case, the following basic conditions ... are relevant: it must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must have been the "only means" of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity". Those conditions reflect customary international law.³⁸⁹

(12) The plea of necessity was apparently an issue in the *Fisheries Jurisdiction* case.³⁹⁰ Regulatory measures taken to conserve straddling stocks had been taken by the Northwest Atlantic Fisheries Organization (NAFO) but had, in Canada's opinion, proved ineffective for various reasons. By the Coastal Fisheries Protection Act 1994, Canada declared that the straddling stocks of the Grand Banks were "threatened with extinction", and asserted that the purpose of the Act and regulations was "to enable Canada to take urgent action necessary to prevent further destruction of those stocks and to permit their rebuilding". Canadian officials subsequently boarded and seized a Spanish fishing ship, the *Estai*, on the high seas, leading to a conflict with the European Union and with Spain. The Spanish Government denied that the arrest could be justified by concerns as to conservation "since it violates the established provisions of the NAFO Convention [Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries] to which Canada is a party".³⁹¹ Canada disagreed, asserting that "the arrest of the *Estai* was necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen".³⁹² The Court held that it had no jurisdiction over the case.³⁹³

³⁸⁹ *Gabčikovo-Nagymaros Project* (see footnote 27 above), pp. 40–41, paras. 51–52.

³⁹⁰ *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432.

³⁹¹ *Ibid.*, p. 443, para. 20. For the European Community protest of 10 March 1995, asserting that the arrest "cannot be justified by any means", see Memorial of Spain (*Jurisdiction of the Court*), *I.C.J. Pleadings, Fisheries Jurisdiction (Spain v. Canada)*, p. 17, at p. 38, para. 15.

³⁹² *Fisheries Jurisdiction* (see footnote 390 above), p. 443, para. 20. See also the Canadian Counter-Memorial (29 February 1996), *I.C.J. Pleadings* (footnote 391 above), paras. 17–45.

³⁹³ By an Agreed Minute between Canada and the European Community, Canada undertook to repeal the regulations applying the 1994 Act to Spanish and Portuguese vessels in the NAFO area and to release the *Estai*. The parties expressly maintained "their respective positions on the conformity of the amendment of 25 May 1994 to Canada's Coastal Fisheries Protection Act, and subsequent regulations, with customary international law and the NAFO Convention" and reserved "their ability to preserve and defend their rights in conformity with international law". See Canada-European Community: Agreed Minute on the Con-

(13) The existence and limits of a plea of necessity have given rise to a long-standing controversy among writers. It was for the most part explicitly accepted by the early writers, subject to strict conditions.³⁹⁴ In the nineteenth century, abuses of necessity associated with the idea of “fundamental rights of States” led to a reaction against the doctrine. During the twentieth century, the number of writers opposed to the concept of state of necessity in international law increased, but the balance of doctrine has continued to favour the existence of the plea.³⁹⁵

(14) On balance, State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions, and this view is embodied in article 25. The cases show that necessity has been invoked to preclude the wrongfulness of acts contrary to a broad range of obligations, whether customary or conventional in origin.³⁹⁶ It has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population. But stringent conditions are imposed before any such plea is allowed. This is reflected in article 25. In particular, to emphasize the exceptional nature of necessity and concerns about its possible abuse, article 25 is cast in negative language (“Necessity may not be invoked ... unless”).³⁹⁷ In this respect it mirrors the language of article 62 of the 1969 Vienna Convention dealing with fundamental change of circumstances. It also mirrors that language in establishing, in paragraph 1, two conditions without which necessity may not be invoked and excluding, in paragraph 2, two situations entirely from the scope of the excuse of necessity.³⁹⁸

servation and Management of Fish Stocks (Brussels, 20 April 1995), ILM, vol. 34, No. 5 (September 1995), p. 1260. See also the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

³⁹⁴ See B. Ayala, *De jure et officii bellicis et disciplina militari, libri tres* (1582) (Washington, D.C., Carnegie Institution, 1912), vol. II, p. 135; A. Gentili, *De iure belli, libri tres* (1612) (Oxford, Clarendon Press, 1933), vol. II, p. 351; H. Grotius, *De jure belli ac pacis, libri tres* (1646) (Oxford, Clarendon Press, 1925), vol. II, pp. 193 et seq.; S. Pufendorf, *De jure naturae et gentium, libri octo* (1688) (Oxford, Clarendon Press, 1934), vol. II, pp. 295–296; C. Wolff, *Jus gentium methodo scientifica pertractatum* (1764) (Oxford, Clarendon Press, 1934), pp. 173–174; and E. de Vattel, *The Law of Nations or the Principles of Natural Law* (1758) (Washington, D.C., Carnegie Institution, 1916), vol. III, p. 149.

³⁹⁵ For a review of the earlier doctrine, see *Yearbook ... 1980*, vol. II (Part Two), pp. 47–49; see also P. A. Pillitu, *Lo stato di necessità nel diritto internazionale* (University of Perugia/Editrice Licosa, 1981); J. Barboza, “Necessity (revisited) in international law”, *Essays in International Law in Honour of Judge Manfred Lachs*, J. Makarczyk, ed. (The Hague, Martinus Nijhoff, 1984), p. 27; and R. Boed, “State of necessity as a justification for internationally wrongful conduct”, *Yale Human Rights and Development Law Journal*, vol. 3 (2000), p. 1.

³⁹⁶ Generally on the irrelevance of the source of the obligation breached, see article 12 and commentary.

³⁹⁷ This negative formulation was referred to by ICJ in the *Gabčíkovo-Nagymaros Project* case (see footnote 27 above), p. 40, para. 51.

³⁹⁸ A further exclusion, common to all the circumstances precluding wrongfulness, concerns peremptory norms (see article 26 and commentary).

(15) The first condition, set out in *paragraph 1 (a)*, is that necessity may only be invoked to safeguard an essential interest from a grave and imminent peril. The extent to which a given interest is “essential” depends on all the circumstances, and cannot be prejudged. It extends to particular interests of the State and its people, as well as of the international community as a whole. Whatever the interest may be, however, it is only when it is threatened by a grave and imminent peril that this condition is satisfied. The peril has to be objectively established and not merely apprehended as possible. In addition to being grave, the peril has to be imminent in the sense of proximate. However, as the Court in the *Gabčíkovo-Nagymaros Project* case said:

That does not exclude ... that a “peril” appearing in the long term might be held to be “imminent” as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.³⁹⁹

Moreover, the course of action taken must be the “only way” available to safeguard that interest. The plea is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient. Thus, in the *Gabčíkovo-Nagymaros Project* case, the Court was not convinced that the unilateral suspension and abandonment of the Project was the only course open in the circumstances, having regard in particular to the amount of work already done and the money expended on it, and the possibility of remedying any problems by other means.⁴⁰⁰ The word “way” in paragraph 1 (*a*) is not limited to unilateral action but may also comprise other forms of conduct available through cooperative action with other States or through international organizations (for example, conservation measures for a fishery taken through the competent regional fisheries agency). Moreover, the requirement of necessity is inherent in the plea: any conduct going beyond what is strictly necessary for the purpose will not be covered.

(16) It is not sufficient for the purposes of paragraph 1 (*a*) that the peril is merely apprehended or contingent. It is true that in questions relating, for example, to conservation and the environment or to the safety of large structures, there will often be issues of scientific uncertainty and different views may be taken by informed experts on whether there is a peril, how grave or imminent it is and whether the means proposed are the only ones available in the circumstances. By definition, in cases of necessity the peril will not yet have occurred. In the *Gabčíkovo-Nagymaros Project* case the Court noted that the invoking State could not be the sole judge of the necessity,⁴⁰¹ but a measure of uncertainty about the future does not necessarily disqualify a State from invoking necessity, if the peril is clearly established on the basis of the evidence reasonably available at the time.

(17) The second condition for invoking necessity, set out in *paragraph 1 (b)*, is that the conduct in question must not seriously impair an essential interest of the other State or States concerned, or of the international community as

³⁹⁹ *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 42, para. 54.

⁴⁰⁰ *Ibid.*, pp. 42–43, para. 55.

⁴⁰¹ *Ibid.*, p. 40, para. 51.

a whole (see paragraph (18) below). In other words, the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective.⁴⁰²

(18) As a matter of terminology, it is sufficient to use the phrase “international community as a whole” rather than “international community of States as a whole”, which is used in the specific context of article 53 of the 1969 Vienna Convention. The insertion of the words “of States” in article 53 of the Convention was intended to stress the paramountcy that States have over the making of international law, including especially the establishment of norms of a peremptory character. On the other hand, ICJ used the phrase “international community as a whole” in the *Barcelona Traction* case,⁴⁰³ and it is frequently used in treaties and other international instruments in the same sense as in paragraph 1(b).⁴⁰⁴

(19) Over and above the conditions in paragraph 1, *paragraph 2* lays down two general limits to any invocation of necessity. This is made clear by the use of the words “in any case”. *Paragraph 2* (a) concerns cases where the international obligation in question explicitly or implicitly excludes reliance on necessity. Thus, certain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule.

(20) According to *paragraph 2* (b), necessity may not be relied on if the responsible State has contributed to the situation of necessity. Thus, in the *Gabčíkovo-Nagymaros Project* case, ICJ considered that because Hungary had “helped, by act or omission to bring about” the situation of alleged necessity, it could not then rely on that situation as a circumstance precluding wrongfulness.⁴⁰⁵ For a plea of necessity to be precluded under *paragraph 2* (b), the contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral. *Paragraph 2* (b) is phrased in more categorical terms than articles 23, *paragraph 2* (a), and 24, *paragraph 2* (a), because necessity needs to be more narrowly confined.

⁴⁰² In the *Gabčíkovo-Nagymaros Project* case ICJ affirmed the need to take into account any countervailing interest of the other State concerned (see footnote 27 above), p. 46, para. 58.

⁴⁰³ *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

⁴⁰⁴ See, e.g., third preambular paragraph of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; fourth preambular paragraph of the International Convention Against the Taking of Hostages; fifth preambular paragraph of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; third preambular paragraph of the Convention on the Safety of United Nations and Associated Personnel; tenth preambular paragraph of the International Convention for the Suppression of Terrorist Bombings; ninth preambular paragraph of the Rome Statute of the International Criminal Court; and ninth preambular paragraph of the International Convention for the Suppression of the Financing of Terrorism.

⁴⁰⁵ *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 46, para. 57.

(21) As embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of “military necessity”. It is true that in a few cases, the plea of necessity has been invoked to excuse military action abroad, in particular in the context of claims to humanitarian intervention.⁴⁰⁶ The question whether measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law is not covered by article 25.⁴⁰⁷ The same thing is true of the doctrine of “military necessity” which is, in the first place, the underlying criterion for a series of substantive rules of the law of war and neutrality, as well as being included in terms in a number of treaty provisions in the field of international humanitarian law.⁴⁰⁸ In both respects, while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations.⁴⁰⁹

Article 26. Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Commentary

(1) In accordance with article 53 of the 1969 Vienna Convention, a treaty which conflicts with a peremptory norm of general international law is void. Under article 64, an earlier treaty which conflicts with a new peremp-

⁴⁰⁶ For example, in 1960 Belgium invoked necessity to justify its military intervention in the Congo. The matter was discussed in the Security Council but not in terms of the plea of necessity as such. See *Official Records of the Security Council, Fifteenth Year*, 873rd meeting, 13–14 July 1960, paras. 144, 182 and 192; 877th meeting, 20–21 July 1960, paras. 31 et seq. and para. 142; 878th meeting, 21 July 1960, paras. 23 and 65; and 879th meeting, 21–22 July 1960, paras. 80 et seq. and paras. 118 and 151. For the “*Caroline*” incident, see above, paragraph (5).

⁴⁰⁷ See also article 26 and commentary for the general exclusion of the scope of circumstances precluding wrongfulness of conduct in breach of a peremptory norm.

⁴⁰⁸ See, e.g., article 23 (g) of the Regulations respecting the Laws and Customs of War on Land (annexed to the Hague Conventions II of 1899 and IV of 1907), which prohibits the destruction of enemy property “unless such destruction or seizure be imperatively demanded by the necessities of war”. Similarly, article 54, paragraph 5, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), appears to permit attacks on objects indispensable to the survival of the civilian population if “imperative military necessity” so requires.

⁴⁰⁹ See, e.g., M. Huber, “Die Kriegsrechtlichen Verträge und die Kriegsraison”, *Zeitschrift für Völkerrecht*, vol. VII (1913), p. 351; D. Anzilotti, *Corso di diritto internazionale* (Rome, Athenaeum, 1915), vol. III, p. 207; C. De Visscher, “Les lois de la guerre et la théorie de la nécessité”, *RGDIP*, vol. 24 (1917), p. 74; N. C. H. Dunbar, “Military necessity in war crimes trials”, *BYBIL*, 1952, vol. 29, p. 442; C. Greenwood, “Historical development and legal basis”, *The Handbook of Humanitarian Law in Armed Conflicts*, D. Fleck, ed. (Oxford University Press, 1995), p. 1, at pp. 30–33; and Y. Dinstein, “Military necessity”, *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, Elsevier, 1997), vol. 3, pp. 395–397.

tory norm becomes void and terminates.⁴¹⁰ The question is what implications these provisions may have for the matters dealt with in chapter V.

(2) Sir Gerald Fitzmaurice as Special Rapporteur on the Law of Treaties treated this question on the basis of an implied condition of “continued compatibility with international law”, noting that:

A treaty obligation the observance of which is incompatible a new rule or prohibition of international law in the nature of *jus cogens* will justify (and require) non-observance of any treaty obligation involving such incompatibility ...

The same principle is applicable where circumstances arise subsequent to the conclusion of a treaty, bringing into play an existing rule of international law which was not relevant to the situation as it existed at the time of the conclusion of the treaty.⁴¹¹

The Commission did not, however, propose with any specific articles on this question, apart from articles 53 and 64 themselves.

(3) Where there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail. The processes of interpretation and application should resolve such questions without any need to resort to the secondary rules of State responsibility. In theory, one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen. But in practice such situations seem not to have occurred.⁴¹² Even if they were to arise, peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts.

(4) It is, however, desirable to make it clear that the circumstances precluding wrongfulness in chapter V of Part One do not authorize or excuse any derogation from a peremptory norm of general international law. For example, a State taking countermeasures may not derogate from such a norm: for example, a genocide cannot justify a counter-genocide.⁴¹³ The plea of necessity likewise cannot excuse the breach of a peremptory norm. It would be possible to incorporate this principle expressly in each of the articles of chapter V, but it is both more economical and more in keeping with the overriding character of this

⁴¹⁰ See also article 44, paragraph 5, which provides that in cases falling under article 53, no separation of the provisions of the treaty is permitted.

⁴¹¹ Fourth report on the law of treaties, *Yearbook ... 1959* (see footnote 307 above), p. 46. See also S. Rosenne, *Breach of Treaty* (Cambridge, Grotius, 1985), p. 63.

⁴¹² For a possible analogy, see the remarks of Judge *ad hoc* Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 325, at pp. 439–441. ICJ did not address these issues in its order.

⁴¹³ As ICJ noted in its decision in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, “in no case could one breach of the Convention serve as an excuse for another” (*Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 243, at p. 258, para. 35).

class of norms to deal with the basic principle separately. Hence, article 26 provides that nothing in chapter V can preclude the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.⁴¹⁴

(5) The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the 1969 Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law, binding as such, but further that it should be recognized as having a peremptory character by the international community of States as a whole. So far, relatively few peremptory norms have been recognized as such. But various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties.⁴¹⁵ Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.⁴¹⁶

(6) In accordance with article 26, circumstances precluding wrongfulness cannot justify or excuse a breach of a State’s obligations under a peremptory rule of general international law. Article 26 does not address the prior issue whether there has been such a breach in any given case. This has particular relevance to certain articles in chapter V. One State cannot dispense another from the obligation to comply with a peremptory norm, e.g. in relation to genocide or torture, whether by treaty or otherwise.⁴¹⁷ But in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose. Determining in which circumstances consent has been validly given is again a matter for other rules of international law and not for the secondary rules of State responsibility.⁴¹⁸

Article 27. Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(b) the question of compensation for any material loss caused by the act in question.

⁴¹⁴ For convenience, this limitation is spelled out again in the context of countermeasures in Part Three, chapter II. See article 50 and commentary, paras. (9) and (10).

⁴¹⁵ See, e.g., the decisions of the International Tribunal for the Former Yugoslavia in case IT-95-17/1-T, *Prosecutor v. Furundzija*, judgement of 10 December 1998; ILM, vol. 38, No. 2 (March 1999), p. 317, and of the British House of Lords in *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)*, ILR, vol. 119. Cf. *Legality of the Threat or Use of Nuclear Weapons* (footnote 54 above), p. 257, para. 79.

⁴¹⁶ Cf. *East Timor* (footnote 54 above).

⁴¹⁷ See paragraph (4) of the commentary to article 45.

⁴¹⁸ See paragraphs (4) to (7) of the commentary to article 20.

Commentary

(1) Article 27 is a without prejudice clause dealing with certain incidents or consequences of invoking circumstances precluding wrongfulness under chapter V. It deals with two issues. First, it makes it clear that circumstances precluding wrongfulness do not as such affect the underlying obligation, so that if the circumstance no longer exists the obligation regains full force and effect. Secondly, it refers to the possibility of compensation in certain cases. Article 27 is framed as a without prejudice clause because, as to the first point, it may be that the effect of the facts which disclose a circumstance precluding wrongfulness may also give rise to the termination of the obligation and, as to the second point, because it is not possible to specify in general terms when compensation is payable.

(2) *Subparagraph (a)* of article 27 addresses the question of what happens when a condition preventing compliance with an obligation no longer exists or gradually ceases to operate. It makes it clear that chapter V has a merely preclusive effect. When and to the extent that a circumstance precluding wrongfulness ceases, or ceases to have its preclusive effect for any reason, the obligation in question (assuming it is still in force) will again have to be complied with, and the State whose earlier non-compliance was excused must act accordingly. The words “and to the extent” are intended to cover situations in which the conditions preventing compliance gradually lessen and allow for partial performance of the obligation.

(3) This principle was affirmed by the tribunal in the “*Rainbow Warrior*” arbitration,⁴¹⁹ and even more clearly by ICJ in the *Gabčíkovo-Nagymaros Project* case. In considering Hungary’s argument that the wrongfulness of its conduct in discontinuing work on the Project was precluded by a state of necessity, the Court remarked that “[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives”.⁴²⁰ It may be that the particular circumstances precluding wrongfulness are, at the same time, a sufficient basis for terminating the underlying obligation. Thus, a breach of a treaty justifying countermeasures may be “material” in terms of article 60 of the 1969 Vienna Convention and permit termination of the treaty by the injured State. Conversely, the obligation may be fully reinstated or its operation fully restored in principle, but modalities for resuming performance may need to be settled. These are not matters which article 27 can resolve, other than by providing that the invocation of circumstances precluding wrongfulness is without prejudice to “compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists”. Here “compliance with the obligation in question” includes cessation of the wrongful conduct.

(4) *Subparagraph (b)* of article 27 is a reservation as to questions of possible compensation for damage in cases covered by chapter V. Although the article uses the term

“compensation”, it is not concerned with compensation within the framework of reparation for wrongful conduct, which is the subject of article 34. Rather, it is concerned with the question whether a State relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any material loss suffered by any State directly affected. The reference to “material loss” is narrower than the concept of damage elsewhere in the articles: article 27 concerns only the adjustment of losses that may occur when a party relies on a circumstance covered by chapter V.

(5) *Subparagraph (b)* is a proper condition, in certain cases, for allowing a State to rely on a circumstance precluding wrongfulness. Without the possibility of such recourse, the State whose conduct would otherwise be unlawful might seek to shift the burden of the defence of its own interests or concerns onto an innocent third State. This principle was accepted by Hungary in invoking the plea of necessity in the *Gabčíkovo-Nagymaros Project* case. As ICJ noted, “Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner”.⁴²¹

(6) *Subparagraph (b)* does not attempt to specify in what circumstances compensation should be payable. Generally, the range of possible situations covered by chapter V is such that to lay down a detailed regime for compensation is not appropriate. It will be for the State invoking a circumstance precluding wrongfulness to agree with any affected States on the possibility and extent of compensation payable in a given case.

PART TWO

CONTENT OF THE INTERNATIONAL
RESPONSIBILITY OF A STATE

(1) Whereas Part One of the articles defines the general conditions necessary for State responsibility to arise, Part Two deals with the legal consequences for the responsible State. It is true that a State may face legal consequences of conduct which is internationally wrongful outside the sphere of State responsibility. For example, a material breach of a treaty may give an injured State the right to terminate or suspend the treaty in whole or in part.⁴²² The focus of Part Two, however, is on the new legal relationship which arises upon the commission by a State of an internationally wrongful act. This constitutes the substance or content of the international responsibility of a State under the articles.

(2) Within the sphere of State responsibility, the consequences which arise by virtue of an internationally wrongful act of a State may be specifically provided for in such terms as to exclude other consequences, in whole or

⁴¹⁹ “*Rainbow Warrior*” (see footnote 46 above), pp. 251–252, para. 75.

⁴²⁰ *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 63, para 101; see also page 38, para. 47.

⁴²¹ *Ibid.*, p. 39, para. 48. A separate issue was that of accounting for accrued costs associated with the Project (*ibid.*, p. 81, paras. 152–153).

⁴²² 1969 Vienna Convention, art. 60.

in part.⁴²³ In the absence of any specific provision, however, international law attributes to the responsible State new obligations, and in particular the obligation to make reparation for the harmful consequences flowing from that act. The close link between the breach of an international obligation and its immediate legal consequence in the obligation of reparation was recognized in article 36, paragraph 2, of the PCIJ Statute, which was carried over without change as Article 36, paragraph 2, of the ICJ Statute. In accordance with article 36, paragraph 2, States parties to the Statute may recognize as compulsory the Court's jurisdiction, *inter alia*, in all legal disputes concerning:

(c) The existence of any fact which, if established, would constitute a breach of an international obligation;

(d) The nature or extent of the reparation to be made for the breach of an international obligation.

Part One of the articles sets out the general legal rules applicable to the question identified in subparagraph (c), while Part Two does the same for subparagraph (d).

(3) Part Two consists of three chapters. Chapter I sets out certain general principles and specifies more precisely the scope of Part Two. Chapter II focuses on the forms of reparation (restitution, compensation, satisfaction) and the relations between them. Chapter III deals with the special situation which arises in case of a serious breach of an obligation arising under a peremptory norm of general international law, and specifies certain legal consequences of such breaches, both for the responsible State and for other States.

CHAPTER I

GENERAL PRINCIPLES

Commentary

(1) Chapter I of Part Two comprises six articles, which define in general terms the legal consequences of an internationally wrongful act of a State. Individual breaches of international law can vary across a wide spectrum from the comparatively trivial or minor up to cases which imperil the survival of communities and peoples, the territorial integrity and political independence of States and the environment of whole regions. This may be true whether the obligations in question are owed to one other State or to some or all States or to the international community as a whole. But over and above the gravity or effects of individual cases, the rules and institutions of State responsibility are significant for the maintenance of respect for international law and for the achievement of the goals which States advance through law-making at the international level.

(2) Within chapter I, article 28 is an introductory article, affirming the principle that legal consequences are

entailed whenever there is an internationally wrongful act of a State. Article 29 indicates that these consequences are without prejudice to, and do not supplant, the continued obligation of the responsible State to perform the obligation breached. This point is carried further by article 30, which deals with the obligation of cessation and assurances or guarantees of non-repetition. Article 31 sets out the general obligation of reparation for injury suffered in consequence of a breach of international law by a State. Article 32 makes clear that the responsible State may not rely on its internal law to avoid the obligations of cessation and reparation arising under Part Two. Finally, article 33 specifies the scope of the Part, both in terms of the States to which obligations are owed and also in terms of certain legal consequences which, because they accrue directly to persons or entities other than States, are not covered by Parts Two or Three of the articles.

Article 28. Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.

Commentary

(1) Article 28 serves an introductory function for Part Two and is expository in character. It links the provisions of Part One which define when the international responsibility of a State arises with the provisions of Part Two which set out the legal consequences which responsibility for an internationally wrongful act involves.

(2) The core legal consequences of an internationally wrongful act set out in Part Two are the obligations of the responsible State to cease the wrongful conduct (art. 30) and to make full reparation for the injury caused by the internationally wrongful act (art. 31). Where the internationally wrongful act constitutes a serious breach by the State of an obligation arising under a peremptory norm of general international law, the breach may entail further consequences both for the responsible State and for other States. In particular, all States in such cases have obligations to cooperate to bring the breach to an end, not to recognize as lawful the situation created by the breach and not to render aid or assistance to the responsible State in maintaining the situation so created (arts. 40–41).

(3) Article 28 does not exclude the possibility that an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States. This follows from article 1, which covers all international obligations of the State and not only those owed to other States. Thus, State responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State. However, while Part One applies to all the cases in which an internationally wrongful act may be committed by a State, Part Two has a more limited scope. It does not apply to obligations of reparation to the extent

⁴²³ On the *lex specialis* principle in relation to State responsibility, see article 55 and commentary.

that these arise towards or are invoked by a person or entity other than a State. In other words, the provisions of Part Two are without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State, and article 33 makes this clear.

Article 29. Continued duty of performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.

Commentary

(1) Where a State commits a breach of an international obligation, questions as to the restoration and future of the legal relationship thereby affected are central. Apart from the question of reparation, two immediate issues arise, namely, the effect of the responsible State's conduct on the obligation which has been breached, and cessation of the breach if it is continuing. The former question is dealt with by article 29, the latter by article 30.

(2) Article 29 states the general principle that the legal consequences of an internationally wrongful act do not affect the continued duty of the State to perform the obligation it has breached. As a result of the internationally wrongful act, a new set of legal relations is established between the responsible State and the State or States to whom the international obligation is owed. But this does not mean that the pre-existing legal relation established by the primary obligation disappears. Even if the responsible State complies with its obligations under Part Two to cease the wrongful conduct and to make full reparation for the injury caused, it is not relieved thereby of the duty to perform the obligation breached. The continuing obligation to perform an international obligation, notwithstanding a breach, underlies the concept of a continuing wrongful act (see article 14) and the obligation of cessation (see subparagraph (a) of article 30).

(3) It is true that in some situations the ultimate effect of a breach of an obligation may be to put an end to the obligation itself. For example, a State injured by a material breach of a bilateral treaty may elect to terminate the treaty.⁴²⁴ But as the relevant provisions of the 1969 Vienna Convention make clear, the mere fact of a breach and even of a repudiation of a treaty does not terminate the treaty.⁴²⁵ It is a matter for the injured State to react to the breach to the extent permitted by the Convention. The injured State may have no interest in terminating the treaty as distinct from calling for its continued performance. Where a treaty is duly terminated for breach, the termination does not affect legal relationships which have accrued under the treaty prior to its termination, includ-

ing the obligation to make reparation for any breach.⁴²⁶ A breach of an obligation under general international law is even less likely to affect the underlying obligation, and indeed will never do so *as such*. By contrast, the secondary legal relation of State responsibility arises on the occurrence of a breach and without any requirement of invocation by the injured State.

(4) Article 29 does not need to deal with such contingencies. All it provides is that the legal consequences of an internationally wrongful act within the field of State responsibility do not affect any continuing duty to comply with the obligation which has been breached. Whether and to what extent that obligation subsists despite the breach is a matter not regulated by the law of State responsibility but by the rules concerning the relevant primary obligation.

Article 30. Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

(a) to cease that act, if it is continuing;

(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Commentary

(1) Article 30 deals with two separate but linked issues raised by the breach of an international obligation: the cessation of the wrongful conduct and the offer of assurances and guarantees of non-repetition by the responsible State if circumstances so require. Both are aspects of the restoration and repair of the legal relationship affected by the breach. Cessation is, as it were, the negative aspect of future performance, concerned with securing an end to continuing wrongful conduct, whereas assurances and guarantees serve a preventive function and may be described as a positive reinforcement of future performance. The continuation in force of the underlying obligation is a necessary assumption of both, since if the obligation has ceased following its breach, the question of cessation does not arise and no assurances and guarantees can be relevant.⁴²⁷

(2) Subparagraph (a) of article 30 deals with the obligation of the State responsible for the internationally wrongful act to cease the wrongful conduct. In accordance with article 2, the word "act" covers both acts and omissions. Cessation is thus relevant to all wrongful acts extending in time "regardless of whether the conduct of a State is

⁴²⁴ See footnote 422 above.

⁴²⁵ Indeed, in the *Gabčíkovo-Nagymaros Project* case, ICJ held that continuing material breaches by both parties did not have the effect of terminating the 1977 Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System (see footnote 27 above), p. 68, para. 114.

⁴²⁶ See, e.g., "Rainbow Warrior" (footnote 46 above), p. 266, citing Lord McNair (dissenting) in *Ambatielos, Preliminary Objection, I.C.J. Reports 1952*, p. 28, at p. 63. On that particular point the Court itself agreed, *ibid.*, p. 45. In the *Gabčíkovo-Nagymaros Project* case, Hungary accepted that the legal consequences of its termination of the 1977 Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System on account of the breach by Czechoslovakia were prospective only, and did not affect the accrued rights of either party (see footnote 27 above), pp. 73–74, paras. 125–127. The Court held that the Treaty was still in force, and therefore did not address the question.

⁴²⁷ 1969 Vienna Convention, art. 70, para. 1.

an action or an omission ... since there may be cessation consisting in abstaining from certain actions".⁴²⁸

(3) The tribunal in the "*Rainbow Warrior*" arbitration stressed "two essential conditions intimately linked" for the requirement of cessation of wrongful conduct to arise, "namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued".⁴²⁹ While the obligation to cease wrongful conduct will arise most commonly in the case of a continuing wrongful act,⁴³⁰ article 30 also encompasses situations where a State has violated an obligation on a series of occasions, implying the possibility of further repetitions. The phrase "if it is continuing" at the end of subparagraph (a) of the article is intended to cover both situations.

(4) Cessation of conduct in breach of an international obligation is the first requirement in eliminating the consequences of wrongful conduct. With reparation, it is one of the two general consequences of an internationally wrongful act. Cessation is often the main focus of the controversy produced by conduct in breach of an international obligation.⁴³¹ It is frequently demanded not only by States but also by the organs of international organizations such as the General Assembly and Security Council in the face of serious breaches of international law. By contrast, reparation, important though it is in many cases, may not be the central issue in a dispute between States as to questions of responsibility.⁴³²

(5) The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule. The responsible State's obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law.

(6) There are several reasons for treating cessation as more than simply a function of the duty to comply with the primary obligation. First, the question of cessation only arises in the event of a breach. What must then occur depends not only on the interpretation of the primary obligation but also on the secondary rules relating to rem-

edies, and it is appropriate that they are dealt with, at least in general terms, in articles concerning the consequences of an internationally wrongful act. Secondly, continuing wrongful acts are a common feature of cases involving State responsibility and are specifically dealt with in article 14. There is a need to spell out the consequences of such acts in Part Two.

(7) The question of cessation often arises in close connection with that of reparation, and particularly restitution. The result of cessation may be indistinguishable from restitution, for example in cases involving the freeing of hostages or the return of objects or premises seized. Nonetheless, the two must be distinguished. Unlike restitution, cessation is not subject to limitations relating to proportionality.⁴³³ It may give rise to a continuing obligation, even when literal return to the *status quo ante* is excluded or can only be achieved in an approximate way.

(8) The difficulty of distinguishing between cessation and restitution is illustrated by the "*Rainbow Warrior*" arbitration. New Zealand sought the return of the two agents to detention on the island of Hao. According to New Zealand, France was obliged to return them to and to detain them on the island for the balance of the three years; that obligation had not expired since time spent off the island was not to be counted for that purpose. The tribunal disagreed. In its view, the obligation was for a fixed term which had expired, and there was no question of cessation.⁴³⁴ Evidently, the return of the two agents to the island was of no use to New Zealand if there was no continuing obligation on the part of France to keep them there. Thus, a return to the *status quo ante* may be of little or no value if the obligation breached no longer exists. Conversely, no option may exist for an injured State to renounce restitution if the continued performance of the obligation breached is incumbent upon the responsible State and the former State is not competent to release it from such performance. The distinction between cessation and restitution may have important consequences in terms of the obligations of the States concerned.

(9) Subparagraph (b) of article 30 deals with the obligation of the responsible State to offer appropriate assurances and guarantees of non-repetition, if circumstances so require. Assurances and guarantees are concerned with the restoration of confidence in a continuing relationship, although they involve much more flexibility than cessation and are not required in all cases. They are most commonly sought when the injured State has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily. For example, following repeated demonstrations against the United States Embassy in Moscow from 1964 to 1965, President Johnson stated that:

The U.S. Government must insist that its diplomatic establishments and personnel be given the protection which is required by international law and custom and which is necessary for the conduct of diplomatic relations between states. Expressions of regret and compensation are no substitute for adequate protection.⁴³⁵

⁴²⁸ "*Rainbow Warrior*" (see footnote 46 above), p. 270, para. 113.

⁴²⁹ *Ibid.*, para. 114.

⁴³⁰ For the concept of a continuing wrongful act, see paragraphs (3) to (11) of the commentary to article 14.

⁴³¹ The focus of the WTO dispute settlement mechanism is on cessation rather than reparation: Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), especially article 3, paragraph 7, which provides for compensation "only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement". On the distinction between cessation and reparation for WTO purposes, see, e.g., Report of the Panel, *Australia-Subsidies Provided to Producers and Exporters of Automotive Leather* (WT/DS126/RW and Corr.1), 21 January 2000, para. 6.49.

⁴³² For cases where ICJ has recognized that this may be so, see, e.g., *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, *Merits, Judgment, I.C.J. Reports 1974*, p. 175, at pp. 201–205, paras. 65–76; and *Gabčíkovo-Nagymaros Project* (footnote 27 above), p. 81, para. 153. See also C. D. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987), pp. 77–92.

⁴³³ See article 35 (b) and commentary.

⁴³⁴ UNRIIAA, vol. XX, p. 217, at p. 266, para. 105 (1990).

⁴³⁵ Reprinted in ILM, vol. 4, No. 2 (July 1965), p. 698.

Such demands are not always expressed in terms of assurances or guarantees, but they share the characteristics of being future-looking and concerned with other potential breaches. They focus on prevention rather than reparation and they are included in article 30.

(10) The question whether the obligation to offer assurances or guarantees of non-repetition may be a legal consequence of an internationally wrongful act was debated in the *LaGrand* case. This concerned an admitted failure of consular notification contrary to article 36 of the Vienna Convention on Consular Relations. In its fourth submission, Germany sought both general and specific assurances and guarantees as to the means of future compliance with the Convention. The United States argued that to give such assurances or guarantees went beyond the scope of the obligations in the Convention and that ICJ lacked jurisdiction to require them. In any event, formal assurances and guarantees were unprecedented and should not be required. Germany's entitlement to a remedy did not extend beyond an apology, which the United States had given. Alternatively, no assurances or guarantees were appropriate in the light of the extensive action it had taken to ensure that federal and State officials would in future comply with the Convention. On the question of jurisdiction, the Court held:

that a dispute regarding the appropriate remedies for the violation of the Convention alleged by Germany is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court's jurisdiction. Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation ... Consequently, the Court has jurisdiction in the present case with respect to the fourth submission of Germany.⁴³⁶

On the question of appropriateness, the Court noted that an apology would not be sufficient in any case in which a foreign national had been "subjected to prolonged detention or sentenced to severe penalties" following a failure of consular notification.⁴³⁷ But in the light of information provided by the United States as to the steps taken to comply in future, the Court held:

that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), must be regarded as meeting Germany's request for a general assurance of non-repetition.⁴³⁸

As to the specific assurances sought by Germany, the Court limited itself to stating that:

if the United States, notwithstanding its commitment referred to ... should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.⁴³⁹

⁴³⁶ *LaGrand, Judgment* (see footnote 119 above), p. 485, para. 48, citing *Factory at Chorzów, Jurisdiction* (footnote 34 above).

⁴³⁷ *LaGrand, Judgment* (see footnote 119 above), p. 512, para. 123.

⁴³⁸ *Ibid.*, p. 513, para. 124; see also the operative part, p. 516, para. 128 (6).

⁴³⁹ *Ibid.*, pp. 513–514, para. 125. See also paragraph 127 and the operative part (para. 128 (7)).

The Court thus upheld its jurisdiction on Germany's fourth submission and responded to it in the operative part. It did not, however, discuss the legal basis for assurances of non-repetition.

(11) Assurances or guarantees of non-repetition may be sought by way of satisfaction (e.g. the repeal of the legislation which allowed the breach to occur) and there is thus some overlap between the two in practice.⁴⁴⁰ However, they are better treated as an aspect of the continuation and repair of the legal relationship affected by the breach. Where assurances and guarantees of non-repetition are sought by an injured State, the question is essentially the reinforcement of a continuing legal relationship and the focus is on the future, not the past. In addition, assurances and guarantees of non-repetition may be sought by a State other than an injured State in accordance with article 48.

(12) Assurances are normally given verbally, while guarantees of non-repetition involve something more—for example, preventive measures to be taken by the responsible State designed to avoid repetition of the breach. With regard to the kind of guarantees that may be requested, international practice is not uniform. The injured State usually demands either safeguards against the repetition of the wrongful act without any specification of the form they are to take⁴⁴¹ or, when the wrongful act affects its nationals, assurances of better protection of persons and property.⁴⁴² In the *LaGrand* case, ICJ spelled out with some specificity the obligation that would arise for the United States from a future breach, but added that "[t]his obligation can be carried out in various ways. The choice of means must be left to the United States".⁴⁴³ It noted further that a State may not be in a position to offer a firm guarantee of non-repetition.⁴⁴⁴ Whether it could properly do so would depend on the nature of the obligation in question.

(13) In some cases, the injured State may ask the responsible State to adopt specific measures or to act in a specified way in order to avoid repetition. Sometimes the injured State merely seeks assurances from the responsible State that, in future, it will respect the rights of the injured State.⁴⁴⁵ In other cases, the injured State requires specific instructions to be given,⁴⁴⁶ or other specific conduct to be

⁴⁴⁰ See paragraph (5) of the commentary to article 36.

⁴⁴¹ In the "Dogger Bank" incident in 1904, the United Kingdom sought "security against the recurrence of such intolerable incidents", G. F. de Martens, *Nouveau recueil général de traités*, 2nd series, vol. XXXIII, p. 642. See also the exchange of notes between China and Indonesia following the attack in March 1966 against the Chinese Consulate General in Jakarta, in which the Chinese Deputy Minister for Foreign Affairs sought a guarantee that such incidents would not be repeated in the future, RGDIP, vol. 70 (1966), pp. 1013 et seq.

⁴⁴² Such assurances were given in the *Doane* incident (1886), Moore, *Digest*, vol. VI, pp. 345–346.

⁴⁴³ *LaGrand, Judgment* (see footnote 119 above), p. 513, para. 125.

⁴⁴⁴ *Ibid.*, para. 124.

⁴⁴⁵ See, e.g., the 1901 case in which the Ottoman Empire gave a formal assurance that the British, Austrian and French postal services would henceforth operate freely in its territory, RGDIP, vol. 8 (1901), p. 777, at pp. 788 and 792.

⁴⁴⁶ See, e.g., the incidents involving the "Herzog" and the "Bundestrath", two German ships seized by the British Navy in December 1899 and January 1900, during the Boer war, in which Germany drew the attention of Great Britain to "the necessity for issuing instructions

taken.⁴⁴⁷ But assurances and guarantees of non-repetition will not always be appropriate, even if demanded. Much will depend on the circumstances of the case, including the nature of the obligation and of the breach. The rather exceptional character of the measures is indicated by the words “if circumstances so require” at the end of subparagraph (b). The obligation of the responsible State with respect to assurances and guarantees of non-repetition is formulated in flexible terms in order to prevent the kinds of abusive or excessive claims which characterized some demands for assurances and guarantees by States in the past.

Article 31. Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Commentary

(1) The obligation to make full reparation is the second general obligation of the responsible State consequent upon the commission of an internationally wrongful act. The general principle of the consequences of the commission of an internationally wrongful act was stated by PCIJ in the *Factory at Chorzów* case:

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.⁴⁴⁸

In this passage, which has been cited and applied on many occasions,⁴⁴⁹ the Court was using the term “reparation” in its most general sense. It was rejecting a Polish argument that jurisdiction to interpret and apply a treaty did not entail jurisdiction to deal with disputes over the form and quantum of reparation to be made. By that stage of the dispute, Germany was no longer seeking for its national the return of the factory in question or of the property seized with it.

to the British Naval Commanders to molest no German merchantmen in places not in the vicinity of the seat of war”, Martens, *op. cit.* (footnote 441 above), vol. XXIX, p. 456 at p. 486.

⁴⁴⁷ In the *Trail Smelter* case (see footnote 253 above), the arbitral tribunal specified measures to be adopted by the Trail Smelter, including measures designed to “prevent future significant fumigations in the United States” (p. 1934). Requests to modify or repeal legislation are frequently made by international bodies. See, e.g., the decisions of the Human Rights Committee: *Torres Ramirez v. Uruguay*, decision of 23 July 1980, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 40 (A/35/40)*, p. 126, para. 19; *Lanza v. Uruguay*, decision of 3 April 1980, *ibid.*, p. 119, para. 17; and *Dermitt Barbato v. Uruguay*, decision of 21 October 1982, *ibid.*, *Thirty-eighth Session, Supplement No. 40 (A/38/40)*, p. 133, para. 11.

⁴⁴⁸ *Factory at Chorzów, Jurisdiction* (see footnote 34 above).

⁴⁴⁹ Cf. the ICJ reference to this decision in *LaGrand, Judgment* (footnote 119 above), p. 485, para. 48.

(2) In a subsequent phase of the same case, the Court went on to specify in more detail the content of the obligation of reparation. It said:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.⁴⁵⁰

In the first sentence, the Court gave a general definition of reparation, emphasizing that its function was the re-establishment of the situation affected by the breach.⁴⁵¹ In the second sentence, it dealt with that aspect of reparation encompassed by “compensation” for an unlawful act—that is, restitution or its value, and in addition damages for loss sustained as a result of the wrongful act.

(3) The obligation placed on the responsible State by article 31 is to make “full reparation” in the *Factory at Chorzów* sense. In other words, the responsible State must endeavour to “wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed”⁴⁵² through the provision of one or more of the forms of reparation set out in chapter II of this part.

(4) The general obligation of reparation is formulated in article 31 as the immediate corollary of a State’s responsibility, i.e. as an obligation of the responsible State resulting from the breach, rather than as a right of an injured State or States. This formulation avoids the difficulties that might arise where the same obligation is owed simultaneously to several, many or all States, only a few of which are specially affected by the breach. But quite apart from the questions raised when there is more than one State entitled to invoke responsibility,⁴⁵³ the general obligation of reparation arises automatically upon commission of an internationally wrongful act and is not, as such, contingent upon a demand or protest by any State, even if the form which reparation should take in the circumstances may depend on the response of the injured State or States.

(5) The responsible State’s obligation to make full reparation relates to the “injury caused by the internationally wrongful act”. The notion of “injury”, defined in *paragraph 2*, is to be understood as including any damage caused by that act. In particular, in accordance with *paragraph 2*, “injury” includes any material or moral damage caused thereby. This formulation is intended both as inclusive, covering both material and moral damage broadly understood, and as limitative, excluding merely abstract concerns or general interests of a State which is individu-

⁴⁵⁰ *Factory at Chorzów, Merits* (see footnote 34 above), p. 47.

⁴⁵¹ Cf. P.-M. Dupuy, “Le fait générateur de la responsabilité internationale des États”, *Collected Courses ... 1984–V* (Dordrecht, Martinus Nijhoff, 1986), vol. 188, p. 9, at p. 94, who uses the term *restauration*.

⁴⁵² *Factory at Chorzów, Merits* (see footnote 34 above), p. 47.

⁴⁵³ For the States entitled to invoke responsibility, see articles 42 and 48 and commentaries. For the situation where there is a plurality of injured States, see article 46 and commentary.

ally unaffected by the breach.⁴⁵⁴ “Material” damage here refers to damage to property or other interests of the State and its nationals which is assessable in financial terms. “Moral” damage includes such items as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one’s home or private life. Questions of reparation for such forms of damage are dealt with in more detail in chapter II of this Part.⁴⁵⁵

(6) The question whether damage to a protected interest is a necessary element of an internationally wrongful act has already been discussed.⁴⁵⁶ There is in general no such requirement; rather this is a matter which is determined by the relevant primary rule. In some cases, the gist of a wrong is the causing of actual harm to another State. In some cases what matters is the failure to take necessary precautions to prevent harm even if in the event no harm occurs. In some cases there is an outright commitment to perform a specified act, e.g. to incorporate uniform rules into internal law. In each case the primary obligation will determine what is required. Hence, article 12 defines a breach of an international obligation as a failure to conform with an obligation.

(7) As a corollary there is no general requirement, over and above any requirements laid down by the relevant primary obligation, that a State should have suffered material harm or damage before it can seek reparation for a breach. The existence of actual damage will be highly relevant to the form and quantum of reparation. But there is no general requirement of material harm or damage for a State to be entitled to seek some form of reparation. In the “*Rainbow Warrior*” arbitration it was initially argued that “in the theory of international responsibility, damage is necessary to provide a basis for liability to make reparation”, but the parties subsequently agreed that:

Unlawful action against non-material interests, such as acts affecting the honor, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State.⁴⁵⁷

The tribunal held that the breach by France had “provoked indignation and public outrage in New Zealand and caused a new, additional non-material damage ... of a moral, political and legal nature, resulting from the affront to the dignity and prestige not only of New Zealand as such, but of its highest judicial and executive authorities as well”.⁴⁵⁸

⁴⁵⁴ Although not individually injured, such States may be entitled to invoke responsibility in respect of breaches of certain classes of obligation in the general interest, pursuant to article 48. Generally on notions of injury and damage, see B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pedone, 1973); B. Graefrath, “Responsibility and damages caused: relationship between responsibility and damages”, *Collected Courses ... 1984-II* (The Hague, Nijhoff, 1985), vol. 185, p. 95; A. Tanzi, “Is damage a distinct condition for the existence of an internationally wrongful act?”, Spinedi and Simma, eds., *op. cit.* (footnote 175 above), p. 1; and Brownlie, *System of the Law of Nations ...* (footnote 92 above), pp. 53–88.

⁴⁵⁵ See especially article 36 and commentary.

⁴⁵⁶ See paragraph (9) of the commentary to article 2.

⁴⁵⁷ “*Rainbow Warrior*” (see footnote 46 above), pp. 266–267, paras. 107 and 109.

⁴⁵⁸ *Ibid.*, p. 267, para. 110.

(8) Where two States have agreed to engage in particular conduct, the failure by one State to perform the obligation necessarily concerns the other. A promise has been broken and the right of the other State to performance correspondingly infringed. For the secondary rules of State responsibility to intervene at this stage and to prescribe that there is no responsibility because no identifiable harm or damage has occurred would be unwarranted. If the parties had wished to commit themselves to that formulation of the obligation they could have done so. In many cases, the damage that may follow from a breach (e.g. harm to a fishery from fishing in the closed season, harm to the environment by emissions exceeding the prescribed limit, abstraction from a river of more than the permitted amount) may be distant, contingent or uncertain. Nonetheless, States may enter into immediate and unconditional commitments in their mutual long-term interest in such fields. Accordingly, article 31 defines “injury” in a broad and inclusive way, leaving it to the primary obligations to specify what is required in each case.

(9) Paragraph 2 addresses a further issue, namely the question of a causal link between the internationally wrongful act and the injury. It is only “[i]njury ... caused by the internationally wrongful act of a State” for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.

(10) The allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process. Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses “attributable to [the wrongful] act as a proximate cause”,⁴⁵⁹ or to damage which is “too indirect, remote, and uncertain to be appraised”,⁴⁶⁰ or to “any direct loss, damage including environmental damage and the depletion of natural resources or injury to foreign Governments, nationals and corporations as a result of” the wrongful act.⁴⁶¹ Thus, causality in fact is a necessary

⁴⁵⁹ See United States-German Mixed Claims Commission, *Administrative Decision No. II*, UNRIAA, vol. VII (Sales No. 1956.V.5), p. 23, at p. 30 (1923). See also *Dix* (footnote 178 above), p. 121, and the Canadian statement of claim following the disintegration of the *Cosmos 954* Soviet nuclear-powered satellite over its territory in 1978, ILM, vol. 18 (1979), p. 907, para. 23.

⁴⁶⁰ See the *Trail Smelter* arbitration (footnote 253 above), p. 1931. See also A. Hauriou, “Les dommages indirects dans les arbitrages internationaux”, *RGDIP*, vol. 31 (1924), p. 209, citing the “*Alabama*” arbitration as the most striking application of the rule excluding “indirect” damage (footnote 87 above).

⁴⁶¹ Security Council resolution 687 (1991) of 3 April 1991, para. 16. This was a resolution adopted with reference to Chapter VII of the Charter of the United Nations, but it is expressed to reflect Iraq’s liability “under international law ... as a result of its unlawful invasion and occupation of Kuwait”. UNCC and its Governing Council have provided some guidance on the interpretation of the requirements of directness and causation under paragraph 16. See, e.g., Recommendations made by the panel of Commissioners concerning individual claims for serious personal injury or death (category “B” claims), report of 14 April 1994 (S/AC.26/1994/1), approved by the Governing Council in its decision 20 of 26 May 1994 (S/AC.26/Dec.20 (1994)); Report and recommendations made by the panel of Commissioners appointed to review the Well Blowout Control Claim (the “WBC claim”), of 15 November 1996 (S/AC.26/1996/5/Annex), paras. 66–86, approved by the Governing

but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too “remote” or “consequential” to be the subject of reparation. In some cases, the criterion of “directness” may be used,⁴⁶² in others “foreseeability”⁴⁶³ or “proximity”.⁴⁶⁴ But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule.⁴⁶⁵ In other words, the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation. In international as in national law, the question of remoteness of damage “is not a part of the law which can be satisfactorily solved by search for a single verbal formula”.⁴⁶⁶ The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.

(11) A further element affecting the scope of reparation is the question of mitigation of damage. Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a “duty to mitigate”, this is not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent.⁴⁶⁷ The point was clearly made in this sense by ICJ in the *Gabčíkovo-Nagymaros Project* case:

Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that “It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained”.

It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a ba-

Council in its decision 40 of 17 December 1996 (S/AC.26/Dec.40 (1996)).

⁴⁶² As in Security Council resolution 687 (1991), para. 16.

⁴⁶³ See, e.g., the “*Naulilaa*” case (footnote 337 above), p. 1031.

⁴⁶⁴ For comparative reviews of issues of causation and remoteness, see, e.g., H. L. A. Hart and A. M. Honoré, *Causation in the Law*, 2nd ed. (Oxford, Clarendon Press, 1985); A. M. Honoré, “Causation and remoteness of damage”, *International Encyclopedia of Comparative Law*, A. Tunc, ed. (Tübingen, Mohr/The Hague, Martinus Nijhoff, 1983), vol. XI, part I, chap. 7; Zweigert and Kötz, *op. cit.* (footnote 251 above), pp. 601–627, in particular pp. 609 et seq.; and B. S. Markesinis, *The German Law of Obligations: Volume II The Law of Torts: A Comparative Introduction*, 3rd ed. (Oxford, Clarendon Press, 1997), pp. 95–108, with many references to the literature.

⁴⁶⁵ See, e.g., the decision of the Iran-United States Claims Tribunal in *The Islamic Republic of Iran v. The United States of America*, cases A15 (IV) and A24, Award No. 590–A15 (IV)/A24–FT, 28 December 1998, *World Trade and Arbitration Materials*, vol. 11, No. 2 (1999), p. 45.

⁴⁶⁶ P. S. Atiyah, *An Introduction to the Law of Contract*, 5th ed. (Oxford, Clarendon Press, 1995), p. 466.

⁴⁶⁷ In the WBC claim, a UNCC panel noted that “under the general principles of international law relating to mitigation of damages ... the Claimant was not only permitted but indeed obligated to take reasonable steps to ... mitigate the loss, damage or injury being caused” report of 15 November 1996 (S/AC.26/1996/5/Annex) (see footnote 461 above), para. 54.

sis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.⁴⁶⁸

(12) Often two separate factors combine to cause damage. In the *United States Diplomatic and Consular Staff in Tehran* case,⁴⁶⁹ the initial seizure of the hostages by militant students (not at that time acting as organs or agents of the State) was attributable to the combination of the students’ own independent action and the failure of the Iranian authorities to take necessary steps to protect the embassy. In the *Corfu Channel* case,⁴⁷⁰ the damage to the British ships was caused both by the action of a third State in laying the mines and the action of Albania in failing to warn of their presence. Although, in such cases, the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes,⁴⁷¹ except in cases of contributory fault.⁴⁷² In the *Corfu Channel* case, for example, the United Kingdom recovered the full amount of its claim against Albania based on the latter’s wrongful failure to warn of the mines even though Albania had not itself laid the mines.⁴⁷³ Such a result should follow *a fortiori* in cases where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals, or some natural event such as a flood. In the *United States Diplomatic and Consular Staff in Tehran* case, the Islamic Republic of Iran was held to be fully responsible for the detention of the hostages from the moment of its failure to protect them.⁴⁷⁴

(13) It is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct. Indeed, in the *Zafiro* claim the tribunal went further and in effect placed the

⁴⁶⁸ *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 80.

⁴⁶⁹ *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 29–32.

⁴⁷⁰ *Corfu Channel, Merits* (see footnote 35 above), pp. 17–18 and 22–23.

⁴⁷¹ This approach is consistent with the way in which these issues are generally dealt with in national law. “It is the very general rule that if a tortfeasor’s behaviour is held to be a cause of the victim’s harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause ... In other words, the liability of a tortfeasor is not affected *vis-à-vis* the victim by the consideration that another is concurrently liable.”: T. Weir, “Complex liabilities”, A. Tunc, ed., *op. cit.* (footnote 464 above), part 2, chap. 12, p. 43. The United States relied on this comparative law experience in its pleadings in the *Aerial Incident of 27 July 1955* case when it said, referring to Article 38, paragraph 1 (c) and (d), of the ICJ Statute, that “in all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of his damage” (Memorial of 2 December 1958 (see footnote 363 above), p. 229).

⁴⁷² See article 39 and commentary.

⁴⁷³ See *Corfu Channel, Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 244, at p. 250.

⁴⁷⁴ *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 31–33.

onus on the responsible State to show what proportion of the damage was *not* attributable to its conduct. It said:

We think it clear that not all of the damage was done by the Chinese crew of the *Zafiro*. The evidence indicates that an unascertainable part was done by Filipino insurgents, and makes it likely that some part was done by the Chinese employees of the company. But we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the *Zafiro*. As the Chinese crew of the *Zafiro* are shown to have participated to a substantial extent and the part chargeable to unknown wrongdoers can not be identified, we are constrained to hold the United States liable for the whole.

In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed.⁴⁷⁵

(14) Concerns are sometimes expressed that a general principle of reparation of all loss flowing from a breach might lead to reparation which is out of all proportion to the gravity of the breach. However, the notion of “proportionality” applies differently to the different forms of reparation.⁴⁷⁶ It is addressed, as appropriate, in the individual articles in chapter II dealing with the forms of reparation.

Article 32. Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.

Commentary

(1) Article 3 concerns the role of internal law in the characterization of an act as wrongful. Article 32 makes clear the irrelevance of a State’s internal law to compliance with the obligations of cessation and reparation. It provides that a State which has committed an internationally wrongful act may not invoke its internal law as a justification for failure to comply with its obligations under this part. Between them, articles 3 and 32 give effect for the purposes of State responsibility to the general principle that a State may not rely on its internal law as a justification for its failure to comply with its international obligations.⁴⁷⁷ Although practical difficulties may arise for a State organ confronted with an obstacle to compliance posed by the rules of the internal legal system under which it is bound to operate, the State is not entitled to oppose its internal law or practice as a legal barrier to the fulfilment of an international obligation arising under Part Two.

(2) Article 32 is modelled on article 27 of the 1969 Vienna Convention, which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This general principle is equally applicable to the international obligations deriving from the rules of State responsibility set out in Part Two. The principle may be qualified by the relevant primary rule, or by a *lex specialis*, such as article 50 of the European Convention on Human Rights, which provides for just satisfaction in lieu of full reparation “if the inter-

nal law of the High Contracting Party concerned allows only partial reparation to be made”.⁴⁷⁸

(3) The principle that a responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations arising out of the commission of an internationally wrongful act is supported both by State practice and international decisions. For example, the dispute between Japan and the United States in 1906 over California’s discriminatory education policies was resolved by the revision of the Californian legislation.⁴⁷⁹ In the incident concerning article 61, paragraph 2, of the Weimar Constitution (Constitution of the Reich of 11 August 1919), a constitutional amendment was provided for in order to ensure the discharge of the obligation deriving from article 80 of the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles).⁴⁸⁰ In the *Peter Pázmány University* case, PCIJ specified that the property to be returned should be “freed from any measure of transfer, compulsory administration, or sequestration”.⁴⁸¹ In short, international law does not recognize that the obligations of a responsible State under Part Two are subject to the State’s internal legal system nor does it allow internal law to count as an excuse for non-performance of the obligations of cessation and reparation.

Article 33. Scope of international obligations set out in this Part

1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

Commentary

(1) Article 33 concludes the provisions of chapter I of Part Two by clarifying the scope and effect of the international obligations covered by the Part. In particular, *paragraph 1* makes it clear that identifying the State or States towards which the responsible State’s obligations in Part Two exist depends both on the primary rule establishing

⁴⁷⁸ Article 41 of the Convention, as amended by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby. Other examples include article 32 of the Revised General Act for the Pacific Settlement of International Disputes and article 30 of the European Convention for the Peaceful Settlement of Disputes.

⁴⁷⁹ See R. L. Buell, “The development of the anti-Japanese agitation in the United States”, *Political Science Quarterly*, vol. 37 (1922), pp. 620 et seq.

⁴⁸⁰ See *British and Foreign State Papers, 1919* (London, HM Stationery Office, 1922), vol. 112, p. 1094.

⁴⁸¹ *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University), Judgment, 1933, P.C.I.J., Series A/B, No. 61*, p. 208, at p. 249.

⁴⁷⁵ The *Zafiro* case (see footnote 154 above), pp. 164–165.

⁴⁷⁶ See articles 35 (b), 37, paragraph 3, and 39 and commentaries.

⁴⁷⁷ See paragraphs (2) to (4) of the commentary to article 3.

the obligation that was breached and on the circumstances of the breach. For example, pollution of the sea, if it is massive and widespread, may affect the international community as a whole or the coastal States of a region; in other circumstances it might only affect a single neighbouring State. Evidently, the gravity of the breach may also affect the scope of the obligations of cessation and reparation.

(2) In accordance with paragraph 1, the responsible State's obligations in a given case may exist towards another State, several States or the international community as a whole. The reference to several States includes the case in which a breach affects all the other parties to a treaty or to a legal regime established under customary international law. For instance, when an obligation can be defined as an "integral" obligation, the breach by a State necessarily affects all the other parties to the treaty.⁴⁸²

(3) When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights. Individual rights under international law may also arise outside the framework of human rights.⁴⁸³ The range of possibilities is demonstrated from the ICJ judgment in the *LaGrand* case, where the Court held that article 36 of the Vienna Convention on Consular Relations "creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person".⁴⁸⁴

(4) Such possibilities underlie the need for *paragraph 2* of article 33. Part Two deals with the secondary obligations of States in relation to cessation and reparation, and those obligations may be owed, *inter alia*, to one or several States or to the international community as a whole. In cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State. This is true, for example, under human rights treaties which provide a right of petition to a court or some other body for individuals affected. It is also true in the case of rights under bilateral or regional investment protection agreements. Part Three is concerned with the invocation of responsibility by other States, whether they are to be considered "injured States" under article 42, or other interested States under article 48, or whether they may be exercising specific rights to invoke responsibility under some special rule (art. 55). The articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, and paragraph 2 makes this clear. It will be a matter for the particular primary rule

to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account. Paragraph 2 merely recognizes the possibility: hence the phrase "which may accrue directly to any person or entity other than a State".

CHAPTER II

REPARATION FOR INJURY

Commentary

Chapter II deals with the forms of reparation for injury, spelling out in further detail the general principle stated in article 31, and in particular seeking to establish more clearly the relations between the different forms of reparation, viz. restitution, compensation and satisfaction, as well as the role of interest and the question of taking into account any contribution to the injury which may have been made by the victim.

Article 34. Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Commentary

(1) Article 34 introduces chapter II by setting out the forms of reparation which separately or in combination will discharge the obligation to make full reparation for the injury caused by the internationally wrongful act. Since the notion of "injury" and the necessary causal link between the wrongful act and the injury are defined in the statement of the general obligation to make full reparation in article 31,⁴⁸⁵ article 34 need do no more than refer to "[f]ull reparation for the injury caused".

(2) In the *Factory at Chorzów* case, the injury was a material one and PCIJ dealt only with two forms of reparation, restitution and compensation.⁴⁸⁶ In certain cases, satisfaction may be called for as an additional form of reparation. Thus, full reparation may take the form of restitution, compensation and satisfaction, as required by the circumstances. Article 34 also makes it clear that full reparation may only be achieved in particular cases by the combination of different forms of reparation. For example, re-establishment of the situation which existed before the breach may not be sufficient for full reparation because the wrongful act has caused additional material damage (e.g. injury flowing from the loss of the use of property wrongfully seized). Wiping out all the consequences of the wrongful act may thus require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused.

⁴⁸² See further article 42 (b) (ii) and commentary.

⁴⁸³ Cf. *Jurisdiction of the Courts of Danzig* (footnote 82 above), pp. 17–21.

⁴⁸⁴ *LaGrand, Judgment* (see footnote 119 above), para. 77. In the circumstances the Court did not find it necessary to decide whether the individual rights had "assumed the character of a human right" (para. 78).

⁴⁸⁵ See paragraphs (4) to (14) of the commentary to article 31.

⁴⁸⁶ *Factory at Chorzów, Merits* (see footnote 34 above), p. 47.

(3) The primary obligation breached may also play an important role with respect to the form and extent of reparation. In particular, in cases of restitution not involving the return of persons, property or territory of the injured State, the notion of reverting to the *status quo ante* has to be applied having regard to the respective rights and competences of the States concerned. This may be the case, for example, where what is involved is a procedural obligation conditioning the exercise of the substantive powers of a State. Restitution in such cases should not give the injured State more than it would have been entitled to if the obligation had been performed.⁴⁸⁷

(4) The provision of each of the forms of reparation described in article 34 is subject to the conditions laid down in the articles which follow it in chapter II. This limitation is indicated by the phrase “in accordance with the provisions of this chapter”. It may also be affected by any valid election that may be made by the injured State as between different forms of reparation. For example, in most circumstances the injured State is entitled to elect to receive compensation rather than restitution. This element of choice is reflected in article 43.

(5) Concerns have sometimes been expressed that the principle of full reparation may lead to disproportionate and even crippling requirements so far as the responsible State is concerned. The issue is whether the principle of proportionality should be articulated as an aspect of the obligation to make full reparation. In these articles, proportionality is addressed in the context of each form of reparation, taking into account its specific character. Thus, restitution is excluded if it would involve a burden out of all proportion to the benefit gained by the injured State or other party.⁴⁸⁸ Compensation is limited to damage actually suffered as a result of the internationally wrongful act, and excludes damage which is indirect or remote.⁴⁸⁹ Satisfaction must “not be out of proportion to the injury”.⁴⁹⁰ Thus, each of the forms of reparation takes such considerations into account.

(6) The forms of reparation dealt with in chapter II represent ways of giving effect to the underlying obligation of reparation set out in article 31. There are not, as it were, separate secondary obligations of restitution, compensation and satisfaction. Some flexibility is shown in practice in terms of the appropriateness of requiring one form of reparation rather than another, subject to the requirement of full reparation for the breach in accordance with article 31.⁴⁹¹ To the extent that one form of reparation is dispensed with or is unavailable in the circumstances, others,

especially compensation, will be correspondingly more important.

Article 35. Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Commentary

(1) In accordance with article 34, restitution is the first of the forms of reparation available to a State injured by an internationally wrongful act. Restitution involves the re-establishment as far as possible of the situation which existed prior to the commission of the internationally wrongful act, to the extent that any changes that have occurred in that situation may be traced to that act. In its simplest form, this involves such conduct as the release of persons wrongly detained or the return of property wrongly seized. In other cases, restitution may be a more complex act.

(2) The concept of restitution is not uniformly defined. According to one definition, restitution consists in re-establishing the *status quo ante*, i.e. the situation that existed prior to the occurrence of the wrongful act. Under another definition, restitution is the establishment or re-establishment of the situation that would have existed if the wrongful act had not been committed. The former definition is the narrower one; it does not extend to the compensation which may be due to the injured party for loss suffered, for example for loss of the use of goods wrongfully detained but subsequently returned. The latter definition absorbs into the concept of restitution other elements of full reparation and tends to conflate restitution as a form of reparation and the underlying obligation of reparation itself. Article 35 adopts the narrower definition which has the advantage of focusing on the assessment of a factual situation and of not requiring a hypothetical inquiry into what the situation would have been if the wrongful act had not been committed. Restitution in this narrow sense may of course have to be completed by compensation in order to ensure full reparation for the damage caused, as article 36 makes clear.

(3) Nonetheless, because restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation. The primacy of restitution was confirmed by PCIJ in the *Factory at Chorzów*

⁴⁸⁷ Thus, in the judgment in the *LaGrand* case (see footnote 119 above), ICJ indicated that a breach of the notification requirement in article 36 of the Vienna Convention on Consular Relations, leading to a severe penalty or prolonged detention, would require reconsideration of the fairness of the conviction “by taking account of the violation of the rights set forth in the Convention” (p. 514, para. 125). This would be a form of restitution which took into account the limited character of the rights in issue.

⁴⁸⁸ See article 35 (b) and commentary.

⁴⁸⁹ See article 31 and commentary.

⁴⁹⁰ See article 37, paragraph 3, and commentary.

⁴⁹¹ For example, the *Mélanie Lachenal* case (UNRIIAA, vol. XIII (Sales No. 64.V.3), p. 117, at pp. 130–131 (1954)), where compensation was accepted in lieu of restitution originally decided upon, the Franco-Italian Conciliation Commission having agreed that restitution

would require difficult internal procedures. See also paragraph (4) of the commentary to article 35.

case when it said that the responsible State was under “the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible”. The Court went on to add that “[t]he impossibility, on which the Parties are agreed, of restoring the Chorzów factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution”.⁴⁹² It can be seen in operation in the cases where tribunals have considered compensation only after concluding that, for one reason or another, restitution could not be effected.⁴⁹³ Despite the difficulties restitution may encounter in practice, States have often insisted upon claiming it in preference to compensation. Indeed, in certain cases, especially those involving the application of peremptory norms, restitution may be required as an aspect of compliance with the primary obligation.

(4) On the other hand, there are often situations where restitution is not available or where its value to the injured State is so reduced that other forms of reparation take priority. Questions of election as between different forms of reparation are dealt with in the context of Part Three.⁴⁹⁴ But quite apart from valid election by the injured State or other entity, the possibility of restitution may be practically excluded, e.g. because the property in question has been destroyed or fundamentally changed in character or the situation cannot be restored to the *status quo ante* for some reason. Indeed, in some cases tribunals have inferred from the terms of the *compromis* or the positions of the parties what amounts to a discretion to award compensation rather than restitution. For example, in the *Walter Fletcher Smith* case, the arbitrator, while maintaining that restitution should be appropriate in principle, interpreted the *compromis* as giving him a discretion to award compensation and did so in “the best interests of the parties, and of the public”.⁴⁹⁵ In the *Aminoil* arbitration, the parties agreed that restoration of the *status quo ante* following the annulment of the concession by the Kuwaiti decree would be impracticable.⁴⁹⁶

(5) Restitution may take the form of material restoration or return of territory, persons or property, or the reversal of some juridical act, or some combination of them. Examples of material restitution include the release of detained individuals, the handing over to a State of an indi-

vidual arrested in its territory,⁴⁹⁷ the restitution of ships⁴⁹⁸ or other types of property,⁴⁹⁹ including documents, works of art, share certificates, etc.⁵⁰⁰ The term “juridical restitution” is sometimes used where restitution requires or involves the modification of a legal situation either within the legal system of the responsible State or in its legal relations with the injured State. Such cases include the revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law,⁵⁰¹ the rescinding or reconsideration of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner⁵⁰² or a requirement that steps be taken (to the extent allowed by international law) for the termination of a treaty.⁵⁰³ In some cases, both material and juridical restitution may be involved.⁵⁰⁴ In others, an international court or tribunal can, by determining the legal position with binding force for the parties, award what amounts to restitution under another form.⁵⁰⁵ The term “restitution” in article 35 thus

⁴⁹⁷ Examples of material restitution involving persons include the “*Trent*” (1861) and “*Florida*” (1864) incidents, both involving the arrest of individuals on board ships (Moore, *Digest*, vol. VII, pp. 768 and 1090–1091), and the *United States Diplomatic and Consular Staff in Tehran* case in which ICJ ordered Iran to immediately release every detained United States national (see footnote 59 above), pp. 44–45.

⁴⁹⁸ See, e.g., the “*Giaffarieh*” incident (1886) which originated in the capture in the Red Sea by an Egyptian warship of four merchant ships from Massawa under Italian registry, *Società Italiana per l’Organizzazione Internazionale–Consiglio Nazionale delle Ricerche, La prassi italiana di diritto internazionale*, 1st series (Dobbs Ferry, NY., Oceana, 1970), vol. II, pp. 901–902.

⁴⁹⁹ For example, *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6, at pp. 36–37, where ICJ decided in favour of a Cambodian claim which included restitution of certain objects removed from the area and the temple by Thai authorities. See also the *Hôtel Métropole* case, UNRIAA, vol. XIII (Sales No. 64.V.3), p. 219 (1950); the *Ottoz* case, *ibid.*, p. 240 (1950); and the *Hénon* case, *ibid.*, p. 248 (1951).

⁵⁰⁰ In the *Buzău-Nehoiși Railway* case, an arbitral tribunal provided for the restitution to a German company of shares in a Romanian railway company, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1839 (1939).

⁵⁰¹ For cases where the existence of a law itself amounts to a breach of an international obligation, see paragraph (12) of the commentary to article 12.

⁵⁰² For example, the *Martini* case, UNRIAA, vol. II (Sales No. 1949.V.1), p. 975 (1930).

⁵⁰³ In the *Bryan-Chamorro Treaty* case (*Costa Rica v. Nicaragua*), the Central American Court of Justice decided that “the Government of Nicaragua, by availing itself of measures possible under the authority of international law, is under the obligation to re-establish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty between the litigant republics in so far as relates to matters considered in this action” (*Anales de la Corte de Justicia Centroamericana* (San José, Costa Rica), vol. VI, Nos. 16–18 (December 1916–May 1917), p. 7); and AJIL, vol. 11, No. 3 (1917), p. 674, at p. 696; see also page 683.

⁵⁰⁴ Thus, PCIJ held that Czechoslovakia was “bound to restore to the Royal Hungarian Peter Pázmány University of Budapest the immovable property claimed by it, freed from any measure of transfer, compulsory administration, or sequestration, and in the condition in which it was before the application of the measures in question” (*Appeal from a judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (see footnote 481 above)).

⁵⁰⁵ In the *Legal Status of Eastern Greenland* case, PCIJ decided that “the declaration of occupation promulgated by the Norwegian Government on July 10th, 1931, and any steps taken in this respect by that Government, constitute a violation of the existing legal situation and are accordingly unlawful and invalid” (*Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 22, at p. 75). In the case of the *Free Zones of Upper Savoy and the District of Gex* (see footnote 79 above), the Court decided that France “must withdraw its customs line in accordance with

(Continued on next page.)

⁴⁹² *Factory at Chorzów, Merits* (see footnote 34 above), p. 48.

⁴⁹³ See, e.g., *British Claims in the Spanish Zone of Morocco* (footnote 44 above), pp. 621–625 and 651–742; *Religious Property Expropriated by Portugal*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 7 (1920); *Walter Fletcher Smith, ibid.*, vol. II (Sales No. 1949.V.1), p. 913, at p. 918 (1929); and *Heirs of Lebas de Courmont, ibid.*, vol. XIII (Sales No. 64.V.3), p. 761, at p. 764 (1957).

⁴⁹⁴ See articles 43 and 45 and commentaries.

⁴⁹⁵ *Walter Fletcher Smith* (see footnote 493 above). In the *Greek Telephone Company* case, the arbitral tribunal, while ordering restitution, asserted that the responsible State could provide compensation instead for “important State reasons” (see J. G. Wetter and S. M. Schwebel, “Some little known cases on concessions”, *BYBIL*, 1964, vol. 40, p. 216, at p. 221).

⁴⁹⁶ *Government of Kuwait v. American Independent Oil Company (Aminoil)* ILR, vol. 66, p. 519, at p. 533 (1982).

has a broad meaning, encompassing any action that needs to be taken by the responsible State to restore the situation resulting from its internationally wrongful act.

(6) What may be required in terms of restitution will often depend on the content of the primary obligation which has been breached. Restitution, as the first of the forms of reparation, is of particular importance where the obligation breached is of a continuing character, and even more so where it arises under a peremptory norm of general international law. In the case, for example, of unlawful annexation of a State, the withdrawal of the occupying State's forces and the annulment of any decree of annexation may be seen as involving cessation rather than restitution.⁵⁰⁶ Even so, ancillary measures (the return of persons or property seized in the course of the invasion) will be required as an aspect either of cessation or restitution.

(7) The obligation to make restitution is not unlimited. In particular, under article 35 restitution is required "provided and to the extent that" it is neither materially impossible nor wholly disproportionate. The phrase "provided and to the extent that" makes it clear that restitution may be only partially excluded, in which case the responsible State will be obliged to make restitution to the extent that this is neither impossible nor disproportionate.

(8) Under article 35, *subparagraph* (a), restitution is not required if it is "materially impossible". This would apply where property to be restored has been permanently lost or destroyed, or has deteriorated to such an extent as to be valueless. On the other hand, restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these. Under article 32 the wrongdoing State may not invoke the provisions of its internal law as justification for the failure to provide full reparation, and the mere fact of political or administrative obstacles to restitution does not amount to impossibility.

(9) Material impossibility is not limited to cases where the object in question has been destroyed, but can cover more complex situations. In the *Forests of Central Rhodopia* case, the claimant was entitled to only a share in the forestry operations and no claims had been brought by the other participants. The forests were not in the same condition as at the time of their wrongful taking, and detailed inquiries would be necessary to determine their condition. Since the taking, third parties had acquired rights to them. For a combination of these reasons, restitution was denied.⁵⁰⁷ The case supports a broad understanding of the impossibility of granting restitution, but it concerned questions of property rights within the legal system of the responsible State.⁵⁰⁸ The position may be different where

the rights and obligations in issue arise directly on the international plane. In that context restitution plays a particularly important role.

(10) In certain cases, the position of third parties may have to be taken into account in considering whether restitution is materially possible. This was true in the *Forests of Central Rhodopia* case. But whether the position of a third party will preclude restitution will depend on the circumstances, including whether the third party at the time of entering into the transaction or assuming the disputed rights was acting in good faith and without notice of the claim to restitution.

(11) A second exception, dealt with in article 35, *subparagraph* (b), involves those cases where the benefit to be gained from restitution is wholly disproportionate to its cost to the responsible State. Specifically, restitution may not be required if it would "involve a burden out of all proportion to the benefit deriving from restitution instead of compensation". This applies only where there is a grave disproportionality between the burden which restitution would impose on the responsible State and the benefit which would be gained, either by the injured State or by any victim of the breach. It is thus based on considerations of equity and reasonableness,⁵⁰⁹ although with a preference for the position of the injured State in any case where the balancing process does not indicate a clear preference for compensation as compared with restitution. The balance will invariably favour the injured State in any case where the failure to provide restitution would jeopardize its political independence or economic stability.

Article 36. Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Commentary

(1) Article 36 deals with compensation for damage caused by an internationally wrongful act, to the extent that such damage is not made good by restitution. The notion of "damage" is defined inclusively in article 31, paragraph 2, as any damage whether material or moral.⁵¹⁰ Article 36, paragraph 2, develops this definition by specifying that compensation shall cover any financially

(Footnote 505 continued.)

the provisions of the said treaties and instruments; and that this régime must continue in force so long as it has not been modified by agreement between the Parties" (p. 172). See also F. A. Mann, "The consequences of an international wrong in international and municipal law", *BYBIL*, 1976-1977, vol. 48, p. 1, at pp. 5-8.

⁵⁰⁶ See above, paragraph (8) of the commentary to article 30.

⁵⁰⁷ *Forests of Central Rhodopia* (see footnote 382 above), p. 1432.

⁵⁰⁸ For questions of restitution in the context of State contract arbitration, see *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic* (1977),

ILR, vol. 53, p. 389, at pp. 507-508, para. 109; *BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic*, *ibid.*, p. 297, at p. 354 (1974); and *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic* *ibid.*, vol. 62, p. 141, at p. 200 (1977).

⁵⁰⁹ See, e.g., J. H. W. Verzijl, *International Law in Historical Perspective* (Leiden, Sijthoff, 1973), part VI, p. 744, and the position taken by the Deutsche Gesellschaft für Völkerrecht (German International Law Association) in *Yearbook ... 1969*, vol. II, p. 149.

⁵¹⁰ See paragraphs (5) to (6) and (8) of the commentary to article 31.

assessable damage including loss of profits so far as this is established in the given case. The qualification “financially assessable” is intended to exclude compensation for what is sometimes referred to as “moral damage” to a State, i.e. the affront or injury caused by a violation of rights not associated with actual damage to property or persons: this is the subject matter of satisfaction, dealt with in article 37.

(2) Of the various forms of reparation, compensation is perhaps the most commonly sought in international practice. In the *Gabčíkovo-Nagymaros Project* case, ICJ declared: “It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it.”⁵¹¹ It is equally well established that an international court or tribunal which has jurisdiction with respect to a claim of State responsibility has, as an aspect of that jurisdiction, the power to award compensation for damage suffered.⁵¹²

(3) The relationship with restitution is clarified by the final phrase of article 36, paragraph 1 (“insofar as such damage is not made good by restitution”). Restitution, despite its primacy as a matter of legal principle, is frequently unavailable or inadequate. It may be partially or entirely ruled out either on the basis of the exceptions expressed in article 35, or because the injured State prefers compensation or for other reasons. Even where restitution is made, it may be insufficient to ensure full reparation. The role of compensation is to fill in any gaps so as to ensure full reparation for damage suffered.⁵¹³ As the Umpire said in the “*Lusitania*” case:

The fundamental concept of “damages” is ... reparation for a loss suffered; a judicially ascertained *compensation* for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.⁵¹⁴

Likewise, the role of compensation was articulated by PCIJ in the following terms:

Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.⁵¹⁵

⁵¹¹ *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 81, para. 152. See also the statement by PCIJ in *Factory at Chorzów, Merits* (footnote 34 above), declaring that “[i]t is a principle of international law that the reparation of a wrong may consist in an indemnity” (p. 27).

⁵¹² *Factory at Chorzów, Jurisdiction* (see footnote 34 above); *Fisheries Jurisdiction* (see footnote 432 above), pp. 203–205, paras. 71–76; *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 142.

⁵¹³ *Factory at Chorzów, Merits* (see footnote 34 above), pp. 47–48.

⁵¹⁴ UNRIAA, vol. VII (Sales No. 1956.V.5), p. 32, at p. 39 (1923).

⁵¹⁵ *Factory at Chorzów, Merits* (see footnote 34 above), p. 47, cited and applied, *inter alia*, by ITLOS in the case of the *M/V “Saiga” (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 65, para. 170 (1999). See also *Papamichalopoulos and Others v. Greece (article 50), Eur. Court H.R., Series A, No. 330-B*, para. 36 (1995); *Velásquez Rodríguez* (footnote 63 above), pp. 26–27 and 30–31; and *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, Iran-U.S. C.T.R.*, vol. 6, p. 219, at p. 225 (1984).

Entitlement to compensation for such losses is supported by extensive case law, State practice and the writings of jurists.

(4) As compared with satisfaction, the function of compensation is to address the actual losses incurred as a result of the internationally wrongful act. In other words, the function of article 36 is purely compensatory, as its title indicates. Compensation corresponds to the financially assessable damage suffered by the injured State or its nationals. It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character.⁵¹⁶ Thus, compensation generally consists of a monetary payment, though it may sometimes take the form, as agreed, of other forms of value. It is true that monetary payments may be called for by way of satisfaction under article 37, but they perform a function distinct from that of compensation. Monetary compensation is intended to offset, as far as may be, the damage suffered by the injured State as a result of the breach. Satisfaction is concerned with non-material injury, specifically non-material injury to the State, on which a monetary value can be put only in a highly approximate and notional way.⁵¹⁷

(5) Consistently with other provisions of Part Two, article 36 is expressed as an obligation of the responsible State to provide reparation for the consequences flowing from the commission of an internationally wrongful act.⁵¹⁸ The scope of this obligation is delimited by the phrase “any financially assessable damage”, that is, any damage which is capable of being evaluated in financial terms. Financially assessable damage encompasses both damage suffered by the State itself (to its property or personnel or in respect of expenditures reasonably incurred to remedy or mitigate damage flowing from an internationally wrongful act) as well as damage suffered by nationals, whether persons or companies, on whose behalf the State is claiming within the framework of diplomatic protection.

(6) In addition to ICJ, international tribunals dealing with issues of compensation include the International Tribunal for the Law of the Sea,⁵¹⁹ the Iran-United States Claims Tribunal,⁵²⁰ human rights courts and other

⁵¹⁶ In the *Velásquez Rodríguez*, *Compensatory Damages* case, the Inter-American Court of Human Rights held that international law did not recognize the concept of punitive or exemplary damages (Series C, No. 7 (1989)). See also *Letelier and Moffitt*, ILR, vol. 88, p. 727 (1992), concerning the assassination in Washington, D.C., by Chilean agents of a former Chilean minister; the *compromis* excluded any award of punitive damages, despite their availability under United States law. On punitive damages, see also N. Jørgensen, “A reappraisal of punitive damages in international law”, *BYBIL*, 1997, vol. 68, pp. 247–266; and S. Wittich, “Awe of the gods and fear of the priests: punitive damages in the law of State responsibility”, *Austrian Review of International and European Law*, vol. 3, No. 1 (1998), p. 101.

⁵¹⁷ See paragraph (3) of the commentary to article 37.

⁵¹⁸ For the requirement of a sufficient causal link between the internationally wrongful act and the damage, see paragraphs (11) to (13) of the commentary to article 31.

⁵¹⁹ For example, the *M/V “Saiga”* case (see footnote 515 above), paras. 170–177.

⁵²⁰ The Iran-United States Claims Tribunal has developed a substantial jurisprudence on questions of assessment of damage and the valuation of expropriated property. For reviews of the tribunal’s juris-

bodies,⁵²¹ and ICSID tribunals under the Convention on the Settlement of Investment Disputes between States and Nationals of other States.⁵²² Other compensation claims have been settled by agreement, normally on a without prejudice basis, with the payment of substantial compensation a term of the agreement.⁵²³ The rules and principles developed by these bodies in assessing compensation can be seen as manifestations of the general principle stated in article 36.

(7) As to the appropriate heads of compensable damage and the principles of assessment to be applied in quantification, these will vary, depending upon the content of particular primary obligations, an evaluation of the respective behaviour of the parties and, more generally, a concern to reach an equitable and acceptable outcome.⁵²⁴ The following examples illustrate the types of damage that may be compensable and the methods of quantification that may be employed.

(8) Damage to the State as such might arise out of the shooting down of its aircraft or the sinking of its ships, attacks on its diplomatic premises and personnel, damage caused to other public property, the costs incurred in responding to pollution damage, or incidental damage arising, for example, out of the need to pay pensions and medical expenses for officials injured as the result of a wrongful act. Such a list cannot be comprehensive and the categories of compensable injuries suffered by States are not closed.

(9) In the *Corfu Channel* case, the United Kingdom sought compensation in respect of three heads of damage: replacement of the destroyer *Saumarez*, which be-

(Footnote 520 continued.)

prudence on these subjects, see, *inter alia*, Aldrich, *op. cit.* (footnote 357 above), chaps. 5–6 and 12; C. N. Brower and J. D. Brueschke, *The Iran-United States Claims Tribunal* (The Hague, Martinus Nijhoff, 1998), chaps. 14–18; M. Pellonpää, “Compensable claims before the Tribunal: expropriation claims”, *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility*, R. B. Lillich and D. B. McGraw, eds. (Irvington-on-Hudson, Transnational, 1998), pp. 185–266; and D. P. Stewart, “Compensation and valuation issues”, *ibid.*, pp. 325–385.

⁵²¹ For a review of the practice of such bodies in awarding compensation, see D. Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 1999), pp. 214–279.

⁵²² ICSID tribunals have jurisdiction to award damages or other remedies in cases concerning investments arising between States parties and nationals. Some of these claims involve direct recourse to international law as a basis of claim. See, e.g., *Asian Agricultural Products Limited v. Republic of Sri Lanka*, *ICSID Reports* (Cambridge University Press, 1997), vol. 4, p. 245 (1990).

⁵²³ See, e.g., *Certain Phosphate Lands in Nauru*, *Preliminary Objections* (footnote 230 above), and for the Court’s order of discontinuance following the settlement, *ibid.*, *Order* (footnote 232 above); *Passage through the Great Belt (Finland v. Denmark)*, *Order of 10 September 1992*, *I.C.J. Reports 1992*, p. 348 (order of discontinuance following settlement); and *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, *Order of 22 February 1996*, *I.C.J. Reports 1996*, p. 9 (order of discontinuance following settlement).

⁵²⁴ See Aldrich, *op. cit.* (footnote 357 above), p. 242. See also Graefrath, “Responsibility and damages caused: relationship between responsibility and damages” (footnote 454 above), p. 101; L. Reitzer, *La réparation comme conséquence de l’acte illicite en droit international* (Paris, Sirey, 1938); Gray, *op. cit.* (footnote 432 above), pp. 33–34; J. Personnaz, *La réparation du préjudice en droit international public* (Paris, 1939); and M. Iovane, *La riparazione nella teoria e nella prassi dell’illecito internazionale* (Milan, Giuffrè, 1990).

came a total loss, the damage sustained by the destroyer “*Volage*”, and the damage resulting from the deaths and injuries of naval personnel. ICJ entrusted the assessment to expert inquiry. In respect of the destroyer *Saumarez*, the Court found that “the true measure of compensation” was “the replacement cost of the [destroyer] at the time of its loss” and held that the amount of compensation claimed by the British Government (£ 700,087) was justified. For the damage to the destroyer “*Volage*”, the experts had reached a slightly lower figure than the £ 93,812 claimed by the United Kingdom, “explained by the necessarily approximate nature of the valuation, especially as regards stores and equipment”. In addition to the amounts awarded for the damage to the two destroyers, the Court upheld the United Kingdom’s claim for £ 50,048 representing “the cost of pensions and other grants made by it to victims or their dependants, and for costs of administration, medical treatment, etc.”⁵²⁵

(10) In the *M/V “Saiga” (No. 2)* case, Saint Vincent and the Grenadines sought compensation from Guinea following the wrongful arrest and detention of a vessel registered in Saint Vincent and the Grenadines, the “*Saiga*”, and its crew. ITLOS awarded compensation of US\$ 2,123,357 with interest. The heads of damage compensated included, *inter alia*, damage to the vessel, including costs of repair, losses suffered with respect to charter hire of the vessel, costs related to the detention of the vessel, and damages for the detention of the captain, members of the crew and others on board the vessel. Saint Vincent and the Grenadines had claimed compensation for the violation of its rights in respect of ships flying its flag occasioned by the arrest and detention of the “*Saiga*”; however, the tribunal considered that its declaration that Guinea acted wrongfully in arresting the vessel in the circumstances, and in using excessive force, constituted adequate reparation.⁵²⁶ Claims regarding the loss of registration revenue due to the illegal arrest of the vessel and for the expenses resulting from the time lost by officials in dealing with the arrest and detention of the ship and its crew were also unsuccessful. In respect of the former, the tribunal held that Saint Vincent and the Grenadines failed to produce supporting evidence. In respect of the latter, the tribunal considered that such expenses were not recoverable since they were incurred in the exercise of the normal functions of a flag State.⁵²⁷

(11) In a number of cases, payments have been directly negotiated between injured and injuring States following wrongful attacks on ships causing damage or sinking of the vessel, and in some cases, loss of life and injury among the crew.⁵²⁸ Similar payments have been negotiated where damage is caused to aircraft of a State, such as

⁵²⁵ *Corfu Channel, Assessment of Amount of Compensation* (see footnote 473 above), p. 249.

⁵²⁶ The *M/V “Saiga”* case (see footnote 515 above), para. 176.

⁵²⁷ *Ibid.*, para. 177.

⁵²⁸ See the payment by Cuba to the Bahamas for the sinking by Cuban aircraft on the high seas of a Bahamian vessel, with loss of life among the crew (RGDIP, vol. 85 (1981), p. 540), the payment of compensation by Israel for an attack in 1967 on the USS *Liberty*, with loss of life and injury among the crew (*ibid.*, p. 562), and the payment by Iraq of US\$ 27 million for the 37 deaths which occurred in May 1987 when Iraqi aircraft severely damaged the USS *Stark* (AJIL, vol. 83, No. 3 (July 1989), p. 561).

the “full and final settlement” agreed between the Islamic Republic of Iran and the United States following a dispute over the destruction of an Iranian aircraft and the killing of its 290 passengers and crew.⁵²⁹

(12) Agreements for the payment of compensation are also frequently negotiated by States following attacks on diplomatic premises, whether in relation to damage to the embassy itself⁵³⁰ or injury to its personnel.⁵³¹ Damage caused to other public property, such as roads and infrastructure, has also been the subject of compensation claims.⁵³² In many cases, these payments have been made on an *ex gratia* or a without prejudice basis, without any admission of responsibility.⁵³³

(13) Another situation in which States may seek compensation for damage suffered by the State as such is where costs are incurred in responding to pollution damage. Following the crash of the Soviet *Cosmos 954* satellite on Canadian territory in January 1978, Canada’s claim for compensation for expenses incurred in locating, recovering, removing and testing radioactive debris and cleaning up affected areas was based “jointly and separately on (a) the relevant international agreements ... and (b) general principles of international law”.⁵³⁴ Canada asserted that it was applying “the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty”.⁵³⁵ The claim was eventually settled in April 1981 when the parties agreed on an *ex gratia* payment of Can\$ 3 million (about 50 per cent of the amount claimed).⁵³⁶

⁵²⁹ *Aerial Incident of 3 July 1988* (see footnote 523 above) (order of discontinuance following settlement). For the settlement agreement itself, see the General Agreement on the Settlement of Certain International Court of Justice and Tribunal Cases (1996), attached to the Joint Request for Arbitral Award on Agreed Terms, Iran-U.S. C.T.R., vol. 32, pp. 213–216 (1996).

⁵³⁰ See, e.g., the Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia concerning the losses incurred by the Government of the United Kingdom and by British nationals as a result of the disturbances in Indonesia in September 1963 (1 December 1966) for the payment by Indonesia of compensation for, *inter alia*, damage to the British Embassy during mob violence (*Treaty Series No. 34 (1967)*) (London, HM Stationery Office) and the payment by Pakistan to the United States of compensation for the sacking of the United States Embassy in Islamabad in 1979 (RGDIP, vol. 85 (1981), p. 880).

⁵³¹ See, e.g., Claim of Consul Henry R. Myers (*United States v. Salvador*) (1890), *Papers relating to the Foreign Relations of the United States*, pp. 64–65; (1892), pp. 24–44 and 49–51; (1893), pp. 174–179, 181–182 and 184; and Whiteman, *Damages in International Law* (footnote 347 above), pp. 80–81.

⁵³² For examples, see Whiteman, *Damages in International Law* (footnote 347 above), p. 81.

⁵³³ See, e.g., the United States-China agreement providing for an *ex gratia* payment of US\$ 4.5 million, to be given to the families of those killed and to those injured in the bombing of the Chinese Embassy in Belgrade on 7 May 1999, AJIL, vol. 94, No. 1 (January 2000), p. 127.

⁵³⁴ The claim of Canada against the Union of Soviet Socialist Republics for damage caused by *Cosmos 954*, 23 January 1979 (see footnote 459 above), pp. 899 and 905.

⁵³⁵ *Ibid.*, p. 907.

⁵³⁶ Protocol between Canada and the Union of Soviet Socialist Republics in respect of the claim for damages caused by the Satellite “Cosmos 954” (Moscow, 2 April 1981), United Nations, *Treaty Series*,

(14) Compensation claims for pollution costs have been dealt with by UNCC in the context of assessing Iraq’s liability under international law “for any direct loss, damage—including environmental damage and the depletion of natural resources ... as a result of its unlawful invasion and occupation of Kuwait”.⁵³⁷ The UNCC Governing Council decision 7 specifies various heads of damage encompassed by “environmental damage and the depletion of natural resources”.⁵³⁸

(15) In cases where compensation has been awarded or agreed following an internationally wrongful act that causes or threatens environmental damage, payments have been directed to reimbursing the injured State for expenses reasonably incurred in preventing or remedying pollution, or to providing compensation for a reduction in the value of polluted property.⁵³⁹ However, environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs or property devaluation. Damage to such environmental values (biodiversity, amenity, etc.—sometimes referred to as “non-use values”) is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify.

(16) Within the field of diplomatic protection, a good deal of guidance is available as to appropriate compensation standards and methods of valuation, especially as concerns personal injury and takings of, or damage to, tangible property. It is well established that a State may seek compensation in respect of personal injuries suffered by its officials or nationals, over and above any direct injury it may itself have suffered in relation to the same event. Compensable personal injury encompasses not only associated material losses, such as loss of earnings and earning capacity, medical expenses and the like, but also non-material damage suffered by the individual (sometimes, though not universally, referred to as “moral damage” in national legal systems). Non-material damage is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life. No less than material injury sustained by the injured State, non-material damage is financially assessable and may be the subject of a claim of compensation, as stressed in the “*Lusitania*” case.⁵⁴⁰ The umpire considered that international law provides compensation for mental

vol. 1470, No. 24934, p. 269. See also ILM, vol. 20, No. 3 (May 1981), p. 689.

⁵³⁷ Security Council resolution 687 (1991), para. 16 (see footnote 461 above).

⁵³⁸ Decision 7 of 16 March 1992, Criteria for additional categories of claims (S/AC.26/1991/7/Rev.1), para 35.

⁵³⁹ See the decision of the arbitral tribunal in the *Trail Smelter* case (footnote 253 above), p. 1911, which provided compensation to the United States for damage to land and property caused by sulphur dioxide emissions from a smelter across the border in Canada. Compensation was assessed on the basis of the reduction in value of the affected land.

⁵⁴⁰ See footnote 514 above. International tribunals have frequently granted pecuniary compensation for moral injury to private parties. For example, the *Chevreau* case (see footnote 133 above) (English translation in AJIL, vol. 27, No. 1 (January 1933), p. 153); the *Gage* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 226 (1903); the *Di Caro* case, *ibid.*, vol. X (Sales No. 60.V.4), p. 597 (1903); and the *Heirs of Jean Maninat* case, *ibid.*, p. 55 (1903).

suffering, injury to feelings, humiliation, shame, degradation, loss of social position or injury to credit and reputation, such injuries being “very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated ...”.⁵⁴¹

(17) International courts and tribunals have undertaken the assessment of compensation for personal injury on numerous occasions. For example, in the *M/V “Saiga”* case,⁵⁴² the tribunal held that Saint Vincent and the Grenadines’ entitlement to compensation included damages for injury to the crew, their unlawful arrest, detention and other forms of ill-treatment.

(18) Historically, compensation for personal injury suffered by nationals or officials of a State arose mainly in the context of mixed claims commissions dealing with State responsibility for injury to aliens. Claims commissions awarded compensation for personal injury both in cases of wrongful death and deprivation of liberty. Where claims were made in respect of wrongful death, damages were generally based on an evaluation of the losses of the surviving heirs or successors, calculated in accordance with the well-known formula of Umpire Parker in the “*Lusitania*” case:

Estimate the amounts (*a*) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (*b*) the pecuniary value to such claimant of the deceased’s personal services in claimant’s care, education, or supervision, and also add (*c*) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by claimant.⁵⁴³

In cases of deprivation of liberty, arbitrators sometimes awarded a set amount for each day spent in detention.⁵⁴⁴ Awards were often increased when abusive conditions of confinement accompanied the wrongful arrest and imprisonment, resulting in particularly serious physical or psychological injury.⁵⁴⁵

(19) Compensation for personal injury has also been dealt with by human rights bodies, in particular the European Court of Human Rights and the Inter-American Court of Human Rights. Awards of compensation encompass material losses (loss of earnings, pensions, medical expenses, etc.) and non-material damage (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium), the latter usually quantified on the basis of an equitable assessment. Hitherto, amounts of compensation or damages awarded or recommended by these bodies have been modest.⁵⁴⁶ Nonetheless, the decisions of human rights bodies

on compensation draw on principles of reparation under general international law.⁵⁴⁷

(20) In addition to a large number of lump-sum compensation agreements covering multiple claims,⁵⁴⁸ property claims of nationals arising out of an internationally wrongful act have been adjudicated by a wide range of *ad hoc* and standing tribunals and commissions, with reported cases spanning two centuries. Given the diversity of adjudicating bodies, the awards exhibit considerable variability.⁵⁴⁹ Nevertheless, they provide useful principles to guide the determination of compensation under this head of damage.

(21) The reference point for valuation purposes is the loss suffered by the claimant whose property rights have been infringed. This loss is usually assessed by reference to specific heads of damage relating to (i) compensation for capital value; (ii) compensation for loss of profits; and (iii) incidental expenses.

(22) Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the “fair market value” of the property lost.⁵⁵⁰ The method used to

of Human Rights (The Hague, Martinus Nijhoff, 1999); and R. Pisillo Mazzeschi, “La riparazione per violazione dei diritti umani nel diritto internazionale e nella Convenzione europea”, *La Comunità internazionale*, vol. 53, No. 2 (1998), p. 215.

⁵⁴⁷ See, e.g., the decision of the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case (footnote 63 above), pp. 26–27 and 30–31. Cf. *Papamichalopoulos* (footnote 515 above).

⁵⁴⁸ See, e.g., R. B. Lillich and B. H. Weston, *International Claims: Their Settlement by Lump Sum Agreements* (Charlottesville, University Press of Virginia, 1975); and B. H. Weston, R. B. Lillich and D. J. Bederman, *International Claims: Their Settlement by Lump Sum Agreements, 1975–1995* (Ardsley, N.Y., Transnational, 1999).

⁵⁴⁹ Controversy has persisted in relation to expropriation cases, particularly over standards of compensation applicable in the light of the distinction between lawful expropriation of property by the State on the one hand, and unlawful takings on the other, a distinction clearly drawn by PCIJ in *Factory at Chorzów, Merits* (footnote 34 above), p. 47. In a number of cases, tribunals have employed the distinction to rule in favour of compensation for lost profits in cases of unlawful takings (see, e.g., the observations of the arbitrator in *Libyan American Oil Company (LIAMCO)* (footnote 508 above), pp. 202–203; and also the *Aminoil* arbitration (footnote 496 above), p. 600, para. 138; and *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 15, p. 189, at p. 246, para. 192 (1987)). Not all cases, however, have drawn a distinction between the applicable compensation principles based on the lawfulness or unlawfulness of the taking. See, e.g., the decision of the Iran-United States Claims Tribunal in *Phillips Petroleum* (footnote 164 above), p. 122, para. 110. See also *Starrett Housing Corporation v. Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 16, p. 112 (1987), where the tribunal made no distinction in terms of the lawfulness of the taking and its award included compensation for lost profits.

⁵⁵⁰ See *American International Group, Inc. v. The Islamic Republic of Iran*, which stated that, under general international law, “the valuation should be made on the basis of the fair market value of the shares”, Iran-U.S. C.T.R., vol. 4, p. 96, at p. 106 (1983). In *Starrett Housing Corporation* (see footnote 549 above), the tribunal accepted its expert’s concept of fair market value “as the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat” (p. 201). See also the Guidelines on the Treatment of Foreign Direct Investment, which state in paragraph 3 of part IV that compensation “will be deemed ‘adequate’ if it is based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known”, World Bank, *Legal Framework*

⁵⁴¹ “*Lusitania*” (see footnote 514 above), p. 40.

⁵⁴² See footnote 515 above.

⁵⁴³ “*Lusitania*” (see footnote 514 above), p. 35.

⁵⁴⁴ For example, the “*Topaze*” case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 387, at p. 389 (1903); and the *Faulkner* case, *ibid.*, vol. IV (Sales No. 1951.V.1), p. 67, at p. 71 (1926).

⁵⁴⁵ For example, the *William McNeil* case, *ibid.*, vol. V (Sales No. 1952.V.3), p. 164, at p. 168 (1931).

⁵⁴⁶ See the review by Shelton, *op. cit.* (footnote 521 above), chaps. 8–9; A. Randelzhofer and C. Tomuschat, eds., *State Responsibility and the Individual: Reparation in Instances of Grave Violations*

assess “fair market value”, however, depends on the nature of the asset concerned. Where the property in question or comparable property is freely traded on an open market, value is more readily determined. In such cases, the choice and application of asset-based valuation methods based on market data and the physical properties of the assets is relatively unproblematic, apart from evidentiary difficulties associated with long outstanding claims.⁵⁵¹ Where the property interests in question are unique or unusual, for example, art works or other cultural property,⁵⁵² or are not the subject of frequent or recent market transactions, the determination of value is more difficult. This may be true, for example, in respect of certain business entities in the nature of a going concern, especially if shares are not regularly traded.⁵⁵³

(23) Decisions of various *ad hoc* tribunals since 1945 have been dominated by claims in respect of nationalized business entities. The preferred approach in these cases has been to examine the assets of the business, making allowance for goodwill and profitability, as appropriate. This method has the advantage of grounding compensation as much as possible in some objective assessment of value linked to the tangible asset backing of the business. The value of goodwill and other indicators of profitability may be uncertain, unless derived from information provided by a recent sale or acceptable arms-length offer. Yet, for profitable business entities where the whole is greater than the sum of the parts, compensation would be incomplete without paying due regard to such factors.⁵⁵⁴

for the *Treatment of Foreign Investment* (Washington, D.C., 1992), vol. II, p. 41. Likewise, according to article 13, paragraph 1, of the Energy Charter Treaty, compensation for expropriation “shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation”.

⁵⁵¹ Particularly in the case of lump-sum settlements, agreements have been concluded decades after the claims arose. See, e.g., the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics concerning the Settlement of Mutual Financial and Property Claims arising before 1939 of 15 July 1986 (*Treaty Series*, No. 65 (1986)) (London, HM Stationery Office) concerning claims dating back to 1917 and the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China concerning the Settlement of Mutual Historical Property Claims of 5 June 1987 (*Treaty Series*, No. 37 (1987), *ibid.*) in respect of claims arising in 1949. In such cases, the choice of valuation method was sometimes determined by availability of evidence.

⁵⁵² See Report and recommendations made by the panel of Commissioners concerning part two of the first instalment of individual claims for damages above US\$ 100 000 (category “D” claims), 12 March 1998 (S/AC.26/1998/3), paras. 48–49, where UNCC considered a compensation claim in relation to the taking of the claimant’s Islamic art collection by Iraqi military personnel.

⁵⁵³ Where share prices provide good evidence of value, they may be utilized, as in *INA Corporation v. The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 8, p. 373 (1985).

⁵⁵⁴ Early claims recognized that even where a taking of property was lawful, compensation for a going concern called for something more than the value of the property elements of the business. The American-Mexican Claims Commission, in rejecting a claim for lost profits in the case of a lawful taking, stated that payment for property elements would be “augmented by the existence of those elements which constitute a going concern”: *Wells Fargo and Company (Decision No. 22-B)* (1926), American-Mexican Claims Commission (Washington, D.C., United States Government Printing Office, 1948), p. 153 (1926). See also decision No. 9 of the UNCC Governing Council in “Propositions and conclusions on compensation for business losses: types of damages and their valuation” (S/AC.26/1992/9), para. 16.

(24) An alternative valuation method for capital loss is the determination of net book value, i.e. the difference between the total assets of the business and total liabilities as shown on its books. Its advantages are that the figures can be determined by reference to market costs, they are normally drawn from a contemporaneous record, and they are based on data generated for some other purpose than supporting the claim. Accordingly, net book value (or some variant of this method) has been employed to assess the value of businesses. The limitations of the method lie in the reliance on historical figures, the use of accounting principles which tend to undervalue assets, especially in periods of inflation, and the fact that the purpose for which the figures were produced does not take account of the compensation context and any rules specific to it. The balance sheet may contain an entry for goodwill, but the reliability of such figures depends upon their proximity to the moment of an actual sale.

(25) In cases where a business is not a going concern,⁵⁵⁵ so-called “break-up”, “liquidation” or “dissolution” value is generally employed. In such cases, no provision is made for value over and above the market value of the individual assets. Techniques have been developed to construct, in the absence of actual transactions, hypothetical values representing what a willing buyer and willing seller might agree.⁵⁵⁶

(26) Since 1945, valuation techniques have been developed to factor in different elements of risk and probability.⁵⁵⁷ The discounted cash flow (DCF) method has gained some favour, especially in the context of calculations involving income over a limited duration, as in the case of wasting assets. Although developed as a tool for assessing commercial value, it can also be useful in the context of calculating value for compensation purposes.⁵⁵⁸ But difficulties can arise in the application of the DCF method to establish capital value in the compensation context. The method analyses a wide range of inherently speculative elements, some of which have a significant impact upon the outcome (e.g. discount rates, currency fluctuations, inflation figures, commodity prices, interest rates and other commercial risks). This has led tribunals to adopt a

⁵⁵⁵ For an example of a business found not to be a going concern, see *Phelps Dodge Corp. v. The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 10, p. 121 (1986), where the enterprise had not been established long enough to demonstrate its viability. In *SEDCO, Inc. v. National Iranian Oil Co.*, the claimant sought dissolution value only, *ibid.*, p. 180 (1986).

⁵⁵⁶ The hypothetical nature of the result is discussed in *Amoco International Finance Corporation* (see footnote 549 above), at pp. 256–257, paras. 220–223.

⁵⁵⁷ See, for example, the detailed methodology developed by UNCC for assessing Kuwaiti corporate claims (report and recommendations made by the panel of Commissioners concerning the first instalment of “E4” claims, 19 March 1999 (S/AC.26/1999/4), paras. 32–62) and claims filed on behalf of non-Kuwaiti corporations and other business entities, excluding oil sector, construction/engineering and export guarantee claims (report and recommendations made by the panel of Commissioners concerning the third instalment of “E2” claims, 9 December 1999 (S/AC.26/1999/22)).

⁵⁵⁸ The use of the discounted cash flow method to assess capital value was analysed in some detail in *Amoco International Finance Corporation* (see footnote 549 above); *Starrett Housing Corporation (ibid.)*; *Phillips Petroleum Company Iran* (see footnote 164 above); and *Ebrahimi (Shahin Shaine) v. Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 30, p. 170 (1994).

cautious approach to the use of the method. Hence, although income-based methods have been accepted in principle, there has been a decided preference for asset-based methods.⁵⁵⁹ A particular concern is the risk of double-counting which arises from the relationship between the capital value of an enterprise and its contractually based profits.⁵⁶⁰

(27) Paragraph 2 of article 36 recognizes that in certain cases compensation for loss of profits may be appropriate. International tribunals have included an award for loss of profits in assessing compensation: for example, the decisions in the *Cape Horn Pigeon* case⁵⁶¹ and *Sapphire International Petroleum Ltd. v. National Iranian Oil Company*.⁵⁶² Loss of profits played a role in the *Factory at Chorzów* case itself, PCIJ deciding that the injured party should receive the value of property by way of damages not as it stood at the time of expropriation but at the time of indemnification.⁵⁶³ Awards for loss of profits have also been made in respect of contract-based lost profits in *Libyan American Oil Company (LIAMCO)*⁵⁶⁴ and in some ICSID arbitrations.⁵⁶⁵ Nevertheless, lost profits have not been as commonly awarded in practice as compensation for accrued losses. Tribunals have been reluctant to provide compensation for claims with inherently speculative elements.⁵⁶⁶ When

⁵⁵⁹ See, e.g., *Amoco* (footnote 549 above); *Starrett Housing Corporation* (*ibid.*); and *Phillips Petroleum Company Iran* (footnote 164 above). In the context of claims for lost profits, there is a corresponding preference for claims to be based on past performance rather than forecasts. For example, the UNCC guidelines on valuation of business losses in decision 9 (see footnote 554 above) state: "The method of a valuation should therefore be one that focuses on past performance rather than on forecasts and projections into the future" (para. 19).

⁵⁶⁰ See, e.g., *Ebrahimi* (footnote 558 above), p. 227, para. 159.

⁵⁶¹ *Navires* (see footnote 222 above) (*Cape Horn Pigeon* case), p. 63 (1902) (including compensation for lost profits resulting from the seizure of an American whaler). Similar conclusions were reached in the *Delagoa Bay Railway* case, Martens, *op. cit.* (footnote 441 above), vol. XXX, p. 329 (1900); Moore, *History and Digest*, vol. II, p. 1865 (1900); the *William Lee* case (footnote 139 above), pp. 3405–3407; and the *Yuille Shortridge and Co. case* (*Great Britain v. Portugal*), Lapradelle–Politis, *op. cit.* (*ibid.*), vol. II, p. 78 (1861). Contrast the decisions in the *Canada case* (*United States of America v. Brazil*), Moore, *History and Digest*, vol. II, p. 1733 (1870) and the *Lacaze* case (footnote 139 above).

⁵⁶² ILR, vol. 35, p. 136, at pp. 187 and 189 (1963).

⁵⁶³ *Factory at Chorzów, Merits* (see footnote 34 above), pp. 47–48 and 53.

⁵⁶⁴ *Libyan American Oil Company (LIAMCO)* (see footnote 508 above), p. 140.

⁵⁶⁵ See, e.g., *Amco Asia Corporation and Others v. The Republic of Indonesia, First Arbitration* (1984); *Annulment* (1986); *Resubmitted case* (1990), ICSID Reports (Cambridge, Grotius, 1993), vol. 1, p. 377; and *AGIP SpA v. the Government of the People's Republic of the Congo, ibid.*, p. 306 (1979).

⁵⁶⁶ According to the arbitrator in the *Shufeldt* case (see footnote 87 above), "the *lucrum cessans* must be the direct fruit of the contract and not too remote or speculative" (p. 1099). See also *Amco Asia Corporation and Others* (footnote 565 above), where it was stated that "non-speculative profits" were recoverable (p. 612, para. 178). UNCC has also stressed the requirement for claimants to provide "clear and convincing evidence of ongoing and expected profitability" (see report and recommendations made by the panel of Commissioners concerning the first instalment of "E3" claims, 17 December 1998 (S/AC.26/1998/13), para. 147). In assessing claims for lost profits on construction contracts, Panels have generally required that the claimant's calculation take into account the risk inherent in the project (*ibid.*, para. 157; report and recommendations made by the panel of Commissioners concerning the fourth instalment of "E3" claims, 30 September 1999 (S/AC.26/1999/14), para. 126).

compared with tangible assets, profits (and intangible assets which are income-based) are relatively vulnerable to commercial and political risks, and increasingly so the further into the future projections are made. In cases where lost future profits have been awarded, it has been where an anticipated income stream has attained sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable.⁵⁶⁷ This has normally been achieved by virtue of contractual arrangements or, in some cases, a well-established history of dealings.⁵⁶⁸

(28) Three categories of loss of profits may be distinguished: first, lost profits from income-producing property during a period when there has been no interference with title as distinct from temporary loss of use; secondly, lost profits from income-producing property between the date of taking of title and adjudication;⁵⁶⁹ and thirdly, lost future profits in which profits anticipated after the date of adjudication are awarded.⁵⁷⁰

(29) The first category involves claims for loss of profits due to the temporary loss of use and enjoyment of the income-producing asset.⁵⁷¹ In these cases there is no interference with title and hence in the relevant period the loss compensated is the income to which the claimant was entitled by virtue of undisturbed ownership.

(30) The second category of claims relates to the unlawful taking of income-producing property. In such cases

⁵⁶⁷ In considering claims for future profits, the UNCC panel dealing with the fourth instalment of "E3" claims expressed the view that in order for such claims to warrant a recommendation, "it is necessary to demonstrate by sufficient documentary and other appropriate evidence a history of successful (i.e. profitable) operation, and a state of affairs which warrants the conclusion that the hypothesis that there would have been future profitable contracts is well founded" (S/AC.26/1999/14), para. 140 (see footnote 566 above).

⁵⁶⁸ According to Whiteman, "in order to be allowable, prospective profits must not be too speculative, contingent, uncertain, and the like. There must be proof that they were reasonably anticipated; and that the profits anticipated were probable and not merely possible" (*Damages in International Law* (Washington, D.C., United States Government Printing Office, 1943), vol. III, p. 1837).

⁵⁶⁹ This is most commonly associated with the deprivation of property, as opposed to wrongful termination of a contract or concession. If restitution were awarded, the award of lost profits would be analogous to cases of temporary dispossession. If restitution is not awarded, as in the *Factory at Chorzów, Merits* (see footnote 34 above) and *Norwegian Shipowners' Claims* (footnote 87 above), lost profits may be awarded up to the time when compensation is made available as a substitute for restitution.

⁵⁷⁰ Awards of lost future profits have been made in the context of a contractually protected income stream, as in *Amco Asia Corporation and Others v. The Republic of Indonesia, First Arbitration; Annulment; Resubmitted case* (see footnote 565 above), rather than on the basis of the taking of income-producing property. In the UNCC report and recommendations on the second instalment of "E2" claims, dealing with reduced profits, the panel found that losses arising from a decline in business were compensable even though tangible property was not affected and the businesses continued to operate throughout the relevant period (S/AC.26/1999/6, para. 76).

⁵⁷¹ Many of the early cases concern vessels seized and detained. In the "*Montijo*", an American vessel seized in Panama, the Umpire allowed a sum of money per day for loss of the use of the vessel (see footnote 117 above). In the "*Betsey*", compensation was awarded not only for the value of the cargo seized and detained, but also for demurrage for the period representing loss of use: Moore, *International Adjudications* (New York, Oxford University Press, 1933) vol. V, p. 47, at p. 113.

lost profits have been awarded for the period up to the time of adjudication. In the *Factory at Chorzów* case,⁵⁷² this took the form of re-invested income, representing profits from the time of taking to the time of adjudication. In the *Norwegian Shipowners' Claims* case,⁵⁷³ lost profits were similarly not awarded for any period beyond the date of adjudication. Once the capital value of income-producing property has been restored through the mechanism of compensation, funds paid by way of compensation can once again be invested to re-establish an income stream. Although the rationale for the award of lost profits in these cases is less clearly articulated, it may be attributed to a recognition of the claimant's continuing beneficial interest in the property up to the moment when potential restitution is converted to a compensation payment.⁵⁷⁴

(31) The third category of claims for loss of profits arises in the context of concessions and other contractually protected interests. Again, in such cases, lost future income has sometimes been awarded.⁵⁷⁵ In the case of contracts, it is the future income stream which is compensated, up to the time when the legal recognition of entitlement ends. In some contracts this is immediate, e.g. where the contract is determinable at the instance of the State,⁵⁷⁶ or where some other basis for contractual termination exists. Or it may arise from some future date dictated by the terms of the contract itself.

(32) In other cases, lost profits have been excluded on the basis that they were not sufficiently established as a legally protected interest. In the *Oscar Chinn* case⁵⁷⁷ a monopoly was not accorded the status of an acquired right. In the *Asian Agricultural Products* case,⁵⁷⁸ a claim for lost profits by a newly established business was rejected for lack of evidence of established earnings. Claims for lost profits are also subject to the usual range of limitations on the recovery of damages, such as causation, remoteness, evidentiary requirements and accounting principles,

⁵⁷² *Factory at Chorzów, Merits* (see footnote 34 above).

⁵⁷³ *Norwegian Shipowners' Claims* (see footnote 87 above).

⁵⁷⁴ For the approach of UNCC in dealing with loss of profits claims associated with the destruction of businesses following the Iraqi invasion of Kuwait, see S/AC.26/1999/4 (footnote 557 above), paras. 184–187.

⁵⁷⁵ In some cases, lost profits were not awarded beyond the date of adjudication, though for reasons unrelated to the nature of the income-producing property. See, e.g., *Robert H. May (United States v. Guatemala)*, 1900 For. Rel. 648; and Whiteman, *Damages in International Law*, vol. III (footnote 568 above), pp. 1704 and 1860, where the concession had expired. In other cases, circumstances giving rise to *force majeure* had the effect of suspending contractual obligations: see, e.g., *Gould Marketing, Inc. v. Ministry of Defence of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 6, p. 272 (1984); and *Sylvania Technical Systems, Inc. v. The Government of the Islamic Republic of Iran*, *ibid.*, vol. 8, p. 298 (1985). In the *Delagoa Bay Railway* case (footnote 561 above), and in *Shufeldt* (see footnote 87 above), lost profits were awarded in respect of a concession which had been terminated. In *Sapphire International Petroleum Ltd.* (see footnote 562 above), p. 136; *Libyan American Oil Company (LIAMCO)* (see footnote 508 above), p. 140; and *Amco Asia Corporation and Others v. The Republic of Indonesia, First Arbitration; Annulment; Resubmitted case* (see footnote 565 above), awards of lost profits were also sustained on the basis of contractual relationships.

⁵⁷⁶ As in *Sylvania Technical Systems, Inc.* (see the footnote above).

⁵⁷⁷ See footnote 385 above.

⁵⁷⁸ See footnote 522 above.

which seek to discount speculative elements from projected figures.

(33) If loss of profits are to be awarded, it is inappropriate to award interest under article 38 on the profit-earning capital over the same period of time, simply because the capital sum cannot be simultaneously earning interest and generating profits. The essential aim is to avoid double recovery while ensuring full reparation.

(34) It is well established that incidental expenses are compensable if they were reasonably incurred to repair damage and otherwise mitigate loss arising from the breach.⁵⁷⁹ Such expenses may be associated, for example, with the displacement of staff or the need to store or sell undelivered products at a loss.

Article 37. Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Commentary

(1) Satisfaction is the third form of reparation which the responsible State may have to provide in discharge of its obligation to make full reparation for the injury caused by an internationally wrongful act. It is not a standard form of reparation, in the sense that in many cases the injury caused by an internationally wrongful act of a State may be fully repaired by restitution and/or compensation. The rather exceptional character of the remedy of satisfaction, and its relationship to the principle of full reparation, are emphasized by the phrase “insofar as [the injury] cannot be made good by restitution or compensation”. It is only in those cases where those two forms have not provided full reparation that satisfaction may be required.

(2) Article 37 is divided into three paragraphs, each dealing with a separate aspect of satisfaction. Paragraph 1 addresses the legal character of satisfaction and the types of injury for which it may be granted. Paragraph 2 describes, in a non-exhaustive fashion, some modalities of satisfaction. Paragraph 3 places limitations on the obliga-

⁵⁷⁹ Compensation for incidental expenses has been awarded by UNCC (report and recommendations on the first instalment of “E2” claims (S/AC.26/1998/7) where compensation was awarded for evacuation and relief costs (paras. 133, 153 and 249), repatriation (para. 228), termination costs (para. 214), renovation costs (para. 225) and expenses in mitigation (para. 183)), and by the Iran-United States Claims Tribunal (see *General Electric Company v. The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 26, p. 148, at pp. 165–169, paras. 56–60 and 67–69 (1991), awarding compensation for items resold at a loss and for storage costs).

tion to give satisfaction, having regard to former practices in cases where unreasonable forms of satisfaction were sometimes demanded.

(3) In accordance with paragraph 2 of article 31, the injury for which a responsible State is obliged to make full reparation embraces “any damage, whether material or moral, caused by the internationally wrongful act of a State”. Material and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation. Satisfaction, on the other hand, is the remedy for those injuries, not financially assessable, which amount to an affront to the State. These injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the State concerned.

(4) The availability of the remedy of satisfaction for injury of this kind, sometimes described as “non-material injury”,⁵⁸⁰ is well established in international law. The point was made, for example, by the tribunal in the “*Rainbow Warrior*” arbitration:

There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities.⁵⁸¹

State practice also provides many instances of claims for satisfaction in circumstances where the internationally wrongful act of a State causes non-material injury to another State. Examples include situations of insults to the symbols of the State, such as the national flag,⁵⁸² violations of sovereignty or territorial integrity,⁵⁸³ attacks on ships or aircraft,⁵⁸⁴ ill-treatment of or deliberate attacks on heads of State or Government or diplomatic or consular representatives or other protected persons⁵⁸⁵ and violations of the premises of embassies or consulates or of the residences of members of the mission.⁵⁸⁶

⁵⁸⁰ See C. Dominicé, “De la réparation constructive du préjudice immatériel souffert par un État”, *L'ordre juridique international entre tradition et innovation: recueil d'études* (Paris, Presses Universitaires de France, 1997), p. 349, at p. 354.

⁵⁸¹ “*Rainbow Warrior*” (see footnote 46 above), pp. 272–273, para. 122.

⁵⁸² Examples are the *Magee* case (Whiteman, *Damages in International Law*, vol. I (see footnote 347 above), p. 64 (1874)), the *Petit Vaisseau* case (*La prassi italiana di diritto internazionale*, 2nd series (see footnote 498 above), vol. III, No. 2564 (1863)) and the case that arose from the insult to the French flag in Berlin in 1920 (C. Eagleton, *The Responsibility of States in International Law* (New York University Press, 1928), pp. 186–187).

⁵⁸³ As occurred in the “*Rainbow Warrior*” arbitration (see footnote 46 above).

⁵⁸⁴ Examples include the attack carried out in 1961 against a Soviet aircraft transporting President Brezhnev by French fighter planes over the international waters of the Mediterranean (RGDIP, vol. 65 (1961), p. 603); and the sinking of a Bahamian ship in 1980 by a Cuban aircraft (*ibid.*, vol. 84 (1980), pp. 1078–1079).

⁵⁸⁵ See F. Przetacznik, “La responsabilité internationale de l'État à raison des préjudices de caractère moral et politique causés à un autre État”, RGDIP, vol. 78 (1974), p. 919, at p. 951.

⁵⁸⁶ Examples include the attack by demonstrators in 1851 on the Spanish Consulate in New Orleans (Moore, *Digest*, vol. VI, p. 811, at p. 812), and the failed attempt of two Egyptian policemen, in 1888, to intrude upon the premises of the Italian Consulate at Alexandria

(5) Paragraph 2 of article 37 provides that satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. The forms of satisfaction listed in the article are no more than examples. The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance.⁵⁸⁷ Many possibilities exist, including due inquiry into the causes of an accident resulting in harm or injury,⁵⁸⁸ a trust fund to manage compensation payments in the interests of the beneficiaries, disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act⁵⁸⁹ or the award of symbolic damages for non-pecuniary injury.⁵⁹⁰ Assurances or guarantees of non-repetition, which are dealt with in the articles in the context of cessation, may also amount to a form of satisfaction.⁵⁹¹ Paragraph 2 does not attempt to list all the possibilities, but neither is it intended to exclude them. Moreover, the order of the modalities of satisfaction in paragraph 2 is not intended to reflect any hierarchy or preference. Paragraph 2 simply gives examples which are not listed in order of appropriateness or seriousness. The appropriate mode, if any, will be determined having regard to the circumstances of each case.

(6) One of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or tribunal. The utility of declaratory relief as a form of satisfaction in the case of non-material injury to a State was affirmed by ICJ in the *Corfu Channel* case, where the Court, after finding unlawful a mine-sweeping operation (Operation Retail) carried out by the British Navy after the explosion, said:

[T]o ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.

(*La prassi italiana di diritto internazionale*, 2nd series (see footnote 498 above), vol. III, No. 2558). Also see cases of apologies and expressions of regret following demonstrations in front of the French Embassy in Belgrade in 1961 (RGDIP, vol. 65 (1961), p. 610), and the fires in the libraries of the United States Information Services in Cairo in 1964 (*ibid.*, vol. 69 (1965), pp. 130–131) and in Karachi in 1965 (*ibid.*, vol. 70 (1966), pp. 165–166).

⁵⁸⁷ In the “*Rainbow Warrior*” arbitration the tribunal, while rejecting New Zealand's claims for restitution and/or cessation and declining to award compensation, made various declarations by way of satisfaction, and in addition a recommendation “to assist [the parties] in putting an end to the present unhappy affair”. Specifically, it recommended that France contribute US\$ 2 million to a fund to be established “to promote close and friendly relations between the citizens of the two countries” (see footnote 46 above), p. 274, paras. 126–127. See also L. Migliorino, “Sur la déclaration d'illicéité comme forme de satisfaction: à propos de la sentence arbitrale du 30 avril 1990 dans l'affaire du *Rainbow Warrior*”, RGDIP, vol. 96 (1992), p. 61.

⁵⁸⁸ For example, the United States naval inquiry into the causes of the collision between an American submarine and the Japanese fishing vessel, the *Ehime Maru*, in waters off Honolulu, *The New York Times*, 8 February 2001, sect. 1, p. 1.

⁵⁸⁹ Action against the guilty individuals was requested in the case of the killing in 1948, in Palestine, of Count Bernadotte while he was acting in the service of the United Nations (Whiteman, *Digest of International Law*, vol. 8, pp. 742–743) and in the case of the killing of two United States officers in Tehran (RGDIP, vol. 80 (1976), p. 257).

⁵⁹⁰ See, e.g., the cases “*I'm Alone*”, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1609 (1935); and “*Rainbow Warrior*” (footnote 46 above).

⁵⁹¹ See paragraph (11) of the commentary to article 30.

This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction.⁵⁹²

This has been followed in many subsequent cases.⁵⁹³ However, while the making of a declaration by a competent court or tribunal may be treated as a form of satisfaction in a given case, such declarations are not intrinsically associated with the remedy of satisfaction. Any court or tribunal which has jurisdiction over a dispute has the authority to determine the lawfulness of the conduct in question and to make a declaration of its findings, as a necessary part of the process of determining the case. Such a declaration may be a preliminary to a decision on any form of reparation, or it may be the only remedy sought. What the Court did in the *Corfu Channel* case was to use a declaration as a form of satisfaction in a case where Albania had sought no other form. Moreover, such a declaration has further advantages: it should be clear and self-contained and will by definition not exceed the scope or limits of satisfaction referred to in paragraph 3 of article 37. A judicial declaration is not listed in paragraph 2 only because it must emanate from a competent third party with jurisdiction over a dispute, and the articles are not concerned to specify such a party or to deal with issues of judicial jurisdiction. Instead, article 37 specifies the acknowledgement of the breach by the responsible State as a modality of satisfaction.

(7) Another common form of satisfaction is an apology, which may be given verbally or in writing by an appropriate official or even the Head of State. Expressions of regret or apologies were required in the *"I'm Alone"*,⁵⁹⁴ *Kellett*⁵⁹⁵ and *"Rainbow Warrior"*⁵⁹⁶ cases, and were offered by the responsible State in the *Consular Relations*⁵⁹⁷ and *LaGrand*⁵⁹⁸ cases. Requests for, or offers of, an apology are a quite frequent feature of diplomatic practice and the tender of a timely apology, where the circumstances justify it, can do much to resolve a dispute. In other circumstances an apology may not be called for, e.g. where a case is settled on an *ex gratia* basis, or it may be insufficient. In the *LaGrand* case the Court considered that "an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties".⁵⁹⁹

⁵⁹² *Corfu Channel, Merits* (see footnote 35 above), p. 35, repeated in the operative part (p. 36).

⁵⁹³ For example, *"Rainbow Warrior"* (see footnote 46 above), p. 273, para. 123.

⁵⁹⁴ See footnote 590 above.

⁵⁹⁵ Moore, *Digest*, vol. V, p. 44 (1897).

⁵⁹⁶ See footnote 46 above.

⁵⁹⁷ *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 248. For the text of the United States' apology, see United States Department of State, Text of Statement Released in Asunción, Paraguay; Press statement by James P. Rubin, Spokesman, 4 November 1998. For the order discontinuing proceedings of 10 November 1998, see *I.C.J. Reports 1998*, p. 426.

⁵⁹⁸ See footnote 119 above.

⁵⁹⁹ *LaGrand, Merits (ibid.)*, para. 123.

(8) Excessive demands made under the guise of "satisfaction" in the past⁶⁰⁰ suggest the need to impose some limit on the measures that can be sought by way of satisfaction to prevent abuses, inconsistent with the principle of the equality of States.⁶⁰¹ In particular, satisfaction is not intended to be punitive in character, nor does it include punitive damages. Paragraph 3 of article 37 places limitations on the obligation to give satisfaction by setting out two criteria: first, the proportionality of satisfaction to the injury; and secondly, the requirement that satisfaction should not be humiliating to the responsible State. It is true that the term "humiliating" is imprecise, but there are certainly historical examples of demands of this kind.

Article 38. Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Commentary

(1) Interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case. For this reason the term "principal sum" is used in article 38 rather than "compensation". Nevertheless, an award of interest may be required in some cases in order to provide full reparation for the injury caused by an internationally wrongful act, and it is normally the subject of separate treatment in claims for reparation and in the awards of tribunals.

(2) As a general principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgement or award concerning, the claim and to the extent that it is necessary to ensure full reparation.⁶⁰² Support for a general rule favouring the award of interest as an aspect of full reparation is found in international jurisprudence.⁶⁰³ In the *S.S. "Wimbledon"*, PCIJ awarded simple interest at 6 per cent as from the date of judgment, on the basis that interest was only payable "from the moment when the amount of the sum due

⁶⁰⁰ For example, the joint note presented to the Chinese Government in 1900 following the Boxer uprising and the demand by the Conference of Ambassadors against Greece in the *Tellini* affair in 1923: see C. Eagleton, *op. cit.* (footnote 582 above), pp. 187–188.

⁶⁰¹ The need to prevent the abuse of satisfaction was stressed by early writers such as J. C. Bluntschli, *Das moderne Völkerrecht der zivilisierten Staaten als Rechtsbuch dargestellt*, 3rd ed. (Nördlingen, Beck, 1878); French translation by M. C. Lardy, *Le droit international codifié*, 5th rev. ed. (Paris, Félix Alcan, 1895), pp. 268–269.

⁶⁰² Thus, interest may not be allowed where the loss is assessed in current value terms as at the date of the award. See the *Lighthouses arbitration* (footnote 182 above), pp. 252–253.

⁶⁰³ See, e.g., the awards of interest made in the *Illinois Central Railroad Co. (U.S.A.) v. United Mexican States* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 134 (1926); and the *Lucas* case, ILR, vol. 30, p. 220 (1966); see also administrative decision No. III of the United States-Germany Mixed Claims Commission, UNRIAA, vol. VII (Sales No. 1956.V.5), p. 66 (1923).

has been fixed and the obligation to pay has been established".⁶⁰⁴

(3) Issues of the award of interest have frequently arisen in other tribunals, both in cases where the underlying claim involved injury to private parties and where the injury was to the State itself.⁶⁰⁵ The experience of the Iran-United States Claims Tribunal is worth noting. In *The Islamic Republic of Iran v. The United States of America (Case A-19)*, the Full Tribunal held that its general jurisdiction to deal with claims included the power to award interest, but it declined to lay down uniform standards for the award of interest on the ground that this fell within the jurisdiction of each Chamber and related "to the exercise ... of the discretion accorded to them in deciding each particular case".⁶⁰⁶ On the issue of principle the tribunal said:

Claims for interest are part of the compensation sought and do not constitute a separate cause of action requiring their own independent jurisdictional grant. This Tribunal is required by [a]rticle V of the Claims Settlement Declaration to decide claims "on the basis of respect for law". In doing so, it has regularly treated interest, where sought, as forming an integral part of the "claim" which it has a duty to decide. The Tribunal notes that the Chambers have been consistent in awarding interest as "compensation for damages suffered due to delay in payment". ... Indeed, it is customary for arbitral tribunals to award interest as part of an award for damages, notwithstanding the absence of any express reference to interest in the *compromis*. Given that the power to award interest is inherent in the Tribunal's authority to decide claims, the exclusion of such power could only be established by an express provision in the Claims Settlement Declaration. No such provision exists. Consequently, the Tribunal concludes that it is clearly within its power to award interest as compensation for damage suffered.⁶⁰⁷

The tribunal has awarded interest at a different and slightly lower rate in respect of intergovernmental claims.⁶⁰⁸ It has not awarded interest in certain cases, for example where a lump-sum award was considered as reflecting full compensation, or where other special circumstances pertained.⁶⁰⁹

(4) Decision 16 of the Governing Council of the United Nations Compensation Commission deals with the question of interest. It provides:

1. Interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.

2. The methods of calculation and of payment of interest will be considered by the Governing Council at the appropriate time.

⁶⁰⁴ See footnote 34 above. The Court accepted the French claim for an interest rate of 6 per cent as fair, having regard to "the present financial situation of the world and ... the conditions prevailing for public loans".

⁶⁰⁵ In the *M/V "Saiga"* case (see footnote 515 above), ITLOS awarded interest at different rates in respect of different categories of loss (para. 173).

⁶⁰⁶ *The Islamic Republic of Iran v. The United States of America*, Iran-U.S. C.T.R., vol. 16, p. 285, at p. 290 (1987). Aldrich, *op. cit.* (see footnote 357 above), pp. 475-476, points out that the practice of the three Chambers has not been entirely uniform.

⁶⁰⁷ *The Islamic Republic of Iran v. The United States of America* (see footnote 606 above), pp. 289-290.

⁶⁰⁸ See C. N. Brower and J. D. Brueschke, *op. cit.* (footnote 520 above), pp. 626-627, with references to the cases. The rate adopted was 10 per cent, as compared with 12 per cent for commercial claims.

⁶⁰⁹ See the detailed analysis of Chamber Three in *McCullough and Company, Inc. v. Ministry of Post, Telegraph and Telephone*, Iran-U.S. C.T.R., vol. 11, p. 3, at pp. 26-31 (1986).

3. Interest will be paid after the principal amount of awards.⁶¹⁰

This provision combines a decision in principle in favour of interest where necessary to compensate a claimant with flexibility in terms of the application of that principle. At the same time, interest, while a form of compensation, is regarded as a secondary element, subordinated to the principal amount of the claim.

(5) Awards of interest have also been envisaged by human rights courts and tribunals, even though the compensation practice of these bodies is relatively cautious and the claims are almost always unliquidated. This is done, for example, to protect the value of a damages award payable by instalments over time.⁶¹¹

(6) In their more recent practice, national compensation commissions and tribunals have also generally allowed for interest in assessing compensation. However in certain cases of partial lump-sum settlements, claims have been expressly limited to the amount of the principal loss, on the basis that with a limited fund to be distributed, claims to principal should take priority.⁶¹² Some national court decisions have also dealt with issues of interest under international law,⁶¹³ although more often questions of interest are dealt with as part of the law of the forum.

(7) Although the trend of international decisions and practice is towards greater availability of interest as an aspect of full reparation, an injured State has no automatic entitlement to the payment of interest. The awarding of interest depends on the circumstances of each case; in particular, on whether an award of interest is necessary in order to ensure full reparation. This approach is compatible with the tradition of various legal systems as well as the practice of international tribunals.

(8) An aspect of the question of interest is the possible award of compound interest. The general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest. For example, the Iran-United States Claims Tribunal has consistently denied claims for compound interest, including in cases where the claimant suffered losses through compound interest charges on indebtedness associated with the claim. In *R.J. Reynolds Tobacco Co. v. The Government of the Islamic Republic of Iran*, the tribunal failed to find:

any special reasons for departing from international precedents which normally do not allow the awarding of compound interest. As noted by one authority, "[t]here are few rules within the scope of the

⁶¹⁰ Awards of interest, decision of 18 December 1992 (S/AC.26/1992/16).

⁶¹¹ See, e.g., the *Velásquez Rodríguez*, Compensatory Damages case (footnote 516 above), para. 57. See also *Papamichalopoulos* (footnote 515 above), para. 39, where interest was payable only in respect of the pecuniary damage awarded. See further D. Shelton, *op. cit.* (footnote 521 above), pp. 270-272.

⁶¹² See, e.g., the Foreign Compensation (People's Republic of China), Order, Statutory Instrument No. 2201 (1987) (London, HM Stationery Office), para. 10, giving effect to the settlement Agreement between the United Kingdom and China (footnote 551 above).

⁶¹³ See, e.g., *McKesson Corporation v. The Islamic Republic of Iran*, United States District Court for the District of Columbia, 116 F. Supp. 2d 13 (2000).

subject of damages in international law that are better settled than the one that compound interest is not allowable" ... Even though the term "all sums" could be construed to include interest and thereby to allow compound interest, the Tribunal, due to the ambiguity of the language, interprets the clause in the light of the international rule just stated, and thus excludes compound interest.⁶¹⁴

Consistent with this approach, the tribunal has gone behind contractual provisions appearing to provide for compound interest, in order to prevent the claimant gaining a profit "wholly out of proportion to the possible loss that [it] might have incurred by not having the amounts due at its disposal".⁶¹⁵ The preponderance of authority thus continues to support the view expressed by Arbitrator Huber in the *British Claims in the Spanish Zone of Morocco* case:

the arbitral case law in matters involving compensation of one State for another for damages suffered by the nationals of one within the territory of the other ... is unanimous ... in disallowing compound interest. In these circumstances, very strong and quite specific arguments would be called for to grant such interest.⁶¹⁶

The same is true for compound interest in respect of State-to-State claims.

(9) Nonetheless, several authors have argued for a reconsideration of this principle, on the ground that "compound interest reasonably incurred by the injured party should be recoverable as an item of damage".⁶¹⁷ This view has also been supported by arbitral tribunals in some cases.⁶¹⁸ But given the present state of international law, it cannot be said that an injured State has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation.

(10) The actual calculation of interest on any principal sum payable by way of reparation raises a complex of issues concerning the starting date (date of breach,⁶¹⁹ date on which payment should have been made, date of claim or demand), the terminal date (date of settlement agreement or award, date of actual payment) as well as the applicable interest rate (rate current in the respondent State, in the applicant State, international lending rates). There

⁶¹⁴ Iran-U.S. C.T.R., vol. 7, p. 181, at pp. 191–192 (1984), citing Whiteman, *Damages in International Law*, vol. III (see footnote 568 above), p. 1997.

⁶¹⁵ *Anaconda-Iran, Inc. v. The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 13, p. 199, at p. 235 (1986). See also Aldrich, *op. cit.* (footnote 357 above), pp. 477–478.

⁶¹⁶ *British Claims in the Spanish Zone of Morocco* (see footnote 44 above), p. 650. Cf. the *Aminoil* arbitration (footnote 496 above), where the interest awarded was compounded for a period without any reason being given. This accounted for more than half of the total final award (p. 613, para. 178 (5)).

⁶¹⁷ F. A. Mann, "Compound interest as an item of damage in international law", *Further Studies in International Law* (Oxford, Clarendon Press, 1990), p. 377, at p. 383.

⁶¹⁸ See, e.g., *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, case No. ARB/96/1, *ICSID Reports* (Cambridge, Grotius, 2002), vol. 5, final award (17 February 2000), paras. 103–105.

⁶¹⁹ Using the date of the breach as the starting date for calculation of the interest term is problematic as there may be difficulties in determining that date, and many legal systems require a demand for payment by the claimant before interest will run. The date of formal demand was taken as the relevant date in the *Russian Indemnity* case (see footnote 354 above), p. 442, by analogy from the general position in European legal systems. In any event, failure to make a timely claim for payment is relevant in deciding whether to allow interest.

is no uniform approach, internationally, to questions of quantification and assessment of amounts of interest payable.⁶²⁰ In practice, the circumstances of each case and the conduct of the parties strongly affect the outcome. There is wisdom in the Iran-United States Claims Tribunal's observation that such matters, if the parties cannot resolve them, must be left "to the exercise ... of the discretion accorded to [individual tribunals] in deciding each particular case".⁶²¹ On the other hand, the present unsettled state of practice makes a general provision on the calculation of interest useful. Accordingly, article 38 indicates that the date from which interest is to be calculated is the date when the principal sum should have been paid. Interest runs from that date until the date the obligation to pay is fulfilled. The interest rate and mode of calculation are to be set so as to achieve the result of providing full reparation for the injury suffered as a result of the internationally wrongful act.

(11) Where a sum for loss of profits is included as part of the compensation for the injury caused by a wrongful act, an award of interest will be inappropriate if the injured State would thereby obtain double recovery. A capital sum cannot be earning interest *and* notionally employed in earning profits at one and the same time. However, interest may be due on the profits which would have been earned but which have been withheld from the original owner.

(12) Article 38 does not deal with post-judgment or moratory interest. It is only concerned with interest that goes to make up the amount that a court or tribunal should award, i.e. compensatory interest. The power of a court or tribunal to award post-judgment interest is a matter of its procedure.

Article 39. Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

Commentary

(1) Article 39 deals with the situation where damage has been caused by an internationally wrongful act of a State, which is accordingly responsible for the damage in accordance with articles 1 and 28, but where the injured State, or the individual victim of the breach, has materially

⁶²⁰ See, e.g., J. Y. Gotanda, *Supplemental Damages in Private International Law* (The Hague, Kluwer, 1998), p. 13. It should be noted that a number of Islamic countries, influenced by the sharia, prohibit payment of interest under their own law or even under their constitution. However, they have developed alternatives to interest in the commercial and international context. For example, payment of interest is prohibited by the Iranian Constitution, articles 43 and 49, but the Guardian Council has held that this injunction does not apply to "foreign governments, institutions, companies and persons, who, according to their own principles of faith, do not consider [interest] as being prohibited" (*ibid.*, pp. 38–40, with references).

⁶²¹ *The Islamic Republic of Iran v. The United States of America* (Case No. A-19) (see footnote 606 above).

contributed to the damage by some wilful or negligent act or omission. Its focus is on situations which in national law systems are referred to as “contributory negligence”, “comparative fault”, “faute de la victime”, etc.⁶²²

(2) Article 39 recognizes that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation. This is consonant with the principle that full reparation is due for the injury—but nothing more—arising in consequence of the internationally wrongful act. It is also consistent with fairness as between the responsible State and the victim of the breach.

(3) In the *LaGrand* case, ICJ recognized that the conduct of the claimant State could be relevant in determining the form and amount of reparation. There, Germany had delayed in asserting that there had been a breach and in instituting proceedings. The Court noted that “Germany may be criticized for the manner in which these proceedings were filed and for their timing”, and stated that it would have taken this factor, among others, into account “had Germany’s submission included a claim for indemnification”.⁶²³

(4) The relevance of the injured State’s contribution to the damage in determining the appropriate reparation is widely recognized in the literature⁶²⁴ and in State practice.⁶²⁵ While questions of an injured State’s contribution to the damage arise most frequently in the context of compensation, the principle may also be relevant to other forms of reparation. For example, if a State-owned ship is unlawfully detained by another State and while under detention sustains damage attributable to the negligence of the captain, the responsible State may be required merely to return the ship in its damaged condition.

(5) Not every action or omission which contributes to the damage suffered is relevant for this purpose. Rather, article 39 allows to be taken into account only those actions or omissions which can be considered as wilful or negligent, i.e. which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights.⁶²⁶ While the notion of a negligent action or

omission is not qualified, e.g. by a requirement that the negligence should have reached the level of being “serious” or “gross”, the relevance of any negligence to reparation will depend upon the degree to which it has contributed to the damage as well as the other circumstances of the case.⁶²⁷ The phrase “account shall be taken” indicates that the article deals with factors that are capable of affecting the form or reducing the amount of reparation in an appropriate case.

(6) The wilful or negligent action or omission which contributes to the damage may be that of the injured State or “any person or entity in relation to whom reparation is sought”. This phrase is intended to cover not only the situation where a State claims on behalf of one of its nationals in the field of diplomatic protection, but also any other situation in which one State invokes the responsibility of another State in relation to conduct primarily affecting some third party. Under articles 42 and 48, a number of different situations can arise where this may be so. The underlying idea is that the position of the State seeking reparation should not be more favourable, so far as reparation in the interests of another is concerned, than it would be if the person or entity in relation to whom reparation is sought were to bring a claim individually.

CHAPTER III

SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

Commentary

(1) Chapter III of Part Two is entitled “Serious breaches of obligations under peremptory norms of general international law”. It sets out certain consequences of specific types of breaches of international law, identified by reference to two criteria: first, they involve breaches of obligations under peremptory norms of general international law; and secondly, the breaches concerned are in themselves serious, having regard to their scale or character. Chapter III contains two articles, the first defining its scope of application (art. 40), the second spelling out the legal consequences entailed by the breaches coming within the scope of the chapter (art. 41).

(2) Whether a qualitative distinction should be recognized between different breaches of international law has been the subject of a major debate.⁶²⁸ The issue was underscored by ICJ in the *Barcelona Traction* case, when it said that:

⁶²⁷ It is possible to envisage situations where the injury in question is entirely attributable to the conduct of the victim and not at all to that of the “responsible” State. Such situations are covered by the general requirement of proximate cause referred to in article 31, rather than by article 39. On questions of mitigation of damage, see paragraph (11) of the commentary to article 31.

⁶²⁸ For full bibliographies, see M. Spinedi, “Crimes of State: bibliography”, *International Crimes of State*, J. H. H. Weiler, A. Cassese and M. Spinedi, eds. (Berlin, De Gruyter, 1989), pp. 339–353; and N. H. B. Jørgensen, *The Responsibility of States for International Crimes* (Oxford University Press, 2000) pp. 299–314.

⁶²² See C. von Bar, *op. cit.* (footnote 315 above), pp. 544–569.

⁶²³ *LaGrand, Judgment* (see footnote 119 above), at p. 487, para. 57, and p. 508, para. 116. For the relevance of delay in terms of loss of the right to invoke responsibility, see article 45, subparagraph (b), and commentary.

⁶²⁴ See, e.g., B. Graefrath, “Responsibility and damages caused: relationship between responsibility and damages” (footnote 454 above) and B. Bollecker-Stern, *op. cit.* (footnote 454 above), pp. 265–300.

⁶²⁵ In the *Delagoa Bay Railway* case (see footnote 561 above), the arbitrators noted that: “[a]ll the circumstances that can be adduced against the concessionaire company and for the Portuguese Government mitigate the latter’s liability and warrant ... a reduction in reparation.” In *S.S. “Wimbledon”* (see footnote 34 above), p. 31, a question arose as to whether there had been any contribution to the injury suffered as a result of the ship harbouring at Kiel for some time, following refusal of passage through the Kiel Canal, before taking an alternative course. PCIJ implicitly acknowledged that the captain’s conduct could affect the amount of compensation payable, although it held that the captain had acted reasonably in the circumstances. For other examples, see Gray, *op. cit.* (footnote 432 above), p. 23.

⁶²⁶ This terminology is drawn from article VI, paragraph 1, of the Convention on International Liability for Damage Caused by Space Objects.

an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.⁶²⁹

The Court was there concerned to contrast the position of an injured State in the context of diplomatic protection with the position of all States in respect of the breach of an obligation towards the international community as a whole. Although no such obligation was at stake in that case, the Court's statement clearly indicates that for the purposes of State responsibility certain obligations are owed to the international community as a whole, and that by reason of "the importance of the rights involved" all States have a legal interest in their protection.

(3) On a number of subsequent occasions the Court has taken the opportunity to affirm the notion of obligations to the international community as a whole, although it has been cautious in applying it. In the *East Timor* case, the Court said that "Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable".⁶³⁰ At the preliminary objections stage of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, it stated that "the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*".⁶³¹ This finding contributed to its conclusion that its temporal jurisdiction over the claim was not limited to the time after which the parties became bound by the Convention.

(4) A closely related development is the recognition of the concept of peremptory norms of international law in articles 53 and 64 of the 1969 Vienna Convention. These provisions recognize the existence of substantive norms of a fundamental character, such that no derogation from them is permitted even by treaty.⁶³²

(5) From the first it was recognized that these developments had implications for the secondary rules of State responsibility which would need to be reflected in some way in the articles. Initially, it was thought this could be done by reference to a category of "international crimes of State", which would be contrasted with all other cases of internationally wrongful acts ("international delicts").⁶³³ There has been, however, no development of penal consequences for States of breaches of these fundamental norms. For example, the award of punitive damages is not recognized in international law even in relation to serious breaches of obligations arising under peremptory norms. In accordance with article 34, the function

of damages is essentially compensatory.⁶³⁴ Overall, it remains the case, as the International Military Tribunal said in 1946, that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".⁶³⁵

(6) In line with this approach, despite the trial and conviction by the Nuremberg and Tokyo Military Tribunals of individual government officials for criminal acts committed in their official capacity, neither Germany nor Japan were treated as "criminal" by the instruments creating these tribunals.⁶³⁶ As to more recent international practice, a similar approach underlies the establishment of the *ad hoc* tribunals for Yugoslavia and Rwanda by the Security Council. Both tribunals are concerned only with the prosecution of individuals.⁶³⁷ In its decision relating to a *subpoena duces tecum* in the *Blaskić* case, the Appeals Chamber of the International Tribunal for the Former Yugoslavia stated that "[u]nder present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems".⁶³⁸ The Rome Statute of the International Criminal Court likewise establishes jurisdiction over the "most serious crimes of concern to the international community as a whole" (preamble), but limits this jurisdiction to "natural persons" (art. 25, para. 1). The same article specifies that no provision of the Statute "relating to individual criminal responsibility shall affect the responsibility of States under international law" (para. 4).⁶³⁹

(7) Accordingly, the present articles do not recognize the existence of any distinction between State "crimes" and "delicts" for the purposes of Part One. On the other hand, it is necessary for the articles to reflect that there are certain *consequences* flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of State responsibility. Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which ICJ has given of

⁶³⁴ See paragraph (4) of the commentary to article 36.

⁶³⁵ International Military Tribunal (Nuremberg), judgement of 1 October 1946, reprinted in AJIL (see footnote 321 above), p. 221.

⁶³⁶ This despite the fact that the London Charter of 1945 specifically provided for the condemnation of a "group or organization" as "criminal"; see Charter of the International Military Tribunal, Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, annex, United Nations, Treaty Series, vol. 82, No. 251, p. 279, arts. 9 and 10.

⁶³⁷ See, respectively, articles 1 and 6 of the statute of the International Tribunal for the Former Yugoslavia; and articles 1 and 7 of the statute of the International Tribunal for Rwanda (footnote 257 above).

⁶³⁸ *Prosecutor v. Blaskić*, International Tribunal for the Former Yugoslavia, Case IT-95-14-AR 108 bis, ILR, vol. 110, p. 688, at p. 698, para. 25 (1997). Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (footnote 54 above), in which neither of the parties treated the proceedings as being criminal in character. See also paragraph (6) of the commentary to article 12.

⁶³⁹ See also article 10: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."

⁶²⁹ *Barcelona Traction* (see footnote 25 above), p. 32, para. 33. See M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford, Clarendon Press, 1997).

⁶³⁰ See footnote 54 above.

⁶³¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (see footnote 54 above), p. 616, para. 31.

⁶³² See article 26 and commentary.

⁶³³ See *Yearbook ... 1976*, vol. II (Part Two), pp. 95–122, especially paras. (6)–(34). See also paragraph (5) of the commentary to article 12.

obligations towards the international community as a whole⁶⁴⁰ all concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise the examples of peremptory norms given by the Commission in its commentary to what became article 53 of the 1969 Vienna Convention⁶⁴¹ involve obligations to the international community as a whole. But there is at least a difference in emphasis. While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance—i.e. in terms of the present articles, in being entitled to invoke the responsibility of any State in breach. Consistently with the difference in their focus, it is appropriate to reflect the consequences of the two concepts in two distinct ways. First, serious breaches of obligations arising under peremptory norms of general international law can attract additional consequences, not only for the responsible State but for all other States. Secondly, all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole. The first of these propositions is the concern of the present chapter; the second is dealt with in article 48.

Article 40. Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Commentary

(1) Article 40 serves to define the scope of the breaches covered by the chapter. It establishes two criteria in order to distinguish “serious breaches of obligations under peremptory norms of general international law” from other types of breaches. The first relates to the character of the obligation breached, which must derive from a peremptory norm of general international law. The second qualifies

⁶⁴⁰ According to ICJ, obligations *erga omnes* “derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”: *Barcelona Traction* (see footnote 25 above), at p. 32, para. 34. See also *East Timor* (footnote 54 above); *Legality of the Threat or Use of Nuclear Weapons* (*ibid.*); and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (*ibid.*).

⁶⁴¹ The Commission gave the following examples of treaties which would violate the article due to conflict with a peremptory norm of general international law, or a rule of *jus cogens*: “(a) a treaty contemplating an unlawful use of force contrary to the principles of the Charter, (b) a treaty contemplating the performance of any other act criminal under international law, and (c) a treaty contemplating or conniving at the commission of such acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate ... treaties violating human rights, the equality of States or the principle of self-determination were mentioned as other possible examples”, *Yearbook ... 1966*, vol. II, p. 248.

the intensity of the breach, which must have been serious in nature. Chapter III only applies to those violations of international law that fulfil both criteria.

(2) The first criterion relates to the character of the obligation breached. In order to give rise to the application of this chapter, a breach must concern an obligation arising under a peremptory norm of general international law. In accordance with article 53 of the 1969 Vienna Convention, a peremptory norm of general international law is one which is:

accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine.⁶⁴²

(3) It is not appropriate to set out examples of the peremptory norms referred to in the text of article 40 itself, any more than it was in the text of article 53 of the 1969 Vienna Convention. The obligations referred to in article 40 arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.

(4) Among these prohibitions, it is generally agreed that the prohibition of aggression is to be regarded as peremptory. This is supported, for example, by the Commission’s commentary to what was to become article 53,⁶⁴³ uncontradicted statements by Governments in the course of the Vienna Conference on the Law of Treaties,⁶⁴⁴ the submissions of both parties in the *Military and Paramilitary Activities in and against Nicaragua* case and the Court’s own position in that case.⁶⁴⁵ There also seems to be widespread agreement with other examples listed in the Commission’s commentary to article 53: viz. the prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid. These practices have been prohibited in widely ratified international treaties and conventions admitting of no exception. There was general agreement among Governments as to the peremptory character of these prohibitions at the Vienna Conference. As to the peremptory character of the prohibition against

⁶⁴² For further discussion of the requirements for identification of a norm as peremptory, see paragraph (5) of the commentary to article 26, with selected references to the case law and literature.

⁶⁴³ *Yearbook ... 1966*, vol. II, pp. 247–249.

⁶⁴⁴ In the course of the conference, a number of Governments characterized as peremptory the prohibitions against aggression and the illegal use of force: see *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March to 24 May 1968, summary records of the plenary meeting and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), 52nd meeting, paras. 3, 31 and 43; 53rd meeting, paras. 4, 9, 15, 16, 35, 48, 59 and 69; 54th meeting, paras. 9, 41, 46 and 55; 55th meeting, paras. 31 and 42; and 56th meeting, paras. 6, 20, 29 and 51.

⁶⁴⁵ *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), pp. 100–101, para. 190; see also the separate opinion of magistrate Nagendra Singh (president), p. 153.

genocide, this is supported by a number of decisions by national and international courts.⁶⁴⁶

(5) Although not specifically listed in the Commission's commentary to article 53 of the 1969 Vienna Convention, the peremptory character of certain other norms seems also to be generally accepted. This applies to the prohibition against torture as defined in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The peremptory character of this prohibition has been confirmed by decisions of international and national bodies.⁶⁴⁷ In the light of the description by ICJ of the basic rules of international humanitarian law applicable in armed conflict as "intransgressible" in character, it would also seem justified to treat these as peremptory.⁶⁴⁸ Finally, the obligation to respect the right of self-determination deserves to be mentioned. As the Court noted in the *East Timor* case, "[t]he principle of self-determination ... is one of the essential principles of contemporary international law", which gives rise to an obligation to the international community as a whole to permit and respect its exercise.⁶⁴⁹

(6) It should be stressed that the examples given above may not be exhaustive. In addition, article 64 of the 1969 Vienna Convention contemplates that new peremptory norms of general international law may come into existence through the processes of acceptance and recognition by the international community of States as a whole, as referred to in article 53. The examples given here are thus without prejudice to existing or developing rules of international law which fulfil the criteria for peremptory norms under article 53.

(7) Apart from its limited scope in terms of the comparatively small number of norms which qualify as peremptory, article 40 applies a further limitation for the purposes of the chapter, viz. that the breach should itself have been "serious". A "serious" breach is defined in paragraph 2 as one which involves "a gross or systematic failure by the responsible State to fulfil the obligation" in question. The word "serious" signifies that a certain order of magnitude of violation is necessary in order not to trivialize the breach and it is not intended to suggest that any violation of these obligations is not serious or is somehow excusable. But relatively less serious cases of

breach of peremptory norms can be envisaged, and it is necessary to limit the scope of this chapter to the more serious or systematic breaches. Some such limitation is supported by State practice. For example, when reacting against breaches of international law, States have often stressed their systematic, gross or egregious nature. Similarly, international complaint procedures, for example in the field of human rights, attach different consequences to systematic breaches, e.g. in terms of the non-applicability of the rule of exhaustion of local remedies.⁶⁵⁰

(8) To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term "gross" refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims. It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.⁶⁵¹

(9) Article 40 does not lay down any procedure for determining whether or not a serious breach has been committed. It is not the function of the articles to establish new institutional procedures for dealing with individual cases, whether they arise under chapter III of Part Two or otherwise. Moreover, the serious breaches dealt with in this chapter are likely to be addressed by the competent international organizations, including the Security Council and the General Assembly. In the case of aggression, the Security Council is given a specific role by the Charter of the United Nations.

Article 41. Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

⁶⁵⁰ See the *Ireland v. the United Kingdom* case (footnote 236 above), para. 159; cf., e.g., the procedure established under Economic and Social Council resolution 1503 (XLVIII), which requires a "consistent pattern of gross and reliably attested violations of human rights".

⁶⁵¹ At its twenty-second session, the Commission proposed the following examples as cases denominated as "international crimes":

"(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

"(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

"(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

"(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas."

Yearbook ... 1976, vol. II (Part Two), pp. 95–96.

⁶⁴⁶ See, for example, ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures* (footnote 412 above), pp. 439–440; *Counter-Claims* (footnote 413 above), p. 243; and the District Court of Jerusalem in the *Attorney-General of the Government of Israel v. Adolf Eichmann* case, ILR, vol. 36, p. 5 (1961).

⁶⁴⁷ Cf. the United States Court of Appeals, Ninth Circuit, in *Siderman de Blake and Others v. The Republic of Argentina and Others*, ILR, vol. 103, p. 455, at p. 471 (1992); the United Kingdom Court of Appeal in *Al Adsani v. Government of Kuwait and Others*, ILR, vol. 107, p. 536, at pp. 540–541 (1996); and the United Kingdom House of Lords in *Pinochet* (footnote 415 above), pp. 841 and 881. Cf. the United States Court of Appeals, Second Circuit, in *Filartiga v. Pena-Irala*, ILR, vol. 77, p. 169, at pp. 177–179 (1980).

⁶⁴⁸ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 54 above), p. 257, para. 79.

⁶⁴⁹ *East Timor* (*ibid.*). See Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), annex, fifth principle.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

Commentary

(1) Article 41 sets out the particular consequences of breaches of the kind and gravity referred to in article 40. It consists of three paragraphs. The first two prescribe special legal obligations of States faced with the commission of “serious breaches” in the sense of article 40, the third takes the form of a saving clause.

(2) Pursuant to *paragraph 1* of article 41, States are under a positive duty to cooperate in order to bring to an end serious breaches in the sense of article 40. Because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation.

(3) Neither does paragraph 1 prescribe what measures States should take in order to bring to an end serious breaches in the sense of article 40. Such cooperation must be through lawful means, the choice of which will depend on the circumstances of the given situation. It is, however, made clear that the obligation to cooperate applies to States whether or not they are individually affected by the serious breach. What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches. It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law. But in fact such cooperation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law and it is often the only way of providing an effective remedy. Paragraph 1 seeks to strengthen existing mechanisms of cooperation, on the basis that all States are called upon to make an appropriate response to the serious breaches referred to in article 40.

(4) Pursuant to *paragraph 2* of article 41, States are under a duty of abstention, which comprises two obligations, first, not to recognize as lawful situations created by serious breaches in the sense of article 40 and, secondly, not to render aid or assistance in maintaining that situation.

(5) The first of these two obligations refers to the obligation of collective non-recognition by the international community as a whole of the legality of situations resulting directly from serious breaches in the sense of

article 40.⁶⁵² The obligation applies to “situations” created by these breaches, such as, for example, attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples. It not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition.

(6) The existence of an obligation of non-recognition in response to serious breaches of obligations arising under peremptory norms already finds support in international practice and in decisions of ICJ. The principle that territorial acquisitions brought about by the use of force are not valid and must not be recognized found a clear expression during the Manchurian crisis of 1931–1932, when the Secretary of State, Henry Stimson, declared that the United States of America—joined by a large majority of members of the League of Nations—would not:

admit the legality of any situation de facto nor ... recognize any treaty or agreement entered into between those Governments, or agents thereof, which may impair the ... sovereignty, the independence or the territorial and administrative integrity of the Republic of China, ... [nor] recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928.⁶⁵³

The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations affirms this principle by stating unequivocally that States shall not recognize as legal any acquisition of territory brought about by the use of force.⁶⁵⁴ As ICJ held in *Military and Paramilitary Activities in and against Nicaragua*, the unanimous consent of States to this declaration “may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves”.⁶⁵⁵

(7) An example of the practice of non-recognition of acts in breach of peremptory norms is provided by the reaction of the Security Council to the Iraqi invasion of Kuwait in 1990. Following the Iraqi declaration of a “comprehensive and eternal merger” with Kuwait, the Security Council, in resolution 662 (1990) of 9 August 1990, decided that the annexation had “no legal validity, and is considered null and void”, and called upon all States, international organizations and specialized agencies not to recognize that annexation and to refrain from any action or dealing that might be interpreted as a recognition of it, whether direct or indirect. In fact, no State recognized the

⁶⁵² This has been described as “an essential legal weapon in the fight against grave breaches of the basic rules of international law” (C. Tomuschat, “International crimes by States: an endangered species?”, *International Law: Theory and Practice — Essays in Honour of Eric Suy*, K. Wellens, ed. (The Hague, Martinus Nijhoff, 1998), p. 253, at p. 259.

⁶⁵³ Secretary of State’s note to the Chinese and Japanese Governments, in Hackworth, *Digest of International Law* (Washington, D.C., United States Government Printing Office, 1940), vol. I, p. 334; endorsed by Assembly resolutions of 11 March 1932, *League of Nations Official Journal*, March 1932, Special Supplement No. 101, p. 87. For a review of earlier practice relating to collective non-recognition, see J. Dugard, *Recognition and the United Nations* (Cambridge, Grotius, 1987), pp. 24–27.

⁶⁵⁴ General Assembly resolution 2625 (XXV), annex, first principle.

⁶⁵⁵ *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), at p. 100, para. 188.

legality of the purported annexation, the effects of which were subsequently reversed.

(8) As regards the denial by a State of the right of self-determination of peoples, the advisory opinion of ICJ in the *Namibia* case is similarly clear in calling for a non-recognition of the situation.⁶⁵⁶ The same obligations are reflected in the resolutions of the Security Council and General Assembly concerning the situation in Rhodesia⁶⁵⁷ and the Bantustans in South Africa.⁶⁵⁸ These examples reflect the principle that where a serious breach in the sense of article 40 has resulted in a situation that might otherwise call for recognition, this has nonetheless to be withheld. Collective non-recognition would seem to be a prerequisite for any concerted community response against such breaches and marks the minimum necessary response by States to the serious breaches referred to in article 40.

(9) Under article 41, paragraph 2, no State shall recognize the situation created by the serious breach as lawful. This obligation applies to all States, including the responsible State. There have been cases where the responsible State has sought to consolidate the situation it has created by its own "recognition". Evidently, the responsible State is under an obligation not to recognize or sustain the unlawful situation arising from the breach. Similar considerations apply even to the injured State: since the breach by definition concerns the international community as a whole, waiver or recognition induced from the injured State by the responsible State cannot preclude the international community interest in ensuring a just and appropriate settlement. These conclusions are consistent with article 30 on cessation and are reinforced by the peremptory character of the norms in question.⁶⁵⁹

(10) The consequences of the obligation of non-recognition are, however, not unqualified. In the *Namibia* advisory opinion the Court, despite holding that the illegality of the situation was opposable *erga omnes* and could not be recognized as lawful even by States not members of the United Nations, said that:

the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.⁶⁶⁰

⁶⁵⁶ *Namibia* case (see footnote 176 above), where the Court held that "the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law" (p. 56, para. 126).

⁶⁵⁷ Cf. Security Council resolution 216 (1965) of 12 November 1965.

⁶⁵⁸ See, e.g., General Assembly resolution 31/6 A of 26 October 1976, endorsed by the Security Council in its resolution 402 (1976) of 22 December 1976; Assembly resolutions 32/105 N of 14 December 1977 and 34/93 G of 12 December 1979; see also the statements of 21 September 1979 and 15 December 1981 issued by the respective presidents of the Security Council in reaction to the "creation" of Venda and Ciskei (S/13549 and S/14794).

⁶⁵⁹ See also paragraph (7) of the commentary to article 20 and paragraph (4) of the commentary to article 45.

⁶⁶⁰ *Namibia* case (see footnote 176 above), p. 56, para. 125.

Both the principle of non-recognition and this qualification to it have been applied, for example, by the European Court of Human Rights.⁶⁶¹

(11) The second obligation contained in paragraph 2 prohibits States from rendering aid or assistance in maintaining the situation created by a serious breach in the sense of article 40. This goes beyond the provisions dealing with aid or assistance in the commission of an internationally wrongful act, which are covered by article 16. It deals with conduct "after the fact" which assists the responsible State in maintaining a situation "opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law".⁶⁶² It extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach, and it applies whether or not the breach itself is a continuing one. As to the elements of "aid or assistance", article 41 is to be read in connection with article 16. In particular, the concept of aid or assistance in article 16 presupposes that the State has "knowledge of the circumstances of the internationally wrongful act". There is no need to mention such a requirement in article 41, paragraph 2, as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State.

(12) In some respects, the prohibition contained in paragraph 2 may be seen as a logical extension of the duty of non-recognition. However, it has a separate scope of application insofar as actions are concerned which would not imply recognition of the situation created by serious breaches in the sense of article 40. This separate existence is confirmed, for example, in the resolutions of the Security Council prohibiting any aid or assistance in maintaining the illegal apartheid regime in South Africa or Portuguese colonial rule.⁶⁶³ Just as in the case of the duty of non-recognition, these resolutions would seem to express a general idea applicable to all situations created by serious breaches in the sense of article 40.

(13) Pursuant to *paragraph 3*, article 41 is without prejudice to the other consequences elaborated in Part Two and to possible further consequences that a serious breach in the sense of article 40 may entail. The purpose of this paragraph is twofold. First, it makes it clear that a serious breach in the sense of article 40 entails the legal consequences stipulated for all breaches in chapters I and II of Part Two. Consequently, a serious breach in the sense of article 40 gives rise to an obligation, on behalf of the responsible State, to cease the wrongful act, to continue performance and, if appropriate, to give guarantees and assurances of non-repetition. By the same token, it entails a duty to make reparation in conformity with the rules set out in chapter II of this Part. The incidence of these obligations will no doubt be affected by the gravity of the breach in question, but this is allowed for in the actual language of the relevant articles.

⁶⁶¹ *Loizidou, Merits* (see footnote 160 above), p. 2216; *Cyprus v. Turkey* (see footnote 247 above), paras. 89–98.

⁶⁶² *Namibia* case (see footnote 176 above), p. 56, para. 126.

⁶⁶³ See, e.g., Security Council resolutions 218 (1965) of 23 November 1965 on the Portuguese colonies, and 418 (1977) of 4 November 1977 and 569 (1985) of 26 July 1985 on South Africa.

(14) Secondly, paragraph 3 allows for such further consequences of a serious breach as may be provided for by international law. This may be done by the individual primary rule, as in the case of the prohibition of aggression. Paragraph 3 accordingly allows that international law may recognize additional legal consequences flowing from the commission of a serious breach in the sense of article 40. The fact that such further consequences are not expressly referred to in chapter III does not prejudice their recognition in present-day international law, or their further development. In addition, paragraph 3 reflects the conviction that the legal regime of serious breaches is itself in a state of development. By setting out certain basic legal consequences of serious breaches in the sense of article 40, article 41 does not intend to preclude the future development of a more elaborate regime of consequences entailed by such breaches.

PART THREE

THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Part Three deals with the implementation of State responsibility, i.e. with giving effect to the obligations of cessation and reparation which arise for a responsible State under Part Two by virtue of its commission of an internationally wrongful act. Although State responsibility arises under international law independently of its invocation by another State, it is still necessary to specify what other States faced with a breach of an international obligation may do, what action they may take in order to secure the performance of the obligations of cessation and reparation on the part of the responsible State. This, sometimes referred to as the *mise-en-oeuvre* of State responsibility, is the subject matter of Part Three. Part Three consists of two chapters. Chapter I deals with the invocation of State responsibility by other States and with certain associated questions. Chapter II deals with countermeasures taken in order to induce the responsible State to cease the conduct in question and to provide reparation.

CHAPTER I

INVOCATION OF THE RESPONSIBILITY OF A STATE

Commentary

(1) Part One of the articles identifies the internationally wrongful act of a State generally in terms of the breach of any international obligation of that State. Part Two defines the consequences of internationally wrongful acts in the field of responsibility as obligations of the responsible State, not as rights of any other State, person or entity. Part Three is concerned with the implementation of State responsibility, i.e. with the entitlement of other States to invoke the international responsibility of the responsible

State and with certain modalities of such invocation. The rights that other persons or entities may have arising from a breach of an international obligation are preserved by article 33, paragraph 2.

(2) Central to the invocation of responsibility is the concept of the injured State. This is the State whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act. This concept is introduced in article 42 and various consequences are drawn from it in other articles of this chapter. In keeping with the broad range of international obligations covered by the articles, it is necessary to recognize that a broader range of States may have a legal interest in invoking responsibility and ensuring compliance with the obligation in question. Indeed, in certain situations, all States may have such an interest, even though none of them is individually or specially affected by the breach.⁶⁶⁴ This possibility is recognized in article 48. Articles 42 and 48 are couched in terms of the entitlement of States to invoke the responsibility of another State. They seek to avoid problems arising from the use of possibly misleading terms such as “direct” versus “indirect” injury or “objective” versus “subjective” rights.

(3) Although article 42 is drafted in the singular (“an injured State”), more than one State may be injured by an internationally wrongful act and be entitled to invoke responsibility as an injured State. This is made clear by article 46. Nor are articles 42 and 48 mutually exclusive. Situations may well arise in which one State is “injured” in the sense of article 42, and other States are entitled to invoke responsibility under article 48.

(4) Chapter I also deals with a number of related questions: the requirement of notice if a State wishes to invoke the responsibility of another (art. 43), certain aspects of the admissibility of claims (art. 44), loss of the right to invoke responsibility (art. 45), and cases where the responsibility of more than one State may be invoked in relation to the same internationally wrongful act (art. 47).

(5) Reference must also be made to article 55, which makes clear the residual character of the articles. In addition to giving rise to international obligations for States, special rules may also determine which other State or States are entitled to invoke the international responsibility arising from their breach, and what remedies they may seek. This was true, for example, of article 396 of the Treaty of Versailles, which was the subject of the decision in the *S.S. “Wimbledon”* case.⁶⁶⁵ It is also true of article 33 of the European Convention on Human Rights. It will be a matter of interpretation in each case whether such provisions are intended to be exclusive, i.e. to apply as a *lex specialis*.

⁶⁶⁴ Cf. the statement by ICJ that “all States can be held to have a legal interest” as concerns breaches of obligations *erga omnes*, *Barcelona Traction* (footnote 25 above), p. 32, para. 33, cited in paragraph (2) of the commentary to chapter III of Part Two.

⁶⁶⁵ Four States there invoked the responsibility of Germany, at least one of which, Japan, had no specific interest in the voyage of the *S.S. “Wimbledon”* (see footnote 34 above).

*Article 42. Invocation of responsibility
by an injured State*

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) that State individually; or**
- (b) a group of States including that State, or the international community as a whole, and the breach of the obligation:**
 - (i) specially affects that State; or**
 - (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.**

Commentary

(1) Article 42 provides that the implementation of State responsibility is in the first place an entitlement of the “injured State”. It defines this term in a relatively narrow way, drawing a distinction between injury to an individual State or possibly a small number of States and the legal interests of several or all States in certain obligations established in the collective interest. The latter are dealt with in article 48.

(2) This chapter is expressed in terms of the invocation by a State of the responsibility of another State. For this purpose, invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal. A State does not invoke the responsibility of another State merely because it criticizes that State for a breach and calls for observance of the obligation, or even reserves its rights or protests. For the purpose of these articles, protest as such is not an invocation of responsibility; it has a variety of forms and purposes and is not limited to cases involving State responsibility. There is in general no requirement that a State which wishes to protest against a breach of international law by another State or remind it of its international responsibilities in respect of a treaty or other obligation by which they are both bound should establish any specific title or interest to do so. Such informal diplomatic contacts do not amount to the invocation of responsibility unless and until they involve specific claims by the State concerned, such as for compensation for a breach affecting it, or specific action such as the filing of an application before a competent international tribunal,⁶⁶⁶ or even the taking of countermeasures. In order to take such steps, i.e. to invoke responsibility in the sense of the articles, some more specific entitlement is needed. In particular, for a State to invoke responsibility on its own account it should have a specific right to do so, e.g. a right of action specifically conferred

by a treaty,⁶⁶⁷ or it must be considered an injured State. The purpose of article 42 is to define this latter category.

(3) A State which is injured in the sense of article 42 is entitled to resort to all means of redress contemplated in the articles. It can invoke the appropriate responsibility pursuant to Part Two. It may also—as is clear from the opening phrase of article 49—resort to countermeasures in accordance with the rules laid down in chapter II of this Part. The situation of an injured State should be distinguished from that of any other State which may be entitled to invoke responsibility, e.g. under article 48 which deals with the entitlement to invoke responsibility in some shared general interest. This distinction is clarified by the opening phrase of article 42, “A State is entitled as an injured State to invoke the responsibility”.

(4) The definition in article 42 is closely modelled on article 60 of the 1969 Vienna Convention, although the scope and purpose of the two provisions are different. Article 42 is concerned with any breach of an international obligation of whatever character, whereas article 60 is concerned with breach of treaties. Moreover, article 60 is concerned exclusively with the right of a State party to a treaty to invoke a material breach of that treaty by another party as grounds for its suspension or termination. It is not concerned with the question of responsibility for breach of the treaty.⁶⁶⁸ This is why article 60 is restricted to “material” breaches of treaties. Only a material breach justifies termination or suspension of the treaty, whereas in the context of State responsibility any breach of a treaty gives rise to responsibility irrespective of its gravity. Despite these differences, the analogy with article 60 is justified. Article 60 seeks to identify the States parties to a treaty which are entitled to respond individually and in their own right to a material breach by terminating or suspending it. In the case of a bilateral treaty, the right can only be that of the other State party, but in the case of a multilateral treaty article 60, paragraph 2, does not allow every other State to terminate or suspend the treaty for material breach. The other State must be specially affected by the breach, or at least individually affected in that the breach necessarily undermines or destroys the basis for its own further performance of the treaty.

(5) In parallel with the cases envisaged in article 60 of the 1969 Vienna Convention, three cases are identified in article 42. In the first case, in order to invoke the responsibility of another State as an injured State, a State must have an individual right to the performance of an obligation, in the way that a State party to a bilateral treaty has *vis-à-vis* the other State party (subparagraph (a)). Secondly, a State may be specially affected by the breach of an obligation to which it is a party, even though it cannot be said that the obligation is owed to it individually (subparagraph (b) (i)). Thirdly, it may be the case that performance of the obligation by the responsible State is a necessary condition of its performance by all the other States (subparagraph (b) (ii)); this is the so-called “integral” or “inter-

⁶⁶⁶ An analogous distinction is drawn by article 27, paragraph 2, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which distinguishes between the bringing of an international claim in the field of diplomatic protection and “informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute”.

⁶⁶⁷ In relation to article 42, such a treaty right could be considered a *lex specialis*: see article 55 and commentary.

⁶⁶⁸ Cf. the 1969 Vienna Convention, art. 73.

dependent” obligation.⁶⁶⁹ In each of these cases, the possible suspension or termination of the obligation or of its performance by the injured State may be of little value to it as a remedy. Its primary interest may be in the restoration of the legal relationship by cessation and reparation.

(6) Pursuant to *subparagraph* (a) of article 42, a State is “injured” if the obligation breached was owed to it individually. The expression “individually” indicates that in the circumstances, performance of the obligation was owed to that State. This will necessarily be true of an obligation arising under a bilateral treaty between the two States parties to it, but it will also be true in other cases, e.g. of a unilateral commitment made by one State to another. It may be the case under a rule of general international law: thus, for example, rules concerning the non-navigational uses of an international river which may give rise to individual obligations as between one riparian State and another. Or it may be true under a multilateral treaty where particular performance is incumbent under the treaty as between one State party and another. For example, the obligation of the receiving State under article 22 of the Vienna Convention on Diplomatic Relations to protect the premises of a mission is owed to the sending State. Such cases are to be contrasted with situations where performance of the obligation is owed generally to the parties to the treaty at the same time and is not differentiated or individualized. It will be a matter for the interpretation and application of the primary rule to determine into which of the categories an obligation comes. The following discussion is illustrative only.

(7) An obvious example of cases coming within the scope of *subparagraph* (a) is a bilateral treaty relationship. If one State violates an obligation the performance of which is owed specifically to another State, the latter is an “injured State” in the sense of article 42. Other examples include binding unilateral acts by which one State assumes an obligation *vis-à-vis* another State; or the case of a treaty establishing obligations owed to a third State not party to the treaty.⁶⁷⁰ If it is established that the beneficiaries of the promise or the stipulation in favour of a third State were intended to acquire actual rights to performance of the obligation in question, they will be injured by its breach. Another example is a binding judgement of an international court or tribunal imposing obligations on one State party to the litigation for the benefit of the other party.⁶⁷¹

(8) In addition, *subparagraph* (a) is intended to cover cases where the performance of an obligation under a multilateral treaty or customary international law is owed to one particular State. The scope of *subparagraph* (a) in this respect is different from that of article 60, paragraph 1, of the 1969 Vienna Convention, which relies on the formal criterion of bilateral as compared with multilat-

eral treaties. But although a multilateral treaty will characteristically establish a framework of rules applicable to all the States parties, in certain cases its performance in a given situation involves a relationship of a bilateral character between two parties. Multilateral treaties of this kind have often been referred to as giving rise to “bundles” of bilateral relations”.⁶⁷²

(9) The identification of one particular State as injured by a breach of an obligation under the Vienna Convention on Diplomatic Relations does not exclude that all States parties may have an interest of a general character in compliance with international law and in the continuation of international institutions and arrangements which have been built up over the years. In the *United States Diplomatic and Consular Staff in Tehran* case, after referring to the “fundamentally unlawful character” of the Islamic Republic of Iran’s conduct in participating in the detention of the diplomatic and consular personnel, the Court drew:

the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.⁶⁷³

(10) Although discussion of multilateral obligations has generally focused on those arising under multilateral treaties, similar considerations apply to obligations under rules of customary international law. For example, the rules of general international law governing the diplomatic or consular relations between States establish bilateral relations between particular receiving and sending States, and violations of these obligations by a particular receiving State injure the sending State to which performance was owed in the specific case.

(11) *Subparagraph* (b) deals with injury arising from violations of collective obligations, i.e. obligations that apply between more than two States and whose performance in the given case is not owed to one State individually, but to a group of States or even the international community as a whole. The violation of these obligations only injures any particular State if additional requirements are met. In using the expression “group of States”, article 42, *subparagraph* (b), does not imply that the group has any separate existence or that it has separate legal personality. Rather, the term is intended to refer to a group of States, consisting of all or a considerable number of States in the world or in a given region, which have combined to achieve some collective purpose and which may be

⁶⁶⁹ The notion of “integral” obligations was developed by Fitzmaurice as Special Rapporteur on the Law of Treaties: see *Yearbook ... 1957*, vol. II, p. 54. The term has sometimes given rise to confusion, being used to refer to human rights or environmental obligations which are not owed on an “all or nothing” basis. The term “interdependent obligations” may be more appropriate.

⁶⁷⁰ Cf. the 1969 Vienna Convention, art. 36.

⁶⁷¹ See, e.g., Article 59 of the Statute of ICJ.

⁶⁷² See, e.g., K. Sachariew, “State responsibility for multilateral treaty violations: identifying the ‘injured State’ and its legal status”, *Netherlands International Law Review*, vol. 35, No. 3 (1988), p. 273, at pp. 277–278; B. Simma, “Bilateralism and community interest in the law of State responsibility”, *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Y. Dinstein, ed. (Dordrecht, Martinus Nijhoff, 1989), p. 821, at p. 823; C. Annacker, “The legal régime of *erga omnes* obligations in international law”, *Austrian Journal of Public and International Law*, vol. 46, No. 2 (1994), p. 131, at p. 136; and D. N. Hutchinson, “Solidarity and breaches of multilateral treaties”, *BYBIL*, 1988, vol. 59, p. 151, at pp. 154–155.

⁶⁷³ *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 41–43, paras. 89 and 92.

considered for that purpose as making up a community of States of a functional character.

(12) *Subparagraph (b) (i)* stipulates that a State is injured if it is “specially affected” by the violation of a collective obligation. The term “specially affected” is taken from article 60, paragraph (2) (b), of the 1969 Vienna Convention. Even in cases where the legal effects of an internationally wrongful act extend by implication to the whole group of States bound by the obligation or to the international community as a whole, the wrongful act may have particular adverse effects on one State or on a small number of States. For example a case of pollution of the high seas in breach of article 194 of the United Nations Convention on the Law of the Sea may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed. In that case, independently of any general interest of the States parties to the Convention in the preservation of the marine environment, those coastal States parties should be considered as injured by the breach. Like article 60, paragraph (2) (b), of the 1969 Vienna Convention, subparagraph (b) (i) does not define the nature or extent of the special impact that a State must have sustained in order to be considered “injured”. This will have to be assessed on a case-by-case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case. For a State to be considered injured, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed.

(13) In contrast, *subparagraph (b) (ii)* deals with a special category of obligations, the breach of which must be considered as affecting *per se* every other State to which the obligation is owed. Article 60, paragraph 2 (c), of the 1969 Vienna Convention recognizes an analogous category of treaties, viz. those “of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations”. Examples include a disarmament treaty,⁶⁷⁴ a nuclear-free zone treaty, or any other treaty where each party’s performance is effectively conditioned upon and requires the performance of each of the others. Under article 60, paragraph 2 (c), any State party to such a treaty may terminate or suspend it in its relations not merely with the responsible State but generally in its relations with all the other parties.

(14) Essentially, the same considerations apply to obligations of this character for the purposes of State responsibility. The other States parties may have no interest in the termination or suspension of such obligations as distinct from continued performance, and they must all be considered as individually entitled to react to a breach. This is so whether or not any one of them is particularly affected; indeed they may all be equally affected, and none may have suffered quantifiable damage for the purposes of article 36. They may nonetheless have a strong interest in cessation and in other aspects of reparation, in particular restitution. For example, if one State party to the Ant-

arctic Treaty claims sovereignty over an unclaimed area of Antarctica contrary to article 4 of that Treaty, the other States parties should be considered as injured thereby and as entitled to seek cessation, restitution (in the form of the annulment of the claim) and assurances of non-repetition in accordance with Part Two.

(15) The articles deal with obligations arising under international law from whatever source and are not confined to treaty obligations. In practice, interdependent obligations covered by subparagraph (b) (ii) will usually arise under treaties establishing particular regimes. Even under such treaties it may not be the case that just any breach of the obligation has the effect of undermining the performance of all the other States involved, and it is desirable that this subparagraph be narrow in its scope. Accordingly, a State is only considered injured under subparagraph (b) (ii) if the breach is of such a character as radically to affect the enjoyment of the rights or the performance of the obligations of all the other States to which the obligation is owed.

Article 43. Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.

2. The injured State may specify in particular:

(a) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;

(b) what form reparation should take in accordance with the provisions of Part Two.

Commentary

(1) Article 43 concerns the modalities to be observed by an injured State in invoking the responsibility of another State. The article applies to the injured State as defined in article 42, but States invoking responsibility under article 48 must also comply with its requirements.⁶⁷⁵

(2) Although State responsibility arises by operation of law on the commission of an internationally wrongful act by a State, in practice it is necessary for an injured State and/or other interested State(s) to respond, if they wish to seek cessation or reparation. Responses can take a variety of forms, from an unofficial and confidential reminder of the need to fulfil the obligation through formal protest, consultations, etc. Moreover, the failure of an injured State which has notice of a breach to respond may have legal consequences, including even the eventual loss of the right to invoke responsibility by waiver or acquiescence: this is dealt with in article 45.

(3) Article 43 requires an injured State which wishes to invoke the responsibility of another State to give notice of its claim to that State. It is analogous to article 65 of the 1969 Vienna Convention. Notice under article 43 need not

⁶⁷⁴ The example given in the commentary of the Commission to what became article 60: *Yearbook ... 1966*, vol. II, p. 255, document A/6309/Rev.1, para. (8).

⁶⁷⁵ See article 48, paragraph (3), and commentary.

be in writing, nor is it a condition for the operation of the obligation to provide reparation. Moreover, the requirement of notification of the claim does not imply that the normal consequence of the non-performance of an international obligation is the lodging of a statement of claim. Nonetheless, an injured or interested State is entitled to respond to the breach and the first step should be to call the attention of the responsible State to the situation, and to call on it to take appropriate steps to cease the breach and to provide redress.

(4) It is not the function of the articles to specify in detail the form which an invocation of responsibility should take. In practice, claims of responsibility are raised at different levels of government, depending on their seriousness and on the general relations between the States concerned. In the *Certain Phosphate Lands in Nauru* case, Australia argued that Nauru's claim was inadmissible because it had "not been submitted within a reasonable time".⁶⁷⁶ The Court referred to the fact that the claim had been raised, and not settled, prior to Nauru's independence in 1968, and to press reports that the claim had been mentioned by the new President of Nauru in his independence day speech, as well as, inferentially, in subsequent correspondence and discussions with Australian Ministers. However, the Court also noted that:

It was only on 6 October 1983 that the President of Nauru wrote to the Prime Minister of Australia requesting him to "seek a sympathetic reconsideration of Nauru's position".⁶⁷⁷

The Court summarized the communications between the parties as follows:

The Court ... takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time.⁶⁷⁸

In the circumstances, it was sufficient that the respondent State was aware of the claim as a result of communications from the claimant, even if the evidence of those communications took the form of press reports of speeches or meetings rather than of formal diplomatic correspondence.

(5) When giving notice of a claim, an injured or interested State will normally specify what conduct in its view is required of the responsible State by way of cessation of any continuing wrongful act, and what form any reparation should take. Thus, *paragraph 2 (a)* provides that the injured State may indicate to the responsible State what should be done in order to cease the wrongful act, if it is continuing. This indication is not, as such, binding on the responsible State. The injured State can only require the responsible State to comply with its obligations, and the legal consequences of an internationally wrongful act are not for the injured State to stipulate or define. But it may be helpful to the responsible State to know what would

satisfy the injured State; this may facilitate the resolution of the dispute.

(6) *Paragraph 2 (b)* deals with the question of the election of the form of reparation by the injured State. In general, an injured State is entitled to elect as between the available forms of reparation. Thus, it may prefer compensation to the possibility of restitution, as Germany did in the *Factory at Chorzów* case,⁶⁷⁹ or as Finland eventually chose to do in its settlement of the *Passage through the Great Belt* case.⁶⁸⁰ Or it may content itself with declaratory relief, generally or in relation to a particular aspect of its claim. On the other hand, there are cases where a State may not, as it were, pocket compensation and walk away from an unresolved situation, for example one involving the life or liberty of individuals or the entitlement of a people to their territory or to self-determination. In particular, insofar as there are continuing obligations the performance of which are not simply matters for the two States concerned, those States may not be able to resolve the situation by a settlement, just as an injured State may not be able on its own to absolve the responsible State from its continuing obligations to a larger group of States or to the international community as a whole.

(7) In the light of these limitations on the capacity of the injured State to elect the preferred form of reparation, article 43 does not set forth the right of election in an absolute form. Instead, it provides guidance to an injured State as to what sort of information it may include in its notification of the claim or in subsequent communications.

Article 44. Admissibility of claims

The responsibility of a State may not be invoked if:

(a) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(b) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Commentary

(1) The present articles are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals. Rather, they define the conditions for establishing the international responsibility of a State and for the invocation of

⁶⁷⁹ As PCIJ noted in the *Factory at Chorzów*, *Jurisdiction* (see footnote 34 above), by that stage of the dispute, Germany was no longer seeking on behalf of the German companies concerned the return of the factory in question or of its contents (p. 17).

⁶⁸⁰ In the *Passage through the Great Belt (Finland v. Denmark)*, *Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 12, ICJ did not accept Denmark's argument as to the impossibility of restitution if, on the merits, it was found that the construction of the bridge across the Great Belt would result in a violation of Denmark's international obligations. For the terms of the eventual settlement, see M. Koskeniemi, "L'affaire du passage par le Grand-Belt", *Annuaire français de droit international*, vol. 38 (1992), p. 905, at p. 940.

⁶⁷⁶ *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 253, para. 31.

⁶⁷⁷ *Ibid.*, p. 254, para. 35.

⁶⁷⁸ *Ibid.*, pp. 254–255, para. 36.

that responsibility by another State or States. Thus, it is not the function of the articles to deal with such questions as the requirement for exhausting other means of peaceful settlement before commencing proceedings, or such doctrines as litispence or election as they may affect the jurisdiction of one international tribunal *vis-à-vis* another.⁶⁸¹ By contrast, certain questions which would be classified as questions of admissibility when raised before an international court are of a more fundamental character. They are conditions for invoking the responsibility of a State in the first place. Two such matters are dealt with in article 44: the requirements of nationality of claims and exhaustion of local remedies.

(2) *Subparagraph (a)* provides that the responsibility of a State may not be invoked other than in accordance with any applicable rule relating to the nationality of claims. As PCIJ said in the *Mavrommatis Palestine Concessions* case:

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.⁶⁸²

Subparagraph (a) does not attempt a detailed elaboration of the nationality of claims rule or of the exceptions to it. Rather, it makes it clear that the nationality of claims rule is not only relevant to questions of jurisdiction or the admissibility of claims before judicial bodies, but is also a general condition for the invocation of responsibility in those cases where it is applicable.⁶⁸³

(3) *Subparagraph (b)* provides that when the claim is one to which the rule of exhaustion of local remedies applies, the claim is inadmissible if any available and effective local remedy has not been exhausted. The paragraph is formulated in general terms in order to cover any case to which the exhaustion of local remedies rule applies, whether under treaty or general international law, and in spheres not necessarily limited to diplomatic protection.

(4) The local remedies rule was described by a Chamber of the Court in the *ELSI* case as “an important principle of customary international law”.⁶⁸⁴ In the context of a claim

⁶⁸¹ For discussion of the range of considerations affecting jurisdiction and admissibility of international claims before courts, see G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale* (Paris, Pedone, 1967); Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge, Grotius, 1986), vol. 2, pp. 427–575; and S. Rosenne, *The Law and Practice of the International Court, 1920–1996*, 3rd ed. (The Hague, Martinus Nijhoff, 1997), vol. II, *Jurisdiction*.

⁶⁸² *Mavrommatis* (see footnote 236 above), p. 12.

⁶⁸³ Questions of nationality of claims will be dealt with in detail in the work of the Commission on diplomatic protection. See first report of the Special Rapporteur for the topic “Diplomatic protection” in *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/506 and Add.1.

⁶⁸⁴ *ELSI* (see footnote 85 above), p. 42, para. 50. See also *Interhandel, Preliminary Objections, I.C.J. Reports 1959*, p. 6, at p. 27. On the exhaustion of local remedies rule generally, see, e.g., C. F. Amerasinghe, *Local Remedies in International Law* (Cambridge, Grotius, 1990); J. Chappaz, *La règle de l'épuisement des voies de recours internes* (Paris, Pedone, 1972); K. Doehring, “Local remedies, exhaustion of”, *Encyclopedia of Public International Law*, R. Bernhardt, ed. (footnote 409 above), vol. 3, pp. 238–242; and G. Perrin, “La naissance de la responsabilité internationale et l'épuisement des voies de recours internes

brought on behalf of a corporation of the claimant State, the Chamber defined the rule succinctly in the following terms:

for an international claim [sc. on behalf of individual nationals or corporations] to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.⁶⁸⁵

The Chamber thus treated the exhaustion of local remedies as being distinct, in principle, from “the merits of the case”.⁶⁸⁶

(5) Only those local remedies which are “available and effective” have to be exhausted before invoking the responsibility of a State. The mere existence on paper of remedies under the internal law of a State does not impose a requirement to make use of those remedies in every case. In particular, there is no requirement to use a remedy which offers no possibility of redressing the situation, for instance, where it is clear from the outset that the law which the local court would have to apply can lead only to the rejection of any appeal. Beyond this, article 44, *subparagraph (b)*, does not attempt to spell out comprehensively the scope and content of the exhaustion of local remedies rule, leaving this to the applicable rules of international law.⁶⁸⁷

Article 45. Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

(a) the injured State has validly waived the claim;

(b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Commentary

(1) Article 45 is analogous to article 45 of the 1969 Vienna Convention concerning loss of the right to invoke a ground for invalidating or terminating a treaty. The article deals with two situations in which the right of an injured State or other States concerned to invoke the responsibility of a wrongdoing State may be lost: waiver and acquiescence in the lapse of the claim. In this regard, the position of an injured State as referred to in article 42 and other States concerned with a breach needs to be distinguished. A valid waiver or settlement of the responsibility dispute

dans le projet d'articles de la Commission du droit international”, *Festschrift für Rudolf Bindschedler* (Bern, Stämpfli, 1980), p. 271. On the exhaustion of local remedies rule in relation to violations of human rights obligations, see, e.g., A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (Cambridge University Press, 1983); and E. Wyler, *L'illicite et la condition des personnes privées* (Paris, Pedone, 1995), pp. 65–89.

⁶⁸⁵ *ELSI* (see footnote 85 above), p. 46, para. 59.

⁶⁸⁶ *Ibid.*, p. 48, para. 63.

⁶⁸⁷ The topic will be dealt with in detail in the work of the Commission on diplomatic protection. See second report of the Special Rapporteur on diplomatic protection in *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/514.

between the responsible State and the injured State, or, if there is more than one, all the injured States, may preclude any claim for reparation. Positions taken by individual States referred to in article 48 will not have such an effect.

(2) *Subparagraph* (a) deals with the case where an injured State has waived either the breach itself, or its consequences in terms of responsibility. This is a manifestation of the general principle of consent in relation to rights or obligations within the dispensation of a particular State.

(3) In some cases, the waiver may apply only to one aspect of the legal relationship between the injured State and the responsible State. For example, in the *Russian Indemnity* case, the Russian embassy had repeatedly demanded from Turkey a certain sum corresponding to the capital amount of a loan, without any reference to interest or damages for delay. Turkey having paid the sum demanded, the tribunal held that this conduct amounted to the abandonment of any other claim arising from the loan.⁶⁸⁸

(4) A waiver is only effective if it is validly given. As with other manifestations of State consent, questions of validity can arise with respect to a waiver, for example, possible coercion of the State or its representative, or a material error as to the facts of the matter, arising perhaps from a misrepresentation of those facts by the responsible State. The use of the term “valid waiver” is intended to leave to the general law the question of what amounts to a valid waiver in the circumstances.⁶⁸⁹ Of particular significance in this respect is the question of consent given by an injured State following a breach of an obligation arising from a peremptory norm of general international law, especially one to which article 40 applies. Since such a breach engages the interest of the international community as a whole, even the consent or acquiescence of the injured State does not preclude that interest from being expressed in order to ensure a settlement in conformity with international law.

(5) Although it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal. In the *Certain Phosphate Lands in Nauru* case, it was argued that the Nauruan authorities before independence had waived the rehabilitation claim by concluding an agreement relating to the future of the phosphate industry as well as by statements made at the time of independence. As to the former, the record of negotiations showed that the question of waiving the rehabilitation claim had been raised and not accepted, and the Agreement itself was silent on the point. As to the latter, the relevant statements were unclear and equivocal. The Court held there had been no waiver, since the conduct in question “did not at any time effect a clear and unequivocal waiver of their claims”.⁶⁹⁰ In particular, the statements relied on “[n]otwithstanding some ambiguity in the wording ... did not imply any departure from the point of view ex-

pressed clearly and repeatedly by the representatives of the Nauruan people before various organs of the United Nations”.⁶⁹¹

(6) Just as it may explicitly waive the right to invoke responsibility, so an injured State may acquiesce in the loss of that right. *Subparagraph* (b) deals with the case where an injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim. The article emphasizes *conduct* of the State, which could include, where applicable, unreasonable delay, as the determining criterion for the lapse of the claim. Mere lapse of time without a claim being resolved is not, as such, enough to amount to acquiescence, in particular where the injured State does everything it can reasonably do to maintain its claim.

(7) The principle that a State may by acquiescence lose its right to invoke responsibility was endorsed by ICJ in the *Certain Phosphate Lands in Nauru* case, in the following passage:

The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.⁶⁹²

In the *LaGrand* case, the Court held the German application admissible even though Germany had taken legal action some years after the breach had become known to it.⁶⁹³

(8) One concern of the rules relating to delay is that additional difficulties may be caused to the respondent State due to the lapse of time, e.g. as concerns the collection and presentation of evidence. Thus, in the *Stevenson* case and the *Gentini* case, considerations of procedural fairness to the respondent State were advanced.⁶⁹⁴ In contrast, the plea of delay has been rejected if, in the circumstances of a case, the respondent State could not establish the existence of any prejudice on its part, as where it has always had notice of the claim and was in a position to collect and preserve evidence relating to it.⁶⁹⁵

(9) Moreover, contrary to what may be suggested by the expression “delay”, international courts have not engaged simply in measuring the lapse of time and applying clear-cut time limits. No generally accepted time limit,

⁶⁹¹ *Ibid.*, p. 250, para. 20.

⁶⁹² *Ibid.*, pp. 253–254, para. 32. The Court went on to hold that, in the circumstances of the case and having regard to the history of the matter, Nauru’s application was not inadmissible on this ground (para. 36). It reserved for the merits any question of prejudice to the respondent State by reason of the delay. See further paragraph (8) of the commentary to article 13.

⁶⁹³ *LaGrand, Provisional Measures* (see footnote 91 above) and *LaGrand, Judgment* (see footnote 119 above), at pp. 486–487, paras. 53–57.

⁶⁹⁴ See *Stevenson*, UNRIAA, vol. IX (Sales No. 59.V.5), p. 385 (1903); and *Gentini, ibid.*, vol. X (Sales No. 60.V.4), p. 551 (1903).

⁶⁹⁵ See, e.g., *Tagliaferro*, UNRIAA, vol. X (Sales No. 60.V.4), p. 592, at p. 593 (1903); see also the actual decision in *Stevenson* (footnote 694 above), pp. 386–387.

⁶⁸⁸ *Russian Indemnity* (see footnote 354 above), p. 446.

⁶⁸⁹ Cf. the position with respect to valid consent under article 20: see paragraphs (4) to (8) of the commentary to article 20.

⁶⁹⁰ *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 247, para. 13.

expressed in terms of years, has been laid down.⁶⁹⁶ The Swiss Federal Department in 1970 suggested a period of 20 to 30 years since the coming into existence of the claim.⁶⁹⁷ Others have stated that the requirements were more exacting for contractual claims than for non-contractual claims.⁶⁹⁸ None of the attempts to establish any precise or finite time limit for international claims in general has achieved acceptance.⁶⁹⁹ It would be very difficult to establish any single limit, given the variety of situations, obligations and conduct that may be involved.

(10) Once a claim has been notified to the respondent State, delay in its prosecution (e.g. before an international tribunal) will not usually be regarded as rendering it inadmissible.⁷⁰⁰ Thus, in the *Certain Phosphate Lands in Nauru* case, ICJ held it to be sufficient that Nauru had referred to its claims in bilateral negotiations with Australia in the period preceding the formal institution of legal proceedings in 1989.⁷⁰¹ In the *Tagliaferro* case, Umpire Ralston likewise held that, despite the lapse of 31 years since the infliction of damage, the claim was admissible as it had been notified immediately after the injury had occurred.⁷⁰²

(11) To summarize, a claim will not be inadmissible on grounds of delay unless the circumstances are such that the injured State should be considered as having acquiesced in the lapse of the claim or the respondent State has been seriously disadvantaged. International courts generally engage in a flexible weighing of relevant circumstances in the given case, taking into account such matters as the conduct of the respondent State and the importance of the rights involved. The decisive factor is whether the respondent State has suffered any prejudice as a result of the delay in the sense that the respondent could have reasonably expected that the claim would no longer be pursued. Even if there has been some prejudice, it may be able to be taken into account in determining the form or extent of reparation.⁷⁰³

⁶⁹⁶ In some cases time limits are laid down for specific categories of claims arising under specific treaties (e.g. the six-month time limit for individual applications under article 35, paragraph 1, of the European Convention on Human Rights) notably in the area of private law (e.g. in the field of commercial transactions and international transport). See the Convention on the Limitation Period in the International Sale of Goods, as amended by the Protocol to the Convention. By contrast, it is highly unusual for treaty provisions dealing with inter-State claims to be subject to any express time limits.

⁶⁹⁷ Communiqué of 29 December 1970, in *Annuaire suisse de droit international*, vol. 32 (1976), p. 153.

⁶⁹⁸ C.-A. Fleischhauer, "Prescription", *Encyclopedia of Public International Law* (see footnote 409 above), vol. 3, p. 1105, at p. 1107.

⁶⁹⁹ A large number of international decisions stress the absence of general rules, and in particular of any specific limitation period measured in years. Rather, the principle of delay is a matter of appreciation having regard to the facts of the given case. Besides *Certain Phosphate Lands in Nauru* (footnotes 230 and 232 above), see, e.g. *Gentini* (footnote 694 above), p. 561; and the *Ambatielos* arbitration, ILR, vol. 23, p. 306, at pp. 314–317 (1956).

⁷⁰⁰ For statements of the distinction between notice of claim and commencement of proceedings, see, e.g. R. Jennings and A. Watts, eds., *Oppenheim's International Law*, 9th ed. (Harlow, Longman, 1992), vol. I, *Peace*, p. 527; and C. Rousseau, *Droit international public* (Paris, Sirey, 1983), vol. V, p. 182.

⁷⁰¹ *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 250, para. 20.

⁷⁰² *Tagliaferro* (see footnote 695 above), p. 593.

⁷⁰³ See article 39 and commentary.

Article 46. Plurality of injured States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Commentary

(1) Article 46 deals with the situation of a plurality of injured States, in the sense defined in article 42. It states the principle that where there are several injured States, each of them may separately invoke the responsibility for the internationally wrongful act on its own account.

(2) Several States may qualify as "injured" States under article 42. For example, all the States to which an interdependent obligation is owed within the meaning of article 42, subparagraph (b) (ii), are injured by its breach. In a situation of a plurality of injured States, each may seek cessation of the wrongful act if it is continuing, and claim reparation in respect of the injury to itself. This conclusion has never been doubted, and is implicit in the terms of article 42 itself.

(3) It is by no means unusual for claims arising from the same internationally wrongful act to be brought by several States. For example, in the *S.S. "Wimbledon"* case, four States brought proceedings before PCIJ under article 386, paragraph 1, of the Treaty of Versailles, which allowed "any interested Power" to apply in the event of a violation of the provisions of the Treaty concerning transit through the Kiel Canal. The Court noted that "each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags". It held they were each covered by article 386, paragraph 1, "even though they may be unable to adduce a prejudice to any pecuniary interest".⁷⁰⁴ In fact, only France, representing the operator of the vessel, claimed and was awarded compensation. In the cases concerning the *Aerial Incident of 27 July 1955*, proceedings were commenced by the United States, the United Kingdom and Israel against Bulgaria concerning the destruction of an Israeli civil aircraft and the loss of lives involved.⁷⁰⁵ In the *Nuclear Tests* cases, Australia and New Zealand each claimed to be injured in various ways by the French conduct of atmospheric nuclear tests at Mururoa Atoll.⁷⁰⁶

(4) Where the States concerned do not claim compensation on their own account as distinct from a declaration

⁷⁰⁴ *S.S. "Wimbledon"* (see footnote 34 above), p. 20.

⁷⁰⁵ ICJ held that it lacked jurisdiction over the Israeli claim: *Aerial Incident of 27 July 1955 (Israel v. Bulgaria), Judgment, I.C.J. Reports 1959*, p. 131, after which the United Kingdom and United States claims were withdrawn. In its Memorial, Israel noted that there had been active coordination of the claims between the various claimant Governments, and added: "One of the primary reasons for establishing coordination of this character from the earliest stages was to prevent, so far as was possible, the Bulgarian Government being faced with double claims leading to the possibility of double damages" (see footnote 363 above), p. 106.

⁷⁰⁶ See *Nuclear Tests (Australia v. France)* and *(New Zealand v. France)* (footnote 196 above), pp. 256 and 460, respectively.

of the legal situation, it may not be clear whether they are claiming as injured States or as States invoking responsibility in the common or general interest under article 48. Indeed, in such cases it may not be necessary to decide into which category they fall, provided it is clear that they fall into one or the other. Where there is more than one injured State claiming compensation on its own account or on account of its nationals, evidently each State will be limited to the damage actually suffered. Circumstances might also arise in which several States injured by the same act made incompatible claims. For example, one State may claim restitution whereas the other may prefer compensation. If restitution is indivisible in such a case and the election of the second State is valid, it may be that compensation is appropriate in respect of both claims.⁷⁰⁷ In any event, two injured States each claiming in respect of the same wrongful act would be expected to coordinate their claims so as to avoid double recovery. As ICJ pointed out in its advisory opinion on *Reparation for Injuries*, “International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case”.⁷⁰⁸

Article 47. Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(a) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

(b) is without prejudice to any right of recourse against the other responsible States.

Commentary

(1) Article 47 deals with the situation where there is a plurality of responsible States in respect of the same wrongful act. It states the general principle that in such cases each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act.

(2) Several States may be responsible for the same internationally wrongful act in a range of circumstances. For example, two or more States might combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation. In that case the injured State can hold each responsible State to account for the wrongful conduct as a whole. Or two States may act through a

common organ which carries out the conduct in question, e.g. a joint authority responsible for the management of a boundary river. Or one State may direct and control another State in the commission of the same internationally wrongful act by the latter, such that both are responsible for the act.⁷⁰⁹

(3) It is important not to assume that internal law concepts and rules in this field can be applied directly to international law. Terms such as “joint”, “joint and several” and “solidary” responsibility derive from different legal traditions⁷¹⁰ and analogies must be applied with care. In international law, the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it in the sense of article 2. The principle of independent responsibility reflects the position under general international law, in the absence of agreement to the contrary between the States concerned.⁷¹¹ In the application of that principle, however, the situation can arise where a single course of conduct is at the same time attributable to several States and is internationally wrongful for each of them. It is to such cases that article 47 is addressed.

(4) In the *Certain Phosphate Lands in Nauru* case,⁷¹² Australia, the sole respondent, had administered Nauru as a trust territory under the Trusteeship Agreement on behalf of the three States concerned. Australia argued that it could not be sued alone by Nauru, but only jointly with the other two States concerned. Australia argued that the two States were necessary parties to the case and that in accordance with the principle formulated in *Monetary Gold*,⁷¹³ the claim against Australia alone was inadmissible. It also argued that the responsibility of the three States making up the Administering Authority was “solidary” and that a claim could not be made against only one of them. The Court rejected both arguments. On the question of “solidary” responsibility it said:

Australia has raised the question whether the liability of the three States would be “joint and several” (*solidaire*), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share. This ... is independent of the question whether Australia can be sued alone. The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia.⁷¹⁴

The Court was careful to add that its decision on jurisdiction “does not settle the question whether reparation

⁷⁰⁹ See article 17 and commentary.

⁷¹⁰ For a comparative survey of internal laws on solidary or joint liability, see T. Weir, *loc. cit.* (footnote 471 above), vol. XI, especially pp. 43–44, sects. 79–81.

⁷¹¹ See paragraphs (1) to (5) of the introductory commentary to chapter IV of Part One.

⁷¹² See footnote 230 above.

⁷¹³ See footnote 286 above. See also paragraph (11) of the commentary to article 16.

⁷¹⁴ *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), pp. 258–259, para. 48.

⁷⁰⁷ Cf. *Forests of Central Rhodopia*, where the arbitrator declined to award restitution, *inter alia*, on the ground that not all the persons or entities interested in restitution had claimed (see footnote 382 above), p. 1432.

⁷⁰⁸ *Reparation for Injuries* (see footnote 38 above), p. 186.

would be due from Australia, if found responsible, for the whole or only for part of the damage Nauru alleges it has suffered, regard being had to the characteristics of the Mandate and Trusteeship Systems ... and, in particular, the special role played by Australia in the administration of the Territory".⁷¹⁵

(5) The extent of responsibility for conduct carried on by a number of States is sometimes addressed in treaties.⁷¹⁶ A well-known example is the Convention on International Liability for Damage Caused by Space Objects. Article IV, paragraph 1, provides expressly for "joint and several liability" where damage is suffered by a third State as a result of a collision between two space objects launched by two States. In some cases liability is strict; in others it is based on fault. Article IV, paragraph 2, provides:

In all cases of joint and several liability referred to in paragraph 1 ... the burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them. Such apportionment shall be without prejudice to the right of the third State to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.⁷¹⁷

This is clearly a *lex specialis*, and it concerns liability for lawful conduct rather than responsibility in the sense of the present articles.⁷¹⁸ At the same time, it indicates what a regime of "joint and several" liability might amount to so far as an injured State is concerned.

(6) According to *paragraph 1* of article 47, where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. Paragraph 1 neither recognizes a general rule of joint and several responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.

(7) Under paragraph 1 of article 47, where several States are each responsible for the same internationally wrongful act, the responsibility of each may be separately invoked by an injured State in the sense of article 42. The conse-

⁷¹⁵ *Ibid.*, p. 262, para. 56. The case was subsequently withdrawn by agreement, Australia agreeing to pay by instalments an amount corresponding to the full amount of Nauru's claim. Subsequently, the two other Governments agreed to contribute to the payments made under the settlement. See *Certain Phosphate Lands in Nauru*, Order (footnote 232 above) and the settlement agreement (*ibid.*).

⁷¹⁶ A special case is the responsibility of the European Union and its member States under "mixed agreements", where the Union and all or some members are parties in their own name. See, e.g., annex IX to the United Nations Convention on the Law of the Sea. Generally on mixed agreements, see, e.g., A. Rosas, "Mixed Union mixed agreements", *International Law Aspects of the European Union*, M. Koskeniemi, ed. (The Hague, Kluwer, 1998), p. 125.

⁷¹⁷ See also article V, paragraph 2, which provides for indemnification between States which are jointly and severally liable.

⁷¹⁸ See paragraph 4 of the general commentary for the distinction between international responsibility for wrongful acts and international liability arising from lawful conduct.

quences that flow from the wrongful act, for example in terms of reparation, will be those which flow from the provisions of Part Two in relation to that State.

(8) Article 47 only addresses the situation of a plurality of responsible States in relation to the same internationally wrongful act. The identification of such an act will depend on the particular primary obligation, and cannot be prescribed in the abstract. Of course, situations can also arise where several States by separate internationally wrongful conduct have contributed to causing the same damage. For example, several States might contribute to polluting a river by the separate discharge of pollutants. In the *Corfu Channel* incident, it appears that Yugoslavia actually laid the mines and would have been responsible for the damage they caused. ICJ held that Albania was responsible to the United Kingdom for the same damage on the basis that it knew or should have known of the presence of the mines and of the attempt by the British ships to exercise their right of transit, but failed to warn the ships.⁷¹⁹ Yet, it was not suggested that Albania's responsibility for failure to warn was reduced, let alone precluded, by reason of the concurrent responsibility of a third State. In such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations.

(9) The general principle set out in paragraph 1 of article 47 is subject to the two provisos set out in *paragraph 2*. *Subparagraph (a)* addresses the question of double recovery by the injured State. It provides that the injured State may not recover, by way of compensation, more than the damage suffered.⁷²⁰ This provision is designed to protect the responsible States, whose obligation to compensate is limited by the damage suffered. The principle is only concerned to ensure against the actual recovery of more than the amount of the damage. It would not exclude simultaneous awards against two or more responsible States, but the award would be satisfied so far as the injured State is concerned by payment in full made by any one of them.

(10) The second proviso, in *subparagraph (b)*, recognizes that where there is more than one responsible State in respect of the same injury, questions of contribution may arise between them. This is specifically envisaged, for example, in articles IV, paragraph 2, and V, paragraph 2, of the Convention on International Liability for Damage Caused by Space Objects. On the other hand, there may be cases where recourse by one responsible State against another should not be allowed. *Subparagraph (b)* does not address the question of contribution among several States which are responsible for the same wrongful act; it merely provides that the general principle stated in paragraph 1 is without prejudice to any right of recourse which one responsible State may have against any other responsible State.

⁷¹⁹ *Corfu Channel, Merits* (see footnote 35 above), pp. 22–23.

⁷²⁰ Such a principle was affirmed, for example, by PCIJ in the *Factory at Chorzów, Merits* case (see footnote 34 above), when it held that a remedy sought by Germany could not be granted "or the same compensation would be awarded twice over" (p. 59); see also pp. 45 and 49.

Article 48. Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(b) the obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

Commentary

(1) Article 48 complements the rule contained in article 42. It deals with the invocation of responsibility by States other than the injured State acting in the collective interest. A State which is entitled to invoke responsibility under article 48 is acting not in its individual capacity by reason of having suffered injury, but in its capacity as a member of a group of States to which the obligation is owed, or indeed as a member of the international community as a whole. The distinction is underlined by the phrase “[a]ny State other than an injured State” in paragraph 1 of article 48.

(2) Article 48 is based on the idea that in case of breaches of specific obligations protecting the collective interests of a group of States or the interests of the international community as a whole, responsibility may be invoked by States which are not themselves injured in the sense of article 42. Indeed, in respect of obligations to the international community as a whole, ICJ specifically said as much in its judgment in the *Barcelona Traction* case.⁷²¹ Although the Court noted that “all States can be held to have a legal interest in” the fulfilment of these rights, article 48 refrains from qualifying the position of the States identified in article 48, for example by referring to them as “interested States”. The term “legal interest” would not permit a distinction between articles 42 and 48, as injured States in the sense of article 42 also have legal interests.

(3) As to the structure of article 48, paragraph 1 defines the categories of obligations which give rise to the wider

right to invoke responsibility. Paragraph 2 stipulates which forms of responsibility States other than injured States may claim. Paragraph 3 applies the requirements of invocation contained in articles 43, 44 and 45 to cases where responsibility is invoked under article 48, paragraph 1.

(4) *Paragraph 1* refers to “[a]ny State other than an injured State”. In the nature of things, all or many States will be entitled to invoke responsibility under article 48, and the term “[a]ny State” is intended to avoid any implication that these States have to act together or in unison. Moreover, their entitlement will coincide with that of any injured State in relation to the same internationally wrongful act in those cases where a State suffers individual injury from a breach of an obligation to which article 48 applies.

(5) Paragraph 1 defines the categories of obligations, the breach of which may entitle States other than the injured State to invoke State responsibility. A distinction is drawn between obligations owed to a group of States and established to protect a collective interest of the group (paragraph 1 (a)), and obligations owed to the international community as a whole (paragraph 1 (b)).⁷²²

(6) Under *paragraph 1* (a), States other than the injured State may invoke responsibility if two conditions are met: first, the obligation whose breach has given rise to responsibility must have been owed to a group to which the State invoking responsibility belongs; and secondly, the obligation must have been established for the protection of a collective interest. The provision does not distinguish between different sources of international law; obligations protecting a collective interest of the group may derive from multilateral treaties or customary international law. Such obligations have sometimes been referred to as “obligations *erga omnes partes*”.

(7) Obligations coming within the scope of paragraph 1 (a) have to be “collective obligations”, i.e. they must apply between a group of States and have been established in some collective interest.⁷²³ They might concern, for example, the environment or security of a region (e.g. a regional nuclear-free-zone treaty or a regional system for the protection of human rights). They are not limited to arrangements established only in the interest of the member States but would extend to agreements established by a group of States in some wider common interest.⁷²⁴ But in any event the arrangement must transcend the sphere of bilateral relations of the States parties. As to the requirement that the obligation in question protect a collective interest, it is not the function of the articles to provide an enumeration of such interests. If they fall within paragraph 1 (a), their principal purpose will be to foster a common interest, over and above any interests of the States concerned individually. This would include situations in

⁷²² For the extent of responsibility for serious breaches of obligations to the international community as a whole, see Part Two, chap. III and commentary.

⁷²³ See also paragraph (11) of the commentary to article 42.

⁷²⁴ In the S.S. “*Wimbledon*” (see footnote 34 above), the Court noted “[t]he intention of the authors of the Treaty of Versailles to facilitate access to the Baltic by establishing an international regime, and consequently to keep the canal open at all times to foreign vessels of every kind” (p. 23).

⁷²¹ *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

which States, attempting to set general standards of protection for a group or people, have assumed obligations protecting non-State entities.⁷²⁵

(8) Under *paragraph 1 (b)*, States other than the injured State may invoke responsibility if the obligation in question was owed “to the international community as a whole”.⁷²⁶ The provision intends to give effect to the statement by ICJ in the *Barcelona Traction* case, where the Court drew “an essential distinction” between obligations owed to particular States and those owed “towards the international community as a whole”.⁷²⁷ With regard to the latter, the Court went on to state that “[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*”.

(9) While taking up the essence of this statement, the articles avoid use of the term “obligations *erga omnes*”, which conveys less information than the Court’s reference to the international community as a whole and has sometimes been confused with obligations owed to all the parties to a treaty. Nor is it the function of the articles to provide a list of those obligations which under existing international law are owed to the international community as a whole. This would go well beyond the task of codifying the secondary rules of State responsibility, and in any event, such a list would be only of limited value, as the scope of the concept will necessarily evolve over time. The Court itself has given useful guidance: in its 1970 judgment it referred, by way of example, to “the outlawing of acts of aggression, and of genocide” and to “the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”.⁷²⁸ In its judgment in the *East Timor* case, the Court added the right of self-determination of peoples to this list.⁷²⁹

(10) Each State is entitled, as a member of the international community as a whole, to invoke the responsibility of another State for breaches of such obligations. Whereas the category of collective obligations covered by *paragraph 1 (a)* needs to be further qualified by the insertion of additional criteria, no such qualifications are necessary in the case of *paragraph 1 (b)*. All States are by definition members of the international community as a whole, and the obligations in question are by definition collective obligations protecting interests of the international community as such. Of course, such obligations may at the same time protect the individual interests of States, as the prohibition of acts of aggression protects the survival of each State and the security of its people. Similarly, individual States may be specially affected by the breach of such an

obligation, for example a coastal State specially affected by pollution in breach of an obligation aimed at protection of the marine environment in the collective interest.

(11) *Paragraph 2* specifies the categories of claim which States may make when invoking responsibility under article 48. The list given in the paragraph is exhaustive, and invocation of responsibility under article 48 gives rise to a more limited range of rights as compared to those of injured States under article 42. In particular, the focus of action by a State under article 48—such State not being injured in its own right and therefore not claiming compensation on its own account—is likely to be on the very question whether a State is in breach and on cessation if the breach is a continuing one. For example, in the *S.S. “Wimbledon”* case, Japan, which had no economic interest in the particular voyage, sought only a declaration, whereas France, whose national had to bear the loss, sought and was awarded damages.⁷³⁰ In the *South West Africa* cases, Ethiopia and Liberia sought only declarations of the legal position.⁷³¹ In that case, as the Court itself pointed out in 1971, “the injured entity” was a people, viz. the people of South West Africa.⁷³²

(12) Under *paragraph 2 (a)*, any State referred to in article 48 is entitled to request cessation of the wrongful act and, if the circumstances require, assurances and guarantees of non-repetition under article 30. In addition, *paragraph 2 (b)* allows such a State to claim from the responsible State reparation in accordance with the provisions of chapter II of Part Two. In case of breaches of obligations under article 48, it may well be that there is no State which is individually injured by the breach, yet it is highly desirable that some State or States be in a position to claim reparation, in particular restitution. In accordance with *paragraph 2 (b)*, such a claim must be made in the interest of the injured State, if any, or of the beneficiaries of the obligation breached. This aspect of article 48, *paragraph 2*, involves a measure of progressive development, which is justified since it provides a means of protecting the community or collective interest at stake. In this context it may be noted that certain provisions, for example in various human rights treaties, allow invocation of responsibility by any State party. In those cases where they have been resorted to, a clear distinction has been drawn between the capacity of the applicant State to raise the matter and the interests of the beneficiaries of the obligation.⁷³³ Thus, a State invoking responsibility under article 48 and claiming anything more than a declaratory remedy and cessation may be called on to establish that it is acting in the interest of the injured party. Where the injured party is a State, its Government will be able authoritatively to represent that interest. Other cases may present greater difficulties, which the present articles

⁷²⁵ Article 22 of the Covenant of the League of Nations, establishing the Mandate system, was a provision in the general interest in this sense, as were each of the Mandate agreements concluded in accordance with it. Cf., however, the much-criticized decision of ICJ in *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, from which article 48 is a deliberate departure.

⁷²⁶ For the terminology “international community as a whole”, see *paragraph (18)* of the commentary to article 25.

⁷²⁷ *Barcelona Traction* (see footnote 25 above), p. 32, para. 33, and see *paragraphs (2) to (6)* of the commentary to chapter III of Part Two.

⁷²⁸ *Barcelona Traction (ibid.)*, p. 32, para. 34.

⁷²⁹ See footnote 54 above.

⁷³⁰ *S.S. “Wimbledon”* (see footnote 34 above), p. 30.

⁷³¹ *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319; *South West Africa, Second Phase, Judgment* (see footnote 725 above).

⁷³² *Namibia* case (see footnote 176 above), p. 56, para. 127.

⁷³³ See, e.g., the observations of the European Court of Human Rights in *Denmark v. Turkey* (friendly settlement), judgment of 5 April 2000, Reports of Judgments and Decisions 2000-IV, pp. 7, 10 and 11, paras. 20 and 23.

cannot solve.⁷³⁴ Paragraph 2 (b) can do no more than set out the general principle.

(13) Paragraph 2 (b) refers to the State claiming “[p]erformance of the obligation of reparation in accordance with the preceding articles”. This makes it clear that article 48 States may not demand reparation in situations where an injured State could not do so. For example, a demand for cessation presupposes the continuation of the wrongful act; a demand for restitution is excluded if restitution itself has become impossible.

(14) *Paragraph 3* subjects the invocation of State responsibility by States other than the injured State to the conditions that govern invocation by an injured State, specifically article 43 (notice of claim), 44 (admissibility of claims) and 45 (loss of the right to invoke responsibility). These articles are to be read as applicable equally, *mutatis mutandis*, to a State invoking responsibility under article 48.

CHAPTER II

COUNTERMEASURES

Commentary

(1) This chapter deals with the conditions for and limitations on the taking of countermeasures by an injured State. In other words, it deals with measures that would otherwise be contrary to the international obligations of an injured State *vis-à-vis* the responsible State, if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation. Countermeasures are a feature of a decentralized system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act.

(2) It is recognized both by Governments and by the decisions of international tribunals that countermeasures are justified under certain circumstances.⁷³⁵ This is reflected in article 22 which deals with countermeasures in response to an internationally wrongful act in the context of the circumstances precluding wrongfulness. Like other forms of self-help, countermeasures are liable to abuse and this potential is exacerbated by the factual inequalities between States. Chapter II has as its aim to establish an operational system, taking into account the exceptional character of countermeasures as a response

to internationally wrongful conduct. At the same time, it seeks to ensure, by appropriate conditions and limitations, that countermeasures are kept within generally acceptable bounds.

(3) As to terminology, traditionally the term “reprisals” was used to cover otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach.⁷³⁶ More recently, the term “reprisals” has been limited to action taken in time of international armed conflict; i.e. it has been taken as equivalent to belligerent reprisals. The term “countermeasures” covers that part of the subject of reprisals not associated with armed conflict, and in accordance with modern practice and judicial decisions the term is used in that sense in this chapter.⁷³⁷ Countermeasures are to be contrasted with retorsion, i.e. “unfriendly” conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act. Acts of retorsion may include the prohibition of or limitations upon normal diplomatic relations or other contacts, embargoes of various kinds or withdrawal of voluntary aid programmes. Whatever their motivation, so long as such acts are not incompatible with the international obligations of the States taking them towards the target State, they do not involve countermeasures and they fall outside the scope of the present articles. The term “sanction” is also often used as equivalent to action taken against a State by a group of States or mandated by an international organization. But the term is imprecise: Chapter VII of the Charter of the United Nations refers only to “measures”, even though these can encompass a very wide range of acts, including the use of armed force (Articles 39, 41 and 42). Questions concerning the use of force in international relations and of the legality of belligerent reprisals are governed by the relevant primary rules. On the other hand, the articles are concerned with countermeasures as referred to in article 22. They are taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two. They are instrumental in character and are appropriately dealt with in Part Three as an aspect of the implementation of State responsibility.

(4) Countermeasures are to be clearly distinguished from the termination or suspension of treaty relations on account of the material breach of a treaty by another State, as provided for in article 60 of the 1969 Vienna Convention. Where a treaty is terminated or suspended in accordance with article 60, the substantive legal obligations of the States parties will be affected, but this is quite different from the question of responsibility that may already have arisen from the breach.⁷³⁸ Countermeasures involve conduct taken in derogation from a subsisting treaty

⁷³⁴ See also paragraphs (3) to (4) of the commentary to article 33.

⁷³⁵ For the substantial literature, see the bibliographies in E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry, N.Y., Transnational, 1984), pp. 179–189; O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford, Clarendon Press, 1988), pp. 227–241; L.-A. Sicilianos, *Les réactions décentralisées à l'illicite: Des contre-mesures à la légitime défense* (Paris, Librairie générale de droit et de jurisprudence, 1990), pp. 501–525; and D. Alland, *Justice privée et ordre juridique international: Etude théorique des contre-mesures en droit international public* (Paris, Pedone, 1994).

⁷³⁶ See, e.g., E. de Vattel, *The Law of Nations, or the Principles of Natural Law* (footnote 394 above), vol. II, chap. XVIII, p. 342.

⁷³⁷ *Air Service Agreement* (see footnote 28 above), p. 443, para. 80; *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 27, para. 53; *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), at p. 106, para. 201; and *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 82.

⁷³⁸ On the respective scope of the codified law of treaties and the law of State responsibility, see paragraphs (3) to (7) of the introductory commentary to chapter V of Part One.

obligation but justified as a necessary and proportionate response to an internationally wrongful act of the State against which they are taken. They are essentially temporary measures, taken to achieve a specified end, whose justification terminates once the end is achieved.

(5) This chapter does not draw any distinction between what are sometimes called “reciprocal countermeasures” and other measures. That term refers to countermeasures which involve suspension of performance of obligations towards the responsible State “if such obligations correspond to, or are directly connected with, the obligation breached”.⁷³⁹ There is no requirement that States taking countermeasures should be limited to suspension of performance of the same or a closely related obligation.⁷⁴⁰ A number of considerations support this conclusion. First, for some obligations, for example those concerning the protection of human rights, reciprocal countermeasures are inconceivable. The obligations in question have a non-reciprocal character and are not only due to other States but to the individuals themselves.⁷⁴¹ Secondly, a limitation to reciprocal countermeasures assumes that the injured State will be in a position to impose the same or related measures as the responsible State, which may not be so. The obligation may be a unilateral one or the injured State may already have performed its side of the bargain. Above all, considerations of good order and humanity preclude many measures of a reciprocal nature. This conclusion does not, however, end the matter. Countermeasures are more likely to satisfy the requirements of necessity and proportionality if they are taken in relation to the same or a closely related obligation, as in the *Air Service Agreement* arbitration.⁷⁴²

(6) This conclusion reinforces the need to ensure that countermeasures are strictly limited to the requirements of the situation and that there are adequate safeguards against abuse. Chapter II seeks to do this in a variety of ways. First, as already noted, it concerns only non-forcible countermeasures (art. 50, para. 1 (a)). Secondly, countermeasures are limited by the requirement that they be directed at the responsible State and not at third parties (art. 49, paras. 1 and 2). Thirdly, since countermeasures are intended as instrumental—in other words, since they are taken with a view to procuring cessation of and reparation for the internationally wrongful act and not by way of punishment—they are temporary in character and must be as far as possible reversible in their effects in terms of future legal relations between the two States (arts. 49, paras. 2 and 3, and 53). Fourthly, countermeasures must be proportionate (art. 51). Fifthly, they must not involve any departure from certain basic obligations (art. 50, para. 1), in particular those under peremptory norms of general international law.

⁷³⁹ See the sixth report of the Special Rapporteur on State responsibility, William Riphagen, article 8 of Part Two of the draft articles, *Yearbook ... 1985*, vol. II (Part One), p. 10, document A/CN.4/389.

⁷⁴⁰ Contrast the exception of non-performance in the law of treaties, which is so limited: see paragraph (9) of the introductory commentary to chapter V of Part One.

⁷⁴¹ Cf. *Ireland v. the United Kingdom* (footnote 236 above).

⁷⁴² See footnote 28 above.

(7) This chapter also deals to some extent with the conditions of the implementation of countermeasures. In particular, countermeasures cannot affect any dispute settlement procedure which is in force between the two States and applicable to the dispute (art. 50, para. 2 (a)). Nor can they be taken in such a way as to impair diplomatic or consular inviolability (art. 50, para. 2 (b)). Countermeasures must be preceded by a demand by the injured State that the responsible State comply with its obligations under Part Two, must be accompanied by an offer to negotiate, and must be suspended if the internationally wrongful act has ceased and the dispute is submitted in good faith to a court or tribunal with the authority to make decisions binding on the parties (art. 52, para. 3).

(8) The focus of the chapter is on countermeasures taken by injured States as defined in article 42. Occasions have arisen in practice of countermeasures being taken by other States, in particular those identified in article 48, where no State is injured or else on behalf of and at the request of an injured State. Such cases are controversial and the practice is embryonic. This chapter does not purport to regulate the taking of countermeasures by States other than the injured State. It is, however, without prejudice to the right of any State identified in article 48, paragraph 1, to take lawful measures against a responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached (art. 54).

(9) In common with other chapters of these articles, the provisions on countermeasures are residual and may be excluded or modified by a special rule to the contrary (see article 55). Thus, a treaty provision precluding the suspension of performance of an obligation under any circumstances will exclude countermeasures with respect to the performance of the obligation. Likewise, a regime for dispute resolution to which States must resort in the event of a dispute, especially if (as with the WTO dispute settlement system) it requires an authorization to take measures in the nature of countermeasures in response to a proven breach.⁷⁴³

Article 49. Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

⁷⁴³ See Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), arts. 1, 3, para. 7, and 22.

Commentary

(1) Article 49 describes the permissible object of countermeasures taken by an injured State against the responsible State and places certain limits on their scope. Countermeasures may only be taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two, namely, to cease the internationally wrongful conduct, if it is continuing, and to provide reparation to the injured State.⁷⁴⁴ Countermeasures are not intended as a form of punishment for wrongful conduct, but as an instrument for achieving compliance with the obligations of the responsible State under Part Two. The limited object and exceptional nature of countermeasures are indicated by the use of the word “only” in paragraph 1 of article 49.

(2) A fundamental prerequisite for any lawful countermeasure is the existence of an internationally wrongful act which injured the State taking the countermeasure. This point was clearly made by ICJ in the *Gabčíkovo-Nagyymaros Project* case, in the following passage:

In order to be justifiable, a countermeasure must meet certain conditions ...

In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State.⁷⁴⁵

(3) *Paragraph 1* of article 49 presupposes an objective standard for the taking of countermeasures, and in particular requires that the countermeasure be taken against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations of cessation and reparation. A State taking countermeasures acts at its peril, if its view of the question of wrongfulness turns out not to be well founded. A State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment.⁷⁴⁶ In this respect, there is no difference between countermeasures and other circumstances precluding wrongfulness.⁷⁴⁷

⁷⁴⁴ For these obligations, see articles 30 and 31 and commentaries.

⁷⁴⁵ *Gabčíkovo-Nagyymaros Project* (see footnote 27 above), p. 55, para. 83. See also “*Naulilaa*” (footnote 337 above), p. 1027; “*Cysne*” (footnote 338 above), p. 1057. At the 1930 Hague Conference, all States which responded on this point took the view that a prior wrongful act was an indispensable prerequisite for the adoption of reprisals; see League of Nations, Conference for the Codification of International Law, *Bases of Discussion ...* (footnote 88 above), p. 128.

⁷⁴⁶ The tribunal’s remark in the *Air Service Agreement* case (see footnote 28 above), to the effect that “each State establishes for itself its legal situation vis-à-vis other States” (p. 443, para. 81) should not be interpreted in the sense that the United States would have been justified in taking countermeasures whether or not France was in breach of the Agreement. In that case the tribunal went on to hold that the United States was actually responding to a breach of the Agreement by France, and that its response met the requirements for countermeasures under international law, in particular in terms of purpose and proportionality. The tribunal did not decide that an unjustified belief by the United States as to the existence of a breach would have been sufficient.

⁷⁴⁷ See paragraph (8) of the introductory commentary to chapter V of Part One.

(4) A second essential element of countermeasures is that they “must be directed against”⁷⁴⁸ a State which has committed an internationally wrongful act, and which has not complied with its obligations of cessation and reparation under Part Two of the present articles.⁷⁴⁹ The word “only” in paragraph 1 applies equally to the target of the countermeasures as to their purpose and is intended to convey that countermeasures may only be adopted against a State which is the author of the internationally wrongful act. Countermeasures may not be directed against States other than the responsible State. In a situation where a third State is owed an international obligation by the State taking countermeasures and that obligation is breached by the countermeasure, the wrongfulness of the measure is not precluded as against the third State. In that sense the effect of countermeasures in precluding wrongfulness is relative. It concerns the legal relations between the injured State and the responsible State.⁷⁵⁰

(5) This does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties. For example, if the injured State suspends transit rights with the responsible State in accordance with this chapter, other parties, including third States, may be affected thereby. If they have no individual rights in the matter they cannot complain. The same is true if, as a consequence of suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt. Such indirect or collateral effects cannot be entirely avoided.

(6) In taking countermeasures, the injured State effectively withholds performance for the time being of one or more international obligations owed by it to the responsible State, and *paragraph 2* of article 49 reflects this element. Although countermeasures will normally take the form of the non-performance of a single obligation, it is possible that a particular measure may affect the performance of several obligations simultaneously. For this reason, paragraph 2 refers to “obligations” in the plural. For example, freezing of the assets of a State might involve what would otherwise be the breach of several obligations to that State under different agreements or arrangements. Different and coexisting obligations might be affected by the same act. The test is always that of proportionality, and a State which has committed an internationally wrongful act does not thereby make itself the target for any form or combination of countermeasures, irrespective of their severity or consequences.⁷⁵¹

(7) The phrase “for the time being” in paragraph 2 indicates the temporary or provisional character of countermeasures. Their aim is the restoration of a condition of legality as between the injured State and the responsible

⁷⁴⁸ *Gabčíkovo-Nagyymaros Project* (see footnote 27 above), pp. 55–56, para. 83.

⁷⁴⁹ In the *Gabčíkovo-Nagyymaros Project* case ICJ held that the requirement had been satisfied, in that Hungary was in continuing breach of its obligations under a bilateral treaty, and Czechoslovakia’s response was directed against it on that ground.

⁷⁵⁰ On the specific question of human rights obligations, see article 50, paragraph (1) (b), and commentary.

⁷⁵¹ See article 51 and commentary. In addition, the performance of certain obligations may not be withheld by way of countermeasures in any circumstances: see article 50 and commentary.

State, and not the creation of new situations which cannot be rectified whatever the response of the latter State to the claims against it.⁷⁵² Countermeasures are taken as a form of inducement, not punishment: if they are effective in inducing the responsible State to comply with its obligations of cessation and reparation, they should be discontinued and performance of the obligation resumed.

(8) Paragraph 1 of article 49 refers to the obligations of the responsible State “under Part Two”. It is to ensuring the performance of these obligations that countermeasures are directed. In many cases the main focus of countermeasures will be to ensure cessation of a continuing wrongful act, but they may also be taken to ensure reparation, provided the other conditions laid down in chapter II are satisfied. Any other conclusion would immunize from countermeasures a State responsible for an internationally wrongful act if the act had ceased, irrespective of the seriousness of the breach or its consequences, or of the State’s refusal to make reparation for it. In this context an issue arises whether countermeasures should be available where there is a failure to provide satisfaction as demanded by the injured State, given the subsidiary role this remedy plays in the spectrum of reparation.⁷⁵³ In normal situations, satisfaction will be symbolic or supplementary and it would be highly unlikely that a State which had ceased the wrongful act and tendered compensation to the injured State could properly be made the target of countermeasures for failing to provide satisfaction as well. This concern may be adequately addressed by the application of the notion of proportionality set out in article 51.⁷⁵⁴

(9) Paragraph 3 of article 49 is inspired by article 72, paragraph 2, of the 1969 Vienna Convention, which provides that when a State suspends a treaty it must not, during the suspension, do anything to preclude the treaty from being brought back into force. By analogy, States should as far as possible choose countermeasures that are reversible. In the *Gabčíkovo-Nagymaros Project* case, the existence of this condition was recognized by the Court, although it found that it was not necessary to pronounce on the matter. After concluding that “the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate”, the Court said:

It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible.⁷⁵⁵

However, the duty to choose measures that are reversible is not absolute. It may not be possible in all cases to reverse all of the effects of countermeasures after the occasion for taking them has ceased. For example, a requirement of notification of some activity is of no value after the activity has been undertaken. By contrast, inflicting irreparable damage on the responsible State could amount

to punishment or a sanction for non-compliance, not a countermeasure as conceived in the articles. The phrase “as far as possible” in paragraph 3 indicates that if the injured State has a choice between a number of lawful and effective countermeasures, it should select one which permits the resumption of performance of the obligations suspended as a result of countermeasures.

Article 50. Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(b) obligations for the protection of fundamental human rights;

(c) obligations of a humanitarian character prohibiting reprisals;

(d) other obligations under peremptory norms of general international law.

2. A State taking countermeasures is not relieved from fulfilling its obligations:

(a) under any dispute settlement procedure applicable between it and the responsible State;

(b) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Commentary

(1) Article 50 specifies certain obligations the performance of which may not be impaired by countermeasures. An injured State is required to continue to respect these obligations in its relations with the responsible State, and may not rely on a breach by the responsible State of its obligations under Part Two to preclude the wrongfulness of any non-compliance with these obligations. So far as the law of countermeasures is concerned, they are sacrosanct.

(2) The obligations dealt with in article 50 fall into two basic categories. Paragraph 1 deals with certain obligations which, by reason of their character, must not be the subject of countermeasures at all. Paragraph 2 deals with certain obligations relating in particular to the maintenance of channels of communication between the two States concerned, including machinery for the resolution of their disputes.

(3) Paragraph 1 of article 50 identifies four categories of fundamental substantive obligations which may not be affected by countermeasures: (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (b) obligations for the protection of fundamental human rights; (c) obligations of a humanitarian character prohibiting reprisals; and (d) other obligations under peremptory norms of general international law.

⁷⁵² This notion is further emphasized by articles 49, paragraph 3, and 53 (termination of countermeasures).

⁷⁵³ See paragraph (1) of the commentary to article 37.

⁷⁵⁴ Similar considerations apply to assurances and guarantees of non-repetition. See article 30, subparagraph (b), and commentary.

⁷⁵⁵ *Gabčíkovo-Nagymaros Project* (see footnote 27 above), pp. 56–57, para. 87.

(4) *Paragraph 1 (a)* deals with the prohibition of the threat or use of force as embodied in the Charter of the United Nations, including the express prohibition of the use of force in Article 2, paragraph 4. It excludes forcible measures from the ambit of permissible countermeasures under chapter II.

(5) The prohibition of forcible countermeasures is spelled out in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, by which the General Assembly proclaimed that “States have a duty to refrain from acts of reprisal involving the use of force”.⁷⁵⁶ The prohibition is also consistent with the prevailing doctrine as well as a number of authoritative pronouncements of international judicial⁷⁵⁷ and other bodies.⁷⁵⁸

(6) *Paragraph 1 (b)* provides that countermeasures may not affect obligations for the protection of fundamental human rights. In the “*Naulilaa*” arbitration, the tribunal stated that a lawful countermeasure must be “limited by the requirements of humanity and the rules of good faith applicable in relations between States”.⁷⁵⁹ The Institut de droit international in its 1934 resolution stated that in taking countermeasures a State must “abstain from any harsh measure which would be contrary to the laws of humanity or the demands of the public conscience”.⁷⁶⁰ This has been taken further as a result of the development since 1945 of international human rights. In particular, the relevant human rights treaties identify certain human rights which may not be derogated from even in time of war or other public emergency.⁷⁶¹

(7) In its general comment No. 8 (1997) the Committee on Economic, Social and Cultural Rights discussed the effect of economic sanctions on civilian populations and especially on children. It dealt both with the effect of measures taken by international organizations, a topic which falls outside the scope of the present articles,⁷⁶² as well as with countermeasures imposed by individual States or groups of States. It stressed that “whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on

Economic, Social and Cultural Rights”,⁷⁶³ and went on to state that:

it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country.⁷⁶⁴

Analogies can be drawn from other elements of general international law. For example, paragraph 1 of article 54 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) stipulates unconditionally that “[s]tarvation of civilians as a method of warfare is prohibited”.⁷⁶⁵ Likewise, the final sentence of paragraph 2 of article 1 of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights states that “In no case may a people be deprived of its own means of subsistence”.

(8) *Paragraph 1 (c)* deals with the obligations of humanitarian law with regard to reprisals and is modelled on article 60, paragraph 5, of the 1969 Vienna Convention.⁷⁶⁶ The paragraph reflects the basic prohibition of reprisals against individuals, which exists in international humanitarian law. In particular, under the Geneva Convention relative to the Treatment of Prisoners of War of 1929, the Geneva Conventions of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) of 1977, reprisals are prohibited against defined classes of protected persons, and these prohibitions are very widely accepted.⁷⁶⁷

(9) *Paragraph 1 (d)* prohibits countermeasures affecting obligations under peremptory norms of general international law. Evidently, a peremptory norm, not subject to derogation as between two States even by treaty, cannot be derogated from by unilateral action in the form of countermeasures. Subparagraph (d) reiterates for the purposes of the present chapter the recognition in article 26 that the circumstances precluding wrongfulness elaborated in chapter V of Part One do not affect the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law. The reference to “other” obligations under

⁷⁵⁶ General Assembly resolution 2625 (XXV), annex, first principle. The Final Act of the Conference on Security and Co-operation in Europe also contains an explicit condemnation of forcible measures. Part of Principle II of the Declaration on Principles Guiding Relations between Participating States embodied in the first “Basket” of that Final Act reads: “Likewise [the participating States] will also refrain in their mutual relations from any act of reprisal by force.”

⁷⁵⁷ See especially *Corfu Channel, Merits* (footnote 35 above), p. 35; and *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 127, para. 249.

⁷⁵⁸ See, e.g., Security Council resolutions 111 (1956) of 19 January 1956, 171 (1962) of 9 April 1962, 188 (1964) of 9 April 1964, 316 (1972) of 26 June 1972, 332 (1973) of 21 April 1973, 573 (1985) of 4 October 1985 and 1322 (2000) of 7 October 2000. See also General Assembly resolution 41/38 of 20 November 1986.

⁷⁵⁹ “*Naulilaa*” (see footnote 337 above), p. 1026.

⁷⁶⁰ *Annuaire de l’Institut de droit international*, vol. 38 (1934), p. 710.

⁷⁶¹ See article 4 of the International Covenant on Civil and Political Rights; article 15 of the European Convention on Human Rights; and article 27 of the American Convention on Human Rights.

⁷⁶² See below, article 59 and commentary.

⁷⁶³ E/C.12/1997/8, para. 1.

⁷⁶⁴ *Ibid.*, para. 4.

⁷⁶⁵ See also paragraph 2 of article 54 (“objects indispensable to the survival of the civilian population”) and article 75. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II).

⁷⁶⁶ Paragraph 5 of article 60 of the 1969 Vienna Convention precludes a State from suspending or terminating for material breach any treaty provision “relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties”. This paragraph was added at the Vienna Conference on the Law of Treaties on a vote of 88 votes in favour, none against and 7 abstentions.

⁷⁶⁷ See K. J. Partsch, “Reprisals”, *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, Elsevier, 2000), vol. 4, p. 200, at pp. 203–204; and S. Oeter, “Methods and means of combat”, D. Fleck, ed., *op. cit.* (footnote 409 above) p. 105, at pp. 204–207, paras. 476–479, with references to relevant provisions.

peremptory norms makes it clear that subparagraph (d) does not qualify the preceding subparagraphs, some of which also encompass norms of a peremptory character. In particular, subparagraphs (b) and (c) stand on their own. Subparagraph (d) allows for the recognition of further peremptory norms creating obligations which may not be the subject of countermeasures by an injured State.⁷⁶⁸

(10) States may agree between themselves on other rules of international law which may not be the subject of countermeasures, whether or not they are regarded as peremptory norms under general international law. This possibility is covered by the *lex specialis* provision in article 55 rather than by the exclusion of countermeasures under article 50, paragraph 1 (d). In particular, a bilateral or multilateral treaty might renounce the possibility of countermeasures being taken for its breach, or in relation to its subject matter. This is the case, for example, with the European Union treaties, which have their own system of enforcement.⁷⁶⁹ Under the dispute settlement system of WTO, the prior authorization of the Dispute Settlement Body is required before a member can suspend concessions or other obligations under the WTO agreements in response to a failure of another member to comply with recommendations and rulings of a WTO panel or the Appellate Body.⁷⁷⁰ Pursuant to article 23 of the WTO Dispute Settlement Understanding (DSU), members seeking “the redress of a violation of obligations or other nullification or impairment of benefits” under the WTO agreements, “shall have recourse to, and abide by” the DSU rules and procedures. This has been construed both as an “exclusive dispute resolution clause” and as a clause “preventing WTO members from unilaterally resolving their disputes in respect of WTO rights and obligations”.⁷⁷¹ To the extent that derogation clauses or other treaty provisions (e.g. those prohibiting reservations) are properly interpreted as indicating that the treaty provisions are “intransgressible”,⁷⁷² they may entail the exclusion of countermeasures.

(11) In addition to the substantive limitations on the taking of countermeasures in paragraph 1 of article 50, paragraph 2 provides that countermeasures may not be taken with respect to two categories of obligations, viz. certain obligations under dispute settlement procedures applicable between it and the responsible State, and obligations with

respect to diplomatic and consular inviolability. The justification in each case concerns not so much the substantive character of the obligation but its function in relation to the resolution of the dispute between the parties which has given rise to the threat or use of countermeasures.

(12) The first of these, contained in paragraph 2 (a), applies to “any dispute settlement procedure applicable” between the injured State and the responsible State. This phrase refers only to dispute settlement procedures that are related to the dispute in question and not to other unrelated issues between the States concerned. For this purpose the dispute should be considered as encompassing both the initial dispute over the internationally wrongful act and the question of the legitimacy of the countermeasure(s) taken in response.

(13) It is a well-established principle that dispute settlement provisions must be upheld notwithstanding that they are contained in a treaty which is at the heart of the dispute and the continued validity or effect of which is challenged. As ICJ said in *Appeal Relating to the Jurisdiction of the ICAO Council*:

Nor in any case could a merely unilateral suspension *per se* render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested.⁷⁷³

Similar reasoning underlies the principle that dispute settlement provisions between the injured and the responsible State and applicable to their dispute may not be suspended by way of countermeasures. Otherwise, unilateral action would replace an agreed provision capable of resolving the dispute giving rise to the countermeasures. The point was affirmed by the Court in the *United States Diplomatic and Consular Staff in Tehran* case:

In any event, any alleged violation of the Treaty [of Amity] by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes.⁷⁷⁴

(14) The second exception in paragraph 2 (b) limits the extent to which an injured State may resort, by way of countermeasures, to conduct inconsistent with its obligations in the field of diplomatic or consular relations. An injured State could envisage action at a number of levels. To declare a diplomat *persona non grata*, to terminate or suspend diplomatic relations, to recall ambassadors in situations provided for in the Vienna Convention on Diplomatic Relations—such acts do not amount to countermeasures in the sense of this chapter. At a second level, measures may be taken affecting diplomatic or consular privileges, not prejudicing the inviolability of diplomatic or consular personnel or of premises, archives and documents. Such measures may be lawful as countermeasures if the requirements of this chapter are met. On the other hand, the scope of prohibited countermeasures under article 50, paragraph 2 (b), is limited to those obligations which are designed to guarantee the physical safety and inviolability (including the jurisdictional immunity) of diplomatic agents, premises, archives and documents in

⁷⁶⁸ See paragraphs (4) to (6) of the commentary to article 40.

⁷⁶⁹ On the exclusion of unilateral countermeasures in European Union law, see, for example, joined cases 90 and 91-63 (*Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium*), *Reports of cases before the Court*, p. 625, at p. 631 (1964); case 52/75 (*Commission of the European Communities v. Italian Republic*), *ibid.*, p. 277, at p. 284 (1976); case 232/78 (*Commission of the European Economic Communities v. French Republic*), *ibid.*, p. 2729 (1979); and case C-5/94 (*The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd.*), *Reports of cases before the Court of Justice and the Court of First Instance*, p. I-2553 (1996).

⁷⁷⁰ See Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), arts. 3, para. 7 and 22.

⁷⁷¹ See WTO, Report of the Panel, *United States—Sections 301–310 of the Trade Act of 1974* (footnote 73 above), paras. 7.35–7.46.

⁷⁷² To use the synonym adopted by ICJ in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons* (see footnote 54 above), p. 257, para. 79.

⁷⁷³ *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, *Judgment*, *I.C.J. Reports 1972*, p. 46, at p. 53. See also S. M. Schwebel, *International Arbitration: Three Salient Problems* (Cambridge, Grotius, 1987), pp. 13–59.

⁷⁷⁴ *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 28, para. 53.

all circumstances, including armed conflict.⁷⁷⁵ The same applies, *mutatis mutandis*, to consular officials.

(15) In the *United States Diplomatic and Consular Staff in Tehran* case, ICJ stressed that “diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions”,⁷⁷⁶ and it concluded that violations of diplomatic or consular immunities could not be justified even as countermeasures in response to an internationally wrongful act by the sending State. As the Court said:

The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.⁷⁷⁷

If diplomatic or consular personnel could be targeted by way of countermeasures, they would in effect constitute resident hostages against perceived wrongs of the sending State, undermining the institution of diplomatic and consular relations. The exclusion of any countermeasures infringing diplomatic and consular inviolability is thus justified on functional grounds. It does not affect the various avenues for redress available to the receiving State under the terms of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.⁷⁷⁸ On the other hand, no reference need be made in article 50, paragraph 2 (b), to multilateral diplomacy. The representatives of States to international organizations are covered by the reference to diplomatic agents. As for officials of international organizations themselves, no retaliatory step taken by a host State to their detriment could qualify as a countermeasure since it would involve non-compliance not with an obligation owed to the responsible State but with an obligation owed to a third party, i.e. the international organization concerned.

Article 51. Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Commentary

(1) Article 51 establishes an essential limit on the taking of countermeasures by an injured State in any given case, based on considerations of proportionality. It is relevant in determining what countermeasures may be applied and

⁷⁷⁵ See, e.g., Vienna Convention on Diplomatic Relations, arts. 22, 24, 29, 44 and 45.

⁷⁷⁶ *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 38, para. 83.

⁷⁷⁷ *Ibid.*, p. 40, para. 86. Cf. article 45, subparagraph (a), of the Vienna Convention on Diplomatic Relations; article 27, paragraph 1 (a), of the Vienna Convention on Consular Relations (premises, property and archives to be protected “even in case of armed conflict”).

⁷⁷⁸ See articles 9, 11, 26, 36, paragraph 2, 43 (b) and 47, paragraph 2 (a), of the Vienna Convention on Diplomatic Relations; and articles 10, paragraph 2, 12, 23, 25 (b) and (c) and article 35, paragraph (3), of the Vienna Convention on Consular Relations.

their degree of intensity. Proportionality provides a measure of assurance inasmuch as disproportionate countermeasures could give rise to responsibility on the part of the State taking such measures.

(2) Proportionality is a well-established requirement for taking countermeasures, being widely recognized in State practice, doctrine and jurisprudence. According to the award in the “*Naulilaa*” case:

even if one were to admit that the law of nations does not require that the reprisal should be approximately in keeping with the offence, one should certainly consider as excessive and therefore unlawful reprisals out of all proportion to the act motivating them.⁷⁷⁹

(3) In the *Air Service Agreement* arbitration,⁷⁸⁰ the issue of proportionality was examined in some detail. In that case there was no exact equivalence between France’s refusal to allow a change of gauge in London on flights from the west coast of the United States and the United States’ countermeasure which suspended Air France flights to Los Angeles altogether. The tribunal nonetheless held the United States measures to be in conformity with the principle of proportionality because they “do not appear to be clearly disproportionate when compared to those taken by France”. In particular, the majority said:

It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach: this is a well-known rule ... It has been observed, generally, that judging the “proportionality” of counter-measures is not an easy task and can at best be accomplished by approximation. In the Tribunal’s view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach. The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the counter-measures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries. If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France. Neither Party has provided the Tribunal with evidence that would be sufficient to affirm or reject the existence of proportionality in these terms, and the Tribunal must be satisfied with a very approximative appreciation.⁷⁸¹

In that case the countermeasures taken were in the same field as the initial measures and concerned the same routes, even if they were rather more severe in terms of their economic effect on the French carriers than the initial French action.

(4) The question of proportionality was again central to the appreciation of the legality of possible countermeasures taken by Czechoslovakia in the *Gabčíkovo-Nagyymaros Project* case.⁷⁸² ICJ, having accepted that

⁷⁷⁹ “*Naulilaa*” (see footnote 337 above), p. 1028.

⁷⁸⁰ *Air Service Agreement* (see footnote 28 above), para. 83.

⁷⁸¹ *Ibid.*; Reuter, dissenting, accepted the tribunal’s legal analysis of proportionality but suggested that there were “serious doubts on the proportionality of the counter-measures taken by the United States, which the tribunal has been unable to assess definitely” (p. 448).

⁷⁸² *Gabčíkovo-Nagyymaros Project* (see footnote 27 above), p. 56, paras. 85 and 87, citing *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23*, p. 27.

Hungary's actions in refusing to complete the Project amounted to an unjustified breach of the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System of 1977, went on to say:

In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.

In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:

"[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user [sic] of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others"...

Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well ...

The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube—with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz—failed to respect the proportionality which is required by international law ...

The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate.

Thus, the Court took into account the quality or character of the rights in question as a matter of principle and (like the tribunal in the *Air Service Agreement* case) did not assess the question of proportionality only in quantitative terms.

(5) In other areas of the law where proportionality is relevant (e.g. self-defence), it is normal to express the requirement in positive terms, even though, in those areas as well, what is proportionate is not a matter which can be determined precisely.⁷⁸³ The positive formulation of the proportionality requirement is adopted in article 51. A negative formulation might allow too much latitude, in a context where there is concern as to the possible abuse of countermeasures.

(6) Considering the need to ensure that the adoption of countermeasures does not lead to inequitable results, proportionality must be assessed taking into account not only the purely "quantitative" element of the injury suffered, but also "qualitative" factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach. Article 51 relates proportionality primarily to the injury suffered but "taking into account" two further criteria: the gravity of the internationally wrongful act, and the rights in question. The reference to "the rights in question" has a broad meaning, and includes not only the effect of a wrongful act on the injured State but also on the rights of the responsible State. Furthermore, the position of other States which may be affected may also be taken into consideration.

(7) Proportionality is concerned with the relationship between the internationally wrongful act and the countermeasure. In some respects proportionality is linked to the

requirement of purpose specified in article 49: a clearly disproportionate measure may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim and to fall outside the purpose of countermeasures enunciated in article 49. Proportionality is, however, a limitation even on measures which may be justified under article 49. In every case a countermeasure must be commensurate with the injury suffered, including the importance of the issue of principle involved and this has a function partly independent of the question whether the countermeasure was necessary to achieve the result of ensuring compliance.

Article 52. Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(a) call upon the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;

(b) notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(a) the internationally wrongful act has ceased; and

(b) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Commentary

(1) Article 52 lays down certain procedural conditions relating to the resort to countermeasures by the injured State. Before taking countermeasures an injured State is required to call on the responsible State in accordance with article 43 to comply with its obligations under Part Two. The injured State is also required to notify the responsible State that it intends to take countermeasures and to offer to negotiate with that State. Notwithstanding this second requirement, the injured State may take certain urgent countermeasures to preserve its rights. If the responsible State has ceased the internationally wrongful act and the dispute is before a competent court or tribunal, countermeasures may not be taken; if already taken, they must be suspended. However, this requirement does not apply if the responsible State fails to implement dispute settlement procedures in good faith. In such a case countermeasures do not have to be suspended and may be resumed.

⁷⁸³ E. Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale* (Milan, Giuffrè, 2000).

(2) Overall, article 52 seeks to establish reasonable procedural conditions for the taking of countermeasures in a context where compulsory third party settlement of disputes may not be available, immediately or at all.⁷⁸⁴ At the same time, it needs to take into account the possibility that there may be an international court or tribunal with authority to make decisions binding on the parties in relation to the dispute. Countermeasures are a form of self-help, which responds to the position of the injured State in an international system in which the impartial settlement of disputes through due process of law is not yet guaranteed. Where a third party procedure exists and has been invoked by either party to the dispute, the requirements of that procedure, e.g. as to interim measures of protection, should substitute as far as possible for countermeasures. On the other hand, even where an international court or tribunal has jurisdiction over a dispute and authority to indicate interim measures of protection, it may be that the responsible State is not cooperating in that process. In such cases the remedy of countermeasures necessarily revives.

(3) The system of article 52 builds upon the observations of the tribunal in the *Air Service Agreement* arbitration.⁷⁸⁵ The first requirement, set out in *paragraph 1 (a)*, is that the injured State must call on the responsible State to fulfil its obligations of cessation and reparation before any resort to countermeasures. This requirement (sometimes referred to as “*sommation*”) was stressed both by the tribunal in the *Air Service Agreement* arbitration⁷⁸⁶ and by ICJ in the *Gabčíkovo-Nagymaros Project* case.⁷⁸⁷ It also appears to reflect a general practice.⁷⁸⁸

(4) The principle underlying the notification requirement is that, considering the exceptional nature and potentially serious consequences of countermeasures, they should not be taken before the other State is given notice of a claim and some opportunity to present a response. In practice, however, there are usually quite extensive and detailed negotiations over a dispute before the point is reached where some countermeasures are contemplated. In such cases the injured State will already have notified the responsible State of its claim in accordance with article 43, and it will not have to do it again in order to comply with *paragraph 1 (a)*.

(5) *Paragraph 1 (b)* requires that the injured State which decides to take countermeasures should notify the responsible State of that decision to take countermeasures and offer to negotiate with that State. Countermeasures can have serious consequences for the target State, which should have the opportunity to reconsider its position faced with the proposed countermeasures. The temporal relationship between the operation of subparagraphs (*a*)

and (*b*) of *paragraph 1* is not strict. Notifications could be made close to each other or even at the same time.

(6) Under *paragraph 2*, however, the injured State may take “such urgent countermeasures as are necessary to preserve its rights” even before any notification of the intention to do so. Under modern conditions of communications, a State which is responsible for an internationally wrongful act and which refuses to cease that act or provide any redress therefore may also seek to immunize itself from countermeasures, for example by withdrawing assets from banks in the injured State. Such steps can be taken within a very short time, so that the notification required by *paragraph 1 (b)* might frustrate its own purpose. Hence, *paragraph 2* allows for urgent countermeasures which are necessary to preserve the rights of the injured State: this phrase includes both its rights in the subject matter of the dispute and its right to take countermeasures. Temporary stay orders, the temporary freezing of assets and similar measures could fall within *paragraph 2*, depending on the circumstances.

(7) *Paragraph 3* deals with the case in which the wrongful act has ceased and the dispute is submitted to a court or tribunal which has the authority to decide it with binding effect for the parties. In such a case, and for so long as the dispute settlement procedure is being implemented in good faith, unilateral action by way of countermeasures is not justified. Once the conditions in *paragraph 3* are met, the injured State may not take countermeasures; if already taken, they must be suspended “without undue delay”. The phrase “without undue delay” allows a limited tolerance for the arrangements required to suspend the measures in question.

(8) A dispute is not “pending before a court or tribunal” for the purposes of *paragraph 3 (b)* unless the court or tribunal exists and is in a position to deal with the case. For these purposes a dispute is not pending before an *ad hoc* tribunal established pursuant to a treaty until the tribunal is actually constituted, a process which will take some time even if both parties are cooperating in the appointment of the members of the tribunal.⁷⁸⁹ *Paragraph 3* is based on the assumption that the court or tribunal to which it refers has jurisdiction over the dispute and also the power to order provisional measures. Such power is a normal feature of the rules of international courts and tribunals.⁷⁹⁰ The rationale behind *paragraph 3* is that once the parties submit their dispute to such a court or tribunal for resolution, the injured State may request it to order provisional measures to protect its rights. Such a request, provided the court or tribunal is available to hear it, will perform a function essentially equivalent to that of countermeasures. Provided the order is complied with it will

⁷⁸⁴ See above, *paragraph (7)* of the commentary to the present chapter.

⁷⁸⁵ *Air Service Agreement* (see footnote 28 above), pp. 445–446, paras. 91 and 94–96.

⁷⁸⁶ *Ibid.*, p. 444, paras. 85–87.

⁷⁸⁷ *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 56, para. 84.

⁷⁸⁸ A. Gianelli, *Adempimenti preventivi all'adozione di contromisure internazionali* (Milan, Giuffrè, 1997).

⁷⁸⁹ Hence, *paragraph 5* of article 290 of the United Nations Convention on the Law of the Sea provides for ITLOS to deal with provisional measures requests “[p]ending the constitution of an arbitral tribunal to which the dispute is being submitted”.

⁷⁹⁰ The binding effect of provisional measures orders under Part XI of the United Nations Convention on the Law of the Sea is assured by *paragraph 6* of article 290. For the binding effect of provisional measures orders under Article 41 of the Statute of ICJ, see the decision in *LaGrand, Judgment* (footnote 119 above), pp. 501–504, paras. 99–104.

make countermeasures unnecessary pending the decision of the tribunal. The reference to a “court or tribunal” is intended to refer to any third party dispute settlement procedure, whatever its designation. It does not, however, refer to political organs such as the Security Council. Nor does it refer to a tribunal with jurisdiction between a private party and the responsible State, even if the dispute between them has given rise to the controversy between the injured State and the responsible State. In such cases, however, the fact that the underlying dispute has been submitted to arbitration will be relevant for the purposes of articles 49 and 51, and only in exceptional cases will countermeasures be justified.⁷⁹¹

(9) Paragraph 4 of article 52 provides a further condition for the suspension of countermeasures under paragraph 3. It comprehends various possibilities, ranging from an initial refusal to cooperate in the procedure, for example by non-appearance, through non-compliance with a provisional measures order, whether or not it is formally binding, through to refusal to accept the final decision of the court or tribunal. This paragraph also applies to situations where a State party fails to cooperate in the establishment of the relevant tribunal or fails to appear before the tribunal once it is established. Under the circumstances of paragraph 4, the limitations to the taking of countermeasures under paragraph 3 do not apply.

Article 53. Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.

Commentary

(1) Article 53 deals with the situation where the responsible State has complied with its obligations of cessation and reparation under Part Two in response to countermeasures taken by the injured State. Once the responsible State has complied with its obligations under Part Two, no ground is left for maintaining countermeasures, and they must be terminated forthwith.

(2) The notion that countermeasures must be terminated as soon as the conditions which justified them have ceased is implicit in the other articles in this chapter. In view of its importance, however, article 53 makes this clear. It underlines the specific character of countermeasures under article 49.

⁷⁹¹ Under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, the State of nationality may not bring an international claim on behalf of a claimant individual or company “in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute” (art. 27, para. 1); see C. H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001) pp. 397–414. This excludes all forms of invocation of responsibility by the State of nationality, including the taking of countermeasures. See paragraph (2) of the commentary to article 42.

Article 54. Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

Commentary

(1) Chapter II deals with the right of an injured State to take countermeasures against a responsible State in order to induce that State to comply with its obligations of cessation and reparation. However, “injured” States, as defined in article 42, are not the only States entitled to invoke the responsibility of a State for an internationally wrongful act under chapter I of this Part. Article 48 allows such invocation by any State, in the case of the breach of an obligation to the international community as a whole, or by any member of a group of States, in the case of other obligations established for the protection of the collective interest of the group. By virtue of article 48, paragraph 2, such States may also demand cessation and performance in the interests of the beneficiaries of the obligation breached. Thus, with respect to the obligations referred to in article 48, such States are recognized as having a legal interest in compliance. The question is to what extent these States may legitimately assert a right to react against unremedied breaches.⁷⁹²

(2) It is vital for this purpose to distinguish between individual measures, whether taken by one State or by a group of States each acting in its individual capacity and through its own organs on the one hand, and institutional reactions in the framework of international organizations on the other. The latter situation, for example where it occurs under the authority of Chapter VII of the Charter of the United Nations, is not covered by the articles.⁷⁹³ More generally, the articles do not cover the case where action is taken by an international organization, even though the member States may direct or control its conduct.⁷⁹⁴

(3) Practice on this subject is limited and rather embryonic. In a number of instances, States have reacted against what were alleged to be breaches of the obligations referred to in article 48 without claiming to be individually injured. Reactions have taken such forms as economic sanctions or other measures (e.g. breaking off air links or other contacts). Examples include the following:

⁷⁹² See, e.g., M. Akehurst, “Reprisals by third States”, *BYBIL*, 1970, vol. 44, p. 1; J. I. Charney, “Third State remedies in international law”, *Michigan Journal of International Law*, vol. 10, No. 1 (1989), p. 57; Hutchinson, *loc. cit.* (footnote 672 above); Sicilianos, *op. cit.* (footnote 735 above), pp. 110–175; B. Simma, “From bilateralism to community interest in international law”, *Collected Courses ...*, 1994–VI (The Hague, Martinus Nijhoff, 1997), vol. 250, p. 217; and J. A. Frowein, “Reactions by not directly affected States to breaches of public international law”, *Collected Courses ...*, 1994–IV (Dordrecht, Martinus Nijhoff, 1995), vol. 248, p. 345.

⁷⁹³ See article 59 and commentary.

⁷⁹⁴ See article 57 and commentary.

• *United States-Uganda (1978)*. In October 1978, the United States Congress adopted legislation prohibiting exports of goods and technology to, and all imports from, Uganda.⁷⁹⁵ The legislation recited that “[t]he Government of Uganda ... has committed genocide against Ugandans” and that the “United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide”.⁷⁹⁶

• *Certain Western countries-Poland and the Soviet Union (1981)*. On 13 December 1981, the Polish Government imposed martial law and subsequently suppressed demonstrations and detained many dissidents.⁷⁹⁷ The United States and other Western countries took action against both Poland and the Soviet Union. The measures included the suspension, with immediate effect, of treaties providing for landing rights of Aeroflot in the United States and LOT in the United States, Great Britain, France, the Netherlands, Switzerland and Austria.⁷⁹⁸ The suspension procedures provided for in the respective treaties were disregarded.⁷⁹⁹

• *Collective measures against Argentina (1982)*. In April 1982, when Argentina took control over part of the Falkland Islands (Malvinas), the Security Council called for an immediate withdrawal.⁸⁰⁰ Following a request by the United Kingdom, European Community members, Australia, Canada and New Zealand adopted trade sanctions. These included a temporary prohibition on all imports of Argentine products, which ran contrary to article XI:1 and possibly article III of the General Agreement on Tariffs and Trade. It was disputed whether the measures could be justified under the national security exception provided for in article XXI (b) (iii) of the Agreement.⁸⁰¹ The embargo adopted by the European countries also constituted a suspension of Argentina’s rights under two sectoral agreements on trade in textiles and trade in mutton and lamb,⁸⁰² for which security exceptions of the Agreement did not apply.

• *United States-South Africa (1986)*. When in 1985, the Government of South Africa declared a state of emergency in large parts of the country, the Security Council recommended the adoption of sectoral economic boycotts and the freezing of cultural and sports relations.⁸⁰³ Subsequently, some countries introduced measures which went beyond those recommended by the Security Council. The United States Congress adopted the Comprehensive Anti-Apartheid Act which suspended landing rights of South African Airlines on United States territory.⁸⁰⁴ This immediate suspension was contrary to the terms of the 1947 United States of America and Union of South Africa Agreement relating to air services between their respective territories⁸⁰⁵ and was justified as a measure which should encourage the Government of South Africa “to adopt reforms leading to the establishment of a non-racial democracy”.⁸⁰⁶

• *Collective measures against Iraq (1990)*. On 2 August 1990, Iraqi troops invaded and occupied Kuwait. The Security Council immediately condemned the invasion. European Community member States and the United States adopted trade embargoes and decided to freeze Iraqi assets.⁸⁰⁷ This action was taken in direct response to the Iraqi invasion with the consent of the Government of Kuwait.

• *Collective measures against the Federal Republic of Yugoslavia (1998)*. In response to the humanitarian crisis in Kosovo, the member States of the European Community adopted legislation providing for the freezing of Yugoslav funds and an immediate flight ban.⁸⁰⁸ For a number of countries, such as France, Germany and the United Kingdom, the latter measure implied the non-performance of bilateral aviation agreements.⁸⁰⁹ Because of doubts about the legitimacy of the action, the British Government initially was prepared to follow the one-year denunciation procedure provided for in article 17 of its agreement with Yugoslavia. However, it later changed its position and denounced flights with immediate effect. Justifying the measure, it stated that “President Milosevic’s ... worsening record on human rights means that, on moral and political grounds, he has forfeited the right of his Government to insist upon the 12 months notice which would normally ap-

⁷⁹⁵ Uganda Embargo Act, Public Law 95-435 of 10 October 1978, *United States Statutes at Large 1978*, vol. 92, part 1 (Washington, D.C., United States Government Printing Office, 1980), pp. 1051–1053.

⁷⁹⁶ *Ibid.*, sects. 5(a) and (b).

⁷⁹⁷ RGDIP, vol. 86 (1982), pp. 603–604.

⁷⁹⁸ *Ibid.*, p. 606.

⁷⁹⁹ See, e.g., article 15 of the Air Transport Agreement between the Government of the United States of America and the Government of the Polish People’s Republic of 1972 (*United States Treaties and Other International Agreements*, vol. 23, part 4 (1972), p. 4269); and article 17 of the United States-Union of Soviet Socialist Republics Civil Air Transport Agreement of 1966, ILM, vol. 6, No. 1 (January 1967), p. 82 and vol. 7, No. 3 (May 1968), p. 571.

⁸⁰⁰ Security Council resolution 502 (1982) of 3 April 1982.

⁸⁰¹ Western States’ reliance on this provision was disputed by other GATT members; cf. communiqué of Western countries, GATT document L. 5319/Rev.1 and the statements by Spain and Brazil, GATT document C/M/157, pp. 5–6. For an analysis, see M. J. Hahn, *Die einseitige Aussetzung von GATT-Verpflichtungen als Repräsentation* (Unilateral Suspension of GATT Obligations as Reprisal (English summary)) (Berlin, Springer, 1996), pp. 328–334.

⁸⁰² The treaties are reproduced in *Official Journal of the European Communities*, No. L 298 of 26 November 1979, p. 2; and No. L 275 of 18 October 1980, p. 14.

⁸⁰³ Security Council resolution 569 (1985) of 26 July 1985. For further references, see Sicilianos, *op. cit.* (footnote 735 above), p. 165.

⁸⁰⁴ For the text of this provision, see ILM, vol. 26, No. 1 (January 1987), p. 79 (sect. 306).

⁸⁰⁵ United Nations, *Treaty Series*, vol. 66, p. 239 (art. VI).

⁸⁰⁶ For the implementation order, see ILM (footnote 804 above), p. 105.

⁸⁰⁷ See, e.g., President Bush’s Executive Orders of 2 August 1990, reproduced in AJIL, vol. 84, No. 4 (October 1990), pp. 903–905.

⁸⁰⁸ Common positions of 7 May and 29 June 1998, *Official Journal of the European Communities*, No. L 143 of 14 May 1998, p. 1 and No. L 190 of 4 July 1998, p. 3; implemented through Council Regulations 1295/98, *ibid.*, No. L 178 of 23 June 1998, p. 33 and 1901/98, *ibid.*, No. L 248 of 8 September 1998, p. 1.

⁸⁰⁹ See, e.g., United Kingdom, *Treaty Series* No. 10 (1960) (London, HM Stationery Office, 1960); and *Recueil des Traités et Accords de la France*, 1967, No. 69.

ply”.⁸¹⁰ The Federal Republic of Yugoslavia protested these measures as “unlawful, unilateral and an example of the policy of discrimination”.⁸¹¹

(4) In some other cases, certain States similarly suspended treaty rights in order to exercise pressure on States violating collective obligations. However, they did not rely on a right to take countermeasures, but asserted a right to suspend the treaty because of a fundamental change of circumstances. Two examples may be given:

- *Netherlands-Suriname (1982)*. In 1980, a military Government seized power in Suriname. In response to a crackdown by the new Government on opposition movements in December 1982, the Dutch Government suspended a bilateral treaty on development assistance under which Suriname was entitled to financial subsidies.⁸¹² While the treaty itself did not contain any suspension or termination clauses, the Dutch Government stated that the human rights violations in Suriname constituted a fundamental change of circumstances which gave rise to a right of suspension.⁸¹³

- *European Community member States-the Federal Republic of Yugoslavia (1991)*. In the autumn of 1991, in response to resumption of fighting within the Federal Republic of Yugoslavia, European Community members suspended and later denounced the 1983 Cooperation Agreement with Yugoslavia.⁸¹⁴ This led to a general repeal of trade preferences on imports and thus went beyond the weapons embargo ordered by the Security Council in resolution 713 (1991) of 25 September 1991. The reaction was incompatible with the terms of the Cooperation Agreement, which did not provide for the immediate suspension but only for denunciation upon six months’ notice. Justifying the suspension, European Community member States explicitly mentioned the threat to peace and security in the region. But as in the case of Suriname, they relied on fundamental change of circumstances, rather than asserting a right to take countermeasures.⁸¹⁵

(5) In some cases, there has been an apparent willingness on the part of some States to respond to violations of obligations involving some general interest, where those

⁸¹⁰ BYBIL, 1998, vol. 69, p. 581; see also BYBIL, 1999, vol. 70, pp. 555–556.

⁸¹¹ Statement of the Government of the Federal Republic of Yugoslavia on the suspension of flights of Yugoslav Airlines of 10 October 1998. See M. Weller, *The Crisis in Kosovo 1989–1999* (Cambridge, Documents & Analysis Publishing, 1999), p. 227.

⁸¹² *Tractatenblad van het Koninkrijk der Nederlanden*, No. 140 (1975). See H.-H. Lindemann, “The repercussions resulting from the violation of human rights in Surinam on the contractual relations between the Netherlands and Surinam”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 44 (1984), p. 64, at pp. 68–69.

⁸¹³ R. C. R. Siekmann, “Netherlands State practice for the parliamentary year 1982–1983”, NYIL, 1984, vol. 15, p. 321.

⁸¹⁴ *Official Journal of the European Communities*, No. L 41 of 14 February 1983, p. 1; No. L 315 of 15 November 1991, p. 1, for the suspension; and No. L 325 of 27 November 1991, p. 23, for the denunciation.

⁸¹⁵ See also the decision of the European Court of Justice in *A. Racke GmbH and Co. v. Hauptzollamt Mainz*, case C-162/96, *Reports of cases before the Court of Justice and the Court of First Instance*, 1998-6, p. I-3655, at pp. 3706–3708, paras. 53–59.

States could not be considered “injured States” in the sense of article 42. It should be noted that in those cases where there was, identifiably, a State primarily injured by the breach in question, other States have acted at the request and on behalf of that State.⁸¹⁶

(6) As this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest. Consequently, it is not appropriate to include in the present articles a provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures in order to induce a responsible State to comply with its obligations. Instead, chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law.

(7) Article 54 accordingly provides that the chapter on countermeasures does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against the responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached. The article speaks of “lawful measures” rather than “countermeasures” so as not to prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole.

PART FOUR

GENERAL PROVISIONS

This Part contains a number of general provisions applicable to the articles as a whole, specifying either their scope or certain matters not dealt with. First, article 55 makes it clear by reference to the *lex specialis* principle that the articles have a residual character. Where some matter otherwise dealt with in the articles is governed by a special rule of international law, the latter will prevail to the extent of any inconsistency. Correlatively, article 56 makes it clear that the articles are not exhaustive, and that they do not affect other applicable rules of international law on matters not dealt with. There follow three saving clauses. Article 57 excludes from the scope of the articles questions concerning the responsibility of international organizations and of States for the acts of international organizations. The articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State, and this is made clear by article 58. Finally, article 59 reserves the effects of the Charter of the United Nations itself.

⁸¹⁶ Cf. *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above) where ICJ noted that action by way of collective self-defence could not be taken by a third State except at the request of the State subjected to the armed attack (p. 105, para. 199).

Article 55. *Lex specialis*

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

Commentary

(1) When defining the primary obligations that apply between them, States often make special provision for the legal consequences of breaches of those obligations, and even for determining whether there has been such a breach. The question then is whether those provisions are exclusive, i.e. whether the consequences which would otherwise apply under general international law, or the rules that might otherwise have applied for determining a breach, are thereby excluded. A treaty may expressly provide for its relationship with other rules. Often, however, it will not do so and the question will then arise whether the specific provision is to coexist with or exclude the general rule that would otherwise apply.

(2) Article 55 provides that the articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law. It reflects the maxim *lex specialis derogat legi generali*. Although it may provide an important indication, this is only one of a number of possible approaches towards determining which of several rules potentially applicable is to prevail or whether the rules simply coexist. Another gives priority, as between the parties, to the rule which is later in time.⁸¹⁷ In certain cases the consequences that follow from a breach of some overriding rule may themselves have a preemptory character. For example, States cannot, even as between themselves, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to preemptory norms of general international law. Thus, the assumption of article 55 is that the special rules in question have at least the same legal rank as those expressed in the articles. On that basis, article 55 makes it clear that the present articles operate in a residual way.

(3) It will depend on the special rule to establish the extent to which the more general rules on State responsibility set out in the present articles are displaced by that rule. In some cases, it will be clear from the language of a treaty or other text that only the consequences specified are to flow. Where that is so, the consequence will be “determined” by the special rule and the principle embodied in article 55 will apply. In other cases, one aspect of the general law may be modified, leaving other aspects still applicable. An example of the former is the WTO Understanding on Rules and Procedures governing the Settlement of Disputes as it relates to certain remedies.⁸¹⁸ An

example of the latter is article 41 of Protocol No. 11 to the European Convention on Human Rights.⁸¹⁹ Both concern matters dealt with in Part Two of the articles. The same considerations apply to Part One. Thus, a particular treaty might impose obligations on a State but define the “State” for that purpose in a way which produces different consequences than would otherwise flow from the rules of attribution in chapter II.⁸²⁰ Or a treaty might exclude a State from relying on *force majeure* or necessity.

(4) For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other. Thus, the question is essentially one of interpretation. For example, in the *Neumeister* case, the European Court of Human Rights held that the specific obligation in article 5, paragraph 5, of the European Convention on Human Rights for compensation for unlawful arrest or detention did not prevail over the more general provision for compensation in article 50. In the Court’s view, to have applied the *lex specialis* principle to article 5, paragraph 5, would have led to “consequences incompatible with the aim and object of the Convention”.⁸²¹ It was sufficient, in applying article 50, to take account of the specific provision.⁸²²

(5) Article 55 is designed to cover both “strong” forms of *lex specialis*, including what are often referred to as self-contained regimes, as well as “weaker” forms such as specific treaty provisions on a single point, for example, a specific treaty provision excluding restitution. PCIJ referred to the notion of a self-contained regime in the *S.S. “Wimbledon”* case with respect to the transit provisions concerning the Kiel Canal in the Treaty of Versailles,⁸²³

which is inconsistent with a covered agreement”. For WTO purposes, “compensation” refers to the future conduct, not past conduct, and involves a form of countermeasure. See article 22 of the Understanding. On the distinction between cessation and reparation for WTO purposes, see, e.g., Report of the Panel, Australia–Subsidies Provided to Producers and Exporters of Automotive Leather (footnote 431 above).

⁸¹⁹ See paragraph (2) of the commentary to article 32.

⁸²⁰ Thus, article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment only applies to torture committed “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”. This is probably narrower than the bases for attribution of conduct to the State in Part One, chapter II. Cf. “federal” clauses, allowing certain component units of the State to be excluded from the scope of a treaty or limiting obligations of the federal State with respect to such units (e.g. article 34 of the Convention for the Protection of the World Cultural and Natural Heritage).

⁸²¹ *Neumeister v. Austria*, Eur. Court H.R., Series A, No. 17 (1974), paras. 28–31, especially para. 30.

⁸²² See also *Mavrommatis* (footnote 236 above), pp. 29–33; *Marcu Colleanu v. German State*, Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix (Paris, Sirey, 1930), vol. IX, p. 216 (1929); WTO, Report of the Panel, Turkey–Restrictions on Imports of Textile and Clothing Products (footnote 130 above), paras. 9.87–9.95; *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, UNRIAA, vol. XXI (Sales No. E/F.95.V.2), p. 53, at p. 100, para. 39 (1977). See further C. W. Jenks, “The conflict of law-making treaties”, BYBIL, 1953, vol. 30, p. 401; M. McDougal, H. D. Lasswell and J. C. Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (New Haven Press, 1994), pp. 200–206; and P. Reuter, *Introduction to the Law of Treaties* (footnote 300 above), para. 201.

⁸²³ *S.S. “Wimbledon”* (see footnote 34 above), pp. 23–24.

⁸¹⁷ See paragraph 3 of article 30 of the 1969 Vienna Convention.

⁸¹⁸ See Marrakesh Agreement establishing the World Trade Organization, annex 2, especially art. 3, para. 7, which provides for compensation “only if the immediate withdrawal of the measure is impractical and as a temporary measure pending the withdrawal of the measure

as did ICJ in the *United States Diplomatic and Consular Staff in Tehran* case with respect to remedies for abuse of diplomatic and consular privileges.⁸²⁴

(6) The principle stated in article 55 applies to the articles as a whole. This point is made clear by the use of language (“the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State”) which reflects the content of each of Parts One, Two and Three.

Article 56. Questions of State responsibility not regulated by these articles

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Commentary

(1) The present articles set out by way of codification and progressive development the general secondary rules of State responsibility. In that context, article 56 has two functions. First, it preserves the application of the rules of customary international law concerning State responsibility on matters not covered by the articles. Secondly, it preserves other rules concerning the effects of a breach of an international obligation which do not involve issues of State responsibility but stem from the law of treaties or other areas of international law. It complements the *lex specialis* principle stated in article 55. Like article 55, it is not limited to the legal consequences of wrongful acts but applies to the whole regime of State responsibility set out in the articles.

(2) As to the first of these functions, the articles do not purport to state all the consequences of an internationally wrongful act even under existing international law and there is no intention of precluding the further development of the law on State responsibility. For example, the principle of law expressed in the maxim *ex injuria jus non oritur* may generate new legal consequences in the field of responsibility.⁸²⁵ In this respect, article 56 mirrors the preambular paragraph of the 1969 Vienna Convention which affirms that “the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention”. However, matters of State responsibility are not only regulated by customary

international law but also by some treaties; hence article 56 refers to the “applicable rules of international law”.

(3) A second function served by article 56 is to make it clear that the present articles are not concerned with any legal effects of a breach of an international obligation which do not flow from the rules of State responsibility, but stem from the law of treaties or other areas of law. Examples include the invalidity of a treaty procured by an unlawful use of force,⁸²⁶ the exclusion of reliance on a fundamental change of circumstances where the change in question results from a breach of an international obligation of the invoking State to any other State party,⁸²⁷ or the termination of the international obligation violated in the case of a material breach of a bilateral treaty.⁸²⁸

Article 57. Responsibility of an international organization

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Commentary

(1) Article 57 is a saving clause which reserves two related issues from the scope of the articles. These concern, first, any question involving the responsibility of international organizations, and secondly, any question concerning the responsibility of any State for the conduct of an international organization.

(2) In accordance with the articles prepared by the Commission on other topics, the expression “international organization” means an “intergovernmental organization”.⁸²⁹ Such an organization possesses separate legal personality under international law,⁸³⁰ and is responsible for its own acts, i.e. for acts which are carried out by the organization through its own organs or officials.⁸³¹ By contrast, where a number of States act together through their own organs as distinct from those of an international organization, the conduct in question is that of the States concerned, in accordance with the principles set out in chapter II of Part One. In such cases, as article 47 confirms, each State remains responsible for its own conduct.

⁸²⁶ 1969 Vienna Convention, art. 52.

⁸²⁷ *Ibid.*, art. 62, para. 2 (b).

⁸²⁸ *Ibid.*, art. 60, para 1.

⁸²⁹ See article 2, paragraph 1 (i), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter “the 1986 Vienna Convention”).

⁸³⁰ A firm foundation for the international personality of the United Nations is laid in the advisory opinion of the Court in *Reparation for Injuries* (see footnote 38 above), at p. 179.

⁸³¹ As the Court has observed, “the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts”, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (see footnote 56 above).

⁸²⁴ *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), at p. 40, para. 86. See paragraph (15) of the commentary to article 50 and also B. Simma, “Self-contained regimes”, *NYIL*, 1985, vol. 16, p. 111.

⁸²⁵ Another possible example, related to the determination whether there has been a breach of an international obligation, is the so-called principle of “approximate application”, formulated by Sir Hersch Lauterpacht in *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23, at p. 46. In the *Gabčíkovo-Nagymaros Project* case (see footnote 27 above), the Court said that “even if such a principle existed, it could by definition only be employed within the limits of the treaty in question” (p. 53, para. 76). See also S. Rosenne, *Breach of Treaty* (footnote 411 above), pp. 96–101.

(3) Just as a State may second officials to another State, putting them at its disposal so that they act for the purposes of and under the control of the latter, so the same could occur as between an international organization and a State. The former situation is covered by article 6. As to the latter situation, if a State seconds officials to an international organization so that they act as organs or officials of the organization, their conduct will be attributable to the organization, not the sending State, and will fall outside the scope of the articles. As to the converse situation, in practice there do not seem to be convincing examples of organs of international organizations which have been “placed at the disposal of” a State in the sense of article 6,⁸³² and there is no need to provide expressly for the possibility.

(4) Article 57 also excludes from the scope of the articles issues of the responsibility of a State for the acts of an international organization, i.e. those cases where the international organization is the actor and the State is said to be responsible by virtue of its involvement in the conduct of the organization or by virtue of its membership of the organization. Formally, such issues could fall within the scope of the present articles since they concern questions of State responsibility akin to those dealt with in chapter IV of Part One. But they raise controversial substantive questions as to the functioning of international organizations and the relations between their members, questions which are better dealt with in the context of the law of international organizations.⁸³³

(5) On the other hand article 57 does not exclude from the scope of the articles any question of the responsibility of a State for its own conduct, i.e. for conduct attributable to it under chapter II of Part One, not being conduct performed by an organ of an international organization. In this respect the scope of article 57 is narrow. It covers only what is sometimes referred to as the derivative or second-

ary liability of member States for the acts or debts of an international organization.⁸³⁴

Article 58. Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

Commentary

(1) Article 58 makes clear that the articles as a whole do not address any question of the individual responsibility under international law of any person acting on behalf of a State. It clarifies a matter which could be inferred in any case from the fact that the articles only address issues relating to the responsibility of States.

(2) The principle that individuals, including State officials, may be responsible under international law was established in the aftermath of the Second World War. It was included in the London Charter of 1945 which established the Nuremberg Tribunal⁸³⁵ and was subsequently endorsed by the General Assembly.⁸³⁶ It underpins more recent developments in the field of international criminal law, including the two *ad hoc* tribunals and the Rome Statute of the International Criminal Court.⁸³⁷ So far this principle has operated in the field of criminal responsibility, but it is not excluded that developments may occur in the field of individual civil responsibility.⁸³⁸ As a saving clause, article 58 is not intended to exclude that possibility; hence the use of the general term “individual responsibility”.

(3) Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility.⁸³⁹ The

⁸³² Cf. *Yearbook ... 1974*, vol. II (Part One), pp. 286–290. The High Commissioner for the Free City of Danzig was appointed by the League of Nations Council and was responsible to it; see *Treatment of Polish Nationals* (footnote 75 above). Although the High Commissioner exercised powers in relation to Danzig, it is doubtful that he was placed at the disposal of Danzig within the meaning of article 6. The position of the High Representative, appointed pursuant to annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina of 14 December 1995, is also unclear. The Constitutional Court of Bosnia and Herzegovina has held that the High Representative has a dual role, both as an international agent and as an official in certain circumstances acting in and for Bosnia and Herzegovina; in the latter respect, the High Representative’s acts are subject to constitutional control. See *Case U 9/00 on the Law on the State Border Service*, Official Journal of Bosnia and Herzegovina, No. 1/01 of 19 January 2001.

⁸³³ This area of international law has acquired significance following controversies, *inter alia*, over the International Tin Council: *J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry*, case 2 A.C. 418 (1990) (England, House of Lords); *Maclaine Watson and Co., Ltd. v. Council and Commission of the European Communities*, case C-241/87, *Reports of cases before the Court of Justice and the Court of First Instance*, 1990–5, p. I–1797; and the Arab Organization for Industrialization (*Westland Helicopters Ltd. v. Arab Organization for Industrialization*, ILR, vol. 80, p. 595 (1985) (International Chamber of Commerce Award); *Arab Organization for Industrialization v. Westland Helicopters Ltd.*, *ibid.*, p. 622 (1987) (Switzerland, Federal Supreme Court); *Westland Helicopters Ltd. v. Arab Organization for Industrialization*, *ibid.*, vol. 108, p. 564 (1994) (England, High Court). See also *Waite and Kennedy v. Germany*, *Eur. Court H.R., Reports*, 1999–I, p. 393 (1999).

⁸³⁴ See the work of the Institute of International Law under R. Higgins, *Yearbook of the Institute of International Law*, vol. 66–I (1995), p. 251, and vol. 66–II (1996), p. 444. See also P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Brussels, Bruylant Editions de l’Université de Bruxelles, 1998). See further WTO, Report of the Panel, Turkey: Restrictions on Imports of Textile and Clothing Products (footnote 130).

⁸³⁵ See footnote 636 above.

⁸³⁶ General Assembly resolution 95 (I) of 11 December 1946. See also the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, elaborated by the International Law Commission, *Yearbook ... 1950*, vol. II, p. 374, document A/1316.

⁸³⁷ See paragraph (6) of the commentary to chapter III of Part Two.

⁸³⁸ See, e.g., article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, dealing with compensation for victims of torture.

⁸³⁹ See, e.g., *Streletz, Kessler and Krenz v. Germany* (application Nos. 34044/96, 35532/97 and 44801/98), judgment of 22 March 2001, *Eur. Court H.R., Reports*, 2001–II: “If the GDR still existed, it would be responsible from the viewpoint of international law for the acts concerned. It remains to be established that alongside that State responsibility the applicants individually bore criminal responsibility at the material time” (para. 104).

State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.⁸⁴⁰ Nor may those officials hide behind the State in respect of their own responsibility for conduct of theirs which is contrary to rules of international law which are applicable to them. The former principle is reflected, for example, in article 25, paragraph 4, of the Rome Statute of the International Criminal Court, which provides that: “[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.” The latter is reflected, for example, in the well-established principle that official position does not excuse a person from individual criminal responsibility under international law.⁸⁴¹

(4) Article 58 reflects this situation, making it clear that the articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term “individual responsibility” has acquired an accepted meaning in the light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity.

⁸⁴⁰ Prosecution and punishment of responsible State officials may be relevant to reparation, especially satisfaction: see paragraph (5) of the commentary to article 36.

⁸⁴¹ See, e.g., the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principle III (footnote 836 above), p. 375; and article 27 of the Rome Statute of the International Criminal Court.

Article 59. Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.

Commentary

(1) In accordance with Article 103 of the Charter of the United Nations, “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”. The focus of Article 103 is on treaty obligations inconsistent with obligations arising under the Charter. But such conflicts can have an incidence on issues dealt with in the articles, as for example in the *Lockerbie* cases.⁸⁴² More generally, the competent organs of the United Nations have often recommended or required that compensation be paid following conduct by a State characterized as a breach of its international obligations, and article 103 may have a role to play in such cases.

(2) Article 59 accordingly provides that the articles cannot affect and are without prejudice to the Charter of the United Nations. The articles are in all respects to be interpreted in conformity with the Charter.

⁸⁴² *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 3; (*Libyan Arab Jamahiriya v. United States of America*), *ibid.*, p. 114.

Annex 280

U.N. Security Council Resolution 1373, U.N. Doc. S/RES/1373 (28 September 2001)

**Security Council**

Distr.: General

28 September 2001

Resolution 1373 (2001)**Adopted by the Security Council at its 4385th meeting, on
28 September 2001**

The Security Council,

Reaffirming its resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001,

Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts,

Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001),

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,

Deeply concerned by the increase, in various regions of the world, of acts of terrorism motivated by intolerance or extremism,

Calling on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism,

Recognizing the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism,

Reaffirming the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts,

Acting under Chapter VII of the Charter of the United Nations,



1. *Decides* that all States shall:

- (a) Prevent and suppress the financing of terrorist acts;
- (b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
- (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
- (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

2. *Decides also* that all States shall:

- (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;
- (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
- (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
- (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
- (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;
- (f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;
- (g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

3. *Calls* upon all States to:

(a) Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups;

(b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts;

(c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;

(d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;

(e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);

(f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;

(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists;

4. *Notes* with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard *emphasizes* the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;

5. *Declares* that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;

6. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and *calls upon* all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution;

7. *Directs* the Committee to delineate its tasks, submit a work programme within 30 days of the adoption of this resolution, and to consider the support it requires, in consultation with the Secretary-General;

8. *Expresses* its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter;

9. *Decides* to remain seized of this matter.

Annex 281

Letter from J.W. Wainwright, Expert Adviser, to the Chairman of the Counter-Terrorism Committee, para. 7 (12 November 2002)

Adopted by CTC: 44th Meeting

24 November 2002

Chairman,
Counter-Terrorism Committee

You have asked me to provide you with a note setting out the views of the panel of experts on the propriety of the CTC seeking from Member States action to freeze funds, etc., of persons or entities that are not named as terrorists or terrorist organizations in lists approved by the Security Council.

2. The short answer is that, early in the review process, the experts concluded that such action was within the scope of UNSCR 1373 (the Resolution).

3. The primary governing text is sub-paragraph 1 (c) of the Resolution, which is in the following terms (emphasis added):

Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

4. Also of relevance in this context, in view, in particular, of the call, in sub-paragraph 3 (d) of the Resolution, for States to '[b]ecome parties as soon as possible to ... the International Convention for the Suppression of the Financing of Terrorism' (the Convention), is paragraph 1 of Article 8 of the Convention, which reads as follows:

Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in Article 2 as well as the proceeds derived from such offence, for purposes of possible forfeiture.

5. In the view of the experts, the clear intent of the references to freezing of assets (as distinct from their forfeiture) is to ensure prompt action to ensure that assets are not removed from a country in order to avoid forfeiture following the carrying out of investigations and the conducting of legal proceedings.

6. Subject to the constitutional and other legal constraints applicable in a State, one means of providing legal authority for the freezing (or, indeed, the forfeiture) of assets is for the identification of the persons and entities whose assets are to be frozen by including their names in a list, whether sanctioned by the Security Council or compiled by the State concerned, that is given legal force by legislation. It should be noted that neither sub-paragraph 1 (c) of the Resolution nor Article 8 of the Convention mandates the use of

lists. Their value in the implementation of the Resolution lies in the fact that they can be adopted quickly by countries having no first-hand knowledge of the identity of terrorists and terrorist groups identified elsewhere and they eliminate the need for proof of actual involvement.

7. However, lists of that kind are of little use where the authorities of a country have evidence supporting a reasonable suspicion that a person or group hitherto unknown or operating under a new name is actually engaged in activities in support of terrorism. In those circumstances, there is no time to be lost waiting for a body such as the Security Council to pronounce on the matter or even to await the gazettal of some form of executive order. Indeed, the time taken even to obtain a warrant from a magistrate may put the necessary freezing action at risk.

8. Accordingly, the experts took the view that it is appropriate for States to adopt the most effective means possible, subject to safeguards, to meet the requirements of subparagraph 1 (c), including, in particular, the adoption of laws of generic application in addition to reliance on published lists, and that it is appropriate also for the CTC to put questions to States as to their performance and intentions in that regard.

9. Support for this view is contained in the February 2002 Report of the Expert Working Group on Legislative and Administrative Measures to Combat Terrorism of the Commonwealth Secretariat. That report deals extensively with the various possible means of giving effect, specifically, to Security Council lists but (at page 7) suggests the adoption of a legislative scheme 'for the freezing of assets of both listed individuals and entities and persons or entities suspected of involvement in terrorist acts or financing'.

J.W. Wainwright

11 November 2002

Annex 282

U.N. G.A. Res. 57/173, U.N. Doc. A/RES/57/173, Strengthening the United Nations Crime Prevention and Criminal Justice Programme, in Particular its Technical Cooperation Capacity
(21 January 2003)



General Assembly

Distr.: General
21 January 2003

Fifty-seventh session
Agenda item 100

Resolution adopted by the General Assembly

[on the report of the Third Committee (A/57/547)]

57/173. Strengthening the United Nations Crime Prevention and Criminal Justice Programme, in particular its technical cooperation capacity

The General Assembly,

Recalling its resolution 46/152 of 18 December 1991 on the creation of an effective United Nations crime prevention and criminal justice programme, in which it approved the statement of principles and programme of action annexed to that resolution,

Recalling also its resolution 56/123 of 19 December 2001 on strengthening the United Nations Crime Prevention and Criminal Justice Programme, in particular its technical cooperation capacity,

Emphasizing the role of the United Nations in the field of crime prevention and criminal justice, specifically the reduction of criminality, more efficient and effective law enforcement and administration of justice, respect for human rights and the rule of law, and promotion of the highest standards of fairness, humanity and professional conduct,

Recognizing that action against global criminal activity is a common and shared responsibility,

Convinced of the desirability of closer coordination and cooperation among States in combating crime, including organized crime, corruption, the smuggling of migrants and trafficking in persons, especially women and children, drug-related crimes, money-laundering, the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition and the criminal misuse of information technologies, as well as criminal activities carried out for the purpose of furthering terrorism in all its forms and manifestations, bearing in mind the role that could be played by both the United Nations and regional organizations in this respect,

Recognizing existing efforts at the regional level that complement the work of the United Nations Crime Prevention and Criminal Justice Programme in combating the smuggling of migrants and trafficking in persons, especially women and children, and noting in this context the outcomes of the Regional Ministerial

Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, held at Bali, Indonesia, from 26 to 28 February 2002,¹ and the seventh Regional Conference on Migration, held at Antigua, Guatemala, from 28 to 31 May 2002, as part of the Puebla Process,

Recognizing also the urgent need to increase technical cooperation activities to assist countries, in particular developing countries and countries with economies in transition, with their efforts in translating United Nations conventions and other legal instruments and policy guidelines into practice,

Recalling its resolution 55/25 of 15 November 2000, by which it adopted the United Nations Convention against Transnational Organized Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air, and its resolution 55/255 of 31 May 2001, by which it adopted the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition,

Emphasizing the importance of the expeditious entry into force of the Convention and the Protocols thereto as a milestone in the efforts to fight and prevent organized crime, one of the most serious contemporary threats to democracy and peace,

Recognizing the need to maintain a balance in the technical cooperation capacity of the Centre for International Crime Prevention of the Office on Drugs and Crime² of the Secretariat between all priorities identified by the General Assembly and the Economic and Social Council,

Recalling its relevant resolutions, in which it requested the Secretary-General, as a matter of urgency, to provide the United Nations Crime Prevention and Criminal Justice Programme with sufficient resources for the full implementation of its mandate, in conformity with the high priority attached to the Programme,

Recalling also its resolution 56/253 of 24 December 2001, in which it requested the Secretary-General to make proposals to strengthen the Terrorism Prevention Branch at the United Nations Office at Vienna and to report thereon to the General Assembly for its consideration,

Bearing in mind the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century, adopted by the General Assembly in its resolution 55/59 of 4 December 2000,

Recalling the plans of action for the implementation of the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century annexed to General Assembly resolution 56/261 of 31 January 2002,

Recalling also its resolution 56/260 of 31 January 2002, by which the General Assembly established the terms of reference of the Ad Hoc Committee for the Negotiation of a Convention against Corruption,

Taking note of Economic and Social Council resolution 2002/19 of 24 July 2002, entitled "Strengthening international cooperation and technical assistance

¹ See A/57/64.

² Formerly known as the Office for Drug Control and Crime Prevention.

within the framework of the activities of the Centre for International Crime Prevention in preventing and combating terrorism”,

Welcoming the progress made thus far by the Ad Hoc Committee for the Negotiation of a Convention against Corruption,

Aware of the continued increase in requests for technical assistance forwarded to the Centre by least developed countries, developing countries, countries with economies in transition and countries emerging from conflict,

Appreciating the funding provided by certain Member States in 2001 and 2002 that has permitted the Centre to enhance its capacity to execute an increased number of projects,

1. *Takes note with appreciation* of the report of the Secretary-General on the progress made in the implementation of General Assembly resolution 56/123,³

2. *Affirms* the importance of the work of the Centre for International Crime Prevention of the Office on Drugs and Crime of the Secretariat in the fulfilment of its mandate, including to prevent and combat terrorism, and in particular in strengthening international cooperation and providing technical assistance, upon request, which complements the work of the Counter-Terrorism Committee of the Security Council, and in this context takes note with appreciation of the report of the Secretary-General on strengthening the Terrorism Prevention Branch of the Secretariat⁴ requested by the General Assembly in its resolution 56/253;

3. *Reaffirms* the importance of the United Nations Crime Prevention and Criminal Justice Programme in promoting effective action to strengthen international cooperation in crime prevention and criminal justice, in responding to the needs of the international community in the face of both national and transnational criminality and in assisting Member States in achieving the goals of preventing crime within and among States and improving the response to crime;

4. *Also reaffirms* the role of the Centre in providing to Member States, upon request, technical cooperation, advisory services and other forms of assistance in the field of crime prevention and criminal justice, including in the areas of prevention and control of transnational organized crime and terrorism, as well as in the area of reconstruction of national criminal justice systems;

5. *Welcomes* the programme of work of the Centre, including the three global programmes addressing trafficking in human beings, corruption and organized crime, formulated on the basis of close consultations with Member States and the review by the Commission on Crime Prevention and Criminal Justice, and calls upon the Secretary-General to enhance further the visibility of that programme of work and to strengthen the Centre by providing it with the resources necessary for the full implementation of its mandate;

6. *Supports* the high priority given to technical cooperation and advisory services in the field of crime prevention and criminal justice, including in the areas of prevention and control of transnational organized crime and terrorism, and stresses the need to enhance the operational activities of the Centre to assist, in particular, developing countries, countries with economies in transition and countries emerging from conflict;

³ A/57/153.

⁴ A/57/152 and Corr.1 and Add.1 and Add.1/Corr.1 and 2 and Add.2.

7. *Urges* States and relevant international organizations to develop national, regional and international strategies and other necessary measures that complement the work of the United Nations Crime Prevention and Criminal Justice Programme in addressing effectively the significant problems posed by the smuggling of migrants and trafficking in persons and related activities;

8. *Invites* all States to support, through voluntary contributions to the United Nations Crime Prevention and Criminal Justice Fund, the operational activities of the United Nations Crime Prevention and Criminal Justice Programme, including for the provision of technical assistance for the implementation of the commitments entered into at the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,⁵ including the measures outlined in the plans of action for the implementation of the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century annexed to resolution 56/261;

9. *Encourages* relevant programmes, funds and organizations of the United Nations system, in particular the United Nations Development Programme, international financial institutions, in particular the World Bank, and regional and national funding agencies, to support the technical operational activities of the Centre;

10. *Urges* States and funding agencies to review, as appropriate, their funding policies for development assistance and to include a crime prevention and criminal justice component in such assistance;

11. *Welcomes* the efforts undertaken by the Commission on Crime Prevention and Criminal Justice to exercise more vigorously its mandated function of resource mobilization, and calls upon the Commission to strengthen further its activities in this direction;

12. *Expresses its appreciation* to non-governmental organizations and other relevant sectors of civil society for their support to the United Nations Crime Prevention and Criminal Justice Programme;

13. *Invites* relevant entities of the United Nations system, including the United Nations International Drug Control Programme, the United Nations Development Programme and the World Bank, and other international funding agencies, to increase their interaction with the Centre, in order to benefit from synergies and avoid duplication of effort, and to ensure that, as appropriate, activities on crime prevention and criminal justice, including activities related to the prevention of corruption, are considered in their sustainable development agenda, and that the expertise of the Centre in activities related to crime prevention and criminal justice, including activities related to the prevention of corruption and the promotion of the rule of law, is fully utilized;

14. *Requests* the Secretary-General to take all necessary measures to provide adequate support to the Commission on Crime Prevention and Criminal Justice, as the principal policy-making body in this field, in performing its activities, including cooperation and coordination with the United Nations Crime Prevention and Criminal Justice Programme Network of Institutes and other relevant bodies;

⁵ See *Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, 10–17 April 2000: report prepared by the Secretariat* (United Nations publication, Sales No. E.00.IV.8).

15. *Urges* all States and regional economic organizations that have not yet done so to sign and ratify the United Nations Convention against Transnational Organized Crime and the Protocols thereto as soon as possible in order to ensure their speedy entry into force;

16. *Welcomes* the voluntary contributions already made, and encourages States to make adequate and regular voluntary contributions for the entry into force and implementation of the Convention and the Protocols thereto, through the United Nations funding mechanism specifically designed for that purpose in the Convention;

17. *Requests* the Secretary-General to take all necessary measures and to provide adequate support to the Centre so as to enable it to promote the speedy entry into force of the Convention and the Protocols thereto, including the organization of a treaty event, in cooperation with the Office of Legal Affairs of the Secretariat, in 2003;

18. *Reaffirms* the importance of the completion of the work of the Ad Hoc Committee for the Negotiation of a Convention against Corruption in accordance with the terms of resolution 56/260, and urges the Ad Hoc Committee to endeavour to complete its work by the end of 2003;

19. *Welcomes* the decision of the Commission on Crime Prevention and Criminal Justice to mainstream a gender perspective into its activities and its request to the Secretariat that a gender perspective be integrated into all activities of the Centre;

20. *Requests* the Secretary-General to submit a report on the implementation of the present resolution to the General Assembly at its fifty-eighth session.

*77th plenary meeting
18 December 2002*

Annex 283

U.N. Security Council Resolution 1636, U.N. Doc. S/RES/1636 (31 October 2005)

**Security Council**Distr.: General
31 October 2005

Resolution 1636 (2005)**Adopted by the Security Council at its 5297th meeting, on
31 October 2005***The Security Council,*

Reaffirming all its previous relevant resolutions, in particular resolutions 1595 (2005) of 7 April 2005, 1373 (2001) of 28 September 2001, and 1566 (2004) of 8 October 2004,

Reiterating its call for the strict respect of the sovereignty, territorial integrity, unity and political independence of Lebanon under the sole and exclusive authority of the Government of Lebanon,

Reaffirming that terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security,

Having examined carefully the report of the international independent investigation Commission (S/2005/662) ("the Commission") concerning its investigation into the 14 February 2005 terrorist bombing in Beirut, Lebanon, that killed former Lebanese Prime Minister Rafiq Hariri and 22 others, and caused injury to dozens of people,

Commending the Commission for the outstanding professional work it has accomplished under difficult circumstances in assisting the Lebanese authorities in their investigation of all aspects of this terrorist act, and taking note of the Commission's conclusion that the investigation is not yet complete,

Commending States which have provided assistance to the Commission in the discharge of its duties,

Commending also the Lebanese authorities for the full cooperation they have provided to the Commission in the discharge of its duties, in accordance with paragraph 3 of resolution 1595 (2005),

Recalling that pursuant to its relevant resolutions, all States are required to afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to terrorist acts, and recalling in particular that it had requested in its resolution 1595 (2005) all States and all parties to cooperate fully with the Commission,

Taking note of the Commission's findings that although the inquiry has already made considerable progress and achieved significant results, it is of the utmost importance to continue the trail both within and outside Lebanon in order to elucidate fully all aspects of this terrorist act, and in particular to identify and hold accountable all those who bear responsibility in its planning, sponsoring, organization and perpetration,

Mindful of the demand of the Lebanese people that all those responsible for the terrorist bombing that killed former Lebanese Prime Minister Rafiq Hariri and others be identified and held accountable,

Acknowledging in this connection the letter of the Prime Minister of Lebanon to the Secretary-General of 13 October 2005 (S/2005/651) requesting that the mandate of the Commission be extended to enable the Commission to continue to assist the competent Lebanese authorities in any further investigation of the various dimensions of the terrorist crime,

Acknowledging also the concurrent recommendation of the Commission that continued international assistance is needed to help the Lebanese authorities get right to the bottom of this terrorist act, and that a sustained effort on the part of the international community to establish an assistance and cooperation platform together with the Lebanese authorities in the field of security and justice is essential,

Willing to continue to assist Lebanon in the search for the truth and in holding those responsible for this terrorist act accountable for their crime,

Calling upon all States to extend to the Lebanese authorities and to the Commission the assistance they may need and request in connection with the inquiry, and in particular to provide them with all relevant information they may possess pertaining to this terrorist attack,

Reaffirming its profound commitment to the national unity and stability of Lebanon, emphasizing that the future of Lebanon should be decided through peaceful means by the Lebanese themselves, free of intimidation and foreign interference, and warning in this regard that attempts to undermine the stability of Lebanon will not be tolerated,

Taking note of the Commission's conclusions that, given the infiltration of Lebanese institutions and society by the Syrian and Lebanese intelligence services working in tandem, it would be difficult to envisage a scenario whereby such a complex assassination plot could have been carried out without their knowledge, and that there is probable cause to believe that the decision to assassinate former Prime Minister Rafiq Hariri could not have been taken without the approval of top-ranked Syrian security officials,

Mindful of the Commission's conclusion that while the Syrian authorities, after initial hesitation, have cooperated to a limited degree with the Commission, several Syrian officials have tried to mislead the investigation by giving false or inaccurate statements,

Convinced that it is unacceptable in principle that anyone anywhere should escape accountability for an act of terrorism for any reason, including because of his own obstruction of the investigation or failure to cooperate in good faith,

Determining that this terrorist act and its implications constitute a threat to international peace and security,

Emphasizing the importance of peace and stability in the region, and the need for peaceful solutions,

Acting under Chapter VII of the Charter of the United Nations,

== I ==

1. *Welcomes* the report of the Commission;

2. *Takes note with extreme concern* of the Commission's conclusion that, there is converging evidence pointing at the involvement of both Lebanese and Syrian officials in this terrorist act, and that it is difficult to envisage a scenario whereby such complex assassination could have been carried out without their knowledge;

3. *Decides* as a step to assist in the investigation of this crime and without prejudice to the ultimate judicial determination of the guilt or innocence of any individual;

(a) that all individuals designated by the Commission or the Government of Lebanon as suspected of involvement in the planning, sponsoring, organizing or perpetrating of this terrorist act, upon notification of such designation to and agreement of the Committee established in subparagraph (b) below, shall be subject to the following measures:

- All States shall take the measures necessary to prevent entry into or transit through their territories of such individuals, provided that nothing in this paragraph shall obligate a state to refuse entry into its territory to its own nationals, or, if such individuals are found within their territory, shall ensure in accordance with applicable law that they are available for interview by the Commission if it so requests;
- All States shall: freeze all funds, financial assets and economic resources that are on their territories that are owned or controlled, directly or indirectly, by such individuals, or that are held by entities owned or controlled, directly or indirectly, by such individuals or by persons acting on their behalf or at their direction; ensure that no funds, financial assets or economic resources are made available by their nationals or by any persons within their territories to or for the benefit of such individuals or entities; and cooperate fully in accordance with applicable law with any international investigations related to the assets or financial transactions of such individuals, entities or persons acting on their behalf, including through sharing of financial information;

(b) to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council consisting of all the members of the Council to undertake the tasks described in the annex to this resolution;

(c) that the Committee and any measures still in force under subparagraph (a) will terminate when the Committee reports to the Security Council that all investigative and judicial proceedings relating to this terrorist attack have been completed, unless otherwise decided by the Security Council;

4. *Determines* that the involvement of any State in this terrorist act would constitute a serious violation by that State of its obligations to work to prevent and refrain from supporting terrorism, in accordance in particular with resolutions 1373 (2001) and 1566 (2004) and that it would amount also to a serious violation of its obligation to respect the sovereignty and political independence of Lebanon;

5. *Takes note with extreme concern* also of the Commission's conclusion that, while the Syrian authorities have cooperated in form but not in substance with the Commission, several Syrian officials tried to mislead the Commission by giving false or inaccurate information, and determines that Syria's continued lack of cooperation to the inquiry would constitute a serious violation of its obligations under relevant resolutions, including 1373 (2001), 1566 (2004) and 1595 (2005);

6. *Takes note* of the recent statement by Syria regarding its intention now to cooperate with the Commission and expects the Syrian Government to implement in full the commitments it is now making;

== II ==

7. *Acknowledges* that continued assistance from the Commission to Lebanon, as requested by its Government in its letter to the Secretary-General of 13 October 2005 and recommended by the Commission in its report, remains necessary to elucidate fully all aspects of this heinous crime, thus enabling that all those involved in the planning, sponsoring, organizing and perpetrating of this terrorist act, as well as their accomplices, be identified and brought to justice;

8. *Welcomes* in this regard the decision of the Secretary-General to extend the mandate of the Commission until 15 December 2005, as authorized by the Security Council in its resolution 1595 (2005), and decides that it will extend the mandate further if recommended by the Commission and requested by the Lebanese Government;

9. *Commends* the Lebanese authorities for the courageous decisions they have already taken in relation to the inquiry, including upon recommendation of the Commission, in particular the arrest and indictment of former Lebanese security officials suspected of involvement in this terrorist act, and encourages the Lebanese authorities to persist in their efforts with the same determination in order to get right to the bottom of this crime;

== III ==

10. *Endorses* the Commission's conclusion that it is incumbent upon the Syrian authorities to clarify a considerable part of the questions which remain unresolved;

11. *Decides* in this context that:

(a) Syria must detain those Syrian officials or individuals whom the Commission considers as suspected of involvement in the planning, sponsoring, organizing or perpetrating of this terrorist act, and make them fully available to the Commission;

(b) the Commission shall have vis-à-vis Syria the same rights and authorities as mentioned in paragraph 3 of resolution 1595 (2005), and Syria must cooperate with the Commission fully and unconditionally on that basis;

(c) the Commission shall have the authority to determine the location and modalities for interview of Syrian officials and individuals it deems relevant to the inquiry;

12. *Insists* that Syria not interfere in Lebanese domestic affairs, either directly or indirectly, refrain from any attempt aimed at destabilizing Lebanon, and respect scrupulously the sovereignty, territorial integrity, unity and political independence of this country;

== IV ==

13. *Requests* the Commission to report to the Council on the progress of the inquiry by 15 December 2005, including on the cooperation received by the Commission from the Syrian authorities, or anytime before that date if the Commission deems that such cooperation does not meet the requirements of this resolution, so that the Council, if necessary, could consider further action;

14. *Expresses* its readiness to consider any additional request for assistance from the Lebanese Government to ensure that all those responsible for this crime are held accountable;

15. *Decides* to remain seized of the matter.

Annex

The following are the functions of the Committee established pursuant to paragraph 3 of this resolution:

1. To register as subject to the measures in paragraph 3 (a) in this resolution an individual designated by the Commission or the Government of Lebanon, provided that within two working days of receipt of such designation no member of the Committee objects, in which case the Committee shall meet within fifteen days to determine the applicability of the measures in paragraph 3 (a).
2. To approve exceptions to the measures established in paragraph 3 (a) on a case-by-case basis:
 - (i) with respect to the travel restrictions, where the Committee determines that such travel is justified on the ground of humanitarian need, including religious obligation, or where the Committee concludes that an exemption would otherwise further the objectives of this resolution;
 - (ii) with respect to the freezing of funds and other economic resources, where the Committee determines that such exceptions are necessary for basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges for routine holding or maintenance of frozen funds or other financial assets or economic resources;
3. To register the removal of an individual from the scope of the measures in paragraph 3 (a) upon notification from the Commission or the Government of Lebanon that the individual is no longer suspected of involvement in this terrorist act, provided that within two working days of receipt of such designation no member of the Committee objects, in which case the Committee shall meet within fifteen days to determine the removal of an individual from the scope of the measures in paragraph 3 (a).
4. To inform all Member States as to which individuals are subject to the measures in paragraph 3 (a).

Annex 284

UNODC, Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols 12-13
(2008)

Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols

**Prepared by the United Nations Office on
Drugs and Crime**



United Nations

Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols

**Prepared by the United Nations Office on
Drugs and Crime**



**United Nations
New York, 2003**

Note

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

Material in this publication may be freely quoted or reprinted, but acknowledgement is requested, together with a copy of the publication containing the quotation or reprint.

| |
|--|
| United Nations publication Sales No. [E.03.XXX] ISBN [XXX] |
|--|

Contents

| | Page |
|---|------|
| I. Introduction | 1 |
| A. Background | 1 |
| B. Strengthening the legal regime against terrorism | 4 |
| C. Development of anti-terrorism instruments and models | 5 |
| II. Penalization requirements of the anti-terrorism conventions and protocols | 7 |
| A. General considerations and definitions | 7 |
| B. Offences related to civil aviation | 9 |
| C. Offences based on the status of the victim | 12 |
| D. Offences related to dangerous materials | 13 |
| E. Offences related to vessels and fixed platforms | 17 |
| F. Offences related to the financing of terrorism | 19 |
| III. Other core elements of the anti-terrorism conventions and protocols | 24 |
| A. Establishment of jurisdiction over the offence | 24 |
| B. Obligation to conduct an inquiry, to report findings and to advise of intent to exercise jurisdiction | 28 |
| C. Obligation to submit for prosecution | 29 |
| D. Elements of knowledge and intent | 29 |
| E. Offences of participation | 30 |
| F. Mutual assistance | 32 |
| G. Extradition provisions | 33 |
| H. Exceptions made on grounds of political offence or discriminatory purposes | 34 |
| I. Rights of the alleged offender to communicate and to fair treatment | 35 |

I. Introduction

A. Background

1. In its resolution 1373 (2001) of 28 September 2001, the Security Council declared that “acts, methods and practices of terrorism [were] contrary to the purposes and principles of the United Nations [and] that knowingly financing, planning and inciting terrorist acts [were] also contrary to the purposes and principles of the United Nations” (para. 5). In the same resolution, the Security Council decided that all Member States should “take the necessary steps to prevent the commission of terrorist acts” (para. 2 (b)). The Council also decided to establish a Committee to monitor implementation of that resolution.

2. In its resolution 1368 (2001) of 12 September 2001, the Council stated that it regarded “any act of international terrorism as a threat to international peace and security”. Under Article 25 of the Charter of the United Nations, “the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the ... Charter”. In paragraph 2 of its resolution 1373 (2001), the Council decided that all Member States should:

“ ...

“(c) Deny safe haven to those who finance, plan, support or commit terrorist acts, or provide safe havens;

“ ...

“(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

“(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

“ ... ”

3. In elaborating means to accomplish these mandatory obligations, the Council called upon all Member States to (resolution 1373 (2001), para. 3):

“ ...

“(d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;

“(e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);

“ ... ”

4. The conventions (meaning multilateral treaties) and protocols (meaning agreements supplementary to a convention) referred to in paragraphs 3 (d) and (e) of Council resolution 1373 (2001) were compiled, together with other global and regional instruments on terrorism, by the Secretariat in a 2001 publication, entitled *International Instruments Related to the Prevention and Suppression of International Terrorism*.¹ In accordance with the guidance of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism (the Counter-Terrorism Committee), the present *Legislative Guide* focuses on the following 12 universal instruments² selected for inclusion in the aforementioned publication:

(a) Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963);³

(b) Convention for the Suppression of Unlawful Seizure of Aircraft (1970);⁴

(c) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971);⁵

(d) Convention on the Prevention and Punishment of Offences against Internationally Protected Persons, Including Diplomatic Agents (1973) (the “1973 Internationally Protected Persons Convention”);⁶

(e) International Convention against the Taking of Hostages (1979) (the “1979 Hostages Convention”);⁷

(f) Convention on the Physical Protection of Nuclear Material (1980) (the “1980 Nuclear Material Convention”);⁸

(g) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the

¹ *International Instruments Related to the Prevention and Suppression of International Terrorism* (United Nations publication, Sales No. E.01.V.3).

² The English-language versions of these conventions and protocols, or links to them, are available at www.un.org/terrorism/. Translations of the conventions and protocols in the other official languages of the United Nations, or links to them, are available in Arabic at www.un.org/arabic/terrorism/; in Chinese at www.un.org/chinese/terrorism/; in French at www.un.org/french/terrorism/; in Spanish at www.un.org/spanish/terrorismo/tratados/terrorismo.html; and in Russian at www.un.org/russian/terrorism/.

³ United Nations, *Treaty Series*, vol. 704, p. 218. Available at <http://untreaty.un.org/English/Terrorism/Conv1.pdf>.

⁴ The Convention for the Suppression of Unlawful Seizure of Aircraft was signed at The Hague on 16 December 1970 and entered into force on 14 October 1971. Available at www.unodc.org/unodc/terrorism_convention_aircraft_seizure.html.

⁵ United Nations, *Treaty Series*, vol. 974, No. 14118. Available at <http://untreaty.un.org/English/Terrorism/Conv3.pdf>.

⁶ *Ibid.*, vol. 1035, No. 15410. Available at <http://untreaty.un.org/English/Terrorism/Conv4.pdf>.

⁷ *Ibid.*, vol. 1316, No. 21931. Available at <http://untreaty.un.org/English/Terrorism/Conv5.pdf>.

⁸ *Ibid.*, vol. 1456, No. 24631. Available at <http://untreaty.un.org/English/Terrorism/Conv6.pdf>.

Suppression of Unlawful Acts against the Safety of Civil Aviation (1988) (the “1988 Montreal Protocol”);⁹

(h) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988) (the “1988 Safety of Maritime Navigation Convention”);¹⁰

(i) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988) (the “1988 Fixed Platforms Protocol”);¹¹

(j) Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991) (the “1991 Plastic Explosives Convention”);¹²

(k) International Convention for the Suppression of Terrorist Bombings (1997) (the “1997 Terrorist Bombings Convention”);¹³

(l) International Convention for the Suppression of the Financing of Terrorism (1999) (the “1999 Financing of Terrorism Convention”).¹⁴

5. In the preface to *International Instruments Related to the Prevention and Suppression of International Terrorism*,¹⁵ United Nations Secretary-General Kofi Annan described the increasing danger faced by the world community in the following terms:

“Terrorism strikes at the very heart of everything the United Nations stands for. It presents a global threat to democracy, the rule of law, human rights and stability. Globalization brings home to us the importance of a truly concerted international effort to combat terrorism in all its forms and manifestations.”

6. At a symposium entitled “Combating terrorism: the contribution of the United Nations”, the Chairman of the Counter-Terrorism Committee expressed the desire of the members of the Committee that the United Nations Office on Drugs and Crime, based in Vienna, should play an important role by providing assistance for the legislative implementation of anti-terrorism measures, as the Committee was

⁹ The 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 was signed at Montreal on 24 February 1988 and entered into force on 6 August 1989. Available at <http://untreaty.un.org/English/Terrorism/Conv7.pdf>.

¹⁰ The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation was adopted on 10 March 1988 and entered into force on 1 March 1992. Available at <http://untreaty.un.org/English/Terrorism/Conv8.pdf>.

¹¹ The Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, was done at Rome on 10 March 1988 and entered into force on 1 March 1992. Available at www.unodc.org/unodc/terrorism_convention_platforms.html.

¹² The International Civil Aviation Organization Convention on the Marking of Plastic Explosives for the Purpose of Detection was signed at Montreal on 1 March 1991 and entered into force on 21 June 1998. Available at <http://untreaty.un.org/English/Terrorism/Conv10.pdf>.

¹³ General Assembly resolution 52/164, annex. Available at www.unodc.org/unodc/terrorism_convention_terrorist_bombing.html.

¹⁴ General Assembly resolution 54/109, annex. Available at www.un.org/law/cod/finterr.htm.

¹⁵ *International Instruments Related to the Prevention and Suppression of International Terrorism* (United Nations publication, Sales No. E.01.V.3).

responsible for analysing the anti-terrorism needs of Member States, but did not itself provide technical assistance. Such a role had been envisaged for the Centre for International Crime Prevention of the Office for Drug Control and Crime Prevention of the Secretariat¹⁶ by its guiding body, the Commission on Crime Prevention and Criminal Justice and reaffirmed by the Economic and Social Council in its resolution 2002/19 of 24 July 2002, as well as by the General Assembly in its resolutions 57/173 of 18 December 2002 and 57/292 of 20 December 2002. The Centre has initiated a preparatory assistance project on strengthening the legal regime against terrorism, which will be executed with the assistance of extrabudgetary funding.

B. Strengthening the legal regime against terrorism

7. Full implementation of the anti-terrorism conventions, as called for by the Security Council in resolution 1373 (2001), will mean far more than ratifying the relevant international conventions and putting in place the supporting legislative framework. It has many aspects, including national security doctrine, budgetary allocations and administrative and personnel measures. The development of legislation is, however, the initial practical obstacle to compliance by a State party with resolution 1373 (2001) and to ratification of the global anti-terrorism conventions.

8. Some countries will not, either because of domestic law or as a matter of policy, ratify a treaty until legislation that permits the satisfaction of all of its juridical obligations is in place. This may be true both with respect to domestic ratification, that is, the constitutional process by which a State commits itself to accept the obligations of the agreement, and international ratification, that is, the formal notification to the designated treaty depository that the State has accepted the reciprocal obligations of the agreement. In other countries, a ratified treaty may have the same status as domestic law, but legislation may be required to provide elements necessary for implementation that are not contained in the treaty. For example, if financing an act of terrorism to take place in another country were not otherwise penalized in domestic law, ratification of the International Convention for the Suppression of the Financing of Terrorism would not permit such an act to be punished until domestic legislation had established a penalty.

9. Providing reference materials and technical advice (online, telephonically, and in person when cost-effective) to those responsible for drafting legislation and other persons involved in the incorporation of anti-terrorism conventions in national legislation directly helps achieve the international cooperation and full implementation of anti-terrorism instruments called for in Security Council resolution 1373 (2001), paragraph 3 (e). Because the development of acceptable legislation also removes technical obstacles to ratification, legislative assistance is an indirect but practical way of encouraging States to become parties to the instruments promptly, as called for in the same resolution, paragraph 3 (d). The present *Legislative Guide* was therefore developed to inform those responsible for drafting legislation and other readers of the development and requirements of the

¹⁶ The Office for Drug Control and Crime Prevention became the United Nations Office on Drugs Crime on 1 October 2002.

12 international conventions. The International Association of Penal Law, the International Institute of Higher Studies in Criminal Sciences and the Monitoring Body on Organized Crime hosted a meeting of international experts in Siracusa, Italy, from 3 to 5 December 2002 to provide general comments and guidance on the proposed text. The present *Legislative Guide* provides drafting resources in the form of laws currently in force or under parliamentary consideration, as well as access to illustrative model laws developed by the Commonwealth Secretariat and others. The *Legislative Guide* and accompanying checklists of the convention requirements have already been used in technical consultations conducted with a total of 25 countries. The process involves a review, carried out with national authorities, of the status of ratification of the 12 conventions and protocols, an examination of whether domestic legislation effectively implements the requirements of those instruments and identification of necessary improvements consistent with resources and legal traditions of the State concerned.

10. The *Legislative Guide* is posted on the web site of the United Nations Office on Drugs and Crime¹⁷ and periodically updated. Accordingly, the Office would welcome suggestions of additional examples of national legislation effectively implementing the penalization, jurisdiction or international cooperation obligations of one or more of the 12 anti-terrorism conventions, as well as information regarding problems which may arise in legislative implementation, drafting or application.¹⁸

C. Development of anti-terrorism instruments and models

11. The conventions and protocols examined in the present *Legislative Guide* were negotiated over four decades, from the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft to the International Convention for the Suppression of the Financing of Terrorism of 1999. They cover topics as disparate as detection markers in plastic explosives and the prevention and punishment of crimes against internationally protected persons. Their approach changed significantly during that time. The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft provides that none of its provisions authorize or require action in respect of an offence against penal laws of a political nature, which could be considered to include laws against terror-producing violence committed in furtherance of revolutionary and separatist movements or wars of national liberation. The most recent conventions contain articles expressly rejecting any “political offence” exception.

12. Considering the number of subjects covered, the evolution of language and content over time and the variety of legal systems in which the conventions and protocols must be ratified and implemented, it is essential to recognize the validity of many possible approaches to their implementation. The present *Legislative Guide* is intended to provide a country considering ratification and implementation of one or more of the anti-terrorism conventions and protocols with an overview of the

¹⁷ The present *Legislative Guide* is available at www.unodc.org/odccp/terrorism.html?id=11702.

¹⁸ Staff of the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime can be contacted by e-mail at cicp.tpb@cicp.un.or.at, by telephone at + (43) (1) 26060-4177 or by facsimile at + (43) (1) 26060-5968.

relevant general principles and experience. In order to provide legislative templates adaptable to a wide variety of legal systems, models of an illustrative nature are presented. The Commonwealth Secretariat has prepared model laws and explanatory materials for the 12 conventions and protocols, collectively entitled *Implementation Kits for the International Counter-Terrorism Conventions*, as well as comprehensive model legislation and explanatory guides for implementation of all the requirements of Security Council resolution 1373 (2001), entitled *Model Legislative Provisions on Measures to Combat Terrorism*.¹⁹

13. In addition to presenting model laws prepared by the Commonwealth Secretariat and other sources, the *Legislative Guide* attempts to provide or refer the reader to examples of, or references to, national legislation currently in force or under parliamentary consideration for each of the 12 instruments. Various means of satisfying the core requirements of the instruments are discussed, emphasizing possible means of combining implementing legislation for related conventions and protocols. The reader is alerted when other applicable international standards require more than the mandatory obligations imposed by the conventions and protocols, such as those relating to the financing of terrorism. Additional useful materials can be found at the web site of the Counter-Terrorism Committee,²⁰ which contains reports from Member States, some of which contain summaries of aspects of the national legislative scheme and attach the text of relevant legislation.

¹⁹ These materials are available at www.thecommonwealth.org/law/model.html. Additional information may be obtained from Kimberly Prost, Head, Criminal Law Unit, Deputy Director, Legal and Constitutional Affairs Division of the Commonwealth Secretariat, at k.prost@commonwealth.int, telephone + (44) 207 747 6420 or + (44) 207 839 3302.

²⁰ The web site of the Counter-Terrorism Committee is at www.un.org/docs/sc/committees/1373.

II. Penalization requirements of the anti-terrorism conventions and protocols

A. General considerations and definitions

14. In two of the 12 anti-terrorism instruments, offences are not defined. Although clearly aimed at unlawful aircraft seizures, commonly called hijackings, the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft simply requires a State party to establish jurisdiction over offences defined according to its domestic law that are committed on board aircraft registered in that Contracting State. Many of the provisions of that Convention are substantially refined in subsequent aviation instruments. The Convention on the Marking of Plastic Explosives for the Purpose of Detection requires its parties to take measures, which may be penal in nature but are not required to be, to prohibit and prevent the movement of unmarked explosives.

15. Of the 12 anti-terrorism instruments, eight conventions and two related protocols obligate parties to penalize offences defined in the instrument: the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and its 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, the 1973 Internationally Protected Persons Convention, the 1979 Hostages Convention, the 1980 Nuclear Material Convention, the 1988 Safety of Maritime Navigation Convention and its 1988 Fixed Platforms Protocol, the 1997 Terrorist Bombings Convention and the 1999 Financing of Terrorism Convention. The format used in each of these 10 instruments comprised four elements:

(a) The definition as an offence of a particular type of terrorist activity that was at that time causing great concern, as were unlawful seizures of aircraft in 1970 and attacks involving bombs and other dangerous devices in the 1990s;

(b) The requirement that parties to the instrument penalize that conduct;

(c) The identification of certain bases upon which the parties agreed to exercise their criminal jurisdiction to control the defined offence, such as the country of registration of a ship or vessel, territoriality or nationality;

(d) The creation of the further jurisdictional obligation that a State party in whose territory a suspect is found must establish and exercise competence over the offence and refer it for prosecution if extradition is not granted pursuant to the particular convention or protocol. This last element is popularly known as the principle of “no safe haven for terrorists”.

16. The core elements of the offences established in the various conventions are summarized in the present chapter, with references to illustrative models or legislation currently in force as examples of how these penalization requirements can effectively be met. This may be achieved by passage of a single consolidated anti-terrorism law; legislative action addressing related groups of anti-terrorism instruments, such as the three conventions and one protocol relating to air travel; or separate legislative implementation of each convention and protocol.

17. The publication of the Commonwealth Secretariat entitled *Model Legislative Provisions on Measures to Combat Terrorism* provides a comprehensive anti-terrorism statute intended to achieve compliance with the mandatory requirements of Security Council resolution 1373 (2001). These requirements are broader in many ways than the penal offences and other actions required under the 12 anti-terrorism instruments, as is explained in the publication. In part I of *Model Legislative Provisions*, entitled “Interpretation”, the terms used throughout the model are defined. In part III, entitled “Offences”, the elements of 16 specified types of criminal conduct related to terrorist acts are listed, including financing, facilitation, support, supply, recruitment, incitement and participation offences. As terrorist acts are defined in part I of the model to include any act or omission constituting an offence within the scope of the 12 relevant conventions and protocols, adoption of this model would satisfy the penalization requirements of all the instruments by incorporation.

18. Since differing national definitions of offences can create problems of dual criminality and other procedural issues, it is desirable to repeat the terminology used in the conventions in national implementing laws or to adopt the definitions used in the conventions by reference.

19. The Anti-Terrorism Act, 2002, of Barbados defines an offence of terrorism as including any offence under nine of the penal conventions and protocols examined in the present *Legislative Guide* (that is, all the instruments examined in the present publication, with the exception of the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, the 1991 Plastic Explosives Convention and the 1999 Financing of Terrorism Convention, the last being dealt with by the creation of the separate crime of financing of terrorism in the Barbados statute). Under the Act, in addition to offences defined by reference to the conventions, terrorism is defined as:

“(b) any other act:

“(i) that has the purpose by its nature or context, to intimidate the public or to compel a government or an international organization to do or to refrain from doing any act; and

“(ii) that is intended to cause:

“(A) death or serious bodily harm to a civilian or in a situation of armed conflict, to any other person not taking an active part in the hostilities;

“(B) serious risk to the health or safety of the public or any segment of the public;

“(C) substantial property damage, whether to public or private property, where the damage involves a risk of the kind mentioned in sub-paragraph (B) or an interference or disruption of the kind mentioned in sub-paragraph (D); or

“(D) serious interference with or serious disruption of an essential service, facility or system, whether public or private, not being an interference or disruption resulting from lawful advocacy, or from protest, dissent or stoppage of work and

not involving a risk of the kind mentioned in subparagraph (B).”

20. This formulation corresponds to part I, “Interpretation”, option 1 of *Model Legislative Provisions on Measures to Combat Terrorism*, in which “terrorist act” is defined. *Model Legislative Provisions* presents alternative ways of defining a terrorist act: option 1 defines the offence as not requiring a political, ideological or religious motivation in addition to the intent to intimidate by killing, damaging or threatening to do so, while option 2 requires such a motive. The Terrorism Act 2000 of the United Kingdom of Great Britain and Northern Ireland, discussed in paragraph 37 below, is an example of an option 2 statute, requiring both an intent to influence or intimidate and an ideological motivation. One practical consideration in choosing between these options is that, unless a suspected offender confesses, such a subjective motivation could be impossible to prove. Another is that dual criminality is a standard requirement for granting extradition; adding a motivation element may be used as the basis of claims that dual criminality is lacking when States request extradition or mutual legal assistance. Others believe that dual criminality should be judged only on whether the intentional physical act would be punishable under the law of both countries, without regard to motivation.

B. Offences related to civil aviation

21. The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and its 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation all derive from a common concern about the safety of air transportation and were negotiated under the auspices of the International Civil Aviation Organization. While aimed at acts jeopardizing the safety, good order and discipline of aircraft and of persons and property on board, the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft only requires the establishment of jurisdiction over the location of offences. While providing rules and procedures in cases of “seizure, or other wrongful exercise of control of an aircraft in flight” (art. 11, para. 1), the initial Convention simply obligates a party to take “such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State” (art. 3, para. 2). There is no requirement to define any particular conduct endangering the safety of an aircraft and/or persons on board as an offence. Moreover, the requirement to establish jurisdiction only applies to acts committed on board an aircraft in flight, defined in that Convention as from the moment when power is applied for the purpose of take-off until the moment when the landing run ends.

22. The three subsequent aviation instruments progress incrementally in reacting to terrorist acts. The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft defines a crime which parties are required to punish by severe penalties. It requires a party to penalize the act of a person who “unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft” (art. 1, para. (a)). Performing or attempting to perform any such act and acting as accomplice of a person who performs or attempts to perform such an act

are only required to be penalized when committed on board an aircraft in flight, but the meaning of that term is expanded to mean after closure of its external doors following embarkation until the moment when any such door is opened for disembarkation (art. 3, para. 1), not just from take-off to landing.

23. Historically, both the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft and the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft were responses to and focused upon hijacking attempts to gain control of aircraft in flight. Terrorist acts aimed at the destruction of aircraft were addressed by the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. This instrument requires penalization of attacks on aircraft in service, meaning from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until 24 hours after any landing (art. 2, para. (b)) and not just in flight and extends to acts of violence against persons on board an aircraft in flight, aircraft or air navigation facilities if those acts are likely to endanger aircraft safety (art. 1). The penalization requirement also extends to attempts to commit such offences (art. 1, para. 2) and accomplices without the limitation in the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft that they be committed on board aircraft.

24. The most recently adopted air travel instrument, the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, is integrally related to the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, which must be ratified by any party wishing to ratify the Protocol. The Protocol defines and applies the attempt and accomplice concepts to the additional offence committed by a person if he, using any device, substance or weapon:

“(a) performs an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death; or

“(b) destroys or seriously damages the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupts the services of the airport,

if such an act endangers or is likely to endanger safety at that airport”
(art. 2, para. 1).

25. From a domestic law perspective, the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation defines as an offence acts that would already be criminal in any country, that is, violence likely to cause serious injury or death committed on the State’s territory. However, the 1988 Montreal Protocol has the significant effect of imposing an international treaty obligation to either extradite or to assume domestic jurisdiction and to extend international cooperation. As described above, the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation define an evolving series of offences, from hijacking of an aircraft in flight, through violence against persons on an aircraft in flight and attacks on an aircraft on the ground, to violence against persons in airports and attacks against airports and other ground facilities. A number of countries responded

to these evolving convention offence requirements with separate acts of ratification and separate implementing statutes, first for the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, then for the later conventions.

26. Models for such separate implementation are available in the Commonwealth Secretariat *Implementation Kits*, which provide model statutes to implement each of the four aviation instruments. Legislative implementation has been achieved in other countries by combining the jurisdictional bases and the offences required by the various aviation instruments in a single statute. After negotiation of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation a number of countries approved legislation that combined implementation of the related 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1970 Convention for the Suppression of Unlawful Seizure of Aircraft and 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation relating to air travel safety. Among these were the New Zealand Aviation Crimes Act 1972, the Malawi Hijacking Act of 1972, the Malaysian Aviation Offences Act 1984 and the Mauritius Civil Aviation (Hijacking and Other Offences) Act 1985. Some of these statutes were later amended by the insertion of an article incorporating the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, as was done by Mauritius. Its Hijacking and Other Offences Act of 1985 had provided for offences of hijacking, violence against passengers or crew and endangering the safety of aircraft, corresponding to the types of offence addressed in the air travel safety conventions negotiated up to 1971.²¹ In 1994, it was amended by the addition of a single article in response to the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation on endangering the safety of airport and airport facilities, of which the text follows (section 6A):

“(1) Any person who, at an airport, unlawfully and by means of any device, substance or weapon—

“(a) makes use of violence against any person which causes or is likely to cause serious injury or death to that person;

“(b) performs any act which causes or is likely to cause serious damage to the environment;

“(c) destroys or seriously damages any aircraft not in service located thereon;

“(d) disrupts the services of an airport,

“shall, where any of the acts specified in subsection (1) (a) to (d) endangers or is likely to endanger safety at that airport, commit an offence;

“(2) Any person who attempts to do or is an accomplice of any person who does any of the acts specified in subsection (1) shall commit an offence”.

Subparagraph (1) (b) was not defined as an offence in the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation.

²¹ *National Laws and Regulations on the Prevention and Suppression of International Terrorism: Part I*, United Nations Legislative Series (United Nations publication, Sales No. E/F.02.V.7), pp. 246-250.

27. Other consolidated laws enacted after negotiation of the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation incorporate not only the offences defined therein, but go beyond the requirements of the Convention by penalizing the unauthorized introduction of weapons and other dangerous articles into airports and on board aircraft. The Australia Crimes (Aviation) Act 1991²² and the Fiji Civil Aviation (Security) Act 1994²³ are comprehensive post-1988 rewritings of prior aircraft enactments. These laws not only incorporate the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, but also provide ancillary airport security measures, such as forbidding the introduction of weapons and other dangerous articles and, in the law of Fiji, include provisions on airport access, security searches and related topics.

C. Offences based on the status of the victim

28. The 1973 Internationally Protected Persons Convention required parties to criminalize violent attacks directed against heads of State and foreign ministers and their family members in a foreign State, as well as those directed against diplomatic agents when those agents are entitled to special protection under international law. The 1979 Hostages Convention requires penalization of any seizure or detention and threat to kill, injure or continue to detain a hostage to compel any State, international organization or person to do or abstain from any act. Penalization is also required for attempts to perform such acts and acting as an accomplice of a person who performs or attempts to perform such acts. This Convention only addresses the seizure, detention, threats and demands involved in hostage-taking if it has an international dimension. If a death or injury results, other conventions and treaties could be implicated, but the incidental seizure, detention and threats would provide a basis for invocation of the provisions of this Convention.

29. The Cook Islands Crimes (Internationally Protected Persons and Hostages) Act 1982, No. 6,²⁴ implements these two conventions in one statute. It should be noted that, while the 1973 Internationally Protected Persons Convention requires penalization of attacks upon internationally protected persons, it is silent as to whether that intent must include knowledge of the victim's protected status. The Cook Islands legislation criminalizes the offences established by the two conventions and addresses the issue of knowledge of the victim's protected status in the following manner:

“7. Prosecution need not prove certain matters

“Notwithstanding anything in sections 3 to 6 of this Act [Crimes against persons; Crimes against premises or vehicles; Threats against persons; Threats against premises or vehicles], in any proceedings brought under any of those sections it shall not be necessary for the prosecution to prove the following matters:

²² Ibid., pp. 28-58. Available at <http://scalepus.law.gov.au/html/comact/7/3826/top.htm>.

²³ Ibid., pp. 158-177. Available at www.unodc.org/pdf/crime/terrorism/fijian_act_english.pdf.

²⁴ Ibid., pp. 120-129. Available at [www.vanuatu.usp.ac.fj/Paclawmat/Cook_Islands_legislation/Crimes_\(Internationally_Protected\).html](http://www.vanuatu.usp.ac.fj/Paclawmat/Cook_Islands_legislation/Crimes_(Internationally_Protected).html).

“(a) In respect of any internationally protected person to whom paragraph (a) or paragraph (c) of the definition of that term in section 2 of this Act applies, that defendant knew, at the time of the alleged crime, the identity of that person or the capacity in which he was internationally protected;

“(b) In respect of any internationally protected person to whom paragraph (b) of that definition applies, that defendant knew, at the time of the alleged crime, that the internationally protected person was accompanying any other person to whom paragraph (a) of that definition applies;

“(c) In respect of any internationally protected person to whom paragraph (c) of that definition applies, the defendant knew, at the time of the alleged crime, that the internationally protected person was entitled under international law to special protection from attack on his person, freedom or dignity;

“(d) In respect of any internationally protected person to whom paragraph (d) of that definition applies, that defendant knew, at the time of the alleged crime, that the internationally protected person was a member of the household of any other person referred to in paragraph (c) of that definition.”

30. Such an approach is typically used by those countries that provide particular penalties or special jurisdiction, for example, by national authorities in a federal system, for assaults on government officials. Invocation of such special jurisdiction or particular penalties does not depend upon proof that the perpetrator knew that the victim occupied an official position. The necessary element of a criminal intent is supplied by the fact that an assault upon any person is a clearly criminal act, *malum in se*. Such legislation can be regarded as a demonstration of a Government’s commitment to protecting functionaries of and relationships with other States rather than as a special deterrent to criminal conduct.

D. Offences related to dangerous materials

31. Three conventions deal with inherently dangerous substances, the 1980 Nuclear Material Convention, the 1991 Plastic Explosives Convention and the 1997 Terrorist Bombings Convention, dealing with bombs and other lethal devices. The first two have significant regulatory elements that require coordination with authorities other than those concerned with criminal justice matters. The 1980 Nuclear Material Convention requires penalization of the possession or handling without lawful authority of nuclear material that is likely to cause death, serious injury or substantial damage to property; the theft, robbery, embezzlement or fraudulent obtaining of nuclear material; demanding nuclear material by force or intimidation; threatening to use nuclear material to cause death or serious injury to any person or substantial property damage; and threatening to commit one of the offences defined above in order to compel a natural or legal person, international organization or State to do or refrain from doing something. This Convention is only one of several dealing with the protection of nuclear or other radioactive material and nuclear facilities. A draft amendment to strengthen its provisions is currently being prepared by an expert group; those concerned with legislative implementation

of the Convention may obtain further information from the International Atomic Energy Agency.²⁵

32. The various conventions dealing with the protection of nuclear or radioactive material and nuclear facilities employ different wording for the definition of offences, but most employ wording similar to that used in the statutes established by Australia and Ireland that are reproduced below. The Nuclear Non-Proliferation (Safeguards) Act 1987 of Australia²⁶ corresponds to that used in the Nuclear Material Convention. The definition is given below:

“Interpretation

“32. In this Division, ‘nuclear material’ has the same meaning as in the Physical Protection Convention.

“Stealing nuclear material

“33. A person shall not:

“(a) steal;

“(b) fraudulently misappropriate;

“(c) fraudulently convert to that person’s own use; or

“(d) obtain by false pretences;

“any nuclear material.

“Penalty: \$20,000 or imprisonment for 10 years, or both.

“Demanding nuclear material by threats

“34. A person shall not demand that another person give nuclear material to the first-mentioned person or some other person by force or threat of force or by any form of intimidation.

“Penalty: \$20,000 or imprisonment for 10 years, or both.

“Use of nuclear material causing injury to persons or damage to property

“35. A person shall not use nuclear material to cause:

“(a) serious injury to any person; or

“(b) substantial damage to property.

“Penalty: \$20,000 or imprisonment for 10 years, or both.

“Threat to use nuclear material

“36. A person shall not:

²⁵ Those concerned with legislative implementation of the 1980 Nuclear Material Convention may obtain further information from Maria de Lourdes Vez Carmona at the International Atomic Energy Agency by sending an e-mail to Carmona.Vez@iaea.org.

²⁶ *National Laws and Regulations ...*, pp. 18-21. Available at <http://scaletext.law.gov.au/html/pasteact/0/12/top.htm>.

- “(a) threaten;
- “(b) state that it is his or her intention; or
- “(c) make a statement from which it could reasonably be inferred that it is his or her intention;

“to use nuclear material to cause:

- “(d) the death of, or injury to any person; or
- “(e) damage to property.

“Penalty: \$20,000 or imprisonment for 10 years, or both.

“*Threat to commit offence*

“37. A person shall not:

- “(a) threaten;
- “(b) state that it is his or her intention; or
- “(c) make a statement from which it could reasonably be inferred that it is his or her intention;

“to do any act that would be a contravention of section 33 in order to compel a person (including an international organisation or the Government of Australia or of a foreign country) to do or refrain from doing any act or thing.

“Penalty: \$20,000 or imprisonment for 10 years, or both.”

33. The Radiological Protection Act 1991 of Ireland,²⁷ giving effect to the Convention, includes the following provisions:

“Interpretation.

“2. ... ‘nuclear material’ has the meaning assigned to it by Article 1 of the Protection Convention.

“Offences relating to nuclear material.

“38.—(1) A person who—

- “(a) possesses, uses, transfers, alters, disposes or disperses nuclear material in such a manner so as to cause or be likely to cause death or serious injury to any person, or substantial damage to property, or
- “(b) steals nuclear material, or
- “(c) embezzles or fraudulently obtains nuclear material, or
- “(d) does any act constituting an unlawful demand for nuclear material, by the threat of the use of force, by the use of force, or by a threat of any kind, or

²⁷ The Radiological Protection Act 1991 of Ireland is available at www.bailii.org/ie/legis/num_act/rpa1991240/.

“(e) threatens—

“(i) to use nuclear material to cause death or serious injury to any person or substantial property damage,

“(ii) to commit an offence under paragraph (b) of this subsection in order to compel any person, an international organisation or state to do or to refrain from doing any act

shall be guilty of an offence.

“39.—...

“40.—(1) ...

“(2) A person who is guilty of an offence under this Act shall be liable:

“(a) ...

“(b) ...

“(c) on conviction on indictment for an offence under section 38 of this Act, to a fine not exceeding £1,000,000 or to imprisonment for life or other term decided by the court or to both ...”

34. Unlike all the other conventions examined in the present publication apart from the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, the 1991 Plastic Explosives Convention defines no offence. It requires parties to take the necessary measures to establish controls over unmarked explosives stocks and to prohibit and prevent the manufacture of unmarked explosives. The Convention does not specify whether those controls and their enforcement should be penal, regulatory or administrative in nature. This is another convention for which the depository is the International Civil Aviation Organization, as it is for the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and its 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation. That organization may serve as a resource for technical advice on implementing legislation.²⁸

35. The Government of South Africa has submitted an explosives bill to parliament that would adopt the technical definitions in the 1991 Plastic Explosives Convention. If enacted, the bill would provide criminal penalties to enforce its provisions that:

“(1) Notwithstanding any other provision in this Act but subject to subsection (3), no person may manufacture, import, transport, keep, store, possess, transfer, purchase, sell, supply or export any unmarked plastic explosives.

“(2) (a) The marking of plastic explosives must be done in such a manner as to achieve homogeneous distribution in the finished product;

“(b) The minimum concentration of a detection agent in the finished product must be in accordance with the Technical Annex to the Convention.”

²⁸ The web site of the International Civil Aviation Organization is at www.icao.int.

Subsection (3) goes on to deal with the exceptions provided in the Convention for the disposal of existing stocks, and so forth.

36. Unlike the predominantly regulatory 1980 Nuclear Material Convention and the 1991 Plastic Explosives Convention, the 1997 Terrorist Bombings Convention is penal in nature and requires parties to criminalize knowing participation in the placement or use of an explosive, incendiary, toxic, biologically dangerous or radioactive device with the intent to cause death, serious injury or major economic loss. Activities of armed forces during an armed conflict are not governed by the Convention, as they are subject to the separate rules of international humanitarian law. Some countries have enacted legislation that essentially tracks the language of the Terrorist Bombings Convention in defining the offence.

37. Other statutes, such as the Terrorism Act 2000 of the United Kingdom, include a specific terrorist intent element, a further political, religious or ideological requirement and address not only the threats listed in the Convention, but also attacks on electronic data or control systems. An extract from the section on interpretation of the Terrorism Act 2000 is given below:

- “(1) In this Act ‘terrorism’ means the use or threat of action where—
 - “(a) the action falls within subsection (2),
 - “(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
 - “(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
- “(2) Action falls within this subsection if it—
 - “(a) involves serious violence against a person,
 - “(b) involves serious damage to property,
 - “(c) endangers a person’s life, other than that of the person committing the action,
 - “(d) creates a serious risk to the health or safety of the public or a section of the public, or
 - “(e) is designed seriously to interfere with or seriously to disrupt an electronic system.
- “(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.”

E. Offences related to vessels and fixed platforms

38. The hijacking of vessels and aircraft present analogous considerations, involving as they do the safety of passengers and crew, elements of mobility and historical parallels based on the authority of the commander and the concept of extraterritorial sovereignty based upon the registration or flag of the conveyance. However, the four air travel instruments were negotiated under the auspices of the

International Civil Aviation Organization, while the 1988 Safety of Maritime Navigation Convention and its contemporaneous Fixed Platforms Protocol were negotiated under the auspices of the International Maritime Organization. Given the independent interests and separate technical and advisory programmes of the two depository organizations, it was considered advisable to treat the 1988 Safety of Maritime Navigation Convention and its Protocol separately.

39. The 1988 Safety of Maritime Navigation Convention combines many of the provisions developed in the preceding decades in dealing with attacks upon aircraft. It requires the penalization of seizures of a ship, damage to a ship or its cargo that is likely to endanger its safe navigation, introduction of a device or substance likely to endanger the ship, endangering safe navigation by serious damage to navigation facilities or by communicating false information and injuring or killing any person in connection with the commission of the previously listed offences. Attempts to commit such offences and participation in them are also required to be penalized. A virtually contemporaneous Protocol extends the coverage of the Convention to attacks upon fixed platforms located on the continental shelf. The Commonwealth Secretariat *Implementation Kits* include separate model laws for implementation of the Convention and its Protocol. An example of legislation from a coastal country is the Australia Crimes (Ships and Fixed Platforms) Act 1992,²⁹ simultaneously implementing the Convention and Protocol.

40. Opened for signature in March 1988, the 1988 Safety of Maritime Navigation Convention and the 1988 Fixed Platforms Protocol entered into force on 1 March 1992 and had gained 69 ratifications, accessions or successions as at 2 July 2002. This number is smaller than the 80 recorded for the more recent 1991 Plastic Explosives Convention, but almost equal to the 64 recorded for the 1997 Terrorist Bombings Convention. The status of ratifications can be found at the web site of the Counter-Terrorism Committee.³⁰

41. It may be perceived by some countries that are landlocked, do not have oil drilling or other fixed platforms on a continental shelf and do not have a significant commercial fleet under their flag and registration that the 1988 Safety of Maritime Navigation Convention and its Fixed Platforms Protocol are inapplicable to their interests. However, a country may be confronted by situations in which its nationals are killed or injured on board a ship or fixed platform or commit an offence under the Convention or Protocol, suspected offenders are found within its territory, or preparations for the commission of offences against the safety of maritime navigation or a fixed platform are made within its territory. All of those situations are covered by these two instruments and legal procedures agreed to in advance under these international agreements could minimize post-attack friction between States. It should also be remembered that ratification and implementation of the global anti-terrorism instruments were called for in Security Council resolution 1373 (2001) and by the Counter-Terrorism Committee, without regard to whether or not a State possessed a sea coast. Non-coastal countries such as Austria and Hungary have ratified both the Convention and its Protocol.

²⁹ *National Laws and Regulations ...*, pp. 59-70.

³⁰ The web site of the Counter-Terrorism Committee is at www.un.org/Docs/sc/committees/1373/.

F. Offences related to the financing of terrorism

42. The 1999 Financing of Terrorism Convention requires parties to penalize conduct by any person who (art. 2, para. 1):

“ ... by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

“(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex [meaning the nine treaties predating the Financing of Terrorism Convention which defined terrorist offences]; or

“(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.”

43. Subparagraph (a) incorporates by reference the offences penalized by nine of the previous global anti-terrorism instruments as acts for which the provision or collection of funds are forbidden. Another means of achieving the same effect would be to quote the offence definition from each instrument in full in the domestic law, either in its body or in an annex listing all of the defined offences. Subparagraph (b) sets out a self-contained definition of a terrorist act. An example of national legislation that parallels the 1999 Financing of Terrorism Convention in this two-part definition of acts for which the provision or collections of funds is prohibited is the Barbados Anti-Terrorism Act, 2002 (discussed in paras. 14-20 above). This Act creates the crime of terrorism and the offence of financing of terrorism, defined as follows:

“4. (1) A person who in or outside Barbados directly or indirectly, unlawfully and wilfully,

“(a) provides or collects funds; or

“(b) provides financial services or makes such services available to persons

“with the intention that the funds or services are to be used or with the knowledge that the funds or services are to be used in full or in part, in order to carry out

“(i) an act that constitutes an offence under or defined in any of the Treaties listed in the Third Schedule [meaning all of the penal conventions/protocols except the Terrorism Financing Convention itself]; or

“(ii) any other act

“(A) that has the purpose by its nature or context, to intimidate the public or to compel a government or an international organization to do or to refrain from doing any act; and

“(B) that is intended to cause

“(aa) death or serious bodily harm to a civilian or in a situation of armed conflict, to any other person not taking an active part in the hostilities;

“(bb) the risk, damage, interference or disruption of the kind mentioned in subparagraph (B), (C), or (D) of section 3 (1) as the case may be.

“is guilty of an offence ...”

44. By its Act of 15 November 2001, France defined the specific offence of financing of terrorism by the following law, the original version of which can be found in the French-language version of the *Legislative Guide*:

“It also constitutes an act of terrorism to finance a terrorist organisation by providing, collecting or managing funds, securities or property of any kind, or by giving advice for this purpose, intending that such funds, security or property be used, or knowing that they are intended to be used, in whole or in part, for the commission of any of the acts of terrorism listed in the present chapter, irrespective of whether such an act takes place.”³¹

45. An updated version of the *Legislative Guide* will, through hyperlinks, make available relevant national legislation and model laws being developed in both the civil and common law traditions.³² The Commonwealth Secretariat *Implementation Kits* provides model legislation and carefully explores the issues and terminology found in the 1999 Financing of Terrorism Convention (and their relationship to the 1997 Terrorist Bombings Convention) and should be consulted in regard to the criminalization of offences under either of those Conventions.

46. In addition to the obligation to penalize the financing of terrorism, the 1999 Financing of Terrorism Convention contains significant non-penal elements. It obligates parties to have legislation to enable a legal entity to be held civilly, administratively or criminally liable when a person responsible for its management or control has committed an offence set forth in article 2 of the Convention. It also requires States parties to have in place appropriate measures to identify, detect, freeze and seize for the purpose of forfeiture funds used or allocated for the commission of terrorist offences. Parties must cooperate to prevent the commission of terrorist acts by adapting their national legislation to require financial institutions and other professions involved in financial transactions to identify their customers and to report transactions suspected of stemming from a criminal activity.

47. It is noteworthy that this last obligation, found in article 18 (b), is not confined to the reporting of suspected terrorist activity, but extends to all suspected criminal activity. This broad formulation of the reporting obligation is necessary to recognize the reality that a financial professional may fairly be expected to identify transactions with no apparent business rationale, but cannot and should not be expected to determine what kind of illegal activity may lie behind such transactions. Article 18 (b) (iii) deals with regulations imposing on financial institutions the obligation to report “... all complex, unusual large transactions and unusual patterns

³¹ French Criminal Code, Art. 421-2-2 (added by Law No. 2001-1062 of 15 November 2001).

³² The present *Legislative Guide* is available at www.unodc.org/unodc/en/terrorism.html.

of transactions, which have no apparent economic or obviously lawful purpose”. Under this classic formulation of what constitutes a suspicious transaction for anti-money laundering purposes, there is no need for an apparent connection to drug trafficking or terrorism and the simple lack of an apparent economic or lawful purpose is sufficient. Once that condition appears, it is the financial institution’s responsibility to report the transaction, leaving it to government authorities to determine whether trafficking in drugs, arms, terrorism or any other serious crime, or a legitimate business or personal purpose, lies behind the transaction.

48. There are obviously significant factual differences between the practices and offences of money-laundering and terrorist financing. Money-laundering typically involves transferring significant proceeds from illegal transactions into legitimate commerce or banking channels, often divided or disguised to avoid detection. Conversely, terrorist financing may involve aggregating sums derived from lawful activities or microcriminality and transferring them to a person or organization, which ultimately may send relatively small payments to support terrorist activities. Such funds become legally tainted only when a person handling them forms the intention to use them to finance a terrorist act. Despite these differences in the two phenomena, global efforts to fight money-laundering and suppression of the financing of terrorism both have need of the assistance of financial institutions and professions in the detection of suspicious transactions and both rely heavily upon intelligence collection and analysis, often through financial intelligence units. As illustrated by the application to terrorist financing of suspicious activity reporting, a control mechanism initially developed to combat the laundering of drug money, the global regimes for control of money-laundering and financing of terrorism are increasingly becoming integrated.

49. The 1999 Financing of Terrorism Convention is only one aspect of a larger international effort to prevent, detect and suppress the financing and support of terrorism. Under Security Council resolution 1373 (2001), Member States are required to take measures not only against the financing of terrorism, but also against other forms of support, such as recruitment and the supply of weapons. The 1999 Financing of Terrorism Convention only prohibits the provision or collection of “funds”, meaning assets or evidence of title to assets. However, when legislation to implement the Convention is enacted, the resolution’s requirement to suppress recruitment and the supply of weapons should also be considered.

50. A 1994 statute of the United States of America (United States Code, Title 18, sect. 2339a) predates both the 1999 Financing of Terrorism Convention and resolution 1373 (2001) and creates the offence of “Providing material support to terrorists”. This law criminalizes not only the provision or collection of funds prohibited by the 1999 Financing of Terrorism Convention, but virtually all forms of material support and the concealment of such support, a crime with obvious similarity to a money-laundering concealment offence:

“(a) Offense.—

Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation ... or in preparation for, or in carrying

out, the concealment of an escape from the commission of any such violation ... shall be [guilty of an offence].

“(b) Definition.—

In this section, the term ‘material support or resources’ means currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation and other physical assets, except medicine or religious materials.”

51. The United States has also enacted a law specifically implementing the 1999 Financing of Terrorism Convention and utilizing its terminology and definitions, entitled “The Suppression of the Financing of Terrorism Convention Implementation Act of 2002”, Title II of Public Law 107-197 of 25 June 2002.

52. Decree Law No. 25475 of 5 May 1992 of Peru treats terrorist financing as one form of prohibited act of collaboration with terrorism. The original version of the law can be found in the Spanish-language version of the *Legislative Guide*; the English-language version of article 4 of that Decree Law, concerning collaboration, provides that:

“Anyone who wilfully secures, gathers, collects or supplies any goods or means or in any manner engages in acts such as to further the commission of offences referred to by this Decree Law or furthers the goals of a terrorist group, shall be punished by a term of imprisonment of no less than 20 years”.

53. Authorities considering legislation to implement the 1999 Financing of Terrorism Convention may also take into consideration the work of the Financial Action Task Force on Money Laundering, an intergovernmental organization housed at the Organisation for Economic Cooperation and Development in Paris and originally formed to combat money-laundering. In October 2001, the Task Force issued eight special recommendations on terrorist financing, which go beyond the requirements of the 1999 Financing of Terrorism Convention and Security Council resolution 1373 (2001) in several respects. These were in addition to its original 40 recommendations on the control of money-laundering, which were issued in 1990, revised in 1996 and further revised in 2003 to be applicable to both money-laundering and terrorism. The eight special recommendations deal with (I) ratification and implementation of the 1999 Financing of Terrorism Convention and implementation of the United Nations resolutions relating to the financing of terrorism; (II) penalization of the financing of terrorism, terrorist acts and terrorist organizations and designation of such offences as money-laundering predicate offences; (III) freezing and confiscating terrorist assets; (IV) reporting of suspicious transactions involving terrorist acts or organizations; (V) international cooperation in connection with criminal, civil enforcement, and administrative investigations, inquiries and proceedings relating to the financing of terrorism, terrorist acts and terrorist organizations; (VI) control of alternative remittance systems; (VII) strengthening of originator information requirements for wire transfers; and (VIII) controls to prevent the misuse of non-profit organizations in the financing of terrorism. The first five special recommendations overlap, to a great extent, the provisions of the 1999 Financing of Terrorism Convention and Council resolution 1373 (2001), whereas the last three cover new ground regarding informal remittance

systems, identifying information to accompany wire transfers, and controls to prevent the use of non-profit organizations in financing terrorism.

54. In the above-mentioned article, participation in the financing of terrorism is defined as including:

“... any kind of economic action, assistance or intervention undertaken voluntarily for the purpose of financing the activities of terrorist elements or groups.”

55. In 2002, the International Monetary Fund (IMF) and the World Bank added the Forty Recommendations on money-laundering of the Financial Action Task Force and the eight special recommendations on terrorist financing to their list of useful standards and undertook a pilot project of assessments that will involve IMF, the World Bank, the Financial Action Task Force and Task Force-style regional bodies. The assessments will be undertaken by IMF and the World Bank in their Financial Sector Assessment Programme and by IMF under its programme of assessments of offshore financial centres. In order to guide these assessments, the plenary meeting of the Task Force adopted a detailed *Methodology for Assessing Compliance with Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) Standard*, which had been developed in cooperation with IMF and the World Bank.

56. For all of the above reasons and because of the inherent complexity of the issues, when drawing up legislation to implement the 1999 Financing of Terrorism Convention or the related financing of terrorism obligations set out in Security Council resolution 1373 (2001), Member States are encouraged to consult available resources. These resources include the Global Programme against Money-Laundering of the United Nations Office on Drugs and Crime, which has developed model legislation targeting money-laundering and proceeds of crime,³³ the Anti-Money Laundering Unit of IMF, which has published *Suppressing the Financing of Terrorism: A Handbook for Legislative Drafting*,³⁴ the World Bank³⁵ and the Financial Action Task Force on Money Laundering.³⁶

³³ Staff of the Global Programme against Money Laundering may be contacted by e-mail at gpml@unodc.org, by telephone on + (43) (1) 26060-4313, or by facsimile on + (43) (1) 26060-6878.

³⁴ International Monetary Fund, *Suppressing the Financing of Terrorism: A Handbook for Legislative Drafting* (2003).

³⁵ The web site of the World Bank is at www.worldbank.org.

³⁶ The staff of the Financial Action Task Force on Money Laundering may be contacted by e-mail at contact@fatf-gafi.org.

III. Other core elements of the anti-terrorism conventions and protocols

A. Establishment of jurisdiction over the offence

1. No safe haven for terrorists

57. The most prevalent and perhaps most significant type of jurisdiction that the universal instruments require to be established is that necessary to ensure that there shall be no safe haven for terrorists. The principle of *aut dedere aut judicare*, which states that a country that does not extradite an alleged offender shall assume jurisdiction to judge that person according to its own laws, is now the fundamental principle of anti-terrorism instruments and was prominently restated in Security Council resolution 1373 (2001), in which the Council:

“ ...

“2. *Decides also* that all States shall:

“ ...

“(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens”.

58. Ten of the conventions and protocols require the penalization of defined offences (meaning all but the initial 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft and the 1991 Plastic Explosives Convention). All of those instruments require States parties to establish jurisdiction whenever the alleged offender is present in the State and the party with custody does not extradite to a party that has established jurisdiction pursuant to that Convention or Protocol. A direct approach to this jurisdictional obligation was adopted by China at the twenty-first meeting of the Standing Committee of the Sixth National People's Congress on 23 June 1987, as follows:

“The 21st Meeting of the Standing Committee of the Sixth National People's Congress resolves that the People's Republic of China shall, within the scope of its treaty obligations, exercise criminal jurisdiction over crimes prescribed in the international treaties to which the People's Republic of China is a party or has acceded.”³⁷

59. The appendices to the legislation then quote the articles of five of the global Conventions, which provide that a State party in whose territory an alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purposes of prosecution, thus clearly demonstrating the statutory intent to establish such jurisdiction.

³⁷ *National Laws and Regulations on the Prevention and Suppression of International Terrorism: Part I*, United Nations Legislative Series (United Nations publication, Sales No. E/F.02.V.7), p. 115.

60. The same effect is achieved by section I, article 4, of the Russian Federation Federal Act on the Suppression of Terrorism of 25 July 1998.³⁸ That article states that:

“The Russian Federation, guided by the interests of ensuring the safety and security of the individual, society and the State, shall prosecute persons within its territory who are involved in terrorism [defined in art. 3 on definition of terms as including various Convention offences] including in circumstances where the acts of terrorism were planned or committed outside the Russian Federation but caused harm to the Russian Federation, and in other circumstances provided for by the Russian Federation’s international agreements.”

61. The Commonwealth Secretariat *Implementation Kits* for individual conventions and protocols does not suggest statutory language explicitly referencing the “extradite or prosecute” imperative in the global instruments, but it does refer to the issue in prominent notes and explains that for the obligation to be implemented, a State must have legislation permitting prosecution when the only jurisdictional basis is the alleged offender’s presence. The Commonwealth Secretariat models given in the Implementation Kits provide the options of jurisdiction based on the presence of the person or a more restricted jurisdiction based upon presence plus the impossibility of extradition, which presumably would arise from an impediment, such as a legitimate fear of discriminatory prosecution or a constitutional ban against extradition of nationals.

62. The other circumstances in which parties are required to establish jurisdiction over defined offences vary according to the nature of the terrorist activity being addressed and to the evolution of anti-terrorist measures over the decades. They are discussed below.

2. Jurisdiction based on registration of aircraft or ships or on territoriality

63. The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft addresses hijacking and requires parties to establish jurisdiction over offences committed on board aircraft based upon their registration. The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft contains the requirement to establish jurisdiction based upon registration, as does the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and its 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, which add a requirement to establish territorial jurisdiction over the offences defined in those Conventions. This new requirement of territorial jurisdiction reflects the nature of these two instruments as reactions to attacks on aircraft on the ground before and after flight and at ground facilities such as airports.

64. The 1973 Internationally Protected Persons Convention also requires that jurisdiction be established by a State party for offences committed in its territory or on board a ship or an aircraft registered in that State, as does the 1979 Hostages Convention. The 1980 Nuclear Material Convention focuses on the protection of nuclear material and its transit, requiring that jurisdiction over offences involving

³⁸ Ibid., pp. 347-361.

such materials be established based upon territoriality and registration of the ship or aircraft involved. The 1988 Safety of Maritime Navigation Convention and its 1988 Fixed Platforms Protocol require that jurisdiction be established based upon territoriality (specified in the Protocol as location on the continental shelf of a State) and upon registration of a ship on which an offence is committed. The 1997 Terrorist Bombings Convention and the 1999 Financing of Terrorism Convention both require the establishment of jurisdiction based upon territoriality and upon registration of a ship or aircraft. The Criminal Code of the Republic of Korea³⁹ expresses these types of jurisdiction very clearly:

“Article 2 (Domestic Crimes)

“This Code shall apply both to Korean nationals and aliens who commit crimes within the territory of the Republic of Korea.

“...

“Article 4 (Crimes by Aliens on Board a Korean vessel outside of Korea)

“This Code shall apply to aliens who commit crimes on board a Korean vessel or aircraft outside the territory of the Republic of Korea.”

65. Another form of jurisdiction or competence dealt with under the 1997 Terrorist Bombings Convention and the 1999 Financing of Terrorism Convention is jurisdiction over offences committed within a State’s territory that affect another State. Article 6 of the 1997 Terrorist Bombings Convention and article 7 of the 1999 Financing of Terrorism Convention are divided into two categories of grounds upon which jurisdiction may be established. Article 6 of the 1997 Terrorist Bombings Convention requires in paragraph 1 that jurisdiction be established on the basis of territoriality, registration of a vessel or aircraft and the nationality of the offender. Paragraph 2 of article 6 refers to various grounds upon which parties may choose to establish jurisdiction, such as the nationality of a victim or an attempt to compel that State to do or abstain from doing any act. Article 7 of the 1999 Financing of Terrorism Convention requires in paragraph 1 the same obligatory grounds of jurisdiction as does the 1997 Terrorist Bombings Convention. Paragraph 2 of article 7 of the 1999 Financing of Terrorism Convention then lists discretionary grounds upon which jurisdiction may be established, similar to those in paragraph 2 of article 6. In considering this division between mandatory and discretionary grounds under the 1997 and 1999 Conventions, it is worthwhile to consider Security Council resolution 1373 (2001), which provides in the mandatory language of paragraph 2, subparagraphs (d) and (e), that all States shall:

“(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;

“(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;”

³⁹ Ibid., pp. 331-332.

3. Jurisdiction based upon the nationality of the alleged offender

66. The 1973 Internationally Protected Persons Convention was the first of the universal anti-terrorism instruments to introduce the requirement that a State party should establish jurisdiction over an alleged offender who is a national of that State. The 1980 Nuclear Material Convention, the 1988 Safety of Maritime Navigation Convention and its 1988 Fixed Platforms Protocol, the 1997 Terrorist Bombings Convention and the 1999 Financing of Terrorism Convention all require jurisdiction to be established based upon the nationality of the alleged offender.

67. The Criminal Code of the Republic of Korea provides a clear statement of this type of jurisdiction:

“Article 3 (Crimes by Koreans outside Korea)

“This Code shall apply to all Korean nationals who commit crimes outside the territory of the Republic of Korea.”

4. Jurisdiction based upon the protection of other specified interests

68. The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft and the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation require a Contracting State to establish jurisdiction when the lessee of an aircraft has his principal place of business in that State. The 1973 Internationally Protected Persons Convention requires the establishment of jurisdiction over crimes committed against a person whose protected status derives from the functions exercised for a State which is a party to the Convention. The 1979 Hostages Convention, the 1980 Nuclear Material Convention, the 1988 Safety of Maritime Navigation Convention, its 1988 Fixed Platforms Protocol and the 1997 Terrorist Bombings Convention all define as offences violence or threats used to compel a Government or international organization to do or refrain from doing an act. However, only the 1979 Hostages Convention affirmatively requires that jurisdiction be established over an offence committed to compel that State to do or refrain from doing any act. The 1988 Safety of Maritime Navigation Convention and its 1988 Fixed Platforms Protocol, the 1997 Terrorist Bombings Convention and the 1999 Financing of Terrorism Convention list this circumstance as among those discretionary grounds for which a State may establish jurisdiction.

69. Sections 129 and 129a of the German Criminal Code define the offences of forming, being a member of, supporting or recruiting for a criminal (section 129) or terrorist (section 129a) organization. Section 129b establishes the following jurisdiction, based upon various State interests, as reflected in the following unofficial translation:

“Sections 129 and 129a shall also apply to organisations abroad. If the offence relates to an organisation outside the Member States of the European Union, this shall only apply if the offence was committed by virtue of an activity exercised within the territorial scope of this law or if the perpetrator or the victim is a German or is within Germany. In cases that fall under the second sentence, the offence shall only be prosecuted on authorisation by the Federal Ministry of Justice. Authorisation may be granted for an individual case or in general for the prosecution of future acts relating to a specific organisation. When deciding on whether to give authorisation, the Federal Ministry of

Justice shall take into account whether the efforts of the organisation are directed against the fundamental values of a state order which respects human dignity or against the peaceful coexistence of peoples, and which seem to be reprehensible when the entire circumstances are weighed up.”⁴⁰

5. Jurisdiction required to be maintained for extradition or prosecution once an alleged offender is present

70. Practical implementation of the fundamental principle of “no safe haven for terrorists” is accomplished in the 11 conventions that define criminal offences or establish criminal jurisdiction (that is, all except the 1991 Plastic Explosives Convention) by the requirement that a State party in whose territory the offender or alleged offender is present shall ensure that person’s presence for the purpose of prosecution or extradition. The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft and the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation contain provisions requiring a contracting State to establish jurisdiction when the aircraft on which the offence was committed lands in its territory with the alleged offender still on board. In most circumstances these two places would be the same, but there have been circumstances in which a hijacked plane has first landed in one State and then continued on to another State. In that case, the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft would require the States of registration, landing and where the suspect is eventually found to establish jurisdiction and the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation would also require the State in whose territory the offence was committed to do so.

B. Obligation to conduct an inquiry, to report findings and to advise of intent to exercise jurisdiction

71. All of the conventions that define a criminal offence (that is, all of the conventions examined in the present publication, except the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft and the 1991 Plastic Explosives Convention) require that a State party which is obligated to ensure the presence of a person for criminal or extradition proceedings to be instituted shall conduct a preliminary inquiry into the facts, report its findings to concerned States and indicate whether it intends to exercise jurisdiction. The 1980 Nuclear Material Convention uses more generic language, providing that a State party ensuring the presence of an alleged offender for prosecution or extradition shall take appropriate measures and shall notify them to concerned States.

72. Paragraph 6 of the Suppression of Terrorist Bombings Act No. 11 of 1999 of Sri Lanka⁴¹ implements the reporting obligation in the following terms:

“Where a request is made to the Government of Sri Lanka, by or on behalf of the Government of a Convention State for the extradition of any person accused or convicted of an offence specified in the Schedule to this Act, the Minister shall, on behalf of the Government of Sri Lanka, forthwith notify the

⁴⁰ See Germany, *Strafgesetzbuch* (Criminal Code), section 1296b.

⁴¹ *National Laws and Regulations ...*, pp. 405-410.

Government of the requesting State of the measures which the Government of Sri Lanka has taken, or proposes to take, for the prosecution or extradition of that person for that offence.”

C. Obligation to submit for prosecution

73. While the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft did not require submission for prosecution, all of the subsequent instruments containing penal offences (that is, all except the 1991 Plastic Explosives Convention) require that a State party where the alleged offender is present shall, if it does not extradite him, without exception, submit the case for prosecution. This does not mean that an allegation which is investigated and determined to be unfounded must be brought to trial. A State’s constitutional principles and its substantive and procedural law will determine to what extent the prosecution must be pursued, but the Conventions require the prosecution process to be invoked as it would be for a serious domestic offence. Statutes such as those of China and the Russian Federation, discussed in paragraphs 57-62 above, explicitly convert these convention obligations into domestic law.

D. Elements of knowledge and intent

74. In order to avoid the danger of overly broad criminal prohibitions in statutes penalizing terrorism offences, careful drafting is required to maintain full respect for the rule of law and to avoid the penalization of innocent conduct. Two crucial issues are the degree of knowledge or intent required for criminalization of an offence and the extent of knowing participation that justifies the imposition of criminal liability. The 1997 Terrorist Bombings Convention requires the criminalization of unlawful and intentional conduct which “in any other way contributes to the commission of one or more offences ... by a group of persons acting with a common purpose” (art. 2, para. 3c.). This broad prohibition is then qualified by the explicit requirement that “such contribution shall be intentional and either made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned”.

75. Similarly, the 1999 Financing of Terrorism Convention is applicable to fund-raising, which can have benevolent as well as sinister purposes. Its criminal intent language requires not merely a general intent that the providing or collecting of funds be done “unlawfully and wilfully”, but also the specific factual qualification that it be done “with the intention that they be used or in the knowledge that they are to be used, in full or in part, in order to carry out ...” (art. 1) a terrorist act. This intention or knowledge requirement ensures that the Convention offence applies only to conduct which is both harmful to society and recognizable as such. Some national legislation defining the offence of terrorist financing, such as the Barbados Anti-Terrorism Act, 2002, uses a similar formulation.

76. In the Prevention of Terrorism Act, 2002, of India, section 22, entitled “Fund raising for a terrorist organization to be an offence”, reckless disregard is equated

with knowledge, by making acts of financing punishable if there is reasonable cause to suspect that the money or other property will be used for terrorism:

- “(1) A person commits an offence if he—
 - “(a) invites another to provide money or other property, and
 - “(b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism.
- “(2) A person commits an offence if he—
 - “(a) receives money or property, and
 - “(b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism.
- “(3) A person commits an offence if he—
 - “(a) provides money or other property, and
 - “(b) knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism.
- “(4) In this section, a reference to the provision of money or other property is a reference to its being given, lent or otherwise made available, whether or not for consideration.”

77. In section 2332d of Title 18 of the United States Code, entitled “Financial transactions”, a similar approach is adopted with regard to any financial transaction with a Government of a country designated as supporting international terrorism. The intent element of the statute can be satisfied either by “knowing or having reasonable cause to know that a country is designated ... as a country supporting international terrorism” (section 2332d, para. (a)). This type of statute is useful and may be required to carry into domestic effect measures imposed under Chapter VII of the Charter of the United Nations, such as those decided upon in Security Council resolution 1373 or in resolutions requiring measures not involving the use of armed force. A model is given in *Model Legislative Provisions on Measures to Combat Terrorism*, part II, entitled “Specified entities”.

E. Offences of participation

78. A related issue is the extent of participation that justifies the imposition of criminal liability. Nine of the 10 conventions and protocols listed above as creating criminal offences expressly require the penalization of participation as an accomplice and many require that other specified forms of participation be made offences, such as organizing or directing a terrorist bombing offence. The 1980 Nuclear Material Convention refers simply to “participation” in any of the offences described in article 7 of that Convention. It is difficult to determine whether “participation” should be considered as equivalent to the criminal liability of an accomplice or was intended to move toward a broader liability for participation, which has developed in many legal systems.

79. In Italy, various associations to commit crimes generally, to engage in Mafia-type activities and to engage in terrorism, including international terrorism, are

penalized. A well-developed jurisprudence exists on the degree of internal or external participation necessary to establish criminal liability. See article 416 of the Codice penale, Associazione per delinquere, article 416 bis, Associazione di tipo mafioso and new article 270 bis, Associazione con finalità di terrorismo anche internazionale. In order to combat its own organized crime phenomenon, the United States has developed not only an expansive concept of conspiracy, but also the concept of a membership in a racketeering enterprise proved by participation in a pattern of specified crimes and the further possibility of a conspiracy to engage in a racketeering enterprise involving various crimes, including terrorism offences. See sections 371 and 1962, Title 18, of the United States Code.⁴²

80. Law No. 599 of 24 July 2000 of Colombia, the original of which appears in the Spanish-language version of the *Legislative Guide*, is entitled “Concerning (agreement) or (joint action), terrorism, threats and instigation”. “When a number of persons (agree together) or (act together) for the purpose of committing crimes, each of them will be punished, for this conduct alone, with imprisonment”. Article 343, entitled “Terrorism”, is translated below:

“Whoever provokes a state of fright or terror in the population or a sector of it, through acts that endanger life, the physical integrity or the liberty of persons or structures or means of communication, transport, processing or transmission of fluids or energy, using means capable of causing mass destruction, will be incarcerated for this offence, without prejudice to the separate penalties provided for the crimes committed in the course of this conduct ...”.

81. While this law unquestionably requires the *mens rea* (guilty mind) of a criminal agreement, whether the necessary *actus reus* (criminal act) is closer to what would be called an attempt in many legal cultures or to conspiracy as applied in common law legal systems requires interpretation by persons familiar with Colombian jurisprudence.

82. Article 2 of the Federal Act against Organized Crime of Mexico provides that:

“When three or more persons organize or agree to organize in order to engage, continuously or repeatedly, in conduct which in itself or in combination with other conduct has as its purpose or result the perpetration of one or more of the following offences, they shall be punished, solely by virtue of that fact, as members of organized crime:

“1. Terrorism, provided for in article 139, first paragraph, ... of the Federal Penal Code.”⁴³

83. These technical difficulties can be overcome by the use of language such as that used in article 5 of the Law against Acts of Terrorism of Cuba, Law No. 93 of 20 December 2001:⁴⁴

“Under this Law, preparatory acts, attempts and consummated acts of terrorism shall be punishable in connection with the offences envisaged in this

⁴² Available at www4.LAW.CORNELL.EDU/USCODE/18/.

⁴³ *National Laws and Regulations* ..., p. 254.

⁴⁴ The English-language version of the Law against Acts of Terrorism of Cuba is available at www.unodc.org/pdf/crime/terrorism/Cuban_law_english.pdf.

Law. Likewise, under the rules established in the Penal Code for preparatory acts, the following shall be punished:

- “(a) any person who, having decided to commit one of the offences envisaged in this Law, proposes to another or to other persons that they participate in carrying out the act in question;
- “(b) any person who conspires with one or more persons to carry out some of the offences envisaged in this Law, and they decide to commit them;
- “(c) any person who incites or induces another or other persons, by spoken word, in writing or in any other form, publicly or privately, to carry out some of the offences envisaged in this Law. If the offence is committed following such incitement or inducement, the person who provokes it shall be punished as the perpetrator of the offence committed.”

84. In connection with all of these concepts of participation, it is necessary to maintain the distinction that participation with others in a terrorism offence cannot be characterized, as can an organized crime associational offence, as being committed for financial or other material advantage. At the same time, defining an ideological or religious purpose to be an element of the offence may create a nearly impossible burden of proof. Proof of such a subjective, internal mental element may be impossible to establish unless the alleged offender voluntarily declares such a purpose. Such an element may not be regarded as necessary when the offence is objectively characterized by particularly harmful terrorist tactics, such as a bomb attack on a civilian population. In this regard, see the Terrorism Act 2000 of the United Kingdom, discussed in paragraph 37 above, on offences related to dangerous materials.

F. Mutual assistance

85. The requirement that parties afford assistance in criminal proceedings appeared first in the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft. It is repeated in all of the subsequent penal conventions (meaning all except the 1991 Plastic Explosives Convention). In the 1979 Hostages Convention and subsequent instruments, that assistance is specified as including the obtaining of evidence at a party's disposal. Beginning with the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the conventions all obligate parties to take measures to prevent offences against other parties. This obligation was broadened in the 1973 Internationally Protected Persons Convention to a duty to exchange information and coordinate administrative and other preventive measures. All subsequent instruments incorporate such a duty, except the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation extending the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, as the original Convention had not contained such an obligation.

86. In the immediate aftermath of the terrorist attacks of 11 September 2001, the chief executives of a number of States issued decrees instructing governmental

bodies to increase their involvement in international cooperation. Since much non-judicial cooperation can be accomplished by the executive branch within its existing powers, these orders may be an expeditious and effective means of implementing basic mutual assistance requirements. More formal and binding arrangements can be secured by ratification and implementation of the universal anti-terrorism Conventions and by negotiation of bilateral or multilateral mutual assistance treaties (see the Model Treaty on Mutual Assistance in Criminal Matters (General Assembly resolution 45/117, annex) and the Manual on the Model Treaty on Mutual Assistance in Criminal Matters).⁴⁵

G. Extradition provisions

87. All of the penal conventions since 1970 (meaning all except the 1991 Plastic Explosives Convention) contain a provision that the offences which they define shall be deemed to be included as extraditable offences in any existing treaty between States parties, who undertake to include such offences in future extradition treaties. If a treaty is required, the Convention may be relied upon between parties. If no treaty is required, the offence shall be treated as extraditable. For purposes of extradition, offences shall be treated as if they had been committed not only in the place where they occurred, but also in the territory of the States that have established jurisdiction under that Convention or Protocol (or in a place within the jurisdiction of the party requesting extradition, a formulation used only in the 1988 Safety of Maritime Navigation Convention).

88. The Commonwealth Secretariat *Implementation Kits* for the various anti-terrorism instruments all contain virtually identical language for the extradition clauses. Paragraphs 7 and 8 of the Suppression of Terrorist Bombings Act No. 11 of Sri Lanka, given below, are typical expressions of language implementing the standard Convention obligation:

“7. Where there is an extradition arrangement made by the Government of Sri Lanka with any Convention State in force on the date on which this Act comes into operation, such arrangement shall be deemed, for the purposes of the Extradition Law, No. 8 of 1977, to include provision for extradition in respect of the offences specified in the Schedule to this Act.

“8. Where there is no extradition agreement made by the Government of Sri Lanka with any Convention State, the Minister may, by Order published in the Gazette, treat the Convention, for the purposes of the Extradition Law, No. 8 of 1977, as an extradition arrangement made by the Government of Sri Lanka with that Convention State providing for extradition in respect of the offences specified in the Schedule to this Act.”

See also the Model Treaty on Extradition (General Assembly resolution 45/116, annex) and the Manual on the Model Treaty on Extradition.⁴⁶

⁴⁵ *International Review of Criminal Policy*, Nos. 45 and 46, 1995 (United Nations publication, Sales No. E.96.IV.2).

⁴⁶ *Ibid.*

H. Exceptions made on grounds of political offence or discriminatory purposes

89. The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft expressly exempted from its application offences against penal laws of a political nature or those based on racial or religious discrimination. Any reference to an exception based on political or discriminatory grounds was omitted from the subsequent conventions between 1970 and 1991 (the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and its 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, the 1980 Nuclear Material Convention, the 1988 Safety of Maritime Navigation Convention and its 1988 Fixed Platforms Protocol and the 1991 Plastic Explosives Convention, which in any event has no penalization obligation), but included in the 1979 Hostages Convention, as explained below.

90. The 1997 Terrorist Bombings Convention and the 1999 Financing of Terrorism Convention contain similar articles requiring the parties to deny any validity, in their domestic political and legal institutions, to any political offence, defence or justification for the acts of terrorism defined in those conventions. In article 5, the 1997 Terrorist Bombings Convention states:

“Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature.”

91. This provision would seem to dictate that such considerations should not be allowable as mitigating circumstances for punishment purposes and that they should not be allowed to be presented or argued as a defence to criminal liability.

92. In addition, article 11 of the 1997 Terrorist Bombings Convention and article 14 of the 1999 Financing of Terrorism Convention provide that:

“None of the offences set forth in article 2 [the offence-defining article in both Conventions] shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.”

93. The articles eliminating the political offence exception are immediately followed in both conventions by anti-discrimination provisos in identical language. Article 12 of the 1997 Terrorist Bombings Convention and article 15 of the 1999 Financing of Terrorism Convention provide that:

“Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences

set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons."

94. Similar language, although referring only to extradition, is found in the 1979 Hostages Convention. Those anti-discrimination articles that accompany the articles eliminating the political offence exception correspond to and embody the principles of non-discrimination and impartiality of the Universal Declaration of Human Rights (General Assembly resolution 217 A (III)). Article 7 of the Declaration recognizes that:

"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

95. Article 10 of the Declaration establishes that:

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

96. An example of domestic legislation implementing these principles and the requirements of the Convention with respect to extradition is the Extradition Act 1988 No. 4 of Australia, amended by the Suppression of Financing of Terrorism Act 2002 No. 66, 2002. Section 5 of the amended act excludes from the definition of "political offence" a list of offences, which includes those referred to in article 2 of the 1999 Financing of Terrorism Convention. That article incorporates the other nine anti-terrorism instruments which define offences. Section 5 also excludes crimes declared by national regulation not to be offences of a political nature. The anti-discrimination elements of the 1999 Financing of Terrorism Convention are implemented in section 7, which lists possible extradition objections, including a discriminatory purpose for the request or such an effect if extradition is granted.

97. It should be noted that, in addition to the prohibitions set out in the 1997 Terrorist Bombings Convention and the 1999 Financing of Terrorism Convention on the recognition of a political offence exception for crimes defined by those Conventions, the Security Council, in paragraph 3 (g) of its resolution 1373 (2001), calls upon all States to:

"Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists."

I. Rights of the alleged offender to communicate and to fair treatment

98. The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft requires immediate notification to the State of nationality of an

alleged offender held for prosecution or extradition and provides that the person be accorded treatment no less favourable than that accorded to nationals of the custody State. The notification provision has become standard in all of the anti-terrorism conventions, although sometimes achieved with different verbal formulations. An example of how this obligation may be recognized appears in section 5 of the Suppression of Terrorist Bombings Act No. 11 of 1999 of Sri Lanka:

“Where a person who is not a citizen of Sri Lanka is arrested for an offence under this Act, such person shall be entitled—

“(a) to communicate without delay, with the appropriate representative of the State of which he is a national or which is otherwise entitled to protect his rights, or if he is a stateless person, with the nearest appropriate representative of the State in the territory of which he was habitually resident;

“(b) to be visited by a representative of that State; and

“(c) to be informed of his rights under paragraphs (a) and (b).”

99. Article 9 of the 1973 Internationally Protected Persons Convention states that:

“Any person regarding whom proceedings are being carried out in connexion with any of the crimes set forth in article 2 shall be guaranteed fair treatment at all stages of the proceedings.”

The offences covered by the Convention are defined in article 2.

100. The 1980 Nuclear Material Convention used the same language as above, but the 1979 Hostages Convention added the following words:

“... including enjoyment of all the rights and guarantees provided by the law of the State in the territory of which he is present.”

101. That version was reproduced in the 1988 Safety of Maritime Navigation Convention, and additional language was again added in the 1997 Terrorist Bombings Convention, as follows:

“... and applicable provisions of international law, including international law of human rights.”

102. The latter part of that formulation was revised in the 1999 Financing of Terrorism Convention to read “including international human rights law”. Neither of those two conventions defines this terminology. Between members of regional groupings, the jurisprudence of forums such as the Inter-American Court of Human Rights or the European Court of Human Rights can provide a common frame of reference to interpret this phrase. When all parties involved in an interpretation dispute are not bound by such a common jurisprudence, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI), annex), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Assembly resolution 39/46, annex) and other applicable United Nations standards and instruments would certainly be consulted.

Annex 285

UNODC, Legislative Guide to the Universal Legal Regime Against Terrorism 30–31 (2008)



UNITED NATIONS
Office on Drugs and Crime

LEGISLATIVE GUIDE TO THE UNIVERSAL LEGAL REGIME AGAINST TERRORISM

Prepared by the United Nations Office on Drugs and Crime

UNITED NATIONS OFFICE ON DRUGS AND CRIME
Vienna

LEGISLATIVE GUIDE TO THE UNIVERSAL LEGAL REGIME AGAINST TERRORISM

Prepared by
the United Nations Office
on Drugs and Crime



UNITED NATIONS
New York, 2008

Note

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

Material in this publication may be freely quoted or reprinted, but acknowledgement is requested, together with a copy of the publication containing the quotation or reprint.

UNITED NATIONS PUBLICATION
Sales No.: E.08.V.9
ISBN 978-92-133780-8

The designations employed and the presentation of material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area of its authorities, or concerning the delimitation of its frontiers or boundaries.

This publication has not been formally edited.

Contents

| | <i>Page</i> |
|---|-------------|
| <i>Preface</i> | v |
| I. The universal legal regime against terrorism | 1 |
| A. Introduction | 1 |
| B. The universal conventions and protocols | 1 |
| C. Binding resolutions of the Security Council concerning terrorist acts and terrorist funds | 3 |
| D. Fundamental considerations in providing legislative advisory services | 5 |
| E. Insistence that counter-terrorism measures be based upon human rights standards | 5 |
| F. The role of the criminal justice system in preventing terrorist acts | 6 |
| G. Prohibiting incitement to terrorism as required by the ICCPR | 7 |
| H. Steps in becoming a party to and implementing the conventions and protocols | 10 |
| II. Criminalization and other legislative requirements of the terrorism related conventions and protocols | 13 |
| A. Common elements of the conventions and protocols | 13 |
| B. Agreements relating to the safety of civil aviation developed by the International Civil Aviation Organization (ICAO) | 13 |
| C. Agreements relating to maritime safety developed by the International Maritime Organization (IMO) | 14 |
| D. Convention on the Physical Protection of Nuclear Material, 1979 and its 2005 Amendment developed by the IAEA | 15 |
| E. Agreements relating to other protections for civilians developed at the initiative of the General Assembly | 16 |
| F. Other legislative requirements relating to the financing of terrorism | 19 |
| G. Issues common to all conventions and protocols | 24 |
| H. Forms of participation in an offence | 29 |
| I. Elements of knowledge and intent | 30 |
| III. Jurisdiction over offences | 33 |
| A. Jurisdiction based upon territoriality | 33 |
| B. Jurisdiction based upon registration of aircraft or maritime vessels | 33 |

| | | |
|-------|--|----|
| C. | Jurisdiction based upon nationality of the offender | 34 |
| D. | Jurisdiction based upon protection of nationals and national interests | 34 |
| E. | Jurisdiction based upon the presence of a person in the national territory | 35 |
| IV. | Obligation to extradite or prosecute | 37 |
| A. | Nature and consequences of the obligation | 37 |
| B. | Obligation to conduct an inquiry, to report findings and to advise of intent | 38 |
| V. | International cooperation in criminal matters | 39 |
| A. | Dependence of the legal regime against terrorism upon international cooperation | 39 |
| B. | Mutual legal assistance | 39 |
| C. | Extradition | 40 |
| D. | Dual criminality | 40 |
| E. | Protections for political activity, against discrimination and requiring fair treatment | 41 |
| F. | Concluding human rights considerations | 44 |
| Annex | | 45 |

Preface

The Terrorism Prevention Branch (TPB) of the United Nations Office on Drugs and Crime (UNODC) is mandated to provide legal and related assistance to requesting countries to ratify and implement the universal legal instruments against terrorism. The Global Project on Strengthening the Legal Regime against Terrorism provides the overall framework for delivering such assistance to countries. The overall project objective is to support Member States in achieving a functional universal legal regime against terrorism in accordance with the principles of the rule of law, especially by facilitating the ratification and implementation of the universal legal instruments against terrorism and enhancing the related capacity of national criminal justice systems.

To assist in identifying and drafting the laws necessary or desirable to implement the terrorism-related instruments, UNODC/TPB furnishes reference materials and technical advice, both by video and telephone conferences, by electronic communications, and by field missions when they are cost effective. These efforts are designed to assist the work of the national officials who ultimately must draft and administer legislation incorporating international commitments into national law. Providing these legal advisory services encourages adoption of the instruments by removing some of the uncertainties and technical obstacles that accompany membership in any international convention. In delivering this assistance UNODC/TPB makes extensive use of several technical assistance tools. Please see the annex for a full listing of available tools and publications and information on how to access them.

This updated version of the *Legislative Guide* has been prepared to facilitate the task of national authorities in adopting and implementing the universal legal regime against terrorism. It replaces a publication issued in 2003, the *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*. Both the 2003 and 2008 versions of the *Guide* were prepared for the information of government officials and others concerned with the international legal aspects of the prevention and suppression of terrorism. The 2003 *Guide* grouped the then existing 12 conventions and protocols according to subject matter, that is as relating to: (a) civil aviation; (b) status of the victim; (c) dangerous materials; (d) vessels and fixed platforms; and (e) the financing of terrorism. The 2008 *Guide* groups the offences according to the entities of the United Nations system responsible for their development in order to place recent developed instruments in context and to indicate sources of technical expertise.

I. The universal legal regime against terrorism

A. Introduction

A key element of the international community's response to terrorism has been the gradual development, since 1963, of a legal infrastructure of terrorism-related conventions and protocols, simply meaning multilateral treaties and supplemental agreements. Those legal instruments, numbering 16 including recent protocols and amendments, require the States that adopt them to criminalize most foreseeable terrorist acts. Another core part of the global legal regime to counter terrorism is a series of Security Council resolutions relating to terrorism, many of them adopted under the authority of chapter VII of the United Nations Charter, which empowers the Security Council to adopt resolutions legally binding on all Member States of the United Nations.

This legal regime against terrorism offers the legal framework to address serious crimes committed by terrorists utilizing a wide array of criminal justice mechanisms. It is based on the premise that perpetrators of terrorist crimes should be brought to trial by their national governments, or should be extradited to a country willing to bring them to trial. The well-known principle of *aut dedere aut judicare* (extradite or prosecute) is meant to make the world inhospitable to terrorists (and those who finance and support them) by denying them safe havens.

Yet it is essential to emphasize that the legal authority to enforce these measures against terrorism is exclusively within the responsibility of sovereign States. No international tribunal exists with competence to prosecute an offender for aircraft or ship hijacking, bombings of civilian targets or financing of terrorism.¹ The legal instruments developed over decades to deal with those offences can only be implemented under national legislation which criminalizes the defined offences, creates appropriate jurisdiction in domestic courts, and authorizes the cooperation mechanisms provided in the international instruments and essential to their effectiveness.

B. The universal conventions and protocols

The selection of the sixteen universal instruments² examined herein reflects the annex to General Assembly resolution 51/210 of 17 December 1996 and General Assembly resolution 61/40 of 18 December 2006. Resolution 51/210 urged Member States to become members of ten specific agreements. Those agreements included:

¹The International Criminal Court, created in 1998 by the Treaty of Rome, is granted jurisdiction over the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Jurisdiction over acts of terrorism was rejected during the negotiations that resulted in the Court's creation.

²The term universal is used to describe those agreements open to membership to all States of the United Nations or its affiliated specialized agencies, such as the International Civil Aviation Organization, as opposed to agreements open only to members of a regional or other restricted groupings, such as the Council of Europe.

- (a) Four conventions and one protocol elaborated by the International Civil Aviation Organization (ICAO);³
- (b) Two conventions developed under the leadership of the General Assembly;⁴
- (c) One convention elaborated by the International Atomic Energy Agency (IAEA);⁵
- (d) One convention and a protocol developed by the International Maritime Organization (IMO).⁶

In addition, the 1996 resolution established an Ad Hoc Committee open to all Member States:

. . . to elaborate an international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism, to supplement related existing international instruments and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism.

Within a year that Committee had elaborated the 1997 International Convention for the Suppression of Terrorist Bombings. It was given an additional mandate by the General Assembly to develop an agreement on terrorist financing, resulting in the International Convention for the Suppression of the Financing of Terrorism of 1999. The International Convention for the Suppression of Acts of Nuclear Terrorism was adopted in 2005 and came into force in July 2007. Negotiations on a comprehensive instrument dealing with terrorism continue as of 2008. The instruments developed by the specialized agencies are also being updated. The IMO developed two protocols in 2005 to update its 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the 1988 Protocol for the Suppression of Acts against the Safety of Fixed Platforms on the Continental Shelf. The IAEA adopted Amendments in 2005 to its 1980 Convention on the Physical Protection of Nuclear Material.⁷ The ratification status of all 16 instruments can be found at www.un.org/sc/ctc under International Law.

³Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963; Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aircraft, 1971; Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 1988.

⁴Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973; International Convention against the Taking of Hostages, 1979.

⁵Physical Protection of Nuclear Material Convention, 1979.

⁶Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental shelf, 1988.

⁷The organization sponsoring negotiations for a convention typically becomes the treaty depository. All of the terrorism-related treaties developed by a General Assembly committee name the Secretary-General of the United Nations in New York as their depository. The specialized agency agreements vary. The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft names the ICAO as its depository. The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft and the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aircraft identify the Governments of the former Union of Soviet Socialist Republics, the United Kingdom and the United States of America as the depositories for instruments of ratification, accession and denunciation. The 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation identifies the same three depository governments and adds the International Civil Aviation Organization in Montreal, which became the sole depository for the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection. The 1979 Physical Protection of Nuclear Material Convention and its 2005 Amendment both provide for signature either at the IAEA in Vienna or at UN Headquarters in New York, and identify the Director General of the IAEA as the depository for the original convention text. This reference to the IAEA Director General appears to be treated as an implied designation of the IAEA as the depository for subsequent treaty purposes, although no explicit reference is made in either instrument to the place of deposit of instruments of ratification, accession or denunciation. The IMO instruments all designate the Secretary General of that organization, headquartered in London, as their depository. The practical significance of these varying designations is that a ratification or accession document sent to the wrong depository may never take effect. It would be wrong to assume that the Secretary-General of the United Nations in New York is the depository for all 16 of the universal terrorism-related instruments. Moreover, advisory services on technical aspects of certain specialized instruments may be within the particular competence of the organization that developed the agreement, such as information from the IAEA in Vienna on the levels of protection required under the 2005 Amendment to the IAEA Physical Protection of Nuclear Material Convention, or from the IMO in London on ship boarding procedures under the 2005 Protocol to the Maritime Safety Convention.

On 20 September 2006, the Member States of the United Nations adopted General Assembly resolution 60/288. In a Plan of Action of 8 September 2006 annexed to this resolution, the Assembly agreed upon the United Nations Global Counter-Terrorism Strategy. In paragraph III-7 of that Plan of Action, the Member States resolved:

7. To encourage the United Nations Office on Drugs and Crime, including its Terrorism Prevention Branch, to enhance, in close consultation with the Counter-Terrorism Committee and its Executive Directorate, its provision of technical assistance to States, upon request, to facilitate the implementation of the international conventions and protocols related to the prevention and suppression of terrorism and relevant United Nations resolutions.

Resolution 61/40 of 18 December 2006 followed soon after the adoption of the Global Strategy. The General Assembly therein called upon Member States to implement that Strategy and upon all States to become parties to all of the ten conventions and protocols referenced in resolution 51/210 of 1996, as well as to the subsequent three conventions, two protocols and one amendment.⁸ In its resolution 62/71 of 8 January 2008, the General Assembly repeated the call made in the Global Strategy for the Terrorism Prevention Branch of UNODC to continue its work assisting States in becoming parties to and implementing the terrorism-related conventions and protocols, adding that this should include national capacity-building.

C. Binding resolutions of the Security Council concerning terrorist acts and terrorist funds

States become Members of the United Nations by adopting its Charter, which is an international convention with legally binding obligations. Under Articles 24, 25 and 48 of the Charter those obligations include the duty to carry out decisions taken by the Security Council when it is acting to preserve peace and security under Chapter VII of the Charter. In October 1999 the Security Council adopted resolution 1267, demanding that the Taliban in Afghanistan turn over Osama bin Laden to a country where he would be brought to justice. In order to enforce the demand the Council decided that all States should:

4(b) Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need.

Non-compliance with the resolution by the Taliban led to resolution 1333 in December 2000, expanding the freezing obligation to “funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organization”. Resolution 1390 of January 2002 continued the freezing of funds and provided for regular updating by the Committee, which came to be known as the Al-Qaida

⁸While tragic events have demonstrated the grave risk to United Nations personnel from terrorism, the 1994 Convention on the Safety of United Nations and Associated Personnel is not included on this list. Historically, that Convention was developed following a series of deaths of United Nations military and police personnel in conflict situations.

and Taliban Sanctions Committee, of the list of designated individuals and entities. That updated list is known as the Consolidated List because it consolidates alphabetically organized lists of Taliban associated individuals, Taliban associated entities, Al-Qaida associated individuals, Al-Qaida associated entities and delisted individuals and entities. The list is available at www.un.org/sc/committees/1267/consolist.shtml. As of 21 January, 2008 it named 142 individuals associated with the Taliban; 228 individuals and 112 entities associated with the Al-Qaida organization, and 11 individuals and 24 entities removed from the list.⁹

On 28 September 2001 the Security Council adopted resolution 1373, expanding freezing obligations to persons (and certain related persons and entities) who commit or attempt to commit terrorist acts. This freezing obligation therefore applies to a broader group than the Taliban and Al-Qaida associated individuals and entities listed under resolution 1267 (1999) and its successor resolutions. Paragraph 1 of resolution 1373 (2001) requires the freezing without delay of:

“funds and other financial assets or economic resources of persons who **commit, or attempt to commit, terrorist acts** or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities. (Emphasis added).

The resolution required the criminalization of the financing of terrorism, which led to a number of law enforcement and international cooperation measures. It also called upon Member States to become parties, as soon as possible, to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism. This appeal to become parties to relevant agreements can also be understood to include regional agreements related to terrorism. Those instruments can play a valuable role complementing bilateral treaties and universal terrorism-related conventions and protocols, so long as those arrangements are “consistent with the Purposes and Principles of the United Nations” in accordance with Article 52 of the United Nations Charter.

Unlike Security Council resolution 1267 (1999), resolution 1373 (2001) does not specify particular individuals or entities whose funds must be frozen because those persons are involved with terrorist acts, nor does it establish a listing mechanism. It also does not define “terrorist acts”. At a minimum that phrase would include crimes that a country denominated as terrorism or terrorist acts under domestic law. Most countries would consider that the offences in the universal terrorism-related conventions and protocols adopted by that country would be considered terrorist acts. In view of the many references describing terrorism and terrorist acts as victimization of civilians in resolutions of the Security Council¹⁰ and the General Assembly,¹¹ the definition in Article 2.1 (b) of the Financing of Terrorism Convention provides another practical guide for identification of acts for which the provision or collection of funds should be forbidden:

Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

⁹Relevant successor resolutions dealing with procedures for listing, delisting and humanitarian exceptions include resolutions 1333 (2000), 1390 (2002), 1452 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1730 (2006) and 1735 (2006).

¹⁰See Security Council resolutions 1456 (2003), 1540 (2004) and 1566 (2004), 1624 (2005) and 1735 (2006).

¹¹See General Assembly resolutions 56/88, 57/27, 58/81 and 58/174, 60/288 and 61/40.

D. Fundamental considerations in providing legislative advisory services

The task assigned to the UNODC by the Global Counter-Terrorism Strategy is to continue the work it has done since 2002 by providing requesting States with technical assistance to facilitate the implementation of the terrorism-related conventions and protocols and of related Security Council resolutions.¹² In executing that task, the legal advisory services provided by UNODC's Terrorism Prevention Branch are conducted according to certain fundamental considerations. A dominant concern is to scrupulously avoid any interference in the internal political affairs of the States requesting legal advisory services. That value is served by providing objective advice, in response to a State's express request, on gaps that may exist between the international requirements of the universal terrorism-related agreements and the provisions of national law and on possible solutions. This technical, apolitical, approach is reinforced by TPB's consistent and limited focus upon terrorism as a set of criminal offences with precise elements defined by the relevant United Nations instruments.

This is in no way intended to undervalue the need for governments and elements of the United Nations system to address terrorist acts and groups in their political and social context and to deal with the conditions conducive to the spread of terrorism listed in Section 1 of the Global Strategy's Plan of Action, as is being done by the organizations and entities in the Secretary-General's Counter-Terrorism Implementation Task Force (CTITF). However, as is evident from the listing of those conditions, many of them cannot be influenced in any significant way by international criminal justice processes.¹³ Moreover, the mandate of the Terrorism Prevention Branch is geared towards advancing the implementation of the universal terrorism-related instruments. Ensuring that the technical assistance provided by the Branch is confined to criminal justice and related procedural aspects of countering terrorism, enables the Branch to work clearly within the limits of its mandate. It also capitalizes upon the advantages of UNODC's established expertise with penal law conventions and international cooperation mechanisms.

E. Insistence that counter-terrorism measures be based upon human rights standards

The UN's counter-terrorism efforts are built upon the uncompromising conviction that successful terrorism prevention efforts should not merely comply with, but must actually be based upon, the spirit and the language of rule of law standards, specifically including the guarantees of the International Covenant on Civil and Political Rights (ICCPR). The premise of this approach is that when communities believe that terrorist acts can be successfully prevented and punished by legal mechanisms that faithfully incorporate human rights protections, there will be less demand for harsher measures and more respect for the rule of law. Instead of a competition in which either security or liberty must be reduced for the other value to be maintained, it is possible to produce synergy so that both effective crime control and respect for human rights are increased. Moreover, the social compact in which citizens willingly support

¹²Resolution 62/71 is the latest GA resolution, regarding TPB's mandate as of January 2008.

¹³"... including but not limited to prolonged unresolved conflicts, dehumanization of victims of terrorism in all its forms and manifestations, lack of rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization, and lack of good governance, while recognizing that none of these conditions can excuse or justify acts of terrorism." Section 1 of the Global Counter-Terrorism Strategy's Plan of Action, UN doc. A/Res/60/288.

their government, obey the law and avoid vigilantism depends upon public confidence that the government will do its part to prevent terrorist attacks and deal firmly but fairly with those accused of planning or committing such attacks.

Article 6 of the International Covenant on Civil and Political Rights (ICCPR), the foundational human rights document in the criminal justice field, provides that: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”.

There can be no clearer example of an arbitrary deprivation of life than the killing by terrorists of harmless civilians enjoying a holiday or shopping. To the citizen, the guarantee of the ICCPR that the right to life will be protected means preventing terrorists from murdering them and their families and friends, not merely supplying a fair and efficient system for trial and punishment after an attack has been accomplished. Protection by law thus demands legal measures to interrupt and interdict preparations by terrorists aimed at arbitrarily depriving civilians of their lives. This interruption and interdiction of terrorist planning and preparation before innocent civilians become victims is infinitely preferable to conducting autopsies and crime scene investigations after a tragedy has occurred and is essential to preserving the faith of citizens in the rule of law and in the credibility of their government.

This insistence upon treating human rights guarantees as the foundation for counter-terrorism technical assistance is simply one aspect of providing integrated legal advisory services. The Global Project on Strengthening the Legal Regime against Terrorism is carefully supervised and subject to great transparency to ensure that it remains within its mandates. Subject to that limitation, however, it would be wasteful to encourage a country to comply only with the technical elements of the Financing of Terrorism Convention and relevant Security Council resolutions on the freezing of terrorist property, without advising the Government of that country to simultaneously consider the human rights implications of its measures, together with the provisions of the Financial Action Task Force’s 40 Recommendations for the control of money laundering and its Nine Special Recommendations relating to the financing of terrorism. Similarly, UNODC technical experts must be prepared to inform States of applicable best practices for implementing international requirements, even though the universal instruments often impose general obligations without specifying the particular legislative language or international cooperation mechanism by which fulfillment of those obligations should be accomplished.

F. The role of the criminal justice system in preventing terrorist acts

Preventive measures exemplify the need to inform countries of pertinent trends and standards, as they are intimately related to the simultaneous achievement of respect for human rights and effective criminal justice practices. The existing conventions and protocols contain no conspiracy, planning, preparation or other prospective provisions. They punish only offences that have been “committed”, “attempted”, “aided or abetted”, “ordered”, “directed” or “contributed to”.¹⁴

¹⁴The only exception is the Financing Convention. That instrument achieves a prospective, preventive effect by establishing as an offence the non-violent financial preparations that precede and support violent terrorist acts. It also avoids ambiguity by specifying that the offence of providing or collecting funds for a terrorist act is not dependent upon commission of the planned violent act. Part II, Section H, explains why the offence of ordering or directing others to commit a terrorist act, established under other recent terrorism-related conventions, arguably may not apply when the act being ordered or directed is not attempted or accomplished.

As a representative example, the offence established by the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation would not have been committed until an attack at an airport were actually attempted or accomplished. That would be true even if overwhelming evidence existed that a group were planning an attack, had secured automatic weapons, ammunition and hand grenades and had printed manifestos announcing their intention to kill as many travelers in the airport as possible in order to publicize their political or ideological cause. Obviously, a regime for international cooperation is not completely satisfactory if a legal prerequisite for its use is an attempted or successful attack with the potential to inflict hundreds of deaths.

Moreover, the phenomenon of suicide attacks makes the deterrent effect of the criminal justice process seem irrelevant. The realization that the criminal justice system cannot deter attackers who are willing to die for their cause can lead to calls for a militarized response, with its obvious risks of further polarization and a weakened respect for procedural protections. To reduce that danger and to contribute to the reduction of terrorism while maintaining confidence in the rule of law, there is increased recognition that intervention against terrorist acts must be possible at the planning and preparation stage. One of the Security Council's mandatory decisions in resolution 1373 of 28 September 2001, is that all States must bring to justice not only those who perpetrate terrorist acts, but also those who "... participate in the **financing, planning, preparation** of such acts." (Emphasis added).

G. Prohibiting incitement to terrorism as required by the ICCPR

The UNODC Terrorism Prevention Branch has prepared a technical assistance working paper analyzing the crucial importance of criminal justice preventive measures in anti-terrorism efforts. This paper is entitled *Preventing Terrorist Acts: A Criminal Justice Strategy Integrating Rule of Law Standards in Implementation of United Nations Anti-Terrorism Instruments (2006)*. It reviews the substantive and procedural mechanisms that permit effective intervention against terrorist planning and preparation, while observing human rights guarantees. Among the substantive offences reviewed are *association de malfaiteurs* and conspiracy, material support for terrorism, preparation offences, recruitment for, training and membership in a terrorist group. Among the procedural mechanisms are undercover operations, technical surveillance, witness incentives, evidentiary rules, regulatory controls and international cooperation improvements.

The Financing of Terrorism Convention was the first global instrument to require the imposition of criminal liability for the logistical support that precedes almost every significant act of terrorist violence and is essential to the groups that form the institutional infrastructure of terrorism. Intense consideration at the global level is now being given to measures aimed at the psychological indoctrination that incites to hatred and violence and is similarly essential to motivating acts of organized terrorism. Article 20, paragraph 2 of the ICCPR requires that:

Any advocacy of national, racial or religious hatred that constitutes **incitement to discrimination, hostility or violence shall be prohibited by law.** (Emphasis added).

General Comment 11 (1983) of the independent experts making up the Human Rights Committee created pursuant to the ICCPR emphasizes that for Article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described here are contrary to public policy and providing for an appropriate sanction in case of violation.

Neither the ICCPR Article 20 nor General Comment 11 specifies that the prohibition or sanction against advocacy of discrimination, hostility or violence must be criminal in nature. Realistically, however, it is difficult to imagine non-penal sanctions being effective against dedicated clandestine terrorist groups. The rule of law as expressed in other international instruments recognizes that incitement to crime may itself be criminalized. Article 25-3 (e) of the 1998 Statute of the International Criminal Court imposes criminal responsibility for any persons who:

In respect of the crime of genocide, directly and publicly incites others to commit genocide.¹⁵

The United Nations Security Council has addressed incitement to terrorism in two of its resolutions. In paragraph 5 of resolution 1373 (2001) the Council:

Declares that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and knowingly financing, planning **and inciting** terrorist acts are also contrary to the purposes and principles of the United Nations. (Emphasis added).

The Council focused specifically on the incitement problem in resolution 1624 (2005), in which it:

1. Calls upon all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:

(a) **Prohibit by law incitement to commit a terrorist act or acts;**

(b) Prevent such conduct;

(c) Deny safe haven to any persons with respect to whom there is credible and relevant evidence giving serious reasons for considering that they have been guilty of such conduct; (Emphasis added);

[...]

3. Calls upon all States to continue international efforts to enhance dialogue and broaden understanding among civilizations, in an effort to prevent the indiscriminate targeting of different religions and cultures, and to take all measures as may be necessary and appropriate and in accordance with their obligations under international law to counter incitement of terrorist acts motivated by extremism and intolerance and to prevent the subversion of educational, cultural, and religious institutions by terrorists and their supporters;

Pursuant to the Council's direction, the Counter-Terrorism Committee created by resolution 1373 (2001) prepared a report, S/2006/737 dated 15 September 2006, on the implementation of resolution 1624 (2005). Paragraphs 6 and 7 of the report indicated that most of the reporting States that prohibit incitement, do so by expressly criminalizing the making of public statements inciting the commission of a terrorist act. Other States indicated that private

¹⁵See also Article 3.1 (c) (iii) of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. This article requires a State Party, subject to its constitutional principles and the basic concepts of its legal system, to criminalize "publicly inciting or inducing others, by any means, to commit any of the offences established in accordance with this article or to use narcotic drugs or psychotropic substances illicitly".

communications were included if they amounted to counseling, inducing or soliciting acts of terrorism. Most of the prohibitions imposed criminal liability without regard to whether a terrorist act was actually attempted or committed, which would help to fill the gap resulting from the reactive nature of the universal terrorism-related conventions and protocols.

The inadequacy of reactive criminal law mechanisms, that depend upon violence being attempted or accomplished, to protect society against persons willing to die for a cause is also leading to greater attention to preventive anti-terrorism mechanisms at the regional level. The Council of Europe, with 47 Member States, long ago developed a Convention on the Suppression of Terrorism (1977). In 2005, its Members negotiated a Convention on the Prevention of Terrorism, which has entered into force in June 2007. Among its preventive measures are the establishment of new offences of public provocation to commit a terrorist offence,¹⁶ recruitment for terrorism and training for terrorism. Article 5 of the Conventions thus states:

For the purposes of this Convention, “public provocation to commit a terrorist offence” means the distribution of, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.

Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

The European Convention is not limited to incitement based upon national, racial or religious hatred. However, since those are the principal grounds used for recruitment for current terrorist acts and groups, the Convention effectively implements the ICCPR requirement that advocacy of hatred that incites violence be prohibited. Of course, the offence established in the Prevention of Terrorism Convention also must comply with the requirement of ICCPR Article 19, that everyone shall have the right to hold opinions without interference, and that:

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds [...]

The Convention’s incitement offence applies only to public provocation to commit criminal offences clearly defined by law, when done with the specific criminal intent to incite the commission of an offence, so mere careless conduct or unforeseen consequences will not result in criminal liability. In view of those safeguards, the provocation offence appears consistent with ICCPR paragraph 3 of Article 19, which states that:

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For the respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

¹⁶A terrorist offence is defined as an offence established under any of the universal terrorism-related instruments from the Aircraft Seizure Convention of 1970 through the Financing of Terrorism Convention of 1999.

H. Steps in becoming a party to and implementing the conventions and protocols

The process of becoming party to an international treaty or convention (multilateral treaty) involves both an international and a domestic component. The international component consists of a formal procedure dictated by the terms of the agreement and governed by international law principles. The terrorism-related conventions and protocols require the deposit of a formal legal instrument with the depository identified in footnote 7 above for the particular agreement. This document must express, in the appropriate international law terminology, the country's willingness to be bound by the obligations of that instrument. Obviously, however, that formal process will not take place until a domestic component of the process has been satisfied. A political decision leading to satisfaction of the approval requirements of a country's constitutional or other legal rules will be necessary, and often legislative action as well.

An analysis of legislation required in order to meet international counter-terrorism standards is normally the first step to becoming a party to the global terrorism-related agreements. Governments and legislatures understandably want to know in advance what changes in their legal system will be required as a result of membership in an international treaty or compliance with other international standards. Some countries will not, either because of domestic law or as a matter of policy, adopt a treaty until legislation is in effect that permits the fulfillment of all of its international obligations, and do not consider a treaty binding until implemented by a domestic law.¹⁷ This is often referred to as the "dualist" position, in that international law and domestic law are considered as two separate systems, so that legislation is required to introduce an international obligation into the domestic legal order.¹⁸

In other countries, adoption of a treaty may automatically incorporate its provisions into domestic law, which would permit articles relating to mutual legal assistance and other procedural matters to serve as self-executing legal authorization for their use upon the treaty entering into force, without further executive or legislative action except for the practical step of publication of the treaty in the official Gazette or otherwise giving notice to the public. However, even countries that follow what is called a "monist" tradition of automatic treaty incorporation will require legislation to provide non-self executing elements essential to implementation.¹⁹ The clearest example of this relates to criminalization of offences. None of the terrorism-related agreements specify a penalty or even a penalty range for the offences defined therein. Typical language is found in Article 4 of the International Convention for the Suppression of the Financing of Terrorism:

Each State Party shall adopt such measures as may be necessary:

- (a) To establish as criminal offences under its domestic law the offences set forth in article 2;
- (b) To make those offences punishable by appropriate penalties which take into account the grave nature of the offences.

¹⁷Unless otherwise stated, all laws and court decisions cited are available either in English or their original language in the terrorism legislative database of the UNODC, at www.unodc.org/tldb.

¹⁸See for example the South African Constitution, 1996, Section 231.

¹⁹ Article 122 (1) of the Constitution of the Republic of Albania provides that: Any international agreement that has been ratified constitutes part of the internal juridical system after it is published in the Official Journal of the Republic of Albania. It is implemented directly, except for cases when it is not self-executing and its implementation requires issuance of a law. [...]

Even if a country's legal tradition were to allow the theoretical possibility of a criminal charge for committing an offence defined only in an international treaty by which that country was bound, and not in a domestic piece of legislation, that offence would remain a crime without punishment until legislation defined the penalty. A fundamental principle of the rule of law is that there can be no punishment without a law, and few persons would argue in favor of allowing punishment to be imposed by analogy to another offence. Consequently, a country that automatically incorporates an offence into its domestic law upon the adoption of a treaty, as defined therein, must take legislative action to provide a penalty for that offence and to implement any other non-self executing provisions.

II. Criminalization and other legislative requirements of the terrorism related conventions and protocols

A. Common elements of the conventions and protocols

Two of the sixteen terrorism-related agreements do not create any offences and therefore are not described in detail. The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft establishes procedures for return of the aircraft and treatment of passengers and crew after an unlawful diversion. It also requires a Contracting State to establish its jurisdiction to punish offences committed on board aircraft registered in that State, but does not establish any offences that State Parties are obligated to punish. The Convention on the Marking of Plastic Explosives for the Purpose of Detection requires a State Party to take measures to control explosives that do not contain volatile chemicals subject to detection by scanning equipment, but those measures need not be penal in nature. It also does not contain any criminal justice cooperation mechanism, so it is not discussed here. The remaining nine conventions, four protocols and one amendment all have common elements. Each requires: (a) criminalization of the conduct defined in a particular agreement as a punishable offence; (b) establishment of specified grounds of jurisdiction over that offence, such as the registration of an aircraft or ship, or the location of an attack; and (c) the ability and obligation to refer a case against a suspected or accused offender to domestic authorities for prosecution if extradition is not granted pursuant to the applicable agreement and to furnish related forms of international cooperation.

B. Agreements relating to the safety of civil aviation developed by the International Civil Aviation Organization (ICAO)

B-1 1970 Convention for the Suppression of Unlawful Seizure of Aircraft

The earliest terrorism-related conventions were developed by the ICAO in 1963, 1970 and 1971 in response to aircraft hijackings. The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft requires its Parties to take “such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State” (Art.3.2). There is no requirement to define any particular conduct endangering the safety of an aircraft or of persons on board as an offence. Moreover, the requirement to establish jurisdiction only applies to acts committed on board an aircraft in flight, defined as from the moment when power is applied for the purpose of take-off until the moment when the landing run ends. Subsequent aviation-related instruments were incremental reactions to the aircraft hijackings then prevalent. Article 1(a) of the 1970 Convention for the Suppression of Unlawful Seizures of Aircraft requires State Parties to punish by severe penalties the act of a person who “unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft”. That article refers to an aircraft “in flight”, defined in Article 3.1 as “at any time from the moment when all of its external doors are closed following embarkation until the moment when any such door is open for disembarkation”.

B-2 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation

This agreement was adopted after the destruction of four civilian aircraft on the ground in the Middle East in September 1970. It requires criminalization of attacks on aircraft “in service”, defined in Article 2(b) as “from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing;” Article 1(a) and (d) also require criminalization of any act of violence against a person on board an aircraft in flight and any damage to or interference with air navigation facilities likely to endanger the safety of an aircraft.

B-3 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation

Only States that are parties to the 1971 Montreal Convention may join this Protocol. Its negotiation followed attacks on travelers in airports in Vienna, Rome and elsewhere in the 1980s. It requires criminalization of acts of violence likely to cause death or serious injury, at airports serving international civil aviation, as well as destroying or seriously damaging aircraft or facilities if such acts endanger or are likely to endanger safety at that airport. The UNODC Model Law against Terrorism, available at www.unodc.org on the Terrorism Prevention page, under technical assistance tools, contains draft laws implementing the criminal provisions of the air travel safety conventions. Legislative implementation has been achieved in some countries by enacting the jurisdictional bases and the offences required by multiple agreements in a single statute. After negotiation of the 1971 Convention, a number of countries approved legislation implementing the 1963, 1970 and 1971 Conventions in a single law.²⁰ Some consolidated laws enacted after negotiation of the 1988 Airport Protocol incorporate not only the offences defined therein, but also the unauthorized introduction of weapons and other dangerous articles into airports and on board aircraft.²¹

C. Agreements relating to maritime safety developed by the International Maritime Organization (IMO)

C-1 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Fixed Platform Protocol

This agreement is often called the SUA Convention in the maritime community. It combines many of the provisions developed in the preceding decades to deal with attacks upon aircraft. Development of the 1988 SUA Convention followed the 1985 hijacking of the cruise ship *Achille Lauro* in the Mediterranean and the murder of a passenger. The agreement requires the criminalization of a ship seizure, damage to a ship or its cargo that is likely to endanger its safe navigation; introduction of a device or substance likely to endanger the ship; endangering safe navigation by serious damage to navigation facilities and injuring or killing any person in connection with the previously listed offences. Its contemporaneous Protocol for the

²⁰Among these were the New Zealand Aviation Crimes Act 1972, the Malawi Hijacking Act of 1972, the Malaysian Aviation Offences Act 1984 and the Mauritius Civil Aviation (Hijacking and Other Offences) Act 1985. Some of the statutes were later amended by insertion of an article incorporating the 1988 Airport Protocol, as was done by Mauritius. Its 1985 Hijacking and Other Offences Act was amended in 1994 by the addition of an article 6A, which criminalized the conduct defined as an offence in the 1988 Airport Protocol to the 1971 Safety of Civil Aviation Convention, as well as any act at an airport using a device, substance or weapon likely to cause serious damage to the environment.

²¹The Australia Crimes (Aviation) Act of 1991 and the Fiji Civil Aviation (Security) Act 1994 are comprehensive post-1988 rewritings of prior air travel safety legislation and incorporate airport security measures forbidding the introduction of weapons and other dangerous articles, and in the law of Fiji, provisions on airport access, security searches and related topics.

Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf extended similar provisions to attacks upon those platforms.²² An example of legislation simultaneously implementing both the Convention and Protocol is the Australia Crimes (Ships and Fixed Platforms) Act 1992, as amended by Schedule 17 of the Law and Justice Amendment Act, No. 24, 2001.

C-2 Protocols to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (2005)

Protocols to both the Convention and Protocol of 1988 were negotiated in 2005. These instruments provide that upon coming into force with the requisite number of adoptions they shall be combined with the earlier instruments, and designated portions will be called the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005 and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 2005. The new agreements create additional offences, including: using against or discharging from a ship explosive, radioactive, biological, chemical or nuclear materials or weapons in a manner likely to cause death, serious injury or damage; discharging other hazardous or noxious substances likely to cause death or serious injury or damage; or using a ship in a manner that causes death or serious injury or damage; or threatening to do so. Transportation on board a ship of certain materials must be criminalized if done with an intent to intimidate a population or to coerce a government or international organization, as well as any equipment, material, software or technology that significantly contributes to the design of a biological, chemical or nuclear weapon. Additional articles require the creation of offences for transporting a person knowing that the person has committed an offence defined in the 2005 Protocol or in the annexed list of terrorism-related treaties and for injuring a person in connection with the commission of the defined offences. The UNODC Model Law contains draft articles criminalizing these new offences and implementing the requirement, as indicated in the 2005 Protocol to the SUA Convention, that Parties take measures to hold liable a legal entity located in its territory or organized under its laws criminally, civilly or administratively liable when a person responsible for its management or control has, in that capacity, committed an offence set forth in the Convention as amended.

D. Convention on the Physical Protection of Nuclear Material, 1979 and its 2005 Amendment developed by the IAEA

In 1979 the IAEA developed the Convention on the Physical Protection of Nuclear Material, establishing obligations concerning the protection and transportation of defined materials. Article 7 requires the State Parties to create offences of unlawful handling of nuclear materials or a threat thereof; a theft, robbery or other unlawful acquisition of or demand for such material; or a threat of such unlawful acquisition in order to coerce a person, international organization or State. In 2005 that instrument was amended to criminalize acts directed against or interfering with a nuclear facility likely to cause serious injury or damage, as well as; unauthorized movement of such material into or out of a State without lawful authority; a demand for

²²A definition of the continental shelf is found in the United Nations Convention on the Law of the Sea. In very simplified terms it is the natural prolongation of a State's land territory to the point where the deep ocean floor begins. However, there are very technical limits and qualifications in the Convention on the Law of the Sea that need to be examined to determine whether a particular location constitutes part of the continental shelf.

nuclear material by threat or use of force; a threat to use such materials to cause death or serious injury or damage to property or to the environment or to commit an offence in order to coerce a person, international organization or State.²³ As will be explained in part II, section E-4, application of this agreement should be considered in conjunction with an instrument developed by the General Assembly's Ad Hoc Committee in 2005, the International Convention for the Suppression of Acts of Nuclear Terrorism.

E. Agreements relating to other protections for civilians developed at the initiative of the General Assembly

E-1 The Internationally Protected Persons and Hostage Taking Conventions of 1973 and 1979

The 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, requires State Parties to criminalize violent attacks directed against Heads of State and foreign ministers and their family members, as well as against diplomatic agents entitled to special protection under international law. The term "diplomatic agents" and the circumstances under which such persons are entitled to special protections can be found in the Vienna Convention on Diplomatic Relations 1961.²⁴ The 1979 Hostage Taking Convention requires criminalization of any seizure or detention and threat to kill, injure or continue to detain any hostage, not merely diplomatic agents, in order to compel any State, international organization or person to do or abstain from doing any act. This Convention only addresses detentions and related threats, and not any resulting death or injury, and applies only when there is an international dimension to the event. The Cook Islands implemented the 1973 Internationally Protected Persons Convention and the 1980 Hostage Taking Convention in one statute, the Crimes (Internationally Protected Persons and Hostages) Act 1982, No. 6. While the 1973 Internationally Protected Persons Convention requires criminalization of attacks on protected persons, it is silent as to whether the necessary criminal intent must include knowledge of the victim's protected status. The Cook Islands legislation specifically provides that knowledge of the person's protected status is not an element of the offence and need not be proven by the prosecution.

E-2 1997 Terrorist Bombings Convention

As mentioned previously, General Assembly 51/210 of 1996 established an Ad Hoc Committee open to all Member States of the United Nations and charged with negotiating instruments for the suppression of various manifestations of terrorism. The first result of the Committee's work was the International Convention for the Suppression of Terrorist Bombings (1997). Although its title refers only to bombings, this instrument also deals with weapons of mass destruction. Article 1.3 defines explosive or other lethal device as:

- (a) An explosive or incendiary weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage; or
- (b) A weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material.

²³2005 Amendment to the Convention on the Physical Protection of Nuclear Material, creating a new agreement to be called the Convention on the Physical Protection of Nuclear Material and Nuclear Facilities.

²⁴Entered into force 24 April 1964, United Nations *Treaty Series*, vol. 500, p. 95

Article 2 requires the creation of an offence of intentionally placing or using an explosive or other lethal device with the intent to cause death, serious injury or major economic loss. Activities of armed forces during an armed conflict are not governed by this Convention, as they are subject to separate rules of international humanitarian law, primarily codified in the Geneva and Hague Conventions and Protocols on the law of armed conflicts.²⁵ The Suppression of Terrorist Bombings Act, No. 11 of 1999 of the Republic of Sri Lanka is an example of national legislation implementing the provisions of the Terrorist Bombings Convention.

E-3 1999 Financing of Terrorism Convention (Criminalization)

The second result of the Ad Hoc Committee's work was the 1999 International Convention for the Suppression of the Financing of Terrorism. Article 2.1 requires State Parties to criminalize conduct by any person who:

...by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

- (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or
- (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

Subparagraph 2.1(a) incorporates by reference the offences penalized in nine of the universal terrorism-related instruments that predate the Financing Convention as acts for which the provision or collection of funds are forbidden. Another means of achieving the same effect would be to quote the offence definition from each instrument in full in the domestic law. Subparagraph 2.1(b) establishes a self-contained definition of violent terrorist acts for which the provision or collection of funds is prohibited.

By Law 2001-1062 of 15 November 2001, Article 421-2-2 of the Penal Code, France defined an offence of financing of terrorism, informally translated in the following terms:

It also constitutes an act of terrorism to finance a terrorist organization by providing, collecting or managing funds, securities or property of any kind, or by giving advice for this purpose, intending that such funds, security or property be used, or knowing that they are intended to be used, in whole or in part, for the commission of any of the acts of terrorism listed in the present chapter, irrespective of whether such an act takes place.²⁶

²⁵See www.icrc.org under International humanitarian law.

²⁶Original text: Constitue également un acte de terrorisme le fait de financer une entreprise terroriste en fournissant, en réunissant ou en gérant des fonds, des valeurs ou des biens quelconques ou en donnant des conseils à cette fin, dans l'intention de voir ces fonds, valeurs ou biens utilisés ou en sachant qu'ils sont destinés à être utilisés, en tout ou partie, en vue de commettre l'un quelconque des actes de terrorisme prévus au présent chapitre, indépendamment de la survenance éventuelle d'un tel acte.

The last phrase of the French law implements Article 2-3 of the Convention, which provides that:

For an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraphs (a) or (b).

Convention Article 2-3 is part of a highly important advance in the use of anti-terrorism measures to prevent rather than merely to react to terrorist violence. Although the Financing Convention parallels the Terrorist Bombings Convention in its structure and language, it achieves a strategic breakthrough against the planning and preparation that precedes almost every terrorist attack. It accomplishes this result by two innovations. Instead of prohibiting a particular form of violence associated with terrorism, the Financing Convention criminalizes the non-violent logistical preparation and support that make significant terrorist groups and terrorist operations possible. Moreover, Article 2-3 eliminates any ambiguity by expressly providing that the prohibited provision or collection of funds need not result in a violent act specified in Article 2.1 of the Convention to be punishable. Meeting all of the international standards applicable to the financing of terrorism can be fully achieved only by legislation establishing the Convention offence and not by reliance upon theories of complicity, conspiracy, money-laundering or other offences not specific to the financing of terrorism.

E-4 2005 Nuclear Terrorism Convention

The Nuclear Terrorism Convention was also a product of the work of the Ad Hoc Committee. It defines as offences: (a) the possession or use of radioactive material or a nuclear explosive or radiation dispersal device with the intent to cause death or serious bodily injury or substantial damage to property or the environment; (b) the use of radioactive material or a device, or the use of or damage to a nuclear facility which risks the release of radioactive material with the intent to cause death or serious injury or substantial damage to property or to the environment, or with the intent to compel a natural or legal person, an international organization or a State to do or refrain from doing any act. These offences focus more explicitly on nuclear devices specifically constructed to do harm than do those in the 1979 Convention on the Physical Protection of Nuclear Materials, but the IAEA agreements also contain prohibitions against harmful use, theft, robbery, embezzlement or other illegal means of obtaining such materials and to related threats. Both conventions define their terminology, and these definitions must be reviewed carefully by experts in the legislative drafting process. For example, a “nuclear facility” is protected by both agreements, but the term is defined differently in the two instruments. Accordingly, national drafting experts may wish to consider consultation with the legal advisors of the UNODC and the IAEA to avoid conflicts and duplication in domestic legislation implementing these two instruments. The UNODC Model Law against Terrorism provides a criminalization package incorporating the offences in both these conventions dealing with nuclear matters. Moreover, in any situation involving possible misuse of radioactive materials, one must also consider the applicability of the Terrorist Bombings Convention, 1997 that applies to:

A weapon or device that is designed, or has the capacity to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of [...] radiation or radioactive material.

E-5 Ongoing Work on a Comprehensive Convention against Terrorism

The continuing work of the Ad Hoc Committee as of 2007 is reflected in General Assembly Document A/62/37, "Report of the Ad Hoc Committee" established by General Assembly resolution 51/210 on meetings of 5, 6 and 15 February 2007. That report, on the negotiation of a comprehensive convention, reflects differing views on a number of issues. As widespread implementation of any such convention could be years in the future, the UNODC and its Terrorism Prevention Branch continue to work for adoption and implementation of the existing terrorism-related instruments.

F. Other legislative requirements relating to the financing of terrorism

F-1 Sources of international standards on the financing of terrorism

Criminalization as discussed in part II, section E-3 is only one of the measures for combating the financing of terrorism required by international standards, and the Financing of Terrorism Convention is only one of those standards. Security Council resolution 1373 (2001) independently requires, not just the 160 State Parties to the Financing Convention, but all States, to criminalize financing, defined in almost exactly the same words as the Convention. The Special Recommendations of the Financial Action Task Force (FATF), discussed below, and the work of FATF-style regional bodies also reinforce this criminalization requirement. Security Council resolutions and FATF Special Recommendations also deal with a number of non-criminal standards, including the freezing of terrorist funds. All of these standards need to be taken into account in drafting legislation to deal with any aspect of combating the financing of terrorism, as the standards and obligations are highly interrelated.

In addition to the obligation to criminalize the financing of terrorism, the Financing Convention contains significant non-criminal elements. It obligates its Parties to have legislation enabling a legal entity to be held civilly, administratively or criminally liable when a person responsible for its management or control has, in that capacity, committed a financing offence.²⁷ It also requires the Parties to have in place appropriate measures to identify, detect, freeze and seize for the purpose of forfeiture funds used or allocated for the commission of terrorist offences. Its Article 18, 1 (b) (iii) requires Parties to oblige financial institutions and other professions involved in financial transactions to identify their customers. The Parties must consider regulations on the reporting of "all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose." Under this formulation of what constitutes a suspicious transaction, there is no need for an apparent connection to drug trafficking or terrorism. The lack of an apparent lawful purpose after consideration of all relevant circumstances is sufficient to require the institution's management to report the transaction. A broad formulation of the reporting duty is necessary because a

²⁷It should be noted that the 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation also contains a counterpart obligation to establish the legal responsibility of a legal entity when a person responsible for its management or control has, in that capacity, committed an offence established by the Convention. A general provision to that effect is found in section 5 of the Anti-Terrorism Act 2002 of Barbados:

Where an offence referred to under section 3 or 4 [meaning acts of terrorism or financing of terrorism] is committed by a person responsible for the management or control of an entity located or registered in Barbados or in any other way organized under the laws of Barbados, that entity, in circumstances where the person committed the offence while acting in that capacity, is guilty of an offence [...].

financial professional may fairly be expected to identify transactions with no apparent legitimate rationale consistent with the client's business profile, but cannot be expected to determine what kind of illegitimate activity may lie behind such transactions.

There are significant factual differences between the practices and offences of money-laundering and terrorist financing, which is one reason why money-laundering offences cannot be relied upon to adequately criminalize the financing of terrorism. Money-laundering typically involves the transfer of significant proceeds derived from illegal transactions into legitimate commerce or banking channels, often divided or disguised to avoid being conspicuous. Conversely, terrorist financing may involve aggregating sums derived from lawful activities or micro-criminality and transferring them to a person or entity that ultimately may send relatively small payments to support terrorist or terrorist activities. Such funds become legally tainted only when the originator or some person in the chain along which they pass, has the intent to use them to finance a terrorist act. Despite these differences between money laundering and terrorist financing, global efforts to fight the two phenomena both need the assistance of banks and non-bank financial institutions and professions in the detection of suspicious transactions. Both rely heavily upon intelligence collection and analysis, often through Financial Intelligence Units. Suspicious activity reporting was developed as an anti-money laundering administrative control mechanism. Its use to combat terrorist financing demonstrates how the global regimes to combat money-laundering and financing of terrorism are increasingly becoming integrated.

F-2 Freezing and confiscation of terrorist funds

The 1999 Financing of Terrorism Convention is only one aspect of a larger international effort to deter, detect and suppress the financing and support of terrorism. Article 8 of the Convention provides that each State must take measures for freezing, seizing and forfeiting proceeds and instrumentalities of the offences listed in the agreement. Following the model of the 1988 Vienna Drug Convention,²⁸ the Financing Convention treats freezing as an interim measure to prevent the disappearance or dissipation of property preliminary to a decision on whether its ownership should be permanently transferred to the State, or in some cases to a victim or rightful owner. The Convention foresees an ultimate determination of forfeitability based upon the property being an instrumentality or the proceeds of crime. Forfeiture proceedings under national laws are usually determined by a conviction of the owner or, in some systems, by the finding of a preponderance or other civil burden of proof that the property was either the proceeds or instrumentality of crime.

However, when countries implement the Financing of Terrorism Convention, it is advisable that they provide for and differentiate the regimes established by the resolutions of the Security Council. Resolution 1267 was adopted in 1999 and its successor resolutions have continuously renewed its freezing obligations. Most recently, in the preamble to resolution 1735 (2006) it was reiterated "that the measures referred to in paragraph 1 below [assets freeze, travel ban and arms embargo], are preventative in nature and are not reliant upon criminal standards set out under national law."

²⁸Article 5 of the 1988 United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances.

Thus, the resolution 1267 (1999) obligation to freeze must be continued, from time to time as determined by the Security Council, without any connection to an ultimate confiscation of the frozen funds, to prosecution of any offence, or any judicial finding. Resolution 1373 (2001) presents different issues. Its emphasis on criminal remedies and lack of explicit characterization of terrorists and what are terrorist acts, leave these matters to be determined within the national legal system, and may lead to forfeiture if grounds exist under domestic law. However, the scope of freezing must apply to all property owned or controlled by persons who commit or attempt to commit terrorist acts, whereas most existing laws only permit the freezing of property that is ultimately subject to forfeiture, which in most countries means instrumentalities and proceeds of crime. Authorities considering legislation to implement the 1999 Financing Convention thus must provide for preventative freezing under resolution 1267 (1999), possible forfeiture under resolution 1373 (2001) if appropriate evidence can be secured, and traditional freezing and forfeiture of instrumentalities and proceeds of the offences under the Financing Convention. One means of providing such legal authority is a law giving a Government the power to enforce decisions of the Security Council pursuant to Chapter VII of the United Nations Charter. A representative example is the United Nations Act Canada:

Application of Security Council decisions;

2. When, in pursuance of Article 41 of the Charter of the United Nations, set out in the schedule, the Security Council of the United Nations decides on a measure to be employed to give effect to any of its decisions and calls on Canada to apply the measure, the Governor in Council may make such orders as appear to him to be necessary or expedient for enabling the measure to be effectively applied.

Offences and punishment

3(1) Any person who contravenes an order or regulation made under this Act is guilty of an offence and liable

(a) on summary conviction, to a fine of not more than \$100,000 or to imprisonment for not more than one year, or to both, or

(b) on conviction on indictment, to imprisonment for a term of not more than 10 years.

F-3 The FATF Special Recommendations

The work of the Financial Action Task Force (FATF, or GAFI in its French acronym) and the FATF style regional bodies that apply the Forty Recommendations on Money Laundering and Nine Special Recommendations on Terrorist Financing must also be taken into account. FATF is an intergovernmental organization housed at the Organization for Economic Cooperation and Development in Paris whose work is reinforced by regional FATF-style bodies throughout the world. The Forty Recommendations on the control of money laundering were issued in 1990 and subsequently updated. Eight Special Recommendations on combating the financing of terrorism were issued in October 2001, and a ninth added in October 2004. They deal with:

(I) The adoption and implementation of the 1999 Financing of Terrorism Convention and implementation of the United Nations resolutions relating to the financing of terrorism;

(II) The criminalization of the financing of terrorism, terrorist acts and terrorist organizations and designation of such offences as money-laundering predicate offences;

- (III) The freezing and confiscating of terrorist assets;
- (IV) The reporting of suspicious transactions involving terrorist acts or organizations;
- (V) International cooperation in connection with criminal, civil enforcement, and administrative investigations, inquiries and proceedings relating to the financing of terrorism, terrorist acts and terrorist organizations;
- (VI) The control of alternative remittance systems;
- (VII) The strengthening of originator information requirements for wire transfers;
- (VIII) Controls to prevent the misuse of non-profit organizations; and
- (IX) Controls over physical cross-border movement of cash.

Because the FATF recommendations are ultimately reflected in national legislation and regulations, they influence international banking practices and affect every country.

The FATF and the FATF-style regional bodies conduct evaluations of their members. The materials used for those assessments provide an excellent internal checklist for compliance not only with the provisions of the Financing Convention but also the relevant United Nations Security Council resolutions and can be accessed at the FATF web site, www.fatf-gafi.org. A Methodology developed with the International Monetary Fund and the World Bank, and used by those organizations for evaluations, is provided. It is a 92-page document with hundreds of questions designated as “essential criteria” or as “additional considerations”, organized according to the pertinent Recommendation. Moreover, an explanatory, 145 page, Handbook is provided for countries and assessors using the Methodology. The International Monetary Fund and the UNODC have also developed Model Legislation on Money Laundering and the Financing of Terrorism, December 2005, available at www.imolin.org under the heading International Norms and Standards.

Summary: financing of terrorism criminalization and freezing provisions

| | | | |
|--|---|--|--|
| | <i>1999 Financing Convention</i> | <i>Security Council resolution 1373 (2001)</i> | <i>Security Council resolution 1267 (1999) and related resolutions</i> |
| Legal obligation | Treaty obligation for State parties. Currently 160 State parties. | Adopted under Chapter VII of the UN Charter. Legally binding for all States. | Adopted under Chapter VII of the United Nations Charter. Legally binding for all States. |
| Criminalization provision | Any person commits an offence when he unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out [certain defined acts, including Convention offences and specific civilian-centered definition provided in the Convention. See below]. | Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts. | No criminalization provision, only freezing of assets, travel ban, and arms sanctions. |
| Freezing obligation | Take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in the Convention as well as the proceeds derived from such offences, for purposes of possible forfeiture. | Freeze the funds, and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts ; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities. | Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by Al-Qaeda, Usama bin Laden and the Taliban and other individuals and entities associated with them, or by any undertaking owned or controlled by Al-Qaeda and the Taliban, as designated by the Committee. |
| Confiscation/ forfeiture obligation | Take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in the Convention and the proceeds derived from such offences. | No confiscation or forfeiture requirement. Only preventative (non-criminal) freezing required. | No confiscation or forfeiture requirement. Only preventative (non-criminal) freezing required. |
| Other | For an act to constitute an offence set forth in the Convention, it shall not be necessary that the funds were actually used to carry out a defined terrorist purpose. Criminalization, freezing and forfeiture apply to funds of innocent origin once provided or collected with the intention or in the knowledge they will be used for one of the defined terrorist purposes | In the absence of a definitive explanation in resolution 1373 (2001) of what acts trigger its freezing obligation, countries apply their own interpretations. Many countries have definitions of terrorism or terrorist acts in criminal statutes. The resolution requires freezing all property of those who commit or support acts of terrorism, including innocent property not intended for criminal use | Consolidated list, as of 21 January 2008: <ul style="list-style-type: none"> - 142 individuals belonging to or associated with the Taliban; - 228 individuals belonging to or associated with the Al-Qaeda organization; - 112 entities belonging to or associated with the Al-Qaeda organization |
| Special Recommendations on Terrorist Financing of the Financial Action Task Force (FATF) should guide the application and implementation of the obligations above | | | |

G. Issues common to all conventions and protocols

G-1 Defining terrorist acts and terrorism

The elements of the offences established in the various treaties are summarized in the UNODC Model Law against Terrorism provisions, available at www.unodc.org, on the Terrorism Prevention page under technical assistance tools.²⁹ There is no single formula for criminalization of these offences that is applicable to all countries, particularly as to whether the offence should be introduced as part of a special anti-terrorism law, or by amendment to a penal code. However, to the extent feasible it is desirable to repeat the terminology used in international conventions in domestic implementing legislation. This is because offence definitions that differ between countries can create problems with the dual criminality requirement of international cooperation, to be discussed in part V, section D. What will be the proper approach to criminalization will depend on the problems facing a country, its history and circumstances, and the legal tradition and jurisprudence that dictate how laws will be interpreted. Some countries have adopted comprehensive anti-terrorism laws that incorporate many or most of the offences created in the universal instruments in to one law, as alternative means of committing an offence of terrorism or terrorist violence. Another approach creates a single generic offence of terrorism in language similar to that in the UNODC Model Law and drawn from Section 2.1 (b) of the Financing of Terrorism Convention:

Whoever commits an act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act, shall be punished with...

Section 261 of the Hungarian Penal Code criminalizes "Acts of terrorism" in the following words:

- (1) Any person committing a violent felony against a person, a crime posing a public threat, or a crime involving weapons as specified in subsection (9), with an intention to:
- (a) compel a government body, another state or an international organization to commit or to refrain from or to endure any act,
 - (b) intimidate or coerce the civilian population;
 - (c) to change or interfere with the constitutional, social or economic order of another state, or to disrupt the operation of an international organization, is guilty of felony...

As explained in the Model Law, the preferred interpretation of "population" and "government" also refers to the population and government of other countries. This implements the mandatory requirement of Security Council resolution 1373 (2001), paragraph 2 (d), that States "Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens". The Terrorism Act 2000 of the United Kingdom implements this concept in its Article 1, defining terrorism:

²⁹See also the Commonwealth Secretariat Implementation Kits for the International Counter-Terrorism Conventions, available at: <http://www.thecommonwealth.org/Internal/38061/documents/> Scroll to the bottom of the page and download in PDF form.

- (4) In this section
 - (a) “action” includes action outside the United Kingdom,
 - (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
 - (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
 - (d) “the government” means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.
- (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organization.

Some countries enact laws that use the explicit term “terrorism” in their title and in substantive offence descriptions.³⁰ The Anti-Terrorism Act 2002 of Barbados, Section 3.1, defines an offence of terrorism as including any offence established under any of the listed terrorism-related conventions and protocols negotiated through 1997, with the 1999 Financing of Terrorism Convention being dealt with by the creation of the separate crime of financing of terrorism in the Barbados statute. The Barbados law also addresses the concern that an anti-terrorism law may be applied to suppress political dissent or industrial actions. Under the Act, in addition to offences defined by reference to the conventions, terrorism is defined as:

- (b) any other act:
 - (i) that has the purpose by its nature or context, to intimidate the public or to compel a government or an international organization to do or to refrain from doing any act; and
 - (ii) that is intended to cause:
 - (A) death or serious bodily harm to a civilian or in a situation of armed conflict, to any other person not taking an active part in the hostilities;
 - (B) serious risk to the health or safety of the public or any segment of the public;
 - (C) substantial property damage, whether to public or private property, where the damage involves a risk of the kind mentioned in subparagraph (B) or an interference or disruption of the kind mentioned in subparagraph (D); or
 - (D) serious interference with or serious disruption of an essential service, facility or system, whether public or private, not being an interference or disruption resulting from lawful advocacy, or from protest, dissent or stoppage of work and not involving a risk of the kind mentioned in subparagraph (B).

³⁰See the Prevention of Terrorism Act 2001 of India, replaced in 2004 by the Unlawful Activities (Prevention) Act 2004. Unless otherwise stated, all laws and court decisions cited are available either in English or their original language in the terrorism legislative database of the UNODC, at www.unodc.org/tldb.

G-2 Proving motive or intent

A frequently encountered legislative drafting issue is whether to include a terrorist motivation as an element of the offence, meaning that the act must be committed with a political, ideological or religious motive. This is a separate and additional requirement of motivation, in addition to a general criminal intent to kill or injure,³¹ or to the specific criminal intent to intimidate or coerce a person, government or international organization.³² An example of a terrorism offence with a motivational element is found in Section 1 of the Terrorism Act 2000 of the United Kingdom:

- (1) In this Act “terrorism” means the use or threat of action where:
 - (a) the action falls within subsection (2),
 - (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
 - (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
- (2) Action falls within this subsection if it:
 - (a) involves serious violence against a person,
 - (b) involves serious damage to property,
 - (c) endangers a person’s life, other than that of the person committing the action,
 - (d) creates a serious risk to the health or safety of the public or a section of the public, or
 - (e) is designed seriously to interfere with or seriously to disrupt an electronic system.

Evidentiary difficulties may flow from the inclusion of an ideological motive or of a specific intent to coerce a government or to intimidate a population as an offence element. Those difficulties involve establishing a defendant’s mental state or purpose without proof of oral or written statements or a post-arrest confession revealing a terrorist purpose. Some legal cultures and some individual adjudicators may be reluctant to infer a defendant’s mental state because of the proverbial impossibility of seeing into a person’s mind or heart. An example would be a refusal to regard the fact that an attack was targeted at a house of worship on a religious feast day as sufficient, without a public claim by the responsible group, to establish an underlying religious motivation. In that situation, the investigating authorities will seek associates who may be able to testify to statements revealing a suspect’s intent and motive, or those authorities will be compelled to seek a confession from the accused. This creates pressures that may contribute to improper interrogation or investigative practices, and this danger should be anticipated and guarded against by policy makers and executive authorities. Making a confession the only feasible way to prove an element of an offence is unhealthy, as it may lead to coercion and conflicts with Article 14, 3 (g) of the ICCPR, providing that in the determination of any criminal charge, the accused is entitled “Not to be compelled to testify against himself or to confess guilt.”

³¹The offence created by Article 2.1 of the 1997 Terrorist Bombing Convention is an example of a general criminal intent crime, defined as the doing of certain acts involving specified weapons or devices “(a) With the intent to cause death or serious bodily injury; or (b) With the intent to cause extensive destruction [...] where such destruction results or is likely to result in major economic loss.”

³²This specific intent is found in the 1979 Hostage Taking Convention (Article 1), the 1988 Maritime Convention (Article 3) and its Fixed Platform Protocol (Article 2), the 1999 Financing of Terrorism Convention (Article 2), the 2005 Nuclear Terrorism Convention (Article 2), the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Article 4) and to its 1988 Fixed Platform Protocol (Article 3).

At least since the publication of Cesare Beccaria's work *On Crimes and Punishments* in 1764, criminology and criminal law have moved away from reliance upon confessions, placing more emphasis upon the reasonable inferences to be drawn from other elements of proof. This trend is demonstrated by Article 28 of the United Nations Convention against Corruption (2002).

Knowledge, intent or purpose required as an element of an offence established in accordance with the Convention may be inferred from objective factual circumstances.

Thus, in a prosecution for having committed a crime requiring an ideological element, evidence of membership in an organization endorsing political violence, possession of extremist literature attacking other religions, past expressions of hatred of the victim group, or the circumstances and target of the attack itself could substitute for a confession as evidence of the defendant's motive.

The need for a realistic approach to proof of an offence's mental element was recognized by the inclusion of a specific evidentiary rule in the Financing Convention. Article 2.1 requires not merely the criminalization of attacks on civilians, but specifies how the specific intent to intimidate or coerce may be proved:

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, **when the purpose of such act, by its nature or context**, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act. (Emphasis added).

To ensure compliance with the Financing Convention, which has rather complex state of mind elements, the evidentiary rule of Article 2.1 (b) may need to be introduced into a country's Code of Criminal Procedure or specifically included in special laws dealing with terrorism.

G-3 Special laws and code amendments

Rather than enacting special laws on terrorism and creating specific offences of terrorism, some countries prefer to simply amend their Penal Code or Code of Penal Procedure to fill any gaps between existing law and the requirements of particular conventions or protocols. This approach is not precluded by the terrorism-related conventions and protocols, none of which require use of the words "terrorist" or "terrorism" to define prohibited conduct. The word "terrorism" is not found in any of the pertinent conventions from 1963 through 1979, even though historically the agreements were clearly responses to terrorist incidents. The word first appears in the preamble to the 1979 International Convention against the Taking of Hostages, referring to the need for cooperation against acts of hostage taking as manifestations of international terrorism, and is repeated in the preambles of subsequent agreements.

The 1997 International Convention for the Suppression of Terrorist Bombings was the first agreement to use the word "terrorist" in its title as well as in the preamble. In Article 5 it also required the adoption of measures to ensure that offences created by the Convention, "in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature." The 1999 International Convention for the Suppression of Terrorist Financing and the 2005 International Convention

for the Suppression of Acts of Nuclear Terrorism closely resemble the Terrorist Bombing Convention by their use of the terrorism terminology in their titles, preambles and in articles specifying that no justification may be permitted for acts of terrorism. But none of these instruments use the word terrorism or terrorist in their offence definitions. Those definitions employ only traditional criminal code terminology—a description of an act constituting a social harm, such as bombing, hostage-taking or use of a ship to distribute dangerous materials, and a general or specific illegal intent, without any requirement that terrorism be mentioned or defined.³³

G-4 Relevancy of the universal instruments to all countries

Questions are often raised about how certain agreements could possibly be relevant to the circumstances of a country and why a country should adopt them. Officials of a land-locked State may question how their country could experience a violation of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. If the country has no seacoast and no registered ships or offshore platforms, it clearly cannot suffer an unlawful seizure of its vessel or platform. However, one of its nationals might commit such a crime; its citizens could be among the passengers threatened or killed; the unlawful seizure and threats to kill or destroy could be directed to force that country to release a particular prisoner or refrain from taking a certain action; or the offender could be found on its territory. These are all grounds of jurisdiction found in the SUA Maritime Convention of 1988, and there are many reasons why a country might wish to have the option to extradite or to prosecute in its own courts, or to be able to ask for extradition of an offender from another country.

Similarly, it is the need for international cooperation, not the ability to punish a domestic crime, that explains the negotiation of an agreement like the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation. No country needed the Airport Protocol to cause it to criminalize attacks with machine guns and grenades on passengers in airports on its territory, as such murderous conduct was already criminal everywhere. That Protocol did not popularize a new offence that did not previously exist in most countries, as did the 1999 International Convention for the Suppression of the Financing of Terrorism. The purpose and value of the Airport Protocol lie in the establishment of jurisdictional grounds, international cooperation mechanisms and the obligation to extradite or to prosecute. Moreover, the voluntary ideal of showing international good citizenship by membership in reciprocal cooperation agreements coincides with the concrete legal obligations set forth in mandatory paragraph 2 of resolution 1373 (2001) to:

- (c) Deny safe haven to those who finance, plan, support or commit terrorist acts, or provide safe haven;
- (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
- (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

³³As previously mentioned, certain offences do include the intent to intimidate a population or to coerce a government or international organization, which in substance is the intent to terrorize. The important point for legislative drafters is that terminology defining the intended effect of acts on a population or a government has an objective factual meaning, whereas “intent to terrorize” could be interpreted very subjectively unless accompanied by a factual definition.

H. Forms of participation in an offence

The test of criminal responsibility has evolved under the terrorism-related conventions and protocols. The eight terrorism-related conventions and protocols negotiated between 1970 and 1988 create reactive criminal offences. They require that criminal liability be imposed, assuming the existence of the necessary guilty state of mind, in only three circumstances:

- (a) The physical commission of the conduct established in a particular convention as an offence, usually called responsibility as a principal. A principal would be the person who personally seizes an aircraft or maritime vessel, or takes hostages, attacks diplomats or passengers at an international airport, steals or unlawfully uses nuclear material, or makes threats prohibited by certain of the universal instruments;
- (b) An attempt to commit a prohibited offence, that fails for reasons beyond the offender's control, such as an armed intrusion into a diplomatic compound that is foiled by the security guards of the diplomats who were to be the victim of an intended hostage taking;
- (c) Intentional participation as an abettor or accomplice in the commission or attempted commission of an offence. Examples would include an embassy employee who leaves a gate unlocked so that assassins may enter, or someone who provides false identity documents to aid the flight of members of a group that has placed and detonated a bomb in a marketplace.

These forms of criminal responsibility developed incrementally. The 1970 convention applied only to an accomplice on board an aircraft in flight. The 1971 convention was expanded to cover any attempt, or to any accomplice, wherever located. In subsequent instruments other forms of criminal responsibility were introduced, including an act constituting participation in the principal offence (the 1979 Physical Protection of Nuclear Materials Convention) or abetting its commission (the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation). Prior to 1997 it was clear that the conventions required the punishment only of completed or attempted acts. In 1997 Article 2.3 of the Terrorist Bombing Convention established two new forms of criminal liability for one who:

- (b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 2 [meaning either accomplishment of the principal offence or its attempted commission];
or
- (c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 by a group of persons acting with a common purpose
[...]

Article 2.3 (c) of the Bombings Convention by its terms applies only to the commission of an offence. From a purely grammatical perspective, however, it could be argued that Article 2.3 (b) imposes criminal responsibility the moment a person organizes or directs others to commit an offence, regardless of whether that act is ever attempted or accomplished. However, grammatical interpretation may not be enough to prevail over the well-established rule of law principle that any ambiguity in a criminal statute must be resolved in favour of the accused. This is particularly true in view of the fact that the Terrorist Bombings Convention does not contain the express clarification found in Article 2.3 of the Financing of Terrorism Convention, which

was apparently considered necessary to establish that the intended act of terrorism need not be committed for the crime of financing to exist.

Viewed in this context, the strategic significance of the 1999 International Convention for the Suppression of the Financing of Terrorism becomes evident. The formal structure of the Convention introduces no new form of criminal liability and simply repeats the same five forms of participation listed in the 1997 Terrorist Bombing Convention, that is as a principal, attempter, accomplice, organizer or director, or contributor to group action. However, the conduct criminalized is no longer a violent terrorist act. Instead, what is prohibited for the first time by a terrorism-related convention or protocol is the non-violent financial preparation that precedes nearly every significant terrorist act. Moreover, that preparation or contribution is explicitly made independently punishable by Article 2-3 of the Convention, regardless of whether the intended terrorist act is actually accomplished or attempted. This criminalization of preparatory conduct re-establishes the effectiveness of the criminal justice system. Unlike a highly indoctrinated suicide bomber, most of those who knowingly provide or collect funds for terrorism do not themselves wish to die, or even go to prison, for their cause, and are therefore subject to deterrence.

I. Elements of knowledge and intent

The Financing Convention applies only to unlawful and willful provision or collection of funds “with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out” specified violent acts. Some national laws have extended criminal liability to a person who “has reasonable cause to suspect” that his or her participation, support or funds may be used for the purposes of supporting terrorist groups or actions. The question may arise whether proof of reasonable cause for suspicion is a standard of negligence or at most recklessness and not of intentional or knowing wrongdoing. Accordingly, a request for international assistance involving reasonable grounds to suspect terrorist activity may be attacked as not satisfying dual criminality under the Financing Convention. The opposing argument is that proof that an offender had reasonable cause to suspect the intended illegal use of funds allows an inference that the accused made a conscious decision to remain willfully blind to the illegality and therefore acted intentionally, or at least knowingly. Which view will prevail depends upon local jurisprudence and statutory language.

The description of the mental element in the Financing Convention as intentionally providing or collecting funds with either the **intention or knowledge** that funds are to be used for unlawful acts tends to provoke two opposing reactions. Some persons question how a provider or collector can know that funds will be used to carry out a terrorist act and yet claim not to intend that result. Others question if it is fair to establish an offence that punishes a person who does not personally desire and intend that his or her funds will be used for a terrorist act. A hypothetical situation serves to answer both questions. Assume that an influential person in an expatriate community is subject to lawful electronic surveillance by the security services of his country of residence. He is overheard reporting his activities to a superior in an organization in his country of origin. This organization carries on both legitimate social programmes and bomb attacks on non-combatant civilians of an opposing group. In the conversation the target of the surveillance advises that he will be sending funds collected from fellow emigrants to the organization by courier, and that he personally hopes that they will be used for medical care for the community. The person being intercepted then acknowledges that despite his personal desires he knows the organization will make the ultimate decision on how to spend the funds and may decide to use

them for bomb attacks on civilians. By those declarations, the speaker indicates that he does not personally desire that the funds be used for terrorist attacks but knows and is willing that such attacks may be facilitated by his fund raising. The offence established to implement the Financing Convention reaches a personal desire and intent to provide or collect funds to support terrorist acts. However, that prohibition alone was not considered sufficient to accomplish the goal of reducing terrorist attacks by discouraging the knowing provision or collection of funds for their accomplishment. Consequently, the offence implementing the Convention must also punish provision or collection of funds with the knowledge and willing acceptance of the possibility that they may be used for terrorist acts.

III. Jurisdiction over offences

A. Jurisdiction based upon territoriality

The location of the offence is the most ancient and fundamental basis upon which a country can assert jurisdiction to punish an offence. The social harm of criminal acts inflicted falls most immediately upon victims and property located within the country's boundaries, and it is that country's public order and tranquility that are undermined by a violation of its laws. Nevertheless, this ground of jurisdiction was not recognized in the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft. That agreement dealt with in-flight hijackings, many of which involved situations in which the territorial jurisdiction was either uncertain, in dispute, or not applicable, such as seizures over the high seas. However, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, protected aircraft "in service", meaning on the ground in the 24 hours before and after a flight, as well as air navigation facilities. It therefore listed territoriality as its first ground of jurisdiction in Article 5.1 (a). Every one of the terrorism conventions developed since then has included the jurisdictional basis of territoriality. The Criminal Code of the Republic of Korea establishes territorial jurisdiction in the following language:

Article 2 (domestic Crimes)

This Code shall apply both to Korean nationals and aliens who commit crimes within the territory of the Republic of Korea.

B. Jurisdiction based upon registration of aircraft or maritime vessels

The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft declares that the State of registration of an aircraft is competent and obligated to exercise jurisdiction over criminal offences committed on board aircraft registered to that State. In recognition of the prevalence of aircraft leasing, the subsequent air travel safety conventions of 1970 and 1971 added a requirement to establish jurisdiction when the offence is committed against or on board an aircraft leased without crew to a lessee whose principal place of business is in that State. Article 6.1 of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation used the traditional maritime registration concept, that jurisdiction exists when an offence established by the Convention is committed:

(a) against or on board a ship flying the flag of the State at the time the offence is committed

The Korean Criminal Code establishes this form of jurisdiction in the following language:

Article 4 (Crimes by Aliens on Board a Korean vessel outside of Korea),

This Code shall apply to aliens who commit crimes on board a Korean vessel or aircraft outside the territory of the Republic of Korea.

The 1963, 1970 and 1971 aircraft conventions were all focused upon the safety of international civil aviation and specifically excluded aircraft used in military, customs or police service. The 1997 Terrorist Bombings Convention permits an optional ground of jurisdiction if an offence established by that instrument is committed on board an aircraft operated by the Government of a State, regardless of its use. That ground is carried forward in the 1999 Financing Convention and the 2005 Nuclear Terrorism Convention. The International Convention on the Physical Protection of Nuclear Material and its 2005 Amendment do not specifically exclude aircraft used in military, customs or police service, and simply require jurisdiction to be established when the offence is committed in the territory of the State or on board a vessel or aircraft registered in that State.

C. Jurisdiction based upon nationality of the offender

The 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, introduced the requirement that a State Party must establish jurisdiction over an alleged offender who is a national of that State. Continuing the use of the Republic of Korea Criminal Code to illustrate how these various grounds of jurisdiction may be established, Article 3 of that Code provides:

Article 3 (Crimes by Koreans outside Korea)

This code shall apply to all Korean nationals who commit crimes outside the territory of the Republic of Korea.

All of the subsequent terrorism-related agreements that create offences require the establishment of jurisdiction over nationals, with the exception of the 1988 Airport Protocol. That instrument supplemented the 1971 International Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, which did not contain the nationality provision. An element of flexibility was introduced in the 1979 Hostage Taking Convention, which recognized that a State might wish to also establish jurisdiction over stateless persons who have their habitual residence in its territory. That ground is listed with other optional grounds in the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Fixed Platform Protocol (and therefore applies to their 2005 Protocols), in the 1997 Terrorist Bombings Convention, the 1999 Financing of Terrorism Convention and the 2005 Nuclear Terrorism Convention.

D. Jurisdiction based upon protection of nationals and national interests

The assassination of the Jordanian Prime Minister in 1971 in Cairo and the murder of three foreign diplomats in Khartoum in 1973 preceded the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,

1973. This was the first of the terrorism-related conventions that established jurisdiction based upon the status or nationality of the victim. In the 1973 Convention the protected status was that of “an internationally protected person as defined in article 1 who enjoys his status as such by virtue of functions which he exercises on behalf of that State.” Jurisdiction based upon the nationality of the hostage was established in the 1979 International Convention against the Taking of Hostages as an optional basis of jurisdiction. That Convention also introduced the protection of national interests principle in Article 5.1 (c) as a mandatory ground of jurisdiction, when hostage taking was committed “in order to compel that State to do or abstain from doing any act.” The 1988 Maritime Safety Convention and its Fixed Platform Protocol included jurisdiction based upon the nationality of the victim and upon an effort to compel a State to do or abstain from doing any act, but treated them as optional rather than mandatory grounds. The optional treatment of both those grounds was continued in the Terrorist Bombings Convention 1997, which also established the optional ground of an offence committed against a State facility abroad. Those three options were repeated in the Financing of Terrorism Convention, 1999 and the Nuclear Terrorism Convention, 2005.

E. Jurisdiction based upon the presence of a person in the national territory

The obligation to extradite or prosecute is discussed separately in part IV, but depends upon a jurisdictional element requiring discussion in this part. The competence of domestic courts to exercise jurisdiction over an act which took place elsewhere and has no connection with a country’s citizens or interests other than the alleged offender’s presence, is a prerequisite to obligating the referral of a case for prosecution, if extradition is refused. Many countries provide for extra-territorial jurisdiction over acts by citizens, as a corollary to constitutional or legislative mandates or jurisprudential tradition that citizens not be extradited. All of the terrorism-related conventions and protocols that create criminal offences impose the obligation to refer for prosecution. As a consequence, so-called “monist” countries, that automatically incorporate treaties in domestic law, may be able to exercise jurisdiction over an alleged offender found in the territory based simply upon the international treaty. However, not all countries provide that a non-citizen found in the territory may be prosecuted for an extra-territorial act simply based upon that person’s presence, or upon presence plus a decision not to extradite. If that is not the case, legislation like Article 64 of the Anti-Terrorism Act, 2002 of The Gambia may be necessary:

- (1) A Gambian Court shall have jurisdiction to try an offence and inflict the penalties specified in this Act where the act constituting the offence under sections 3, 4, 5, 6, 7, 11, 15, 18 or 19 had been done or completed outside The Gambia and –

[...]

- (c) the alleged offender is in The Gambia, and The Gambia does not extradite him or her.

IV. Obligation to extradite or prosecute

A. Nature and consequences of the obligation

The most fundamental rule of international cooperation established by the terrorism-related conventions and protocols is the principle of extradite or prosecute. This obligation is found in all of the terrorism-related agreements that define criminal offences. As phrased in Article 8 of the 1997 Terrorist Bombing Convention, a State Party that does not extradite a person to a Requesting State Party shall:

[...] be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

Analytically, compliance with this obligation requires both jurisdiction over the extra-territorial offence and an obligation to refer the case for prosecutive examination. As mentioned previously, extra-territorial jurisdiction based upon mere presence may be limited to cases wherein extradition is refused. It would also be dependent upon the standard condition of dual criminality. In some countries both jurisdiction over a foreign offence committed by a person found on the national territory and the obligation to extradite or prosecute flow automatically from membership in the terrorism-related agreements. In others, legislative action may be necessary to make referral for prosecution mandatory rather than discretionary. As a matter of executive administrative policy, this could easily be interpreted as a self-executing provision of a convention. However, the language that the “authorities shall take their decision in the same manner as in the case of any other offence of a grave nature.” demonstrates that an allegation that is investigated and determined to be unfounded need not be brought to trial. A State’s constitutional principles and its substantive and procedural law will determine to what extent the prosecution must be pursued “in accordance with the laws of that State.”

The phrase found in the extradite or prosecute articles of the conventions and protocols providing that the requested State Party is obliged to submit the case for the purpose of prosecution “without exception whatsoever” can be interpreted in differing ways. One possible meaning is that the words eliminate the traditional “public order” exception to international cooperation. Under that exception a State would not be required to render cooperation in a matter that would undermine its domestic tranquility by causing public disturbance or disrupt public morale. In the terrorism context that might equate to refusal of cooperation for fear that a terrorist group would retaliate against the requested State’s nationals or national interests if it granted extradition of aircraft hijackers who had been found on its territory. Another potential interpretation is that the language is an implicit rejection of the political offence exception. That possible meaning will be discussed in part V, section E, dealing with protections for political activity, against discrimination and requiring fair treatment.

Reference to part V, section E, dealing with protection against discrimination, raises the question of whether the obligation to extradite or prosecute applies even when there are substantial grounds to believe that a request for international cooperation is made for discriminatory reasons or that a person's position would be prejudiced for such reasons. In the abstract, it may seem counter-intuitive that a State should pursue the prosecution of a person who would suffer prejudice if extradited. However it must be recognized that a person believed to have committed atrocities may well provoke hatred and be the type of person most likely to suffer discrimination and unjust treatment. One can imagine a situation in which there is overwhelming evidence, perhaps including the offender's own claims of responsibility, that a person has committed terrorist acts. At the same time, there may be very substantial ground to believe that the person's position would be prejudiced if extradition were granted, because of official hatred of his or her political position or ethnic or religious affiliation. In that situation there is no obligation to extradite or even to grant mutual assistance, but there may well be an obligation to ensure that the available evidence is considered objectively by the authorities of the requested State under the "prosecute" alternative of the extradite or prosecute rule, considering that it applies "without exception whatsoever."

B. Obligation to conduct an inquiry, to report findings and to advise of intent

Because the terrorism-related conventions and protocols must deal with a wide variety of legal systems, they normally do not include the level of procedural detail found in bilateral treaties, such as the number of days allowed for certain actions or the precise form or channel of communications. However, the agreements do contain articles concerning the need for orderly procedures governing the custody and extradition or prosecution of a suspect.³⁴ When a requested State is satisfied that grounds exist to take an alleged offender into custody, that custody should ensure the person's presence for the purposes of prosecution or extradition. A preliminary inquiry into the facts must be made. All of these procedural steps are to be governed by national law. The State of nationality and other interested states must be notified immediately of the custody and informed promptly of the results of the inquiry, and of whether the custodial State intends to exercise jurisdiction.

³⁴Representative language is found in Article 10 of the International Convention for the Suppression of Nuclear Terrorism, 2005.

V. International cooperation in criminal matters

A. Dependence of the legal regime against terrorism upon international cooperation

There being no international tribunal with competence for acts of terrorism, those acts can only be dealt with by domestic courts. The international community has come to recognize how handicapped domestic authorities are when they confront criminals and terrorists who conduct their illegal activities so that national borders serve as insulation from investigation and prosecution. The terrorism-related conventions and protocols provide essential tools of extradition and mutual legal assistance so that national authorities can effectively conduct cross-border investigations and ensure that there are no safe havens from prosecution and extradition. Some salient points in connection with the use of those tools are mentioned below. The complexities of those mechanisms are analyzed in greater detail in the Manual for International Cooperation in Criminal Matters against Terrorism, available through the UNODC website.

B. Mutual legal assistance

The requirement that Parties afford assistance in criminal proceedings appeared first in Article 10.1 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft:

Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offence and other acts mentioned in article 4. The law of the State requested shall apply in all cases.

A mutual assistance article appears in all of the subsequent conventions that create criminal offences (except the 1991 Convention on the Marking of Plastic Explosives for the Purposes of Detection). In the 1979 Hostages Convention and subsequent instruments, that assistance is specified as including the obtaining of evidence at a party's disposal. Beginning with the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the Conventions obligate parties to take measures to prevent offences against other parties. This obligation was broadened in the 1973 Convention on Internationally Protected Persons, including Diplomatic Agents, to a duty to exchange information and coordinate administrative and other preventive measures. Prior to the 1997 Terrorist Bombings Convention the mutual assistance articles all referred to "assistance in connection with criminal proceedings." In 1997 the language was expanded, or at least clarified. The words "criminal proceedings" clearly apply to the evidence-gathering phase in civil law systems, where inquiries are conducted under the authority of a magistrate who opens a formal proceeding. It arguably may not apply to the evidence-gathering phase in systems where investigations are opened and conducted by the police without participation by a prosecutor or judge until a formal charge is filed. Whether an investigation by police authorities prior to the filing of a charge would be regarded as a criminal

proceeding depends on the law and discretion of the Requested State. Despite this ambiguity, the “criminal proceeding” language was used in all of the conventions and protocols until the Terrorist Bombings Convention introduced the language “investigations or criminal or extradition proceedings,” which has been used in the subsequent conventions developed by the General Assembly’s Ad Hoc Committee.

C. Extradition

All of the terrorism-related agreements that create criminal offences contain a provision that the offences established therein shall be deemed to be extraditable offences in any existing treaty between State Parties. This provision gives treaty partners the opportunity to use a bilateral treaty that is likely to contain more procedural details than the universal instruments, which are written to apply to a variety of legal systems. If the law of a Requested State requires a treaty as a legal basis for extradition, the State may at its option choose to regard the Convention as such a basis. If no treaty is required, the offence shall be treated as extraditable. For purposes of extradition, offences shall be treated as if they had been committed not only in the place where they occurred, but also in the territory of the States that have established jurisdiction under that convention or protocol (or in a place within the jurisdiction of the party requesting extradition, a formulation used only in the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its 2005 Protocol). Countries that maintain the death penalty should be aware that many countries will refuse to extradite unless assurances are received that a death sentence will not be imposed, or if imposed, will not be carried out. Similar assurances are sometimes required, with regard to other penalties that are considered to violate the public policy of a requested country, such as a sentence of life imprisonment without possibility of parole.

D. Dual criminality

Although the tests for its application are progressively becoming more flexible, an important limitation upon international cooperation is the necessity for dual or double criminality. In simple terms this policy means that a Requested State will normally not assist a Requesting State in investigating or punishing an activity that the Requested State does not consider as meriting criminal punishment. An example might be blasphemy or adultery, which are criminal offences in some legal systems, but only considered socially undesirable, not criminal, in others. As a consequence, a request for extradition of an adulterous spouse would not be granted by a country that did not criminalize adultery. At one time this doctrine was applied in a legalistic fashion that focused on form rather than substance, that is on whether the offence was similarly denominated in both systems, or whether the offence elements were identical. Modern treaties and domestic jurisprudence tend to focus more on whether the conduct would be punishable by the laws of both countries, regardless of the name of the offence or its elements.

An unresolved question in the terrorism context is the effect of dual criminality of an offence that must be committed with a particular motive. Inclusion of an ideological motive as an element of terrorism-related offences, in addition to a specific intent to coerce a government or to intimidate a population and a general criminal intent to commit the prohibited act, permits a very precise definition of offences and thus reduces the risk of the overly broad application of severe sentences or special procedural measures. However, inclusion of such a motivation requirement may have consequences for international cooperation. None of the terrorism-

related instruments require that the prohibited conduct be committed for a racial, religious, political or other ideological motive, and so many countries require only that the defined offences be committed with the state of mind specified in the respective convention or protocol. That specified state of mind may be a general criminal intent (to do the prohibited act “intentionally”, or in some instruments “willfully”) or a specific intent in other cases (in order to intimidate a population or to coerce a government or international organization to do or to refrain from doing any act). If a country that defines an offence as only requiring a general or specific intent were to request international cooperation from a country that also requires an ideological motivation as an element of the offence, the question arises whether dual criminality exists.

E. Protections for political activity, against discrimination and requiring fair treatment

The evolution of protective articles in the conventions and protocols demonstrates a progression toward ensuring the rule of law in international criminal justice cooperation while reducing tolerance for terrorist violence. For over a century prior to adoption of the first terrorism-related convention in 1963, the political offence exception had constituted a ground for refusal of international cooperation in many countries. That exception to the obligation to grant extradition was based on the choice by certain countries not to assist in punishing political activity directed against the government of another country, such as treason, sedition, or attempts to force a ruling group to change or adopt certain policies. In addition to prohibited, but non-violent, political activity, such as unauthorized public demonstrations or publications, the exception often covered violent offences connected with a political offence, such as injuries or damage inflicted during a political protest or in the course of resisting an arrest for a political offence. Proponents of the exception argued that it should cover even an attack upon civilians to draw attention to a cause because the inspiration for the offence was political in nature. Obviously, application of the exception to shield political violence from extradition or international evidence gathering would frustrate an anti-terrorism convention, as terrorist incidents involving violence against airline and ship passengers, hostages and civilians, are routinely inspired by political motives and associated with efforts to change government policies.

By the time of the adoption of the Convention on Offences and Certain Other Acts on Board Aircraft in 1963, the international law community had come to recognize the difficulties in applying the traditionally broad and ambiguous political offence exception to terrorism-related offences. The 1963 Convention reflects an attempt to allow a limited exception for laws of a political nature without negating the purpose of the agreement. Its Article 2 provides in pertinent part that:

“[...] except when the safety of the aircraft or of persons or property on board so requires, no provision of this Convention shall be interpreted as authorizing or requiring any action in respect of offences against penal laws of a political nature or those based on racial or religious discrimination.”

The stated exception recognizes the most limited form of political offence exception, that of offences against penal laws of a political nature, such as those prohibiting specified political speech or activity, but not the more problematic exceptions for violent offences connected to a political offence or unlawful acts inspired by political motives. This protective article also introduced a form of non-discrimination protection, making the agreement inapplicable to violations of laws based on racial or religious discrimination.

For 34 years after 1963, no express reference is found to any form of political offence exception in any of the terrorism-related conventions and protocols.³⁵ However, some interpret the obligation to extradite or prosecute “without exception whatsoever” found in the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft as an implicit rejection of the political offence exception. This interpretation is based in part on the disappearance of the limited political offence exception which exists in the 1963 aircraft convention, which was negotiated under the auspices of the same organization, ICAO. In part it is also based on the 1970 Unlawful Seizure Convention reference to the obligation to decide upon prosecution in the same manner as any “ordinary” offence of a serious nature.³⁶ In legal writing the term “ordinary” crimes was often used to distinguish murders and other crimes in which the motives and consequences resembled normal criminality, because involving personal advantage or harm to innocent civilians, from offences more directly related to political expression and considered more worthy of the political offence exception. While the boundary between “ordinary” and “political” offences was never clear or coherent, use of the term “ordinary” offence normally conveyed a contrast with a “political” offence.

An important factor facilitating the rejection of the political offence exception in the 1997 Terrorist Bombing Convention and in subsequent universal terrorism-related instruments is the expansion of superior safeguards for alleged offenders. The 1963 Convention required minimal protection for a suspected hijacker. Custody of a suspect could be continued only “for such time as is reasonably necessary to enable any criminal or extradition proceedings to be instituted.” Article 13.3 granted a person in custody the right to be assisted in communicating immediately with the nearest appropriate representative of the State of nationality. Article 15.2 also required a State to accord a suspect disembarked in its territory treatment no less favorable for his protection and security than that accorded to its own nationals.

Protections for suspected offenders have grown steadily during the decades since 1963, as demonstrated by the relevant articles in the 1997 Terrorist Bombings Convention. Article 7.3 ensures that any suspect regarding whom restrictive measures have been taken against shall be entitled to:

- (a) Communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person’s rights or, if that person is a stateless person, the State in the territory of which that person habitually resides;

³⁵Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963), Convention for the Suppression of Unlawful Seizure of Aircraft (1970), Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971), Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973), International Convention Against the Taking of Hostages (1979), Convention on the Physical Protection of Nuclear Material (1979), Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988), Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988), Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988), Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991), International Convention for the Suppression of Terrorist Bombings (1997), International Convention for the Suppression of the Financing of Terrorism (1999), International Convention for the Suppression of Acts of Nuclear Terrorism (2005), Amendment to the Convention on the Physical Protection of Nuclear Material (2005), Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (2005), Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (2005).

³⁶Article 7, Convention for the Suppression of Unlawful Seizure of Aircraft, 1970:

The Contracting State in the territory which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

- (b) Be visited by a representative of that State;
- (c) Be informed of that person's rights under subparagraphs (a) and (b).

Article 14 is a so-called "fair treatment" article, elaborating the concept found in Article 15.2 of the 1963 Convention, but with more precision regarding the international law component of human rights guarantees:

Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights.³⁷

Article 12 establishes the important principle of non-discrimination in the following language:

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

The above non-discrimination article is found immediately following an article abolishing the political offence exception not only in the 2005 Nuclear Bombings Convention, but in the 1997 Terrorist Bombings Convention, the 1999 Financing of Terrorism Convention and the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. These articles expressly declare that the offences established in those agreements:

... shall not be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives.³⁸

The political offence exception was always a difficult tool for legal analysis except in its simplest application to non-violent expressions of political speech or activity. This was particularly true of offences connected with a political offence, most typically consisting of violence utilized to implement a political goal and of offences inspired by a political motive, which could involve the most extreme forms of demonstrative violence. Various tests were developed to judge whether the offence was a prohibited expression of an attempt to force change upon a government or more analogous to an ordinary crime, but consistently satisfactory rules of appli-

³⁷At a minimum, this body of law would include obligations assumed under the ICCPR, the Convention against Torture, the International Convention on the Status of Refugees and those guarantees recognized as part of *jus gentium*, the customary law of nations existing independently of treaty law. Further information in this regard can be found in an Introduction to International Law Aspects of Counter-Terrorism, available at www.unodc.org, on the Terrorism Prevention page under technical assistance tools.

³⁸All of these articles are similarly worded, except the 2005 Maritime Protocol, which adds gender to the list of impermissible considerations.

cation were never achieved. Excusing attacks against innocent civilians inspired by political motives increasingly came to be viewed as a protection for terrorists. These difficulties are avoided by the rejection of the political offence exception for the offences defined by the 1997 Terrorist Bombings conventions and subsequent agreements. At the same time, the legitimate interests of the accused offenders are protected by incorporation of a robust anti-discrimination article that protects against any prejudice a person might suffer for political or other impermissible reasons. If a person was being prosecuted or punished because of her political opinion or if her position would suffer prejudice for that reason, the non-discrimination articles allow an extradition or mutual assistance request to be refused, leaving the Requested State free to deal with the person as dictated by its own national law and the available evidence.

F. Concluding human rights considerations

In a Legislative Guide intended as a concise introduction to the universal legal regime against terrorism, it is not possible to analyze each of the human rights protections that may become relevant in a particular investigation, prosecution or international cooperation situation. Readers are therefore encouraged to supplement their reading of this *Guide* with the detailed examination of protections found in a companion UNODC publication. That work, an Introduction to International Law Aspects Related to Counter-Terrorism, contains valuable explanations of human rights considerations that could only be touched upon in this *Guide*. Specific issues include the application of humanitarian law principles and the Geneva Conventions to terrorism, asylum law and the 1951 Convention and 1967 Protocol Relating to the Status of Refugees, the structure and functions of the United Nations human rights bodies, and the extent and conditions of permissible derogation from the guarantees of the International Covenant on Civil and Political Rights. The interaction of these topics and the terrorism-related conventions and protocols and Security Council resolutions are examined in the context of the overall principles of international human rights and humanitarian law. Accordingly, readers should be aware that this guide is only a partial introduction to the legal regime against terrorism and should be supplemented by consulting other resources available at the UNODC website, particularly the above-described Introduction and the Manual for International Cooperation in Criminal Matters against Terrorism.

Annex

The Terrorism Prevention Branch has developed the following technical assistance tools to assist countries in their work to combat terrorism:

- Legislative guide to universal anti-terrorism conventions and protocols
- Guide for the legislative incorporation of the provisions of the universal legal instruments against terrorism
- Preventing terrorist acts: a criminal justice strategy integrating rule of law standards in the implementation of United Nations anti-terrorism instruments
- Model legislative provisions against terrorism
- Model law on extradition (prepared jointly with the Treaty and Legal Assistance Branch)
- Mutual legal assistance request writer tool (prepared by the Treaty and Legal Assistance Branch)
- Electronic legal resources on international terrorism
- Comparative study on anti-terrorism legislative developments in seven Asian and Pacific countries

These tools and publications are accessible on TPB's website in all six official languages of the United Nations (<http://www.unodc.org/unodc/en/terrorism/index.html>); print copies are available upon request from TPB. Further technical assistance tools and publications are currently under preparation.



UNITED NATIONS Office on Drugs and Crime

Vienna International Centre, PO Box 500, A 1400 Vienna, Austria
Tel: +(43) (1) 26060-0, Fax: +(43) (1) 26060-5866, www.unodc.org

كيفية الحصول على منشورات الأمم المتحدة

يمكن الحصول على منشورات الأمم المتحدة من المكتبات ودور التوزيع في جميع أنحاء العالم. استعلم عنها من المكتبة التي تتعامل معها أو اكتب إلى: الأمم المتحدة، قسم البيع في نيويورك أو في جنيف.

如何购取联合国出版物

联合国出版物在全世界各地的书店和经营处均有发售。 请向书店询问或写信到纽约或日内瓦的联合国销售组。

HOW TO OBTAIN UNITED NATIONS PUBLICATIONS

United Nations publications may be obtained from bookstores and distributors throughout the world. Consult your bookstore or write to: United Nations, Sales Section, New York or Geneva.

COMMENT SE PROCURER LES PUBLICATIONS DES NATIONS UNIES

Les publications des Nations Unies sont en vente dans les librairies et les agences dépositaires du monde entier. Informez-vous auprès de votre libraire ou adressez-vous à: Nations Unies, Section des ventes, New York ou Genève.

КАК ПОЛУЧИТЬ ИЗДАНИЯ ОРГАНИЗАЦИИ ОБЪЕДИНЕННЫХ НАЦИЙ

Издания Организации Объединенных Наций можно купить в книжных магазинах и агентствах во всех районах мира. Наводите справки об изданиях в вашем книжном магазине или пишите по адресу: Организация Объединенных Наций, Секция по продаже изданий, Нью-Йорк или Женева.

CÓMO CONSEGUIR PUBLICACIONES DE LAS NACIONES UNIDAS

Las publicaciones de las Naciones Unidas están en venta en librerías y casas distribuidoras en todas partes del mundo. Consulte a su librero o diríjase a: Naciones Unidas, Sección de Ventas, Nueva York o Ginebra.



9 789211 337808

United Nations publication
ISBN 978-92-133780-8
Sales No. E.08.V.9

FOR UNITED NATIONS USE ONLY



Printed in Austria
V.08-51220—April 2008—2,300

Annex 286

Committee Against Torture, General Comment No. 2 (28 January 2008)

COMMITTEE AGAINST TORTURE

docstore.ohchr.org/SelfServices/FilesHandler.ashx

UNITED
NATIONS

CAT



Convention against Torture and Other Cruel, Inhuman or Degrading
Treatment or Punishment

Distr.

GENERAL

CAT/C/GC/2

24 January
2008

Original:
ENGLISH

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

GENERAL COMMENT No. 2

Implementation of article 2 by States parties

1. This general comment addresses the three parts of article 2, each of which identifies distinct interrelated and essential principles that undergird the Convention's absolute prohibition against torture. Since the adoption of the Convention against Torture, the absolute and non-derogable character of this prohibition has become accepted as a matter of customary international law. The provisions of article 2 reinforce this peremptory jus cogens norm against torture and constitute the foundation of the Committee's authority to implement effective means of prevention, including but not limited to those measures contained in the subsequent articles 3 to 16, in response to evolving threats, issues, and practices.

2. Article 2, paragraph 1, obliges each State party to take actions that will reinforce the prohibition against torture through legislative, administrative, judicial, or other actions that must, in the end, be effective in preventing it. To ensure that measures are in fact taken that are known to prevent or punish any acts of torture, the Convention outlines in subsequent articles obligations for the State party to take measures specified therein.

GE.08-402623. The obligation to prevent torture in article 2 is wide-ranging. The obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment (hereinafter "ill-treatment") under article 16, paragraph 1, are indivisible, interdependent and interrelated. The obligation to prevent ill-treatment in practice overlaps with and is largely

congruent with the obligation to prevent torture. Article 16, identifying the means of prevention of ill-treatment, emphasizes “in particular” the measures outlined in articles 10 to 13, but does not limit effective prevention to these articles, as the Committee has explained, for example, with respect to compensation in article 14. In practice, the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment. Accordingly, the Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention and its prevention to be an effective and non-derogable measure.

4. States parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented. States parties also have the obligation continually to keep under review and improve their national laws and performance under the Convention in accordance with the Committee’s concluding observations and views adopted on individual communications. If the measures adopted by the State party fail to accomplish the purpose of eradicating acts of torture, the Convention requires that they be revised and/or that new, more effective measures be adopted. Likewise, the Committee’s understanding of and recommendations in respect of effective measures are in a process of continual evolution, as, unfortunately, are the methods of torture and ill-treatment.

II. Absolute prohibition

5. Article 2, paragraph 2, provides that the prohibition against torture is absolute and non-derogable. It emphasizes that no exceptional circumstances whatsoever may be invoked by a State Party to justify acts of torture in any territory under its jurisdiction. The Convention identifies as among such circumstances a state of war or threat thereof, internal political instability or any other public emergency. This includes any threat of terrorist acts or violent crime as well as armed conflict, international or non-international. The Committee is deeply concerned at and rejects absolutely any efforts by States to justify torture and ill-treatment as a means to protect public safety or avert emergencies in these and all other situations. Similarly, it rejects any religious or traditional justification that would violate this absolute prohibition. The Committee considers that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability.

6. The Committee reminds all States parties to the Convention of the non-derogable nature of the obligations undertaken by them in ratifying the Convention. In the aftermath of the attacks of 11 September 2001, the Committee specified that the obligations in articles 2 (whereby “no exceptional circumstances whatsoever...may be invoked as a justification of torture”), 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer), and 16 (prohibiting cruel, inhuman or degrading treatment or punishment) are three such provisions that “must be observed in all circumstances”. The Committee considers that articles 3 to 15 are likewise obligatory as applied to both torture and ill-treatment. The Committee recognizes that States parties may choose the measures through which they fulfill these obligations, so long as they are effective and consistent with

the object and purpose of the Convention.

7. The Committee also understands that the concept of “any territory under its jurisdiction,” linked as it is with the principle of non-derogability, includes any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of a State party. The Committee emphasizes that the State’s obligation to prevent torture also applies to all persons who act, de jure or de facto, in the name of, in conjunction with, or at the behest of the State party. It is a matter of urgency that each State party should closely monitor its officials and those acting on its behalf and should identify and report to the Committee any incidents of torture or ill-treatment as a consequence of anti-terrorism measures, among others, and the measures taken to investigate, punish, and prevent further torture or ill-treatment in the future, with particular attention to the legal responsibility of both the direct perpetrators and officials in the chain of command, whether by acts of instigation, consent or acquiescence.

III. Content of the obligation to take effective measures to prevent torture

8. States parties must make the offence of torture punishable as an offence under its criminal law, in accordance, at a minimum, with the elements of torture as defined in article 1 of the Convention, and the requirements of article 4.

9. Serious discrepancies between the Convention’s definition and that incorporated into domestic law create actual or potential loopholes for impunity. In some cases, although similar language may be used, its meaning may be qualified by domestic law or by judicial interpretation and thus the Committee calls upon each State party to ensure that all parts of its Government adhere to the definition set forth in the Convention for the purpose of defining the obligations of the State. At the same time, the Committee recognizes that broader domestic definitions also advance the object and purpose of this Convention so long as they contain and are applied in accordance with the standards of the Convention, at a minimum. In particular, the Committee emphasizes that elements of intent and purpose in article 1 do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances. It is essential to investigate and establish the responsibility of persons in the chain of command as well as that of the direct perpetrator(s).

10. The Committee recognizes that most States parties identify or define certain conduct as ill-treatment in their criminal codes. In comparison to torture, ill-treatment may differ in the severity of pain and suffering and does not require proof of impermissible purposes. The Committee emphasizes that it would be a violation of the Convention to prosecute conduct solely as ill-treatment where the elements of torture are also present.

11. By defining the offence of torture as distinct from common assault or other crimes, the Committee considers that States parties will directly advance the Convention’s overarching aim of preventing torture and ill-treatment. Naming and defining this crime will promote the Convention’s aim, inter alia, by alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture. Codifying this crime will also (a) emphasize the need for appropriate punishment that takes into account the gravity of the offence, (b) strengthen the deterrent effect of the prohibition itself, (c) enhance the ability of

responsible officials to track the specific crime of torture and (d) enable and empower the public to monitor and, when required, to challenge State action as well as State inaction that violates the Convention.

12. Through review of successive reports from States parties, the examination of individual communications, and monitoring of developments, the Committee has, in its concluding observations, articulated its understanding of what constitute effective measures, highlights of which we set forth here. In terms of both the principles of general application of article 2 and developments that build upon specific articles of the Convention, the Committee has recommended specific actions designed to enhance each State party's ability swiftly and effectively to implement measures necessary and appropriate to prevent acts of torture and ill-treatment and thereby assist States parties in bringing their law and practice into full compliance with the Convention.

13. Certain basic guarantees apply to all persons deprived of their liberty. Some of these are specified in the Convention, and the Committee consistently calls upon States parties to use them. The Committee's recommendations concerning effective measures aim to clarify the current baseline and are not exhaustive. Such guarantees include, inter alia, maintaining an official register of detainees, the right of detainees to be informed of their rights, the right promptly to receive independent legal assistance, independent medical assistance, and to contact relatives, the need to establish impartial mechanisms for inspecting and visiting places of detention and confinement, and the availability to detainees and persons at risk of torture and ill-treatment of judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment.

14. Experience since the Convention came into force has enhanced the Committee's understanding of the scope and nature of the prohibition against torture, of the methodologies of torture, of the contexts and consequences in which it occurs, as well as of evolving effective measures to prevent it in different contexts. For example, the Committee has emphasized the importance of having same sex guards when privacy is involved. As new methods of prevention (e.g. videotaping all interrogations, utilizing investigative procedures such as the Istanbul Protocol of 1999, or new approaches to public education or the protection of minors) are discovered, tested and found effective, article 2 provides authority to build upon the remaining articles and to expand the scope of measures required to prevent torture.

IV. Scope of State obligations and responsibility

15. The Convention imposes obligations on States parties and not on individuals. States bear international responsibility for the acts and omissions of their officials and others, including agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law. Accordingly, each State party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm. The

Convention does not, however, limit the international responsibility that States or individuals can incur for perpetrating torture and ill-treatment under international customary law and other treaties.

16. Article 2, paragraph 1, requires that each State party shall take effective measures to prevent acts of torture not only in its sovereign territory but also “in any territory under its jurisdiction.” The Committee has recognized that “any territory” includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law. The reference to “any territory” in article 2, like that in articles 5, 11, 12, 13 and 16, refers to prohibited acts committed not only on board a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control. The Committee notes that this interpretation reinforces article 5, paragraph 1 (b), which requires that a State party must take measures to exercise jurisdiction “when the alleged offender is a national of the State.” The Committee considers that the scope of “territory” under article 2 must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention.

17. The Committee observes that States parties are obligated to adopt effective measures to prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture as defined in the Convention. Thus, States parties should adopt effective measures to prevent such authorities or others acting in an official capacity or under colour of law, from consenting to or acquiescing in any acts of torture. The Committee has concluded that States parties are in violation of the Convention when they fail to fulfil these obligations. For example, where detention centres are privately owned or run, the Committee considers that personnel are acting in an official capacity on account of their responsibility for carrying out the State function without derogation of the obligation of State officials to monitor and take all effective measures to prevent torture and ill-treatment.

18. The Committee has made clear that where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State’s indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties’ failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.

19. Additionally, if a person is to be transferred or sent to the custody or control of an individual or institution known to have engaged in torture or ill-treatment, or has not implemented adequate safeguards, the State is responsible, and its officials subject to

punishment for ordering, permitting or participating in this transfer contrary to the State's obligation to take effective measures to prevent torture in accordance with article 2, paragraph 1. The Committee has expressed its concern when States parties send persons to such places without due process of law as required by articles 2 and 3.

V. Protection for individuals and groups made vulnerable by discrimination or marginalization

20. The principle of non-discrimination is a basic and general principle in the protection of human rights and fundamental to the interpretation and application of the Convention. Non-discrimination is included within the definition of torture itself in article 1, paragraph 1, of the Convention, which explicitly prohibits specified acts when carried out for "any reason based on discrimination of any kind...". The Committee emphasizes that the discriminatory use of mental or physical violence or abuse is an important factor in determining whether an act constitutes torture.

21. The protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment. States parties must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of race, colour, ethnicity, age, religious belief or affiliation, political or other opinion, national or social origin, gender, sexual orientation, transgender identity, mental or other disability, health status, economic or indigenous status, reason for which the person is detained, including persons accused of political offences or terrorist acts, asylum-seekers, refugees or others under international protection, or any other status or adverse distinction. States parties should, therefore, ensure the protection of members of groups especially at risk of being tortured, by fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of other positive measures of prevention and protection, including but not limited to those outlined above.

22. State reports frequently lack specific and sufficient information on the implementation of the Convention with respect to women. The Committee emphasizes that gender is a key factor. Being female intersects with other identifying characteristics or status of the person such as race, nationality, religion, sexual orientation, age, immigrant status etc. to determine the ways that women and girls are subject to or at risk of torture or ill-treatment and the consequences thereof. The contexts in which females are at risk include deprivation of liberty, medical treatment, particularly involving reproductive decisions, and violence by private actors in communities and homes. Men are also subject to certain gendered violations of the Convention such as rape or sexual violence and abuse. Both men and women and boys and girls may be subject to violations of the Convention on the basis of their actual or perceived non-conformity with socially determined gender roles. States parties are requested to identify these situations and the measures taken to punish and prevent them in their reports.

23. Continual evaluation is therefore a crucial component of effective measures. The Committee has consistently recommended that States parties provide data disaggregated by age, gender and other key factors in their reports to enable the Committee to adequately evaluate the implementation of the Convention. Disaggregated data permits the States

parties and the Committee to identify, compare and take steps to remedy discriminatory treatment that may otherwise go unnoticed and unaddressed. States parties are requested to describe, as far as possible, factors affecting the incidence and prevention of torture or ill-treatment, as well as the difficulties experienced in preventing torture or ill-treatment against specific relevant sectors of the population, such as minorities, victims of torture, children and women, taking into account the general and particular forms that such torture and ill-treatment may take.

24. Eliminating employment discrimination and conducting ongoing sensitization training in contexts where torture or ill-treatment is likely to be committed is also key to preventing such violations and building a culture of respect for women and minorities. States are encouraged to promote the hiring of persons belonging to minority groups and women, particularly in the medical, educational, prison/detention, law enforcement, judicial and legal fields, within State institutions as well as the private sector. States parties should include in their reports information on their progress in these matters, disaggregated by gender, race, national origin, and other relevant status.

VI. Other preventive measures required by the Convention

25. Articles 3 to 15 of the Convention constitute specific preventive measures that the States parties deemed essential to prevent torture and ill-treatment, particularly in custody or detention. The Committee emphasizes that the obligation to take effective preventive measures transcends the items enumerated specifically in the Convention or the demands of this general comment. For example, it is important that the general population be educated on the history, scope, and necessity of the non-derogable prohibition of torture and ill-treatment, as well as that law enforcement and other personnel receive education on recognizing and preventing torture and ill-treatment. Similarly, in light of its long experience in reviewing and assessing State reports on officially inflicted or sanctioned torture or ill-treatment, the Committee acknowledges the importance of adapting the concept of monitoring conditions to prevent torture and ill-treatment to situations where violence is inflicted privately. States parties should specifically include in their reports to the Committee detailed information on their implementation of preventive measures, disaggregated by relevant status.

VII. Superior orders

26. The non-derogability of the prohibition of torture is underscored by the long-standing principle embodied in article 2, paragraph 3, that an order of a superior or public authority can never be invoked as a justification of torture. Thus, subordinates may not seek refuge in superior authority and should be held to account individually. At the same time, those exercising superior authority - including public officials - cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures. The Committee considers it essential that the responsibility of any superior officials, whether for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein, be fully investigated through competent, independent and impartial prosecutorial

and judicial authorities. Persons who resist what they view as unlawful orders or who cooperate in the investigation of torture or ill-treatment, including by superior officials, should be protected against retaliation of any kind.

27. The Committee reiterates that this general comment has to be considered without prejudice to any higher degree of protection contained in any international instrument or national law, as long as they contain, as a minimum, the standards of the Convention.

Annex 287

International Law Commission, Draft Articles on Effects of Armed Conflicts on Treaties, with Commentaries (2011)

**Draft articles on the effects of armed conflicts on treaties,
with commentaries**

2011

Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10). The report, which also contains commentaries to the draft articles (para. 101), appears in *Yearbook of the International Law Commission, 2011*, vol. II, Part Two.



Copyright © United Nations
2011

Article 10. Obligations imposed by international law independently of a treaty

The termination of or the withdrawal from a treaty, or the suspension of its operation, as a consequence of an armed conflict, shall not impair in any way the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of that treaty.

Article 11. Separability of treaty provisions

Termination, withdrawal from or suspension of the operation of a treaty as a consequence of an armed conflict shall, unless the treaty otherwise provides or the parties otherwise agree, take effect with respect to the whole treaty except where:

(a) the treaty contains clauses that are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other Party or Parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

Article 12. Loss of the right to terminate or withdraw from a treaty or to suspend its operation

A State may no longer terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty remains in force or continues in operation; or

(b) it must by reason of its conduct be considered as having acquiesced in the continued operation of the treaty or in its maintenance in force.

Article 13. Revival or resumption of treaty relations subsequent to an armed conflict

1. Subsequent to an armed conflict, the States parties may regulate, on the basis of agreement, the revival of treaties terminated or suspended as a consequence of the armed conflict.

2. The resumption of the operation of a treaty suspended as a consequence of an armed conflict shall be determined in accordance with the factors referred to in article 6.

PART THREE

MISCELLANEOUS

Article 14. Effect of the exercise of the right to self-defence on a treaty

A State exercising its inherent right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty to which it is a party insofar as that operation is incompatible with the exercise of that right.

Article 15. Prohibition of benefit to an aggressor State

A State committing aggression within the meaning of the Charter of the United Nations and resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict that results from the act of aggression if the effect would be to the benefit of that State.

Article 16. Decisions of the Security Council

The present draft articles are without prejudice to relevant decisions taken by the Security Council in accordance with the Charter of the United Nations.

Article 17. Rights and duties arising from the laws of neutrality

The present draft articles are without prejudice to the rights and duties of States arising from the laws of neutrality.

Article 18. Other cases of termination, withdrawal or suspension

The present draft articles are without prejudice to the termination, withdrawal or suspension of treaties as a consequence of, *inter alia*: (a) a material breach; (b) supervening impossibility of performance; or (c) a fundamental change of circumstances.

ANNEX

INDICATIVE LIST OF TREATIES REFERRED TO IN ARTICLE 7

(a) Treaties on the law of armed conflict, including treaties on international humanitarian law;

(b) treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries;

(c) multilateral law-making treaties;

(d) treaties on international criminal justice;

(e) treaties of friendship, commerce and navigation and agreements concerning private rights;

(f) treaties for the international protection of human rights;

(g) treaties relating to the international protection of the environment;

(h) treaties relating to international watercourses and related installations and facilities;

(i) treaties relating to aquifers and related installations and facilities;

(j) treaties which are constituent instruments of international organizations;

(k) treaties relating to the international settlement of disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement;

(l) treaties relating to diplomatic and consular relations.

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO

101. The text of the draft articles with commentaries thereto as adopted by the Commission, on second reading, at its sixty-third session is reproduced below.

EFFECTS OF ARMED CONFLICTS ON TREATIES

PART ONE

SCOPE AND DEFINITIONS

Article 1. Scope

The present draft articles apply to the effects of armed conflict on the relations of States under a treaty.

Commentary

(1) Article 1 situates, as the point of departure for the elaboration of the draft articles, the 1969 Vienna Convention on the law of treaties, article 73 of which provides, *inter alia*, that the provisions of the Convention do not

prejudge any question that may arise in regard to a treaty from the outbreak of hostilities between States.³⁹⁸ Thus, the present draft articles apply to the effects of an armed conflict in respect of treaty relations between States.

(2) The formulation of article 1 is patterned on article 1 of the 1969 Vienna Convention. By using the formulation “relations of States under a treaty”, the draft articles also cover the position of States not parties to an armed conflict but are parties to a treaty with a State involved in that armed conflict. Accordingly, three scenarios would be contemplated: (a) the situation concerning the treaty relations between two States engaged in an armed conflict, including States engaged on the same side; (b) the situation of the treaty relations between a State engaged in an armed conflict with another State and a third State not party to that conflict; and (c) the situation of the effect of a non-international armed conflict on the treaty relations of the State in question with third States. Article 1, accordingly, should be read in the light of article 3, which expressly envisages such hypotheses. The scope of the third scenario is further limited by the requirement of “protracted resort to armed force between governmental authorities and organized armed groups”, reflected in the definition of armed conflict in article 2, subparagraph (b), as well as by the inclusion of the element of “the degree of outside involvement” as a factor to be taken into account, under article 6, subparagraph (b), when ascertaining the susceptibility of a treaty to termination, withdrawal or suspension. The typical non-international armed conflict should not, in principle, call into question the treaty relations between States.

(3) Several Governments expressed the view that the draft articles should apply also to treaties or parts of treaties that are being provisionally applied.³⁹⁹ In the Commission’s view, the issue can be resolved by reference to the provisions of article 25 of the 1969 Vienna Convention.⁴⁰⁰

³⁹⁸ At its fifteenth session (1963), the Commission concluded that the draft articles on the law of treaties should not contain any provisions concerning the effect of the outbreak of hostilities upon treaties, although this topic might raise problems both of the termination of treaties and of the suspension of their operation. It felt that such a study would inevitably involve a consideration of the effect of the provisions of the Charter of the United Nations concerning the threat or use of force upon the legality of the recourse to the particular hostilities in question. Consequently, it did not feel that this question could conveniently be dealt with in the context of its present work upon the law of treaties, *Yearbook ... 1963*, vol. II, document A/5509, p. 189, para. 14. Article 73 expressly reserving the problem was added at the United Nations Conference on the Law of Treaties.

³⁹⁹ See the comments by the Netherlands (2005), *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 18th meeting (A/C.6/60/SR.18), para. 40; Malaysia (2006), *ibid.*, *Sixty-first Session, Sixth Committee*, 19th meeting (A/C.6/61/SR.19), para. 48; Romania (2008), *ibid.*, *Sixty-third Session, Sixth Committee*, 21st meeting (A/C.6/63/SR.21), para. 51; and Burundi (2010), *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/622 and Add.1.

⁴⁰⁰ Article 25 of the 1969 Vienna Convention reads as follows:

“Article 25. *Provisional application*

“1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

“(a) The treaty itself so provides; or

“(b) The negotiating States have in some other manner so agreed.

“2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.”

(4) The Commission decided not to include within the scope of the draft articles relations arising under treaties between international organizations or between States and international organizations, owing to the complexity of giving such an additional dimension to the draft articles, which would likely outweigh the possible benefits of doing so, since international organizations rarely, if ever, engage in armed conflict to the extent that their treaty relations may be affected. While it is conceivable that such treaty relations could be affected *qua* third parties in the second scenario envisaged in paragraph (2) above, and that, accordingly, some of the provisions of the present draft articles might apply by analogy, the Commission decided to leave the consideration of such issues to a possible future topic for inclusion in its work programme. However, article 1 should not be read as excluding multilateral treaties to which international organizations are parties in addition to States. This point is made in subparagraph (a) of article 2, which clarifies that the definition of treaties given in the draft articles “includes treaties between States to which international organizations are also parties”. Similarly, the formulation “relations of States under a treaty”, found in article 1, is drawn from article 2, subparagraph (c), of the 1969 Vienna Convention, and places the focus on the relations existing under the treaty regime in question, thereby making it possible to distinguish the treaty relations between States, which are included within the scope of the draft articles, from the relations between States and international organizations or between international organizations arising under the same treaty, which are excluded from the scope of the articles.

(5) Structurally, the present draft articles are divided into three parts: Part One, entitled “Scope and definitions”, includes articles 1 and 2 which are introductory in nature, dealing with scope and definitions. Part Two, entitled “Principles”, consists of two chapters. Chapter I, entitled “Operation of treaties in the event of armed conflicts”, includes articles 3 to 7 that constitute core provisions reflecting the foundations underlying the draft articles, which are to favour legal stability and continuity. They are reflective of the general principle that treaties are not, in and of themselves, terminated or suspended as a result of armed conflict. Articles 4 to 7 extrapolate, from the general principle in article 3, a number of basic legal propositions which are expository in character. Chapter II, entitled “Other provisions relevant to the operation of treaties”, comprises articles 8 to 13, which address a variety of ancillary aspects relevant to the application of treaties during armed conflict, drawing, where appropriate, upon corresponding provisions of the 1969 Vienna Convention. Finally, the incidence of armed conflict bears not only on the law of treaties but also on other fields of international law, including obligations of States under the Charter of the United Nations. Accordingly, Part Three, entitled “Miscellaneous”, includes draft articles 14 to 18 which deal with a number of miscellaneous issues with regard to such relationships through *inter alia* “without prejudice” or saving clauses. An indicative list of treaties whose subject matter involves an implication that they continue in operation, in whole or in part, during armed conflict, is to be found in the annex to the present draft articles, which is linked to article 7.

Article 2. Definitions

For the purposes of the present draft articles:

(a) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation, and includes treaties between States to which international organizations are also parties;

(b) “armed conflict” means a situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups.

Commentary

(1) Article 2 provides definitions for two key terms used in the draft articles.

(2) Subparagraph (a) defines the term “treaty” by reproducing the formulation found in article 2 (1) (a) of the 1969 Vienna Convention, to which it adds the words “and includes treaties between States to which international organizations are also parties”. This inclusion should not be regarded as an indication that the draft articles deal with the position of international organizations. As already explained in paragraph (4) of the commentary to article 1, the treaty relations of international organizations are excluded from the scope of the present draft articles, and the concluding phrase cited above was included to forestall an interpretation of the scope which would have excluded multilateral treaties that include international organizations among their parties.

(3) No particular distinction is drawn between bilateral and multilateral treaties.

(4) Subparagraph (b) defines the term “armed conflict” for the purposes of the present draft articles. It reflects the definition employed by the International Tribunal for the Former Yugoslavia in the *Tadić* decision,⁴⁰¹ except that the concluding words “or between such groups within a

⁴⁰¹ *Prosecutor v. Duško Tadić a/k/a “Dule”*, Case No. IT-94-1-AR72, Decision on the Defence Motion of Interlocutory Appeal on Jurisdiction, Decision of 2 October 1995, International Tribunal for the Former Yugoslavia, *Judicial Reports 1994–1995*, vol. I, p. 428, para. 70. In this decision, the Tribunal noted that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.

It should be noted that this definition differs from that adopted by the Institute of International Law in its resolution on “The effects of armed conflicts on treaties” adopted on 28 August 1985, at its Helsinki Session:

“Article 1

“For the purpose of this Resolution, the term ‘armed conflict’ means a state of war or an international conflict which involve armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between States parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict” (Institute of International Law, *Yearbook*, vol. 61, Part II, Session of Helsinki (1985), p. 278; available from www.idi-iiil.org, “Resolutions”). See also article 73 of the 1969 Vienna Convention, which refers to “the outbreak of hostilities between States”.

State” have been deleted since the present draft articles, under article 3, apply only to situations involving at least one State party to the treaty. The use of this definition is without prejudice to the rules of international humanitarian law, which constitute the *lex specialis* governing the conduct of hostilities.

(5) The definition applies to treaty relations between States parties to an armed conflict, as well as treaty relations between a State party to an armed conflict and a third State. The formulation of the provision and the above reference to “between a State party to an armed conflict and a third State” are intended to cover the effects of an armed conflict which may vary according to the circumstances. Accordingly, it extends to situations where the armed conflict only affects the operation of a treaty with regard to one of the parties to a treaty, and it recognizes that an armed conflict may affect the obligations of parties to a treaty in different ways. That phrase also serves to include within the scope of the draft articles the possible effect of non-international armed conflict on treaty relations of a State involved in such a conflict with another State. The emphasis of the effects is on the application or operation of the treaty rather than the treaty itself.

(6) It was also considered that it was desirable to include situations involving a state of armed conflict in the absence of armed actions between the parties.⁴⁰² Thus the definition includes the occupation of territory which meets with no armed resistance. In this context the provisions of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict are of considerable interest. In its relevant part, article 18 provides as follows:

Article 18. Application of the Convention

1. Apart from the provisions which shall take effect in time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one or more of them.

2. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

(7) Similar considerations militate in favour of the inclusion of a blockade even in the absence of armed actions between the parties.⁴⁰³

(8) Contemporary developments have blurred the distinction between international and non-international armed conflicts. Non-international armed conflicts have increased in number and are statistically more frequent than are international armed conflicts. In addition, many “civil wars” include “external elements”, such as the support and involvement by other States to varying degrees, supplying arms, providing training facilities and funds, and so forth. Non-international armed conflicts could affect the operation of treaties as much as international ones could. The draft articles therefore include the effect on treaties of non-international armed conflicts, which is indicated by the phrase “resort to armed force between governmental authorities and organized armed

⁴⁰² See A. D. McNair and A. D. Watts, *The Legal Effects of War*, 4th ed., Cambridge University Press, 1966, pp. 2–3.

⁴⁰³ *Ibid.*, pp. 20–21.

groups". At the same time, a threshold requirement is introduced by the inclusion of a qualifier to the effect that such a type of armed conflict needs to be "protracted" in order to constitute the type of conflict covered by the draft articles. As mentioned in paragraph (2) of the commentary to article 1, this threshold serves to mitigate the potentially destabilizing effect that the inclusion of internal armed conflicts within the scope of the present draft articles might have on the stability of treaty relations.

(9) The definition of "armed conflict" includes no explicit reference to "international" or "non-international" armed conflict. This is intended to avoid reflecting specific factual or legal considerations in the article, and, accordingly, running the risk of *a contrario* interpretations.

PART TWO

PRINCIPLES

CHAPTER I

OPERATION OF TREATIES IN THE EVENT OF ARMED CONFLICTS

Commentary

Articles 3 to 7 are central to the operation of the entire set of draft articles. Article 3 establishes their basic orientation, namely, that armed conflict does not, *ipso facto*, terminate or suspend the operation of treaties. Articles 4 to 7 seek to assist the determination of whether a treaty survives in an armed conflict. They are arranged in order of priority. Accordingly, the first step is to look at the treaty itself. Under article 4, an express provision within a treaty regulating its continuity in the context of an armed conflict would prevail. In the absence of an express provision, resort would next be had, under article 5, to the established international rules on treaty interpretation so as to ascertain the fate of the treaty in the event of an armed conflict. If no conclusive answer is yielded by the application of those two articles, the enquiry will shift to considerations extraneous to the treaty, and article 6 provides a number of contextual factors that may be relevant in making a determination one way or the other. Finally, the determination is further assisted by article 7, which refers to the indicative list of treaties, contained in the annex, the subject matter of which provides an indication that they continue in operation, in whole or in part, in time of armed conflict.

Article 3. General principle

The existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties:

- (a) as between States parties to the conflict;
- (b) as between a State party to the conflict and a State that is not.

Commentary

(1) Article 3 is of overriding significance. It establishes the general principle of legal stability and continuity. To that end, it incorporates the key developments embodied

by the Institute of International Law in its 1985 resolution: the existence of an armed conflict does not *ipso facto* cause the suspension or termination of a treaty. At the same time, it must be recognized that there is no easy way of reconciling the principle of stability, in article 3, with the fact that the existence of armed conflict may result in the termination or suspension of treaty relations. The Commission consciously decided not to adopt an affirmative formulation establishing a presumption of continuity, out of concern that such an approach would not necessarily reflect the prevailing position under international law, and because it implied a reorientation of the draft articles from providing for situations where treaties are assumed to continue, to attempting to indicate situations when such a presumption of continuity would not apply. The Commission was of the view that such a reorientation would be too complex and fraught with risks of unanticipated *a contrario* interpretations. It considered that the net effect of the present approach of seeking merely to dispel any assumption of discontinuity, together with several indications of when treaties are assumed to continue, was to strengthen the stability of treaty relations.

(2) The formulation is based on article 2 of the resolution adopted by the Institute of International Law in 1985.⁴⁰⁴ The principle has been commended by a number of authorities. Oppenheim asserts that "the opinion is pretty general that war by no means annuls every treaty".⁴⁰⁵ McNair states that "[i]t is thus clear that war does not *per se* put an end to pre-war treaty obligations in existence between opposing belligerents".⁴⁰⁶ During the work of the Institute of International Law in 1983, Briggs said that

[o]ur first—and most important—rule is that the mere outbreak of armed conflict (whether declared war or not) does not *ipso facto* terminate or suspend treaties in force between parties to the conflict. This is established international law.⁴⁰⁷

The same conclusion results from the case law. While the British High Court of Admiralty found in 1817, in "*The Louis*" case, that "[t]reaties ... are perishable things, and their obligations are dissipated by the first hostility",⁴⁰⁸ other judgments are less categorical and, as is now provided for by article 3 of the present draft articles, hold that the existence of armed conflict does not, in and of itself, do away with treaties or suspend them. This is, in particular, the conclusion reached by United States courts, the leading case being that of *Society for the Propagation*

⁴⁰⁴ Article 2 of the resolution of the Institute of International Law reads as follows: "The outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties in force between the parties to the armed conflict" (Institute of International Law, *Yearbook*, vol. 61, Part II (see footnote 401 above), p. 280).

⁴⁰⁵ L. Oppenheim, *International Law: a Treatise*, vol. II, *Disputes, War and Neutrality*, 7th ed., H. Lauterpacht (ed.), London, Longman, 1952, p. 302.

⁴⁰⁶ A. D. McNair, *The Law of Treaties*, Oxford, Clarendon, 1961, p. 697.

⁴⁰⁷ Institute of International Law, *Yearbook*, vol. 61, Part I, Session of Helsinki (1985), pp. 8–9; see also H. Briggs (ed.), *The Law of Nations: Cases, Documents and Notes*, 2nd ed., London, Stevens and Sons, 1953, p. 938.

⁴⁰⁸ 15 December 1817, *British International Law Cases*, vol. 3, *Jurisdiction*, p. 691, at p. 708.

of the *Gospel v. Town of New Haven* (1823), where the Supreme Court said that

treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, suspended while it lasts.⁴⁰⁹

A more recent case is that of *Karnuth v. United States* (1929), where the United States Supreme Court, dealing with article III of the Treaty of Amity, Commerce, and Navigation of 1794 between Britain and the United States,⁴¹⁰ confirmed and developed its earlier ruling:

The law of the subject is still in the making, and, in attempting to formulate principles at all approaching generality, courts must proceed with a good deal of caution. But there seems to be fairly common agreement that, at least, the following treaty obligations remain in force: stipulations in respect of what shall be done in a state of war; treaties of cession, boundary, and the like; provisions giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other; and, generally, provisions which represent completed acts. On the other hand, treaties of amity, of alliance, and the like, having a political character, the object of which "is to promote relations of harmony between nation and nation", are generally regarded as belonging to the class of treaty stipulations that are absolutely annulled by war.⁴¹¹

Although the above passages could suggest that a treaty may be suspended as long as the war lasts, this is no longer the line followed. The new line, rather, is to limit termination to "political" treaties, treaties incompatible with the existence of hostilities and treaties the maintenance of which is "incompatible with national policy in time of war".⁴¹²

While the leading judgments on this matter are not always models of clarity, it has become evident that, under contemporary international law, the existence of an armed conflict does not *ipso facto* put an end to or suspend existing agreements, although a number of them may indeed lapse or be suspended on account of their nature, commercial treaties for instance.⁴¹³

(3) The reference in the *chapeau* to the "existence" of an armed conflict indicates that the draft articles cover the effect on treaties not only at the outbreak of the conflict, but also throughout its duration.

(4) Subparagraphs (a) and (b) establish the various hypotheses of parties covered by the present draft articles,

⁴⁰⁹ *Society for the Propagation of the Gospel v. Town of New Haven*, AILC 1783–1968, vol. 19, pp. 41 *et seq.*, at p. 48, 21 U.S. (8 Wheat.) 464.

⁴¹⁰ Treaty of Amity, Commerce, and Navigation between His Britannick Majesty and the United States of America (Jay Treaty), signed at London on 19 November 1794, H. Miller (ed.), *Treaties and Other International Acts of the United States of America*, vol. 2, Washington, D.C., United States Government Printing Office, 1931, document No. 16, pp. 245 *et seq.*, at pp. 246–247 (art. 3).

⁴¹¹ *Karnuth v. United States*, AILC 1783–1968, vol. 19, p. 49, at pp. 52–53.

⁴¹² *Techt v. Hughes*, United States, Court of Appeals of New York, AILC 1783–1968, vol. 19, pp. 95 *et seq.* (see also ILR, vol. 1, Case No. 271); and *Clark v. Allen*, United States, Supreme Court, AILC 1783–1968, vol. 19, pp. 70 *et seq.*, at pp. 78–79.

⁴¹³ *Russian–German Commercial Treaty* case, German *Reichsgericht*, 23 May 1925, ADPILC 1925–1926, Case No. 331, p. 438. See also *Rosso v. Marro*, France, *Tribunal civil de Grasse*, 18 January 1945, ADPILC 1943–1945, Case No. 104; and *Bussi v. Menetti*, France, *Cour de cassation (Chambre sociale)*, 5 November 1943, *ibid.*, Case No. 103.

as described in paragraph (2) of the commentary to article 1. The article is therefore to be distinguished from that adopted by the Institute of International Law in that, while the Institute's resolution is concerned with the fate of treaties in force between States parties to the armed conflict, the present draft articles cover the additional hypotheses discussed in the context of article 1.

(5) The possibility of including withdrawal from a treaty as one of the consequences of an outbreak of armed conflict, alongside suspension or termination, in article 3, was considered but rejected since withdrawal involves a conscious decision by a State, whereas article 3 deals with the automatic application of law.

Article 4. Provisions on the operation of treaties

Where a treaty itself contains provisions on its operation in situations of armed conflict, those provisions shall apply.

Commentary

(1) Article 4 recognizes the possibility of treaties expressly providing for their continued operation in situations of armed conflict. It lays down the general rule that a treaty, where it so provides, continues to operate in situations of armed conflict. The effect of this rule is that, in principle, the first step of the inquiry should be to establish whether the treaty so provides, since it will, depending on the terms of the provision and its scope, settle the question of continuity. This is indicated by placing article 4 immediately after article 3.

(2) The Commission considered whether to include the qualifier "expressly", but decided against doing so as it regarded it as being redundant. Furthermore, it was found that such a qualifier could be unnecessarily limiting, since there were treaties which, although not expressly providing therefor, continued in operation by implication through the application of articles 6 and 7.

(3) On a strict view, this article may seem redundant, but it was generally recognized that such a provision was justified in the cause of expository clarity.

Article 5. Application of rules on treaty interpretation

The rules of international law on treaty interpretation shall be applied to establish whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict.

Commentary

(1) Article 5 follows from article 4 in that it represents the next stage of the inquiry if the treaty itself does not contain a provision regulating continuity or if the application of article 4 proves inconclusive. It is also the second provision, in sequence, focusing on an investigation internal to the treaty as distinct from the consideration of factors external to the treaty, referred to in article 6, which might provide an indication on the treaty's susceptibility to termination or withdrawal or suspension of operation. The provision is intentionally drafted in an open-ended manner ("to establish whether"), so as to anticipate the possibility of applying articles 6 and 7 if the process of interpreting the treaty, too, proves inconclusive.

(2) Article 5 thus requires that, in the absence of a clear indication in the text of the treaty itself, one should seek to ascertain its meaning through the application of the established rules of international law on treaty interpretation, by which the Commission chiefly had in mind articles 31 and 32 of the 1969 Vienna Convention. The Commission preferred to retain a more general reference to the “rules of international law”, however, out of recognition that not all States are parties to the 1969 Vienna Convention, and in deference to its general policy of not including in its texts cross references to other legal instruments.

(3) The Commission rejected the inclusion of a reference to the intention of the parties to the treaty. This idea had proved controversial both among Governments and in the Commission itself. It was acknowledged that the drafters of treaties rarely provide an indication of their intention regarding the effect of the existence of an armed conflict on the treaty. Wherever such an intention is discernible, it would most likely be through a provision of the treaty—a practice worth encouraging. Such a case would be covered by article 4. A reference to the intention of the parties could also have been interpreted as a reintroduction of a subjective test, despite the fact that the United Nations Conference on the Law of Treaties had clearly opted for an objective test focusing on the “meaning” of the treaty. Nonetheless, it is acknowledged that the criterion of the intention of the parties is implicit in the process of making the determinations set out in article 31 of the 1969 Vienna Convention.

(4) The title of article 5 is formulated in such a manner as to confirm that the provision is not concerned with treaty interpretation generally, but rather with specific situations where the existing rules on treaty interpretation are to be applied. As with article 4, the provision is strictly not necessary as one would typically seek to interpret the treaty in any event. Nonetheless, the provision was included for expository clarity.

Article 6. Factors indicating whether a treaty is susceptible to termination, withdrawal or suspension

In order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, regard shall be had to all relevant factors, including:

(a) the nature of the treaty, in particular its subject matter, its object and purpose, its content and the number of parties to the treaty; and

(b) the characteristics of the armed conflict, such as its territorial extent, its scale and intensity, its duration and, in the case of non-international armed conflict, also the degree of outside involvement.

Commentary

(1) Article 6 derives from article 3. The existence of an armed conflict does not *ipso facto* put an end to or suspend the operation of the treaty. It is another key provision of the present draft articles and follows, in sequence, the investigation undertaken on the basis of the treaty itself, pursuant to articles 4 and 5. If the analysis under

those provisions proves inconclusive, article 6 will apply. The article highlights certain criteria, including criteria external to the treaty, which may assist in ascertaining whether the treaty is susceptible to termination, withdrawal or suspension.

(2) With regard to the *chapeau* of the provision, and in contrast to article 3, withdrawal from treaties as one of the possibilities open to States parties to an armed conflict is included as it provides an appropriate context for its inclusion in subsequent ancillary draft articles. The article enumerates, in subparagraphs (a) and (b), two categories of factors which may be relevant in ascertaining its susceptibility to termination, withdrawal or suspension in the event of an armed conflict. This indication of factors is not exhaustive, as is confirmed by the concluding clause of the *chapeau*: “regard shall be had to all relevant factors, including”. This suggests (a) that there may be factors others than those listed in the subparagraphs which may be relevant in the context of a particular treaty or armed conflict; and (b) that not all factors are equally relevant in all cases—some may be more relevant than are others, depending on the treaty or the conflict. As such, the factors in subparagraphs (a) and (b) of the article are to be viewed as a mere mention of the factors that could prove relevant in particular cases, depending on the circumstances.

(3) Subparagraph (a) suggests a series of factors pertaining to the nature of the treaty, particularly its subject matter, its object and purpose, its content and the number of parties to the treaty. While a measure of overlap exists with regard to the inquiry undertaken under article 5, for example, the object and purpose of the treaty, when taken in combination with other factors such as the number of parties, may open up a new perspective. Although the Commission did not find it practicable to suggest more specific guidelines on how to assess the nature, subject matter, object and purpose, and content of a treaty in the context of an armed conflict, given the wide variety of treaties, it has suggested a list of categories of treaties in the annex linked to article 7 which exhibit a high likelihood of continued applicability, in whole or in part, during armed conflict. As regards the number of parties, no definitive position is being taken except to suggest that the potential effect on treaties with numerous parties, which are not parties to the armed conflict, should, as a matter of policy, be mitigated.

(4) Subparagraph (b) provides a second set of suggested factors, this time pertaining to the characteristics of the armed conflict. Here, the suggested factors are the territorial extent of the conflict (and whether it takes place on land or at sea, which may be relevant, for example, when it comes to ascertaining the impact of an armed conflict on air transportation agreements) and its scale, intensity and duration. In addition, given the scope of the draft articles, which includes conflicts of a non-international character, mention is made of “the degree of outside involvement” in such a conflict. This latter element establishes an additional threshold intended to limit the possibility for States to assert the termination or suspension of the operation of a treaty, or a right of withdrawal, on the basis of their participation in such types of conflicts. In other words, this element serves as a factor of control to favour the stability

of treaties: the greater the involvement of third States in a non-international armed conflict, the greater the possibility that treaties will be affected, and vice versa.

(5) The question of the legality of the use of force as one of the factors to be considered under article 6 was examined, but it was decided to resolve the matter in the context of articles 14 to 16.

(6) It cannot be assumed that the effect of armed conflict between parties to the same treaty would be the same as its effect on treaties between a party to an armed conflict and a third State.

Article 7. Continued operation of treaties resulting from their subject matter

An indicative list of treaties the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict, is to be found in the annex to the present draft articles.

Commentary

Article 7, which is expository in character, is linked to article 6, subparagraph (a), in that it further elaborates on the element of the “subject matter” of a treaty which may be taken into account when ascertaining susceptibility to termination, withdrawal or suspension of operation in the event of an armed conflict. The provision establishes a link to the annex, which contains an indicative list of categories of treaties involving an implication that they continue in operation, in whole or in part, during armed conflict. The commentary relating to each category of treaties will be found in the annex at the end of the present draft articles.

CHAPTER II

OTHER PROVISIONS RELEVANT TO THE OPERATION OF TREATIES

Article 8. Conclusion of treaties during armed conflict

1. The existence of an armed conflict does not affect the capacity of a State party to that conflict to conclude treaties in accordance with international law.

2. States may conclude agreements involving termination or suspension of a treaty or part of a treaty that is operative between them during situations of armed conflict, or may agree to amend or modify the treaty.

Commentary

(1) Article 8 is in line with the basic policy of the draft articles, which seek to ensure the legal security and continuity of treaties. Both provisions reflect the fact that States may, in times of armed conflict, continue to have dealings with one another.

(2) Paragraph 1 of article 8 reflects the basic proposition that an armed conflict does not affect the capacity of a State party to that conflict to enter into treaties. While the

provision includes a general reference to “international law”, the Commission understood this as referring to the international rules on the capacity of States to conclude treaties reflected in the 1969 Vienna Convention.

(3) While, technically speaking, paragraph 1 deals with the effect of armed conflict on the capacity of States to enter into agreements, as opposed to the effect on treaties themselves, it was thought useful to retain it for expository purposes. The provision refers to the capacity “of a State party to that conflict” so as to indicate that there may be only one State party to the armed conflict, as in situations of non-international armed conflict.

(4) Paragraph 2 deals with the practice of States parties to an armed conflict expressly agreeing, during the conflict, either to suspend or to terminate a treaty which is operative between them at the time. As McNair remarked, “There is no inherent juridical impossibility ... in the formation of treaty obligations between two opposing belligerents during war”.⁴¹⁴ Such agreements have been concluded in practice, and a number of writers have referred to them. Partly echoing McNair, Fitzmaurice observed in his Hague lectures that

there is no inherent impossibility in treaties being actually concluded between two belligerents during the course of a war. This is indeed what happens when, for instance, an armistice agreement is concluded between belligerents. It also occurs when belligerents conclude special agreements for the exchange of personnel, or for the safe conduct of enemy personnel through their territory, and so on. These agreements may have to be concluded through the medium of a third neutral State or protecting power, but once concluded they are valid and binding international agreements.⁴¹⁵

(5) The Commission decided not to make reference to the “lawfulness” or “validity” of the agreements contemplated in paragraph 2, preferring to leave such matters to the operation of the general rules of international law, including those reflected in the 1969 Vienna Convention.

(6) Reference is made, at the end of paragraph 2, to the possibility of agreeing on the amendment or modification of the treaty. The Commission had in mind the position of States parties to the treaty which are not parties to the armed conflict. Such States could conceivably not be in a position to justify termination or suspension of operation, thus only leaving them the possibility to seek the modification or amendment of the treaty.

Article 9. Notification of intention to terminate or withdraw from a treaty or to suspend its operation

1. A State intending to terminate or withdraw from a treaty to which it is a party, or to suspend the operation of that treaty, as a consequence of an armed conflict shall notify the other State party or States parties to the treaty, or its depositary, of such intention.

2. The notification takes effect upon receipt by the other State party or States parties, unless it provides for a subsequent date.

⁴¹⁴ McNair, *The Law of Treaties* (footnote 406 above), p. 696.

⁴¹⁵ G. G. Fitzmaurice, “The juridical clauses of the peace treaties”, *Recueil des cours de l'Académie de droit international de La Haye, 1948-II*, vol. 73, p. 309.

3. Nothing in the preceding paragraphs shall affect the right of a party to object within a reasonable time, in accordance with the terms of the treaty or other applicable rules of international law, to the termination of or withdrawal from the treaty, or suspension of its operation.

4. If an objection has been raised in accordance with paragraph 3, the States concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

5. Nothing in the preceding paragraphs shall affect the rights or obligations of States with regard to the settlement of disputes insofar as they have remained applicable.

Commentary

(1) Article 9 establishes a basic duty of notification of termination, withdrawal or suspension of the treaty. Its text is based on that of article 65 of the 1969 Vienna Convention, but streamlined and adjusted to the context of armed conflict. The intention behind article 9 is to establish a basic duty of notification, while recognizing the right of another State party to the treaty to raise an objection, which would remain unresolved, however, until a solution is reached through any one of the means listed in Article 33 of the Charter of the United Nations.

(2) Paragraph 1 formulates the basic duty for a State intending to terminate or withdraw from a treaty, or to suspend its operation, to notify that other State party or States parties to the treaty, or its depositary, of its intention. Such notification is a unilateral act through which a State, upon the existence of an armed conflict, informs the other contracting State or States, or the depositary if there is one, of its intention to terminate the treaty, to withdraw from it or to suspend its operation. Performance of this unilateral act is not required when the State in question does not wish to terminate or withdraw from the treaty or to suspend its operation. This is a consequence of the general rule set out in article 3, which provides that the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties.

(3) Paragraph 2 establishes the point in time when the notification takes effect: upon its receipt by the other State party or States parties, unless a later date is provided for in the notification. Contrary to paragraph 1, no reference is made to the date of receipt by the depositary. There are treaties which do not have depositaries. Accordingly, the possibility of notifying either the States Parties or the depositary had to be provided for in paragraph 1. However, as regards the taking effect of the notification, what is important is the moment at which the other State party or States parties receive the notification and not the moment at which the depositary receives it. Nonetheless, for those treaties which do have depositaries through whom the notification is made, the notification takes effect when the State for which it is intended receives it from the depositary.

(4) The purpose of paragraph 3 is to preserve the right that may exist under a treaty or general international

law to object to the proposed termination, suspension or withdrawal of the treaty. Hence, the objection is to the intention to terminate, suspend or withdraw, which is communicated by the notification envisaged in paragraph 1. While the Commission acknowledged that it was somewhat unrealistic to impose time limits in the context of armed conflict, especially in the light of the difficulties to establish a definitive point in time from which such limit would run, it was nonetheless of the view that the lack of a deadline would undermine the efficacy of the provision and could give rise to disputes as to the legal consequences of the notifications envisaged in paragraph 1. With both considerations in mind, the Commission decided against indicating a specific time period and instead opted for a “reasonable” period (“within a reasonable time”). What is “reasonable” in relation to a particular treaty and conflict would be the subject of determination by the dispute-settlement procedure envisaged in paragraph 4 and would depend on the circumstances of the case, taking into account, *inter alia*, the factors enumerated in article 6.

(5) Paragraph 4 establishes the procedural requirement that, in the event of an objection having been raised, pursuant to paragraph 3, the States concerned would need to seek the peaceful settlement of their dispute through the means listed in Article 33 of the Charter of the United Nations, which provides as follows:

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

(6) A notification made by a State party under paragraph 1 takes effect when it has been received by the other State party or States parties, unless the notification provides for a subsequent date (para. 2). If no objection is received within a reasonable period of time, the notifying State may take the measure indicated in the notification (para. 3). If an objection is received, the issue will remain open between the States concerned until there is a diplomatic or legal settlement pursuant to paragraph 4.

(7) Paragraph 5 contains a saving clause preserving the rights or obligations of States in matters of dispute settlement, to the extent that they have remained applicable in the event of an armed conflict. The Commission considered it useful to include this provision so as to discourage any interpretation of paragraph 4 as implying that States involved in an armed conflict operate from a clean slate when it comes to the peaceful settlement of disputes. The adoption of this provision is also in line with the inclusion, in paragraph (k) of the annex, of treaties relating to the settlement of international disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement.

Article 10. Obligations imposed by international law independently of a treaty

The termination of or the withdrawal from a treaty, or the suspension of its operation, as a consequence of an armed conflict, shall not impair in any way the duty

of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of that treaty.

Commentary

(1) Articles 10 to 12 seek to establish a modified regime modelled on articles 43 to 45 of the 1969 Vienna Convention. Article 10 has its roots in article 43 of that Convention. Its purpose is to preserve the requirement to fulfil an obligation under general international law in cases where the same obligation appears in a treaty which has been terminated or suspended, or from which the State party concerned has withdrawn as a consequence of an armed conflict. This latter point, namely, the linkage to the armed conflict, has been added in order to put the provision into its proper context for the purposes of the present draft articles.

(2) The principle set out in this article seems self-evident: customary international law continues to apply independently of treaty obligations. In a famous *dictum* in the *Military and Paramilitary Activities in and against Nicaragua* case, the International Court of Justice stated as follows:

The fact that the above-mentioned principles [of general and customary international law], recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions.⁴¹⁶

Article 11. Separability of treaty provisions

Termination, withdrawal from or suspension of the operation of a treaty as a consequence of an armed conflict shall, unless the treaty otherwise provides or the parties otherwise agree, take effect with respect to the whole treaty except where:

(a) the treaty contains clauses that are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

Commentary

(1) Article 11 deals with the separability of provisions of treaties affected by an armed conflict. This provision plays a key role in the present draft articles by “moderating” the impact of the operation of articles 4 to 7 by providing for the possibility of differentiated effects on a treaty.

⁴¹⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 1984, p. 392, at p. 424, para. 73; see also Judge Morelli’s dissenting opinion in *North Sea Continental Shelf, Judgment*, I.C.J. Reports 1969, p. 3, at p. 198.

(2) The present provision is based on its counterpart in article 44 of the 1969 Vienna Convention. Subparagraphs (a) to (c) reproduce verbatim the text of their equivalents in that Convention.

(3) Regarding the requirement that the continued performance of the remainder of the treaty not be “unjust”, the Commission recalled that this provision was introduced into article 44 of the 1969 Vienna Convention at the behest of the United States of America. As Mr. Kearney, the representative of the United States, explained,

It was possible that a State claiming invalidity of part of a treaty might insist on termination of some of its provisions, even though continued performance of the remainder of the treaty in the absence of those provisions would be very unjust to the other parties.⁴¹⁷

In other words, as is the case with article 44, paragraph 3 (c), of the 1969 Vienna Convention, subparagraph (c) of draft article 11 is a general clause that may be invoked if the separation of treaty provisions—to satisfy the wishes of the requesting party—would create a significant imbalance to the detriment of the other party or parties. It thus complements subparagraphs (a) (separability with regard to application) and (b) (acceptance of the clause or clauses whose termination or invalidity is requested was not an essential basis of the consent of the other party or parties to be bound by the treaty).

Article 12. Loss of the right to terminate or withdraw from a treaty or to suspend its operation

A State may no longer terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty remains in force or continues in operation; or

(b) it must by reason of its conduct be considered as having acquiesced in the continued operation of the treaty or in its maintenance in force.

Commentary

(1) Article 12 is based on the equivalent provision of article 45 of the 1969 Vienna Convention. It deals with the loss of the right to terminate a treaty, to withdraw from it or to suspend its operation. It amounts to a recognition that a minimum of good faith must prevail even in times of armed conflict.

(2) To make it clear that article 12 is to apply in the context of an armed conflict, an appropriate reference has been added in the *chapeau*. The Commission understood the part of the sentence referring to “becoming aware of the

⁴¹⁷ Statement made by Mr. Kearney, *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.39/11)*, United Nations publication, Sales No. E.68.V.7), 41st meeting of the Committee of the Whole, 27 April 1968, para. 17. For the proposal by the United States, see A/CONF.39/C.1/L.260, which was reproduced in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference (A/CONF.39/11/Add.2)*, United Nations publication, Sales No. E.70.V.5), para. 369.

facts”, drawn from article 45 of the 1969 Vienna Convention, as relating not only to the existence of the armed conflict but also to the practical consequences thereof in terms of the possible effect of the conflict on the treaty.

(3) It is acknowledged that the situation pertaining to a treaty in the context of an armed conflict can only be assessed once the conflict has produced its effect on the treaty—which may not have been the case at its outbreak. The most that can be said is that States are encouraged to refrain from undertaking the actions referred to in this article until the effects of the conflict on the treaty have become reasonably clear.

(4) The reference in the title to the various actions which can be taken (“to terminate or withdraw from a treaty or to suspend its operation”) is to be understood as a reference to the preceding articles which set out what rights a State would have and the applicable conditions.

Article 13. Revival or resumption of treaty relations subsequent to an armed conflict

1. Subsequent to an armed conflict, the States parties may regulate, on the basis of agreement, the revival of treaties terminated or suspended as a consequence of the armed conflict.

2. The resumption of the operation of a treaty suspended as a consequence of an armed conflict shall be determined in accordance with the factors referred to in article 6.

Commentary

(1) Article 13 concerns the question of the revival (para. 1) or resumption (para. 2) of treaty relations subsequent to an armed conflict.

(2) Paragraph 1 formulates the general rule that, whether a treaty has been terminated or suspended in whole or in part, the States parties may, if they wish, conclude an agreement to revive or render operative even agreements or parts thereof that have ceased to exist. This is a consequence of the freedom to conclude treaties and cannot be undertaken unilaterally. Accordingly, the paragraph deals with situations where the status of “pre-war” agreements is ambiguous and where it is necessary to draw an overall assessment of the treaty picture. Such an assessment may, in practice, involve the revival of treaties the status of which was ambiguous or which had been treated as terminated or suspended as a consequence of an armed conflict. Specific agreements regulating the revival of such treaties are not prejudiced by the present provision. An agreement of this type can be found, for example, in article 44 of the Treaty of Peace with Italy, concluded on 10 February 1947 between the Allied Powers and Italy. That article provides that each Allied Power may, within a time limit of six months, notify Italy of the treaties it wishes to revive.

(3) Paragraph 2, which deals with the resumption of treaties that were suspended as a consequence of an armed conflict, is narrower: it applies only to treaties that have been suspended as a consequence of the application of article 6.

Since, in such a case, the treaty has been suspended at the initiative of one State party—also a party to the armed conflict—on the basis of the factors mentioned in article 6, those factors cease to apply when the armed conflict is over. As a result, the treaty can become operative once again, unless other causes of termination, withdrawal or suspension have emerged in the meantime (in accordance with article 18), or unless the parties have agreed otherwise. Resumption may be called for by one or several States parties, as it is no longer a matter of agreement between States. The result of such an initiative will be determined in accordance with the factors listed in article 6.

(4) The question of when a treaty is resumed should be dealt with on a case-by-case basis.

PART THREE

MISCELLANEOUS

Article 14. Effect of the exercise of the right to self-defence on a treaty

A State exercising its inherent right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty to which it is a party insofar as that operation is incompatible with the exercise of that right.

Commentary

(1) Article 14 is the first of three articles which are based on the relevant resolution of the Institute of International Law adopted at its Helsinki session in 1985.⁴¹⁸ It reflects the need for a clear recognition that the article does not create advantages for an aggressor State. The same policy imperative is reflected in articles 15 and 16, which complement the present provision.

(2) The article covers the situation of a State exercising its right of individual or collective self-defence in accordance with the Charter of the United Nations. Such State is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right. The article has to be understood against the background of the application of the regime under the Charter of the United Nations, as contemplated in articles 15 and 16. It accordingly also aims at preventing impunity for the aggressor and any imbalance between the two sides, which would undoubtedly emerge if the aggressor, having disregarded the prohibition on the use of force set out in Article 2, paragraph 4, of the Charter of the United Nations, were able, at the same time, to require the strict application of the existing law and thus deprive the attacked State, in whole or in part, of its right to defend itself. At the

⁴¹⁸ In particular, article 7 of the resolution of the Institute of International Law reads as follows:

“A State exercising its rights of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right, subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor” (Institute of International Law, *Yearbook*, vol. 61, Part II (see footnote 401 above), p. 247).

same time, article 14 is subject to the application of articles 6 and 7: a consequence that would not be tolerated in the context of armed conflict can equally not be accepted in the context of self-defence. For example, the right provided for does not prevail over treaty provisions that are designed to apply in armed conflict, in particular the provisions of treaties on international humanitarian law and on the law of armed conflict, such as the 1949 Geneva Conventions for the protection of war victims.

(3) While the provision envisages the suspension of agreements between the aggressor and the victim, it does not exclude cases—perhaps less likely to occur—of treaties between the State that is the victim of the aggression and third States. The article does not, however, concern non-international armed conflicts since it refers to self-defence within the meaning of Article 51 of the Charter of the United Nations. The right envisaged in article 14 is limited to suspension and does not provide for termination.

(4) No attempt has been made to prescribe a comprehensive treatment of the legal consequences of the exercise of the inherent right to self-defence. Article 14 is, therefore, without prejudice to the applicable rules of international law concerning issues of notification, opposition, time limits and peaceful settlement.

Article 15. Prohibition of benefit to an aggressor State

A State committing aggression within the meaning of the Charter of the United Nations and resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict that results from the act of aggression if the effect would be to the benefit of that State.

Commentary

(1) Article 15 prohibits an aggressor State from benefiting from the possibility of termination of or withdrawal from a treaty, or of suspension of its operation, as a consequence of the armed conflict that this State has provoked. Its formulation is based on article 9 of the resolution of the Institute of International Law,⁴¹⁹ with some adjustments, particularly to include the possibility of withdrawal from a treaty and to specify that the treaties dealt with are those that are terminated, withdrawn from or suspended *as a consequence* of the armed conflict in question.

(2) The characterization of a State as an aggressor will depend, fundamentally, on the definition given to the word “aggression” and, in terms of procedure, on the Security Council. If the Council determines that a State wishing to terminate or withdraw from a treaty or suspend its

⁴¹⁹ Article 9 of the resolution of the Institute of International Law reads as follows:

“A State committing aggression within the meaning of the Charter of the United Nations and resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or suspend the operation of a treaty if the effect would be to benefit that State” (Institute of International Law, *Yearbook*, vol. 61, Part II (see footnote 401 above), p. 248).

operation—which presupposes that the case has been referred to the Council—is an aggressor, that State may not take those measures or, in any case, may do so only insofar as it does not benefit from them; this latter point may be assessed either by the Security Council or by a judge or arbitrator. In the absence of such a determination, the State may act under article 4 and the following articles.

(3) From the moment of the commission of the aggression, the State characterized as an aggressor by the attacked State may no longer, under article 9, claim the right to terminate a treaty, to withdraw from it or to suspend its operation, unless it derives no benefit from doing so. It may claim the right anyway, arguing that no aggression has been committed or that its adversary is the aggressor. The situation will therefore remain in limbo until the second stage, which is the determination by the Security Council. That action determines what follows: If the State initially considered to be the aggressor turns out not to be, or if it does not benefit from the aggression, the notification that it may have made under article 9 will be assessed in accordance with the ordinary criteria established in the draft articles. If, on the other hand, the State is confirmed as the aggressor and has benefited from setting aside its treaty obligations, such criteria are no longer applicable when it comes to determining the legitimacy of termination, withdrawal or suspension. In other words, when a State gives notification of termination of or withdrawal from the treaty, or of suspension of its operation, and is then determined to be an aggressor, it will be necessary to establish whether it benefits from the termination, withdrawal or suspension. If it does, the notification has no effect unless the treaty in question sets out particular rules in that regard.

(4) The words “as a consequence of an armed conflict that results from the act of aggression” serve to limit the characterization as an aggressor State to the conflict in question, thus avoiding an interpretation that that State will retain such designation even in the context of entirely different conflicts with the same opposing State or even with a third State.

(5) The Commission decided not to go beyond a formula referring to the resort to armed force in violation of the Charter of the United Nations.

(6) The title of the article emphasizes the fact that the provision deals less with the question of the commission of aggression and more with the possible benefit in terms of the termination of, withdrawal from or suspension of a treaty that might be derived from an aggressor State from the armed conflict in question.

Article 16. Decisions of the Security Council

The present draft articles are without prejudice to relevant decisions taken by the Security Council in accordance with the Charter of the United Nations.

Commentary

(1) Article 16 seeks to preserve the legal effects of decisions of the Security Council taken under the Charter of the United Nations. While the Council’s actions under Chapter VII of the Charter of the United Nations are

arguably the most relevant in the context of the present draft articles, the Commission recognized that the actions of the Council taken under other provisions of the Charter of the United Nations, such as Article 94 on the enforcement of judgments of the International Court of Justice, may be equally relevant. Article 16 has the same function as article 8 of the 1985 resolution of the Institute of International Law.⁴²⁰ The Commission decided to present the provision in the form of a “without prejudice” clause instead of the formulation adopted by the Institute which was cast in more affirmative terms.

(2) Article 103 of the Charter of the United Nations provides that, in the event of a conflict between the obligations of the Members of the United Nations under the Charter of the United Nations and their obligations under any other international agreement, their obligations under the Charter of the United Nations shall prevail. In addition to the rights and obligations contained in the Charter of the United Nations itself, Article 103 applies to obligations flowing from binding decisions taken by United Nations bodies. In particular, the primacy of Security Council decisions under Article 103 has been widely accepted in practice as well as in writings on international law.⁴²¹

(3) Article 16 leaves open the variety of questions that may arise as a consequence of Article 103.

Article 17. Rights and duties arising from the laws of neutrality

The present draft articles are without prejudice to the rights and duties of States arising from the laws of neutrality.

Commentary

(1) Article 17 is another “without prejudice” clause, which seeks to preserve the rights and duties of States arising from the laws of neutrality. This wording has been preferred to a more specific reference to the “status of third States as neutrals”. It was felt that the reference to “neutrals” was, as a matter of drafting, imprecise, as it was not clear whether it referred to formal neutrality or mere non-belligerency. The present provision is accordingly more of a saving clause.

(2) As a status derived from a treaty, neutrality becomes fully operational only at the outbreak of an armed conflict between third States; it is therefore clear that it survives the conflict since it is precisely in periods of conflict that it is intended to apply. Moreover, the status of neutrality is not always derived from a treaty. The question of the

⁴²⁰ Article 8 of the resolution of the Institute of International Law reads as follows:

“A State complying with a resolution by the Security Council of the United Nations concerning action with respect to threats to the peace, breaches of the peace or acts of aggression shall either terminate or suspend the operation of a treaty which would be incompatible with such resolution” (Institute of International Law, *Yearbook*, vol. 61, Part II (see footnote 401 above), p. 248).

⁴²¹ See, in particular, the report of the Study Group of the Commission on fragmentation of international law (A/CN.4/L.682 and Corr.1 and Add.1) (mimeographed; available from the Commission’s website, documents of the fifty-eighth session; the final text is published as an annex to *Yearbook ... 2006*, vol. II (Part One), paras. 328–340).

applicability of the laws of neutrality does not generally arise in terms of the survival of the status of neutrality but in relation to the specific rights and duties of a State that is neutral and remains neutral; pursuant to article 17, these rights and duties prevail over the rights and duties arising from the present draft articles.

Article 18. Other cases of termination, withdrawal or suspension

The present draft articles are without prejudice to the termination, withdrawal or suspension of treaties as a consequence of, *inter alia*: (a) a material breach; (b) supervening impossibility of performance; or (c) a fundamental change of circumstances.

Commentary

(1) Article 18 preserves the possibility of termination or withdrawal of a treaty, or of suspension thereof, arising from the application of other rules of international law, in the case of the examples drawn from the 1969 Vienna Convention, in particular articles 55 to 62. The reference to “Other” in the title is intended to indicate that these grounds are additional to those in the present draft articles. The words “*inter alia*” seek to clarify that the grounds listed in article 18 are non-exhaustive.

(2) While this provision may be thought to state the obvious, the clarification was considered useful. It was to dispel the possible implication that the occurrence of an armed conflict gives rise to a *lex specialis* precluding the operation of other grounds for termination, withdrawal or suspension.

ANNEX

INDICATIVE LIST OF TREATIES REFERRED TO IN ARTICLE 7

- (a) **Treaties on the law of armed conflict, including treaties on international humanitarian law;**
- (b) **treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries;**
- (c) **multilateral law-making treaties;**
- (d) **treaties on international criminal justice;**
- (e) **treaties of friendship, commerce and navigation and agreements concerning private rights;**
- (f) **treaties for the international protection of human rights;**
- (g) **treaties relating to the international protection of the environment;**
- (h) **treaties relating to international watercourses and related installations and facilities;**
- (i) **treaties relating to aquifers and related installations and facilities;**

(j) treaties which are constituent instruments of international organizations;

(k) treaties relating to the international settlement of disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement;

(l) treaties relating to diplomatic and consular relations.

Commentary

(1) The present annex contains an indicative list of categories of treaties the subject matter of which carries an implication that they continue in operation, in whole or in part, during armed conflict. It is linked to article 7 and was included, as has been explained in the commentary to that provision, to further elaborate on the element of “subject matter” of treaties contained among the factors, listed in subparagraph (a) of article 6, to be taken into account when ascertaining the susceptibility of a treaty to termination, withdrawal or suspension in the event of an armed conflict.

(2) The effect of such an indicative list is to create a set of rebuttable presumptions based on the subject matter of those treaties: the subject matter of the treaty implies that the treaty survives an armed conflict. Although the emphasis is on *categories* of treaties, it may well be that only the subject matter of particular provisions of the treaty carries the implication of continuance.

(3) The list is purely indicative, as confirmed by the use of that adjective in article 7, and no priority is in any way implied by the order in which the categories are presented. Moreover, it is recognized that in certain instances the categories are overlapping. The Commission decided not to include within the list an item referring to *jus cogens*. This category is not qualitatively similar to the other categories which have been included in the list. The latter are subject-matter based, whereas *jus cogens* cuts across several subjects. It is understood that the provisions of articles 3 to 7 are without prejudice to the effect of principles or rules included in treaties and having the character of *jus cogens*.

(4) The list reflects available State practice, particularly United States practice, and is based on the views of several generations of writers. It must be admitted, however, that the likelihood of a substantial flow of information from States, indicating evidence of State practice, is small. Moreover, the identification of relevant State practice is, in this sphere, unusually difficult. Apparent examples of State practice often concern legal principles that bear no relation to the specific issue of the effect of armed conflict on treaties. Thus some of the modern State practice refers, for the most part, to the effect of a fundamental change of circumstances, or to the supervening impossibility of performance, and is accordingly irrelevant. In some areas, such as that of treaties creating permanent regimes, State practice offers a firm basis. In other areas, there may be a firm basis in the case law of municipal courts and in some executive advice given to courts.

(a) *Treaties on the law of armed conflict, including treaties on international humanitarian law*

(5) It seems evident that, being intended to govern the conduct and the consequences of armed conflicts, treaties relating thereto, including those bearing on international humanitarian law, apply in the event of such conflicts. As pointed out by McNair,

There is abundant evidence that treaties which in express terms purport to regulate the relations of the contracting parties during a war, including the actual conduct of warfare, remain in force during war and do not require revival after its termination.⁴²²

(6) The present category is not limited to treaties expressly applicable during armed conflict. It covers, broadly, agreements relating to the law of armed conflict, including treaties relating to international humanitarian law. As early as 1785, article 24 of the Treaty of Amity and Commerce between His Majesty the King of Prussia and the United States of America expressly stated that armed conflict had no effect on its humanitarian law provisions.⁴²³ Moreover, the *Restatement of the Law Third*, while restating the traditional position that the outbreak of war between States terminated or suspended agreements between them, acknowledges that “agreements governing the conduct of hostilities survived, since they were designed for application during war”.⁴²⁴ In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice found that

as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality,

⁴²² McNair, *The Law of Treaties* (footnote 406 above), p. 704:

“There were in existence at the outbreak of the First World War a number of treaties (to which one or more neutral States were parties) the object of which was to regulate the conduct of hostilities, e.g., the Declaration of Paris of 1856 [Declaration Respecting Maritime Law], and certain of the Hague Conventions of 1899 and 1907. It was assumed that those were unaffected by the war and remained in force, and many decisions rendered by British and other Prize Courts turned upon them. Moreover, they were not specifically revived by or under the treaties of peace. Whether this legal result is attributable to the fact that the contracting parties comprised certain neutral States or to the character of the treaties as the source of general rules of law intended to operate during war is not clear, but it is believed that the latter was regarded as the correct view. If evidence is required that the Hague Conventions were considered by the United Kingdom Government to be in operation after the conclusion of peace, it is supplied by numerous references to them in the annual British lists of ‘Accessions, Withdrawals, &c.’, published in the British Treaty Series during recent years, and by the British denunciation in 1925 of Hague Convention VI of 1907 [Convention relating to the status of enemy merchant ships at the outbreak of hostilities]. Similarly in 1923 the United Kingdom Government, on being asked by a foreign Government whether it regarded the Geneva Red Cross Convention of 6 July 1906 [Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field] as being still in force between the ex-Allied Powers and the ex-enemy Powers, replied that ‘in the view of His Majesty’s Government this convention, being of a class the object of which is to regulate the conduct of belligerents during war, was not affected by the outbreak of war’” (*ibid.*).

⁴²³ Treaty of Amity and Commerce between His Majesty the King of Prussia and the United States of America, signed at The Hague on 10 September 1785, *Treaties and Other International Agreements of the United States of America, 1776–1949*, vol. 8, Department of State, 1971, p. 78 (cited in J. H. W. Verzijl (ed.), *International Law in Historical Perspective*, Leiden, Sijthoff, 1973, at p. 371).

⁴²⁴ *Restatement of the Law Third: the Foreign Relations Law of the United States*, vol. 1, St. Paul, Minnesota, American Law Institute Publishers, 1987, para. 336 (e).

whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the [Charter of the United Nations]) to all international armed conflict, whatever type of weapons might be used.⁴²⁵

(7) The implication of continuity does not affect the operation of the law of armed conflict as *lex specialis* applicable to armed conflict. The mention of this category of treaties does not address numerous questions that may arise in relation to the application of that law, nor is it intended to prevail regarding the conclusions to be drawn on the applicability of the principles and rules of humanitarian law in particular contexts.

(b) *Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries*

(8) It is generally recognized that treaties declaring, creating or regulating a permanent regime or status, or related permanent rights, are not suspended or terminated in case of an armed conflict. The types of agreements involved include agreements on cessions of territory, treaties of union, treaties neutralizing part of the territory of a State, treaties creating or modifying boundaries, and treaties creating exceptional rights of use of or access to the territory of a State.

(9) There is a certain amount of case law supporting the position that such agreements are unaffected by the incidence of armed conflict. Thus, in *The North Atlantic Coast Fisheries Case*, the Government of the United Kingdom contended that the fisheries rights of the United States, recognized by the Treaty of 1783,⁴²⁶ had been abrogated as a consequence of the war of 1812. The Permanent Court of Arbitration did not share this view and stated that “[i]nternational law in its modern development recognizes that a great number of Treaty obligations are not annulled by war, but at most suspended by it”.⁴²⁷

(10) Similarly, in the *In re Meyer's Estate* case (1951), an appellate court in the United States of America, addressing the permanence of treaties dealing with territory, held that

[t]he authorities appear to be in accord that there is nothing incompatible with the policy of the government, with the safety of the nation, or with the maintenance of war in the enforcement of dispositive treaties or dispositive parts of treaties. Such provisions are compatible with, and are not abrogated by, a state of war.⁴²⁸

In *State ex rel. Miner v. Reardon* (1926), the court ruled that some treaties survive a state of war, such as boundary

treaties.⁴²⁹ This finding is, of course, connected with the prohibition against the annexation of occupied territory.

(11) The resort to this category does, however, generate certain problems. One of them is the fact that treaties of cession and other treaties affecting permanent territorial dispositions create permanent rights, and it is these rights which are permanent, not the treaties themselves. Consequently, if such treaties are executed, they cannot be affected by a subsequent armed conflict.

(12) A further source of difficulty derives from the fact that the limits of this category remain to some extent uncertain. For example, in the case of treaties of guarantee, it is clear that the effect of an armed conflict will depend upon the precise object and purpose of the treaty of guarantee. Treaties intended to guarantee a lasting state of affairs, such as the permanent neutralization of a territory, will not be terminated by an armed conflict. Thus, as McNair notes,

the treaties creating and guaranteeing the permanent neutralization of Switzerland or Belgium or Luxembourg are certainly political but they were not abrogated by the outbreak of war because it is clear that their object was to create a permanent system or status.⁴³⁰

(13) A number of writers would include agreements relating to the grant of reciprocal rights to nationals and to acquisition of nationality within the category of treaties creating permanent rights or a permanent status. However, the considerations applying to the treatment of such agreements as not susceptible to termination are to be differentiated to a certain extent from those concerning treaties of cession of territory and boundaries. Accordingly, such agreements will be more appropriately associated with the wider class of friendship, commerce and navigation treaties and other agreements concerning private rights. This class of treaties is dealt with below.

(14) In their regulation of the law of treaties, the Commission and States have also accorded a certain recognition to the special status of boundary treaties.⁴³¹ Article 62, paragraph (2) (a) of the 1969 Vienna Convention provides that a fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty if the treaty establishes a boundary. Such treaties were recognized as an exception to the general rule of article 62 because otherwise that rule, instead of serving the cause of peaceful change, might become a source of dangerous frictions.⁴³² The 1978 Vienna Convention reached a similar conclusion about the resilience of boundary treaties, providing in its article 11 that “[a] succession of States does not as such affect: (a) a boundary established by a

⁴²⁵ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 261, para. 89.

⁴²⁶ Definitive Treaty of Peace, signed at Paris on 3 September 1783, H. Miller (ed.), *Treaties and Other International Acts of the United States of America* (see footnote 410 above), document Nos. 1–40 (1776–1818), p. 151.

⁴²⁷ *The North Atlantic Coast Fisheries Case*, Award of 7 September 1910, UNRIAA, vol. XI (Sales No. 61.V.4), p. 167, at p. 181. See also C. Parry (ed.), *A British Digest of International Law: Phase I: 1860–1914*, vol. 2B, London, Stevens and Sons, 1967, pp. 585–605.

⁴²⁸ *In re Meyer's Estate*, 107 Cal. App. 2d 799, 805 (1981), AILC 1783–1968, vol. 19, p. 133, at p. 138.

⁴²⁹ United States, Supreme Court of Kansas, *ibid.*, p. 117, at p. 119; see also ADPILC 1919–1942, Case No. 132, at p. 238.

⁴³⁰ McNair, *The Law of Treaties* (footnote 406 above), p. 703.

⁴³¹ On this issue, see equally the *In re Meyer's Estate* case mentioned in paragraph (10) above.

⁴³² See paragraph (11) of the Commission's commentary to draft article 59 [now article 62 of the 1969 Vienna Convention], *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 283; or *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions* (footnote 417 above), p. 79. The exception of treaties establishing a boundary from the fundamental change of circumstances rule, though opposed by a few States, was endorsed by a very large majority of States at the United Nations Conference on the Law of Treaties.

treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary". Although these examples are not directly relevant to the question of the effects of armed conflicts on treaties, they nevertheless attest to the special status attached to these types of regimes.

(c) *Multilateral law-making treaties*

(15) Law-making treaties have been defined as follows:

(i) *Multi-partite law-making treaties*

By these are meant treaties which create rules of international law for regulating the future conduct of the parties without creating an international régime, status, or system. It is believed that these treaties survive a war, whether all the contracting parties or only some of them are belligerents. The intention to create permanent law can usually be inferred in the case of these treaties. Instances are not numerous. The Declaration of Paris of 1856 [Declaration Respecting Maritime Law] is one; its content makes it clear that the parties intended it to regulate their conduct during a war, but it is submitted that the reason why it continues in existence after a war is that the parties intended by it to create permanent rules of law. Hague Convention II of 1907 [respecting the limitation of the employment of force for the recovery of contract debts] and the Peace Pact of Paris of 1928 [General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact)] are also instances of this type. Conventions creating rules as to nationality, marriage, divorce, reciprocal enforcement of judgments, &c., would probably belong to the same category.⁴³³

(16) The term "law-making" is somewhat problematic⁴³⁴ and may not lend itself to a clear definition. There is, however, a certain amount of State practice relating to multilateral treaties of a technical character arising from the post-war arrangements following the Second World War. It has been asserted that "Multilateral Conventions of the 'law-making' type relating to health, drugs, protection of industrial property, etc., are not annulled on the outbreak of war but are either suspended and revived on the termination of hostilities, or receive even in wartime a partial application".⁴³⁵

(17) The position of the United States is described in a letter of 29 January 1948 from the State Department Legal Adviser, Ernest A. Gross:

With respect to multilateral treaties of the type referred to in your letter, however, this Government considers that, in general, non-political multilateral treaties to which the United States was a party when the United States became a belligerent in the war, and which this Government has not since denounced in accordance with the terms thereof, are still in force in respect of the United States and that the existence of a state of war between some of the parties to such treaties did not *ipso facto* abrogate them, although it is realized that, as a practical matter, certain of the provisions might have been inoperative. The view of this Government is that the effect of the war on such treaties was only to terminate or suspend their execution as between opposing belligerents, and that, in the absence of special reasons for a contrary view, they remained in force between co-belligerents, between belligerents and neutral parties, and between neutral parties.

It is considered by this Government that, with the coming into force on September 15, 1947 of the treaty of peace with Italy, the non-political multilateral treaties which were in force between the United States and Italy at the time a state of war commenced between the two countries, and which neither government has since denounced in

accordance with the terms thereof, are now in force and again in operation as between the United States and Italy. A similar position has been adopted by the United States Government regarding Bulgaria, Hungary, and Rumania ...⁴³⁶

(18) The position of the United Kingdom, as stated in a letter from the Foreign Office of 7 January 1948, was the following:

I am replying ... to your letter ... in which you enquired about the legal status of Multilateral Treaties of a technical or non-political nature, and whether these are regarded by His Majesty's Government in the United Kingdom as having been terminated by war, or merely suspended.

You will observe that, in the Peace Treaties with Italy, Finland, Roumania, Bulgaria and Hungary, no mention is made of such treaties, the view being taken at the Peace Conference that no provision regarding them was necessary, inasmuch as, according to International Law, such treaties were in principle simply suspended as between the belligerents for the duration of the war, and revived automatically with the peace. It is not the view of His Majesty's Government that multilateral conventions *ipso facto* should lapse with the outbreak of war, and this is particularly true in the case of conventions to which neutral Powers are parties. Obvious examples of such conventions are the [Convention Relating to the Regulation of Aerial Navigation] of 1919 and various Postal and Telegraphic Conventions. Indeed, the true legal doctrine would appear to be that it is only the suspension of normal peaceful relations between belligerents which renders impossible the fulfilment of multilateral conventions in so far as concerns them, and operates as a temporary suspension as between the belligerents of such conventions. In some cases, however, such as the Red Cross Convention, the multilateral convention is especially designed to deal with the relations of Powers at war, and clearly such a convention would continue in force and not be suspended.

As regards multilateral conventions to which only the belligerents are parties, if these are of a non-political and technical nature, the view upon which His Majesty's Government would probably act is that they would be suspended during the war, but would thereafter revive automatically unless specifically terminated. This case, however, has not yet arisen in practice.⁴³⁷

⁴³⁶ R. Rank, "Modern war and the validity of treaties: a comparative study", *Cornell Law Quarterly*, vol. 38 (1952-1953), pp. 343-344.

⁴³⁷ *Ibid.*, p. 346. See also Oppenheim (footnote 405 above), pp. 304-306. Fitzmaurice discusses the way in which the revival or otherwise of bilateral treaties was dealt with, which involved a method of notification, and notes thus:

"The merit of a provision of this kind is that it settles beyond possibility of doubt the position in regard to each bi-lateral treaty which was in force at the outbreak of war between the former enemy States and any of the Allied or Associated Powers, which would certainly not be the case in the absence of such a provision, having regard to the considerable difficulty and confusion which surrounds the subject of the effect of war on treaties, particularly bi-lateral treaties.

"This difficulty also exists in regard to multilateral treaties and conventions, but it is much less serious, as it is usually fairly obvious on the face of the multilateral treaty or convention concerned what the effect of the outbreak of war will have been on it. In consequence, and having regard to the great number of multilateral conventions to which the former enemies and the Allied and Associated Powers were parties (together with a number of other States, some of them neutral or otherwise not participating in the peace settlement) and of the difficulty that there would have been in framing detailed provisions about all these conventions, it was decided to say nothing about them in the Peace Treaties and to leave the matter to rest on the basic rules of international law governing it. It is, however, of interest to note that when the subject was under discussion in the Juridical Commission of the Peace Conference, the view of the Commission was formally placed on record and inscribed in the minutes that, in general, multilateral conventions between belligerents, particularly those of a technical character, are not affected by the outbreak of war as regards their existence and continued validity, although it may be impossible for the period of the war to apply them as between belligerents, or even in certain cases as between belligerents and neutrals who may be cut off from each other by the line of war; but that such conventions are at the most suspended in their operation and automatically revive upon the restoration of peace

⁴³³ McNair, *The Law of Treaties* (footnote 406 above), p. 723.

⁴³⁴ See "The effects of armed conflict on treaties: an examination of practice and doctrine", memorandum by the Secretariat (footnote 389 above), paras. 49-50.

⁴³⁵ I. A. Shearer (ed.), *Starke's International Law*, 11th ed., London, Butterworths, 1994, p. 493.

(19) The position of the Governments of Germany,⁴³⁸ Italy⁴³⁹ and Switzerland⁴⁴⁰ appears to be essentially similar with regard to the present subject matter. However, the State practice is not entirely consistent and further evidence of practice, and especially more current practice, is needed.

(20) In this particular context, the decisions of municipal courts must be regarded as a problematical source. In the first place, such courts may depend upon the guidance of the executive. Secondly, municipal courts may rely on policy elements not directly related to the principles of international law. Nonetheless, it can be said that the case law of domestic courts is not inimical to the principle of survival. In this connection, the decision of the Scottish Court of Session in *Masinimport v. Scottish Mechanical Light Industries Ltd.* (1976)⁴⁴¹ may be cited.

(21) Although the sources are not all congruent, the category of law-making treaties can be recommended for recognition as a class of treaties enjoying a status of survival. As a matter of principle they should qualify, and there is not an inconsiderable quantity of State practice favourable to the principle of survival.

(d) *Treaties on international criminal justice*

(22) By including “treaties on international criminal justice”, the Commission chiefly intended to ensure the survival and continued operation of treaties such as the Rome Statute of the International Criminal Court of 17 July 1998. The category in question may also encompass other general, regional and even bilateral agreements establishing international mechanisms for trying persons suspected of having perpetrated international crimes (crimes against humanity, genocide, war crimes, crime of aggression). The category covered here only extends to treaties establishing international mechanisms for the prosecution of persons suspected of such crimes, to the exclusion of those set up by other types of acts such as the Security Council resolutions relating to the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda.⁴⁴² It also excludes mechanisms resulting from agreements between a State and an international organization, because the present draft articles do not cover treaty relations involving international organizations.⁴⁴³ Finally, the category described

without the necessity of any special provision to that effect. The matter is actually not quite so simple as that, even in relation to multilateral conventions, but at any rate that was broadly the basis upon which it was decided not to make any express provision about the matter in the Peace Treaties” (Fitzmaurice (footnote 415 above), pp. 308–309).

⁴³⁸ Rank (footnote 436 above), pp. 349–354.

⁴³⁹ *Ibid.*, pp. 347–348.

⁴⁴⁰ P. Guggenheim (ed.), *Répertoire suisse de droit international public: documentation concernant la pratique de la Confédération en matière de droit international public, 1914–1939*, vol. I, Basel, Helbing and Lichtenhahn, 1975, pp. 186–191.

⁴⁴¹ *Masinimport v. Scottish Mechanical Light Industries Ltd.*, ILR, vol. 74 (1987), p. 559, at p. 564.

⁴⁴² International Tribunal for the Former Yugoslavia, established by Security Council resolution 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993; and International Tribunal for Rwanda, established by Security Council resolution 955 (1994) of 8 November 1994.

⁴⁴³ See the Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian

here only encompasses treaties setting up procedures for prosecution and trial in an international context and does not comprise agreements on issues of international criminal law generally.

(23) The prosecution of international crimes and the trial of those suspected of having committed them concern the international community as a whole. This is in itself a reason for advocating the survival of the treaties belonging to this category. In addition to this, the inclusion of war crimes renders essential the survival of the treaties considered here: war crimes can only occur in time of armed conflict, and aggression is an act resulting in international armed conflict. The two other main categories of international crimes, crimes against humanity and genocide, too, are often committed in the context of armed conflict.

(24) It may be, however, that certain provisions of an instrument belonging to this category of treaties cease to be operational as a result of armed conflict, for example those relating to the transfer of suspects to an international authority or obligations assumed by a State regarding the execution of sentences on their territory. The separability of such provisions and obligations from the rest of the treaty pursuant to draft article 11 of the present draft articles would seem unproblematic.

(25) There remains the question of whether the insertion of this type of treaties is a matter of *lex ferenda* or *lex lata*. At first sight, the former would seem to hold true because the kinds of conventions under consideration are of relatively recent origin, and very little practice—if any—can be produced, except of course for the fact that a treaty such as the Rome Statute of the International Criminal Court was plainly intended to continue to operate in situations of international or non-international conflict. It should also be recalled that part of the treaty provisions under consideration are of a *jus cogens* character.

(e) *Treaties of friendship, commerce and navigation and agreements concerning private rights*

(26) Before analysing this type of treaties and their fate in some detail, a few preliminary observations are in order. First, it must be made clear that this category is not necessarily confined to classical treaties of friendship, commerce and navigation, but may include treaties of friendship, commerce and consular relations⁴⁴⁴ or treaties of establishment. Second, as a rule, only a part of these instruments survives. It is evident, in particular, that provisions relating to “friendship” are unlikely to survive to an armed conflict opposing the contracting States, but

law of crimes committed during the period of Democratic Kampuchea (Phnom Penh, 6 June 2003), United Nations, *Treaty Series*, vol. 2329, No. 41723, p. 117; the Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon (Beirut, 22 January 2007, and New York, 6 February 2007), *ibid.*, vol. 2461, No. 44232, p. 257, and Security Council resolution 1757 (2007) of 30 May 2007; and the Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (Freetown, 16 January 2002), *ibid.*, vol. 2178, No. 38342, p. 137.

⁴⁴⁴ See *Brownell v. City and County of San Francisco*, California Court of Appeal, First District, 21 June 1954, ILR, vol. 21 (1954), p. 432 *et seq.*, at p. 438.

that does not mean that provisions relating to the status of foreign individuals do not continue to apply, that is, provisions regarding their “private rights”.⁴⁴⁵ Third, while treaties of commerce tend to lapse as a result of armed conflicts between States,⁴⁴⁶ such treaties may contain provisions securing the private rights of foreign individuals which may survive as a result of the separability of treaty provisions under article 11 of the present draft articles. Fourth, the term “private rights” requires explanations: Is it limited to individuals’ substantive rights or does it also encompass procedural ones?

(27) Regarding treaties of friendship, commerce and navigation, reference has to be made, in the first place, to the Jay Treaty, or the Treaty of Amity, Commerce, and Navigation between His Britannick Majesty and the United States of America concluded on 19 November 1794 between the United States of America and Great Britain. Some provisions of this Treaty have remained applicable to this day, surviving, in particular, the War of 1812 between the two countries.

(28) In what is perhaps the leading case in the matter—*Karnuth v. United States* (1929)—the provision in issue was article 3 of the Jay Treaty, which gives the subjects of one contracting party free access to the territory of the other. While it held that the article in question had been abrogated by the War of 1812, the Supreme Court reiterated what it had said in the earlier case of *Society for the Propagation of the Gospel v. Town of New Haven*:

Treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.⁴⁴⁷

(29) Article 3 of the Jay Treaty also exempts from customs duties the members of the Five Indian Nations established on the one or the other side of the border. In two cases, United States courts ruled that provisions of the Treaty bearing on the rights or obligations, not of the contracting parties as such, but of “third parties” (individuals), had survived armed conflicts.⁴⁴⁸

(30) Article 9 of the Jay Treaty provided that subjects of either country may continue to hold land on the territory of the other. In *Sutton v. Sutton*, a very early case brought before the British Court of Chancery, the Master of the Rolls held that since the relevant treaty provision stated that subjects of one party were entitled to keep property on the territory of the other, as were their heirs and assignees, it was reasonable to infer that the parties intended the operation of the Treaty to be permanent, and

⁴⁴⁵ In this sense, individuals are considered to be “third parties”; see below, paragraph (29) of the commentary to this article.

⁴⁴⁶ See two cases reported in *Fontes juris gentium, Series A, Sectio 2, Tomus 1* (1879–1929), p. 163, No. 342, and *Tomus 6* (1966–1970), p. 371, No. 78; and the *Russian–German Commercial Treaty* case (footnote 413 above).

⁴⁴⁷ *Karnuth v. United States* (see footnote 411 above), p. 54. See also footnotes 409 and 410 above.

⁴⁴⁸ *United States ex rel. Goodwin v. Karnuth*, 28 November 1947, District Court for the Western District of New York, ADPILC 1947, Case No. 1; and *McCandless v. United States*, Court of Appeals, Third Circuit, 9 March 1928, ADPILC 1927–1928, Case No. 363.

not to depend upon the continuance of a state of peace. This was borne out, the Master of the Rolls added, by the “true construction” to be given to the act of implementation on the domestic level.⁴⁴⁹

(31) It is now convenient to turn to a number of precedents dealing with treaties which do not bear the “friendship, commerce and navigation” label. The object of the case *Ex parte Zenzo Arakawa* (1947) was article I of the Treaty of Commerce and Navigation between the United States and Japan concluded in 1911, which provided for the constant protection and security of the citizens of each party on the territory of the other.⁴⁵⁰ According to the judge, “[s]ome [treaties] are unaffected by war, some are merely suspended, while others are totally abrogated”. Treaties of commerce and navigation fall into the second or third category, “because the carrying out of their terms would be incompatible with the existence of a state of war”. The *Ex parte Zenzo Arakawa* case may be a special one, however, conditioned as it was by the peculiarities of the armed conflict between the two countries and perhaps also by the dimension of the protection granted by the relevant treaty provision.⁴⁵¹

(32) *Techt v. Hughes* was another landmark in the progression of the case law. The issue considered was the survival of the Treaty of Commerce and Navigation between the United States and Austria–Hungary of 1829, more precisely its provision on the tenure of land.⁴⁵² Judge Cardozo pointed out that it was difficult to see why, while in *Society for the Propagation of the Gospel v. Town of New Haven*⁴⁵³ a provision on the acquisition of real property was found to have survived the War of 1812, this should be disallowed when it came to the enjoyment of such property.⁴⁵⁴

(33) *State ex rel. Miner v. Reardon* pertained to article 14 of the 1828 Treaty of Commerce and Navigation between the United States and Prussia. A provision of that Treaty dealt with the protection of the property of individuals, in particular the right to inherit property.⁴⁵⁵ The

⁴⁴⁹ Court of Chancery, 29 July 1830, *British International Law Cases*, vol. 4, p. 362, at pp. 367–368.

⁴⁵⁰ Treaty of Commerce and Navigation between the United States and Japan, signed at Washington, D.C. on 21 February 1911, *Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and Other Powers, 1910–1923*, vol. III, Washington, D.C., United States Government Printing Office, 1923, p. 2712.

⁴⁵¹ District Court for the Eastern District of Pennsylvania, AILC 1783–1968, vol. 19, p. 84.

⁴⁵² Treaty of Commerce and Navigation between the United States and Austria–Hungary, signed at Washington, D.C. on 27 August 1829, *Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and Other Powers, 1776–1909*, vol. I, Washington, D.C., United States Government Printing Office, 1910, pp. 29 *et seq.* See also the Treaty of Commerce and Navigation between the United States and Austria, signed at Washington, D.C. on 8 May 1848, *The Statutes at Large and Treaties of the United States*, vol. 9, Boston, Little and Brown, 1851, pp. 944 *et seq.*

⁴⁵³ *Society for the Propagation of the Gospel v. Town of New Haven* (see footnote 409 above), p. 41, especially at p. 48.

⁴⁵⁴ *Techt v. Hughes* (see footnote 412 above).

⁴⁵⁵ Treaty of Commerce and Navigation between the United States and Prussia, signed at Washington, D.C. on 1 May 1828, *Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and Other Powers, 1776–1909* (footnote 452 above), vol. II, pp. 1496 *et seq.*, at p. 1500.

lower court opted for the survival of this provision,⁴⁵⁶ as did the Supreme Court of Nebraska in a decision of 10 January 1929,⁴⁵⁷ and the United States Supreme Court in its decision in *Clark v. Allen* (1947), where article IV of the 1923 Treaty of Friendship, Commerce and Consular Rights between Germany and the United States of America⁴⁵⁸ was under scrutiny. That provision allowed nationals of either State to succeed to nationals of the other. Following established precedent, the Court stated that “the outbreak of war does not necessarily suspend or abrogate treaty provisions”—note the reference to “treaty provisions” rather than to “treaties”—though such a provision may of course be incompatible with the existence of a state of war (*Karnuth v. United States*, para. (28) above), or the President or the Congress may have formulated a policy inconsistent with the enforcement of all or part of the treaty (*Techt v. Hughes*, para. (32) above). The Court then followed the decision in *Techt v. Hughes*, where a similar treaty provision was held to have survived. Indeed, the question to be answered was whether the provision in issue was “incompatible with national policy in time of war”. The Court found that it was not.⁴⁵⁹

(34) Another group of cases begins with two French decisions. *Bussi v. Menetti* was about a proprietor in Avignon who, for health reasons, wished to live in a house owned by him and gave notice to his Italian tenant. The tribunal of first instance accepted his plea, considering that the outbreak of the war between France and Italy in 1940 had ended the Treaty of Establishment concluded between the two countries on 3 June 1930, according to which French and Italian nationals enjoyed equal rights in tenancy matters.⁴⁶⁰ The *Cour de cassation* (*Chambre civile*) ruled that treaties were not necessarily suspended by the existence of a war. In particular, the Court said that

treaties of a purely private law nature, which do not involve any intercourse between the enemy Powers and which have no connexion with the conduct of hostilities—such as Conventions relating to leases—are not suspended merely by the outbreak of war.⁴⁶¹

(35) The case of *Rosso v. Marro* was a similar one, except that the claim was one of damages for the refusal to renew a lease, allegedly in violation of a 1932 convention. On this issue, the *Tribunal civil de Grasse* explained the following:

Treaties concluded between States who subsequently become belligerents are not necessarily suspended by war. In particular, the conduct of the war [must permit] the economic life and commercial activities to continue in the common interest. [Hence] the Court of Cassation, reverting ... to the doctrine which it has laid down during the past century ..., now holds that treaties of a purely private law nature, not involving any intercourse between the belligerent Powers, and

⁴⁵⁶ *State ex rel. Miner v. Reardon* (see footnote 429 above), p. 122.

⁴⁵⁷ *Goos v. Brocks et al.*, 10 January 1929, Supreme Court of Nebraska, ADPILC 1929–1930, Case No. 279.

⁴⁵⁸ Treaty of Friendship, Commerce and Consular Relations between Germany and the United States of America, signed at Washington, D.C. on 8 December 1923, Leagues of Nations, *Treaty Series*, vol. LII, No. 1254, pp. 133 *et seq.*, at pp. 158–159.

⁴⁵⁹ *Clark v. Allen* (see footnote 412 above), at pp. 73–74 *et seq.*, and pp. 78–79. See also *Blank v. Clark*, 12 August 1948, District Court for the Eastern District of Pennsylvania, ADPILC 1948, Case No. 143.

⁴⁶⁰ Treaty of Establishment between France and Italy, signed at Rome on 3 June 1930, *Journal officiel de la République française*, 20 January 1935, p. 643.

⁴⁶¹ *Bussi v. Menetti* (see footnote 413 above), pp. 304–305.

having no connexion with the conduct of hostilities, are not suspended in their operation, merely by the existence of a state of war.⁴⁶²

(36) The above case law is, however, contradicted by *Lovera v. Rinaldi*. In that case, the Plenary Assembly of the *Cour de cassation*, again having to deal with the status of the 1930 Treaty of Establishment between France and Italy, which prescribed national or at least most-favoured-nation treatment, found that the Treaty had lapsed at the onset of war, because the maintenance of its obligations was judged incompatible with the state of war.⁴⁶³ In *Artel v. Seymand*, the *Cour de cassation* (*Chambre civile*) also concluded that the same Treaty had lapsed so far as leases were concerned.⁴⁶⁴

(37) In relation to the 1930 Treaty of Establishment between France and Italy, the *Cour de cassation* held, in 1953, that the national treatment to be granted to Italians under the Treaty regarding the tenure of agricultural land was incompatible with a state of war.⁴⁶⁵

(38) This series will be closed by a somewhat peculiar case which concerns individuals but makes a foray into the field of public law. Article 13 of a Convention concluded between France and Italy in 1896, providing that persons residing in Tunis and having retained Italian citizenship would continue to be considered Italians,⁴⁶⁶ was considered operative in 1950 despite World War II.⁴⁶⁷

(39) There are a large number of cases which concern procedural rights secured by multilateral treaties. Many of them relate to security for costs (*cautio judicatum solvi*). This was true for the case of *C.A.M.A.T. v. Scagni*, the object of which was article 17 of the Convention relating to civil procedure of 1905. According to the French court involved,⁴⁶⁸ private-law treaties should, in principle, survive but cannot be invoked by aliens whose hostile attitude may have affected the evolution of the war, especially, as was the case here, by persons who had been expelled from France on account of their attitude.⁴⁶⁹ In another case dealt with by a Dutch court after World War II, it was held that the relevant provision of the Convention had not lapsed as a result of the War. By contrast, another Dutch court reached the conclusion that the Convention had been suspended at the outbreak of the War and had re-entered into force on the basis of the 1947 Treaty of Peace with Italy.⁴⁷⁰ The same conclusion was reached by

⁴⁶² *Rosso v. Marro* (see footnote 413 above), p. 307.

⁴⁶³ *Lovera v. Rinaldi*, decision of 22 June 1949, ADPILC 1949, Case No. 130.

⁴⁶⁴ *Artel v. Seymand*, decision of 10 February 1948, ADPILC 1948, Case No. 133.

⁴⁶⁵ *Gambino v. Consorts Arcens*, 11 March 1953, *Cour de cassation*, ILR 1953, p. 599.

⁴⁶⁶ Consular and Establishment Convention, signed at Paris on 28 September 1896, F. Stoerk, *Nouveau recueil général de traités et autres actes relatifs aux rapports de droit international. Continuation du grand recueil de G. F. de Martens*, 2nd series, vol. XXIII, Leipzig, Librairie Theodor Weicher, 1898, pp. 363 *et seq.*, at pp. 366–367.

⁴⁶⁷ *In re Barrabini*, 28 July 1950, Court of Appeal of Paris, ILR 1951, Case No. 156, pp. 507–508.

⁴⁶⁸ Court of Appeal of Agen, France.

⁴⁶⁹ *C.A.M.A.T. v. Scagni*, 19 November 1946, Court of Appeal of Agen, *Revue critique de droit international privé*, vol. 36, No. 1 (January–June 1947), p. 294; see also ADPILC 1946, Case No. 99.

⁴⁷⁰ *Gevato v. Deutsche Bank*, 18 January 1952, District Court of Rotterdam, ILR 1952, Case No. 13, p. 29.

the *Landgericht* of Mannheim (Germany) and by another Dutch court.⁴⁷¹ In one case, the question of the survival of the Convention relating to civil procedure of 1905 was left open.⁴⁷²

(40) Certain cases relate to the survival of other multi-lateral treaties, such as the 1902 Convention relating to the Settlement of the Conflict of Laws and Jurisdictions as regards Divorce and Separation, which was held to have been suspended during World War II and reactivated at the end of that conflict.⁴⁷³

(41) Mention has to be made as well of the 1902 Convention for the Regulation of Conflicts of Laws in relation to Marriage, article 4 of which prescribed a certificate of capacity to marry. This requirement was objected to by a husband-to-be who contended that, as a result of the war, the Convention had lapsed. The Court of Cassation of the Netherlands disagreed, explaining that “[t]here could only be a question of suspension in so far and for so long as the provisions of the Convention should have become untenable”, which was not the case here and which suggests that the issue was considered to be one of temporary impossibility of performance rather than one of the effects of armed conflicts on treaties.⁴⁷⁴

(42) One also notes with interest a decision in which the Court of Appeal of Aix (France) upheld the continued validity of the ILO 1925 Convention concerning workmen’s compensation for accidents. The Court found that the Convention had not lapsed *ipso facto*, without denunciation, upon the outbreak of a war and that, at the most, the exercise of rights deriving from the Convention was suspended⁴⁷⁵—an unsatisfactory conclusion because it appears to say, on the one hand, that the Convention remained applicable while, on the other, it speaks of suspension, which suggests exactly the contrary.

(43) Mention must equally be made of a series of Italian cases dealing with multilateral and bilateral conventions on the execution of judgments. In some of these cases, survival was assumed,⁴⁷⁶ in others, it was not.⁴⁷⁷

(44) As a matter of principle and sound policy, the principle of survival would seem to extend to obligations arising under multilateral conventions concerning arbitration and the enforcement of awards. In *Masinimport*

v. Scottish Mechanical Light Industries Ltd., the Scottish Court of Session held that such treaties had survived World War II and were not covered by the 1947 Treaty of peace with Roumania. The agreements concerned were the Protocol on Arbitration Clauses of 24 September 1923 and the Convention on the Execution of Foreign Arbitral Awards of 26 September 1927. The Court characterized the instruments as “multipartite law-making treaties”.⁴⁷⁸ In 1971, the Italian Court of Cassation (Joint Session) held that the Protocol on Arbitration Clauses had not been terminated despite the declaration by Italy of war against France, its operation having only been suspended pending cessation of the state of war.⁴⁷⁹ This is, again, an unsatisfactory conclusion, for the reasons indicated in paragraph (42) above (*Cornet* case).

(45) The recognition of this group of treaties would seem to be justified, and there are also links with other classes of agreements, including multilateral law-making treaties.

(46) The preceding description and analysis lead to the conclusion that, even though the case law examined may not be entirely coherent, there is a clear trend towards holding that “private rights” protected by treaties subsist, even where procedural rights of individuals are concerned.

(f) *Treaties for the international protection of human rights*

(47) Writers make very few references to the status, for present purposes, of treaties on the international protection of human rights. This state of affairs is easily explained. Much of the relevant writings on the effect of armed conflicts on treaties preceded the conclusion of international human rights treaties. Furthermore, the specialist literature on human rights has a tendency to neglect technical problems. Article 4 of the 1985 resolution of the Institute of International Law provides, however, that

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

Article 4 was adopted by 36 votes to none, with 2 abstentions.⁴⁸⁰

(48) The use of the category of human rights protection may be viewed as a natural extension of the status accorded to treaties of friendship, commerce and navigation and analogous agreements concerning private rights, including bilateral investment treaties. There is also a close relation to the treaties creating a territorial regime and, in so doing, setting up standards governing the human rights of the population as a whole, or a regime for minorities, or a regime for local autonomy.

(49) The application of international human rights treaties in time of armed conflict is described as follows:

⁴⁷¹ *Security for Costs* case, 26 July 1950, ADPILC 1949, Case No. 133; *Herzum v. van den Borst*, 17 February 1955, District Court of Roermond, ILR 1955, p. 900.

⁴⁷² *Legal Aid* case, 24 September 1949, Court of Appeal of Celle, Germany, ADPILC 1949, Case No. 132.

⁴⁷³ *Silverio v. Delli Zotti*, 30 January 1952, Luxembourg High Court of Justice, ILR 1952, Case No. 118, p. 558.

⁴⁷⁴ *In re Utermöhlen*, 2 April 1948, Court of Cassation of the Netherlands, ADPILC 1949, Case No. 129, at p. 381.

⁴⁷⁵ *Établissements Cornet v. Vve Gaido*, 7 May 1951, Court of Appeal of Aix, ILR 1951, Case No. 155.

⁴⁷⁶ *P. M. v. Miclich e Presi*, 3 September 1965, Court of Cassation, *Diritto internazionale*, vol. 21-II (1967), p. 122.

⁴⁷⁷ *L. S. Z. v. M. C.*, 22 April 1963, Court of Appeal of Rome, *ibid.*, vol. 19-II (1965), p. 37. In some cases, the decision was made dependent on whether the relevant treaties had been put back in operation: *Rigano v. Società Johann Meyer*, Court of Cassation, 9 May 1962, *ibid.*, vol. 18-II (1964), p. 181; and *Shapiro v. Società Fratelli Viscardi*, 19 May 1964, Court of Appeal of Milan, *Rivista di diritto internazionale*, vol. 48 (1965), p. 286.

⁴⁷⁸ *Masinimport v. Scottish Mechanical Light Industries Ltd.* (see footnote 441 above), p. 560, at p. 564.

⁴⁷⁹ *Lanificio Branditex v. Società Azais e Vidal*, ILR, vol. 71 (1986), p. 595.

⁴⁸⁰ Institute of International Law, *Yearbook*, vol. 61, Part II (see footnote 401 above), pp. 200 and 221.

Although the debate continues whether human rights treaties apply to armed conflict, it is well established that non-derogable provisions of human rights treaties apply *during* armed conflict. First, the International Court of Justice stated in its advisory opinion on nuclear weapons [*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226] that “the protection of the International Covenant [on] Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency” [p. 240, para. 25]. The *nuclear weapons* opinion is the closest that the Court has come to examining the effects of armed conflict on treaties, including significant discussion of the effect of armed conflict on both human rights and environmental treaties. Second, the International Law Commission stated in its Commentary on the articles on the responsibility of States for internationally wrongful acts that although the inherent right to self-defence may justify non-performance of certain treaties, “[a]s to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct”. Finally, commentators are also in agreement that non-derogable human rights provisions are applicable during armed conflict.⁴⁸¹

(50) This description illustrates the problems relating to the applicability of human rights standards in the event of armed conflict.⁴⁸² The task of the Commission has not been to deal with such matters of substance but to direct attention to the effects of armed conflict upon the operation or validity of particular treaties. In this connection, the test of derogability is not appropriate because derogability concerns the operation of the treaty provisions and is not related to the issue of continuation or termination. However, the competence to derogate “in time of war or other public emergency threatening the life of the nation” certainly provides evidence that an armed conflict as such may not result in suspension or termination. At the end of the day, the appropriate criteria are those laid down in draft article 4. The exercise of a competence to derogate by one party to the treaty would not prevent another party from asserting that a suspension or termination was justified on other grounds.

(51) Finally, it will be remembered that, under article 11 of the present draft articles, certain provisions of international treaties for the protection of human rights may not be terminated or suspended. This does not mean that the same is true for the other provisions if the requirements of article 11 are met. Conversely, there may be human rights provisions in treaties belonging to other categories of treaties which may continue in operation even if those treaties do not, or only do partly, survive, always supposing that the separability tests of article 11 are fulfilled.

(g) *Treaties relating to the international protection of the environment*

(52) Most environmental treaties do not contain express provisions on their applicability in case of armed conflict. The subject matter and modalities of treaties for the international protection of the environment are extremely varied.⁴⁸³

⁴⁸¹ “The effects of armed conflict on treaties: an examination of practice and doctrine”, memorandum by the Secretariat (footnote 389 above), para. 32 (footnotes omitted).

⁴⁸² See also R. Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, 2002, pp. 247–276.

⁴⁸³ See P. Sands, *Principles of International Environmental Law*, 2nd ed., Cambridge University Press, 2003, pp. 307–316; P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment*, 3rd ed., Oxford University Press, 2009, pp. 205–208; and K. Mollard Bannelier, *La protection de l’environnement en temps de conflit armé*, Paris, Pedone, 2001.

(53) The pleadings relating to the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* indicate, quite clearly, that there is no general agreement on the proposition that all environmental treaties apply both in peace and in time of armed conflict, subject to express provisions indicating the contrary.⁴⁸⁴

(54) In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court formulated the general legal position in these terms:

The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.

However, the Court is of the view that the issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.

The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.

This approach is supported, indeed, by the terms of Principle 24 of the Rio Declaration, which provides that:

“Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.”

The Court notes furthermore that Articles 35, paragraph 3, and 55 of Additional Protocol I [to the Geneva Conventions for the protection of war victims] provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals.

These are powerful constraints for all the States having subscribed to these provisions.⁴⁸⁵

(55) These observations are, of course, significant. They provide general and indirect support for the use of a presumption that environmental treaties apply in case of armed conflict, despite the fact that, as indicated in the written submissions relating to the advisory opinion proceedings, there was no general agreement on the specific legal question.⁴⁸⁶

⁴⁸⁴ See “The effects of armed conflict on treaties: an examination of practice and doctrine”, memorandum by the Secretariat (footnote 389 above), paras. 58–63.

⁴⁸⁵ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 425 above), pp. 241–242, paras. 29–31. With regard to the Rio Declaration on Environment and Development (Rio Declaration), see *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigendum), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

⁴⁸⁶ See D. Akande, “Nuclear weapons, unclear law? Deciphering the *Nuclear Weapons* advisory opinion of the International Court”, *BYBIL 1997*, vol. 68 (1998), pp. 183–184.

(h) *Treaties relating to international watercourses and related installations and facilities*

(56) Treaties relating to watercourses or rights of navigation are essentially a subset of the category of treaties creating or regulating permanent rights or a permanent regime or status. It is, nonetheless, convenient to examine them separately.

(57) The picture is, however, far from simple. The practice of States has been described as follows by Fitzmaurice:

Where all the parties to a convention, whatever its nature, are belligerents, the matter falls to be decided in much the same way as if the convention were a bilateral one. For instance, the class of law-making treaties, or of conventions intended to create permanent settlements, such as conventions providing for the free navigation of certain canals or waterways or for freedom and equality of commerce in colonial areas, will not be affected by the fact that a war has broken out involving all the parties. Their operation may be partially suspended but they continue in existence and their operation automatically revives [on] the restoration of peace.⁴⁸⁷

(58) The application of treaties concerning the status of certain waterways may be subject to the exercise of the inherent right of self-defence recognized in Article 51 of the Charter of the United Nations.⁴⁸⁸

(59) In any event, the regime of individual straits and canals is usually dealt with by specific treaty provisions. Examples of such treaties include the 1888 Convention between Austria-Hungary, France, Germany, Great Britain, Italy, the Netherlands, Russia, Spain and Turkey respecting the free navigation of the Suez Canal (Constantinople Convention); the 1922 Convention instituting the Statute of Navigation of the Elbe (art. 49); the 1919 Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) as it relates to the Kiel Canal (arts. 380–386); the 1936 Convention regarding the Régime of the Straits; the 1977 Panama Canal Treaty;⁴⁸⁹ and the 1977 Treaty concerning the Permanent Neutrality and Operation of the Panama Canal.⁴⁹⁰

(60) Certain multilateral agreements provide expressly for a right of suspension in time of war. Thus article 15 of the 1921 Convention and Statute on the Regime of Navigable Waterways of International Concern provides that

[t]his Statute does not prescribe the rights and duties of belligerents and neutrals in time of war. The Statute shall, however, continue in force in time of war so far as such rights and duties permit.

(61) The 1997 Convention on the Law of the Non-navigational Uses of International Watercourses prescribes the following in its article 29:

International watercourses and installations in time of armed conflict

⁴⁸⁷ Fitzmaurice (footnote 415 above), p. 316.

⁴⁸⁸ See R. R. Baxter, *The Law of International Waterways, with Particular Regard to Interoceanic Canals*, Cambridge (Massachusetts), Harvard University Press, 1964, p. 205.

⁴⁸⁹ Signed at Washington, D.C. on 7 September 1977, United Nations, *Treaty Series*, vol. 1280, No. 21086, p. 3. See also ILM, vol. 16 (1977), p. 1022.

⁴⁹⁰ Signed at Washington, D.C. on 7 September 1977, ILM, vol. 16 (1977), p. 1040.

International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules.

(62) There is accordingly a case for including the present category in the indicative list.

(i) *Treaties relating to aquifers and related installations and facilities*

(63) Similar considerations would seem to apply with respect to treaties relating to aquifers and related installations and facilities. Groundwater constitutes about 97 per cent of the world's fresh water resources. Some of it forms part of surface water systems governed by the Convention on the Law of the Non-navigational Uses of International Watercourses mentioned in paragraph (61) above and, accordingly, will fall under that instrument. On the groundwaters not subject to that Convention, there is very little State practice. In its work on the law of transboundary aquifers, the Commission has demonstrated what is achievable in this area.⁴⁹¹ In addition, the existing body of bilateral, regional and international agreements and arrangements on groundwaters is becoming noteworthy.⁴⁹²

(64) Based on the fact that the Commission's draft articles on the law of transboundary aquifers largely follow provisions of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, and also on the underlying protection provided for by the law of armed conflict, the basic assumption is that transboundary aquifers or aquifer systems and related installations, facilities and other works enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflicts and are not to be used in violation of those principles and rules.⁴⁹³

(65) Although the law of armed conflict itself provides protection, it may not be so clear that there is a necessary implication from the subject matter of treaties relating to aquifers and related installations and facilities that no effect ensues from an armed conflict. However, the vulnerability of aquifers and the need to protect the waters contained therein make a compelling case for drawing the necessary implication of continuance.

(j) *Treaties which are constituent instruments of international organizations*

(66) Most international organizations have been established by treaty,⁴⁹⁴ commonly referred to as the

⁴⁹¹ General Assembly resolution 63/124 of 11 December 2008, annex. The text of the draft articles on the law of transboundary aquifers with commentaries thereto is reproduced in *Yearbook ... 2008*, vol. II (Part Two), para. 53.

⁴⁹² See generally S. Burchi and K. Mechlem, *Groundwater in International Law: Compilation of Treaties and Other Legal Instruments*, Rome, FAO/UNESCO, 2005, p. 102. See also ILM, vol. 40, No. 2 (March 2001), p. 321.

⁴⁹³ See article 18 of the draft articles on the law of transboundary aquifers adopted by the Commission at its sixtieth session, *Yearbook ... 2008*, vol. II (Part Two), pp. 42–43.

⁴⁹⁴ See paragraph (4) of the commentary to article 2 of the draft articles on the responsibility of international organizations adopted by the Commission at its current session, chapter V, section E2, above.

“constituent instrument” of the organization. As a general rule, international organizations established by treaties enjoy, under international law, a legal personality separate from that of their members.⁴⁹⁵ The legal position, therefore, is analogous to that of the establishment of a permanent regime by means of a treaty. The considerations applicable to permanent regimes, discussed in paragraphs (8) to (14), accordingly also apply generally to constituent instruments of international organizations. As a general proposition, such instruments are not affected by the existence of an armed conflict in the three scenarios envisaged in article 3.⁴⁹⁶ In the modern era, there is scant evidence of practice to the contrary. This is particularly the case with international organizations of a universal or regional character whose mandates include the peaceful settlement of disputes.

(67) This general proposition is without prejudice to the applicability of the rules of an international organization, which include its constituent instrument,⁴⁹⁷ to ancillary questions such as the continued participation of its members in the activities of the international organization, the suspension of such activities in the light of the existence of an armed conflict and even the question of the dissolution of the organization.

(k) *Treaties relating to the international settlement of disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement*

(68) This category is not prominent in the literature, and there is to some extent an overlap with the category of multilateral treaties constituting an international regime. Certain writers, however, give explicit recognition to the continuing operation of treaties establishing mechanisms for the peaceful settlement of international disputes.⁴⁹⁸ In accordance with this principle, special agreements concluded before World War I were applied to the arbitrations concerned after the War.

(69) The treaties falling into this category relate to conventional instruments on international settlement procedures, that is, on procedures between subjects of international law. That category does not extend, *per se*, to

⁴⁹⁵ *Reparation for injuries suffered in the service of the United Nations* (see footnote 69 above), p. 185; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (see footnote 67 above), para. 37 (“International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties”); and *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (see footnote 68 above), p. 78, para. 25.

⁴⁹⁶ See the 1985 resolution of the Institute of International Law, article 6: “A treaty establishing an international organization is not affected by the existence of an armed conflict between any of its parties” (Institute of International Law, *Yearbook*, vol. 61, Part II (footnote 401 above), p. 201).

⁴⁹⁷ Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (1975), art. 1, para. 1 (34).

⁴⁹⁸ See S. H. McIntyre, *Legal Effect of World War II on Treaties of the United States*, The Hague, Martinus Nijhoff, 1958, pp. 74–86; and McNair, *The Law of Treaties* (footnote 406 above), p. 720. See also M. O. Hudson, *The Permanent Court of International Justice 1920–1942*, New York, Macmillan, 1943.

mechanisms for the protection of human rights, which are, however, covered by subparagraph (f) (Treaties for the international protection of human rights). Similarly, it does not include treaty mechanisms of peaceful settlement for the disputes arising in the context of private investments abroad which may, however, come within group (e) as “agreements concerning private rights”.

(70) The survival of this type of agreement is also favoured by article 9 of the present draft articles (Notification of intention to terminate or withdraw from a treaty or to suspend its operation), which envisages the preservation of the rights or obligations of States regarding dispute settlement (see paragraph (7) of the commentary to article 9).

(l) *Treaties relating to diplomatic and consular relations*

(71) Also included in the indicative list are treaties relating to diplomatic relations. While the experience is not well documented, it is not unusual for embassies to remain open in time of armed conflict. In any event, the provisions of the Vienna Convention on Diplomatic Relations suggest its application in time of armed conflict. Indeed, article 24 of that Convention provides that the archives and documents of the mission shall be inviolable “at any time”; this phrase was added during the United Nations Conference on the Law of Treaties in order to make it clear that inviolability continued in the event of armed conflict.⁴⁹⁹ Other provisions, for example article 44 on facilities for departure, include the words “even in case of armed conflict”. Article 45 is of particular interest as it provides as follows:

If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:

(a) The receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;

(b) The sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State;

(c) The sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.

(72) The principle of survival is recognized by some commentators.⁵⁰⁰ The specific character of the regime reflected in the Vienna Convention on Diplomatic Relations was described in emphatic terms by the International Court of Justice in the case concerning *United States Diplomatic and Consular Staff in Tehran*. In the words of the Court:

The rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded

⁴⁹⁹ See E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 3rd ed., Oxford University Press, 2008, p. 189.

⁵⁰⁰ See for example C. M. Chinkin, “Crisis and the performance of international agreements: the outbreak of war in perspective”, *The Yale Journal of World Public Order*, vol. 7 (1980–1981), pp. 177 *et seq.*, at pp. 194–195. See also “The effects of armed conflict on treaties: an examination of practice and doctrine”, memorandum by the Secretariat (footnote 389 above), para. 36.

to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their nature, entirely efficacious, for unless the sending State recalls the member of the mission objected to forthwith, the prospect of the almost immediate loss of his privileges and immunities, because of the withdrawal by the receiving State of his recognition as a member of the mission, will in practice compel that person, in his own interest, to depart at once. But the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established régime, to the evolution of which the traditions of Islam made a substantial contribution. The fundamental character of the principle of inviolability is, moreover, strongly underlined by the provisions of Articles 44 and 45 of the [Vienna Convention on Diplomatic Relations] of 1961 (cf. also Articles 26 and 27 of the [Vienna Convention on Consular Relations] of 1963). Even in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission must be respected by the receiving State.⁵⁰¹

(73) The Vienna Convention on Diplomatic Relations of 1961 was in force for both Iran and the United States. In any event, the Court made it reasonably clear that the applicable law included “the applicable rules of general international law” and that the Convention was a codification of the law.⁵⁰²

(74) As in the case of treaties relating to diplomatic relations, so also in the case of treaties relating to consular relations, there is a strong case for placing such treaties within the class of agreements which are not necessarily terminated or suspended in case of an armed conflict. It is well recognized that consular relations may continue even in the event of severance of diplomatic relations or of armed conflict.⁵⁰³ The provisions of the 1963 Vienna Convention on Consular Relations indicate its application in time of armed conflict. Thus, article 26 provides that the facilities to be granted by the receiving State to members of the consular post, and others, for their departure, shall be granted “even in case of armed conflict”. Article 27 provides that the receiving State shall,

“even in case of armed conflict”, respect and protect the consular premises. The principle of survival is recognized by Chinkin.⁵⁰⁴

(75) The International Court of Justice, in its judgment in *United States Diplomatic and Consular Staff in Tehran*, emphasized the special character of the two Vienna Conventions of 1961 and 1963 (see para. (72) above).

(76) The Vienna Convention on Consular Relations was in force for both Iran and the United States. Moreover, the Court recognized that the Convention constituted a codification of the law and made it reasonably clear that the applicable law included “the applicable rules of general international law”.⁵⁰⁵

(77) Regarding national practice, a decision of the California Court of Appeal (First District) may be of interest. The Treaty of Friendship, Commerce and Consular Rights between Germany and the United States of America of 1923⁵⁰⁶ exempted from taxation land and buildings used by each State on the territory of the other. Taxes were levied, however, when Switzerland, as a caretaker, and, later on, the Federal Government, took over the premises of the Consulate General of Germany in San Francisco. The City and County of San Francisco contended that the 1923 Treaty had lapsed or been suspended as a result of the outbreak of World War II. However, the Court of Appeal found that the Treaty and the exemption provided by it were not abrogated “since the immunity from taxation therein provided was not incompatible with the existence of a state of war”. While this case may be viewed as an affirmation of the continued applicability of a treaty of friendship and commerce, the 1923 Treaty also concerned consular relations and hence may serve as evidence of the survival of agreements on consular relations.⁵⁰⁷

⁵⁰⁴ Chinkin (footnote 500 above), pp. 194–195. See also “The effects of armed conflict on treaties: an examination of practice and doctrine”, memorandum by the Secretariat (footnote 389 above), para. 36.

⁵⁰⁵ *United States Diplomatic and Consular Staff in Tehran* (see footnote 501 above), p. 24, para. 45; p. 41, para. 90; and (in the *dispositif*) p. 44, para. 95.

⁵⁰⁶ See footnote 458 above.

⁵⁰⁷ *Brownell v. City and County of San Francisco* (see footnote 444 above), p. 433.

⁵⁰¹ *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, at p. 40, para. 86.

⁵⁰² *Ibid.*, p. 24, para. 45; p. 41, para. 90; and (in the *dispositif*) p. 44, para. 95.

⁵⁰³ L. T. Lee, *Consular Law and Practice*, 2nd ed., Oxford, Clarendon Press, 1991, p. 111.

Annex 288

International Law Commission, The Obligation to Extradite or Prosecute (aut dedere aut
judicare): Final Report of the International Law Commission (2014)

The obligation to extradite or prosecute
(*aut dedere aut judicare*)

Final Report of the International Law Commission
2014

Adopted by the International Law Commission at its sixty-sixth session, in 2014, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 65). The report will appear in *Yearbook of the International Law Commission, 2014*, vol. II (Part Two).



The obligation to extradite or prosecute (*aut dedere aut judicare*)

Final report on the topic

65. This report is intended to summarize and to highlight particular aspects of the work of the Commission on the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)”, in order to assist States in this matter.

1. Obligation to fight impunity in accordance with the rule of law

(1) The Commission notes that States have expressed their desire to cooperate among themselves, and with competent international tribunals, in the fight against impunity for crimes, in particular offences of international concern,⁴²⁰ and in accordance with the rule of law.⁴²¹ In the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, the Heads of State and Government and heads of delegation attending the meeting on 24 September 2012 committed themselves to “ensuring that impunity is not tolerated for genocide, war crimes, crimes against humanity and for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law ...”.⁴²² The obligation to cooperate in combating such impunity is given effect in numerous conventions, *inter alia*, through the obligation to extradite or prosecute.⁴²³ The view that the obligation to extradite or prosecute plays a crucial role in the fight against impunity is widely shared by States;⁴²⁴ the obligation applies in respect of a wide range of crimes of serious concern to the international community and has been included in all sectoral conventions against international terrorism concluded since 1970.

(2) The role the obligation to extradite or prosecute plays in supporting international cooperation to fight impunity has been recognized at least since the time of Hugo Grotius, who postulated the principle of *aut dedere aut punire* (either extradite or punish): “When appealed to, a State should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal.”⁴²⁵ The modern terminology replaces “punishment” with “prosecution” as the alternative to extradition in order to reflect better the possibility that an alleged offender may be found not guilty.

⁴²⁰ See, e.g., General Assembly resolution 2840 (XXVI) of 18 December 1971 entitled “Question of the punishment of war criminals and of persons who have committed crimes against humanity”; General Assembly resolution 3074 (XXVIII) of 3 December 1973 on the “Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity”; and principle 18 of Economic and Social Council resolution 1989/65 of 24 May 1989 entitled “Effective prevention and investigation of extra-legal, arbitrary and summary executions”.

⁴²¹ General Assembly resolution 67/1 of 24 September 2012.

⁴²² *Ibid.*, para. 22.

⁴²³ See Part 3 below. In the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the International Court of Justice states: “... Extradition and prosecution are alternative ways to combat impunity in accordance with Art. 7, para 1 [of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984]. ...” (*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at p. 443, para. 50). The Court adds that the States parties to the Convention against Torture have “a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity” (*ibid.*, p. 449, para. 68). The Court reiterates that the object and purpose of the Convention are “to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts” (*ibid.*, p. 451, para. 74 and cf. also para. 75).

Special Rapporteur Zdzisław Galicki’s fourth report dealt at length with the issue of the duty to cooperate in the fight against impunity. He cited the following examples of international instruments which provide a legal basis for the duty to cooperate: Art. 1 (3) of the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, the preamble to the 1998 Rome Statute of the International Criminal Court, and guideline XII of the Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, adopted by the Committee of Ministers on 30 Mar. 2011, A/CN.4/648, paras. 26–33.

⁴²⁴ For example, Belgium (A/CN.4/612, para. 33); Denmark, Finland, Iceland, Norway and Sweden (A/C.6/66/SR.26, para. 10); Switzerland (*ibid.*, para. 18); El Salvador (*ibid.*, para. 24); Italy (*ibid.*, para. 42); Peru (*ibid.*, para. 64); Belarus (A/C.6/66/SR.27, para. 41); Russian Federation (*ibid.*, para. 64); and India (*ibid.*, para. 81).

⁴²⁵ Hugo Grotius, *De Jure Belli ac Pacis*, Book II, chapter XXI, section IV (English translation by Francis W. Kelsey (Oxford/London: Clarendon Press/Humphrey Milford, 1925), pp. 527–529 at 527).

2. The importance of the obligation to extradite or prosecute in the work of the International Law Commission

(3) The topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)” may be viewed as having been encompassed by the topic “Jurisdiction with regard to crimes committed outside national territory” which was on the provisional list of fourteen topics at the first session of the Commission in 1949.⁴²⁶ It is also addressed in articles 8 (Establishment of jurisdiction) and 9 (Obligation to extradite or prosecute) of the 1996 Draft code of crimes against the peace and security of mankind. Article 9 of the Draft code stipulates an obligation to extradite or prosecute for genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes.⁴²⁷ The principle *aut dedere aut judicare* is said to have derived from “a number of multilateral conventions”⁴²⁸ that contain the obligation. An analysis of the draft code’s history suggests that draft article 9 is driven by the need for an effective system of criminalization and prosecution of the said core crimes, rather than actual State practice and *opinio juris*.⁴²⁹ The article is justified on the basis of the grave nature of the crimes involved and the desire to combat impunity for individuals who commit these crimes.⁴³⁰ While the draft code’s focus is on core crimes,⁴³¹ the material scope of the obligation to extradite or prosecute covers most crimes of international concern, as mentioned in (1) above.

3. Summary of work

(4) The following summarizes several key aspects of the Commission’s work on this topic. In the past, some members of the Commission, including Special Rapporteur Zdzislaw Galicki, doubted the use of the Latin formula “*aut dedere aut judicare*”, especially in relation to the term “*judicare*”, which they considered as not reflecting precisely the scope of the term “prosecute”. However, the Special Rapporteur considered it premature at that time to focus on the precise definition of terms, leaving them to be defined in a future draft article on “Use of terms”.⁴³² The report of the Commission decided to proceed on the understanding that whether the mandatory nature of “extradition” or that of “prosecution” has priority over the other depends on the context and applicable legal regime in particular situations.

(5) The Commission considered useful to its work a wide range of materials, particularly: the Survey of multilateral conventions which may be of relevance for the Commission’s work on the topic “The

⁴²⁶ United Nations, *The Work of the International Law Commission*, Eighth edition (New York: United Nations 2012), vol. 1, p. 37.

⁴²⁷ “Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17 [genocide], 18 [crimes against humanity], 19 [crimes against United Nations and associated personnel] or 20 [war crimes] is found shall extradite or prosecute that individual”. See also the Commission’s commentary on this article (*Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10)*, chap. II).

⁴²⁸ Draft code of crimes against the peace and security of mankind, art. 8, para. (3) (*ibid.*).

⁴²⁹ *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10)*, p. 80, para. 142.

⁴³⁰ Draft code of crimes against the peace and security of mankind, art. 8, paras. (3), (4) and (8) and art. 9, para.

(2) (*ibid.*, *Fifty-first Session, Supplement No. 10 (A/51/10)*).

⁴³¹ At the first reading in 1991, the draft code comprised the following 12 crimes: aggression; threat of aggression; intervention; colonial domination and other forms of alien domination; genocide; apartheid; systematic or mass violations of human rights; exceptionally serious war crimes; recruitment, financing and training of mercenaries; international terrorism; illicit traffic in narcotic drugs; and wilful and severe damage to the environment. At its sessions in 1995 and 1996, the Commission reduced the number of crimes in the final draft code to four crimes: aggression; genocide; war crimes; and crimes against humanity, adhering to the Nuremberg legacy as the criterion for the choice of the crimes covered by the draft code. The primary reason for this approach appeared to have been the unfavourable comments by 24 Governments to the list of 12 crimes proposed in 1991. A fifth crime, crimes against United Nations and associated personnel, was added at the last moment on the basis of its magnitude, the seriousness of the problem of attacks on such personnel and “its centrality to the maintenance of international peace and security” (A/CN.4/448 and Add.1).

The crime of aggression was not subject to the provision of art. 9 of the draft code. In the Commission’s opinion, “[t]he determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in parent imperium non habet*. ... [and] the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security.” (Draft code of crimes against the peace and security of mankind, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10)*, p. 30, para. 14).

⁴³² A/CN.4/603, paras. 36–37. In his preliminary report, the Special Rapporteur discussed various Latin formulas relevant to this topic; namely: *aut dedere aut punire*; *judicare aut dedere*; *aut dedere aut prosequi*; *aut dedere, aut judicare, aut tergiversari*; and *aut dedere aut poenam persequi* (A/CN.4/571, paras. 5–8). See also: Raphaël van Steenberghe, “The Obligation to Extradite or Prosecute: Clarifying its Nature” (*Journal of International Criminal Justice*, vol. 9 (2011), p. 1089 at pp. 1107–8, on the formulas *aut dedere aut punire*, *aut dedere aut prosequi*, and *aut dedere aut judicare*).

obligation to extradite or prosecute (*aut dedere aut judicare*)” conducted by Secretariat⁴³³ (hereinafter “Secretariat’s Survey (2010)”), which identified multilateral instruments at the universal and regional levels that contain provisions combining extradition and prosecution as alternatives for the punishment of offenders; and the Judgment of 20 July 2012 of the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*.

(a) Typology of provisions in multilateral instruments

(6) The Secretariat’s Survey (2010) proposed a description and a typology of the relevant instruments in light of these provisions, and examined the preparatory work of certain key conventions that had served as models in the field. For some provisions, it also reviewed any reservations made. It pointed out the differences and similarities between the reviewed provisions in different conventions and their evolution, and offered overall conclusions as to: (a) the relationship between extradition and prosecution in the relevant provisions; (b) the conditions applicable to extradition under the various conventions; and (c) the conditions applicable to prosecution under the various conventions. The Survey classified conventions that included such provisions into four categories: (a) the 1929 Convention for the Suppression of Counterfeiting Currency and other conventions that have followed the same model; (b) regional conventions on extradition; (c) the 1949 Geneva Conventions and the 1977 Additional Protocol I; and (d) the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft and other conventions that have followed the same model.

(7) The 1929 Convention for the Suppression of Counterfeiting Currency and other conventions that have followed the same model⁴³⁴ typically: (a) criminalize the relevant offence, which the States parties undertake to make punishable under their domestic laws; (b) make provision for prosecution and extradition which take into account the divergent views of States with regard to the extradition of nationals and the exercise of extraterritorial jurisdiction, the latter being permissive rather than compulsory; (c) contain provisions which impose an obligation to extradite, with prosecution coming into play once there is a refusal of extradition; (d) establish an extradition regime by which States undertake, under certain conditions, to consider the offence as extraditable; (e) contain a provision providing that a State’s attitude on the general issue of criminal jurisdiction as a question of international law was not affected by its participation in the Convention; and (f) contain a non-prejudice clause with regard to each State’s criminal legislation and administration. While some of the instruments under this model contain terminological differences of an editorial nature, others modify the substance of the obligations undertaken by States Parties.

(8) Numerous regional conventions and arrangements on extradition also contain provisions that combine options of extradition and prosecution,⁴³⁵ although those instruments typically emphasize the obligation to extradite (which is regulated in detail) and only contemplate submission to prosecution as an alternative to avoid impunity in the context of that cooperation. Under that model, extradition is a means to ensure the effectiveness of criminal jurisdiction. States parties have a general duty to extradite unless the request fits within a condition or exception, including mandatory and discretionary grounds for refusal. For instance, extradition of nationals could be prohibited or subject to specific safeguards. Provisions in subsequent agreements and arrangements have been subject to modification and adjustment over time, particularly in respect of conditions and exceptions.⁴³⁶

⁴³³ A/CN.4/630.

⁴³⁴ E.g., (a) 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs; (b) the 1937 Convention for the Prevention and Punishment of Terrorism; (c) the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; (d) the 1961 Single Convention on Narcotic Drugs; and (e) the 1971 Convention on Psychotropic Substances.

⁴³⁵ These instruments include: (a) the 1928 Convention on Private International Law, also known as the “Bustamante Code”, under Book IV (International Law of Procedure), Title III (Extradition); (b) the 1933 Convention on Extradition; (c) the 1981 Inter-American Convention on Extradition; (d) the 1957 European Convention on Extradition; (e) the 1961 General Convention on Judicial Cooperation (*Convention générale de coopération en matière de justice*); (f) the 1994 Economic Community of West African States (ECOWAS) Convention on Extradition; and (g) the London Scheme for Extradition within the Commonwealth.

⁴³⁶ It may also be recalled that General Assembly has adopted the Model Treaty on Extradition (resolution 45/116, annex) and the Model Treaty on Mutual Assistance in Criminal Matters (resolution 45/117). See also the 2004 *Model Law on Extradition* prepared by the United Nations Office on Drugs and Crime, Available at

(9) The four Geneva Conventions of 1949 contain the same provision whereby each High Contracting Party is obligated to search for persons alleged to have committed, or to have ordered to be committed, grave breaches, and to bring such persons, regardless of their nationality, before its own courts. However, it may also, if it prefers, and in accordance with its domestic legislation, hand such persons over for trial to another High Contracting Party concerned, provided that the latter has established a *prima facie* case.⁴³⁷ Therefore, under that model, the obligation to search for and submit to prosecution an alleged offender is not conditional on any jurisdictional consideration and that obligation exists irrespective of any request for extradition by another party.⁴³⁸ Nonetheless, extradition is an available option subject to a condition that the prosecuting State has established a *prima facie* case. That mechanism is made applicable to Additional Protocol I of 1977 by renvoi.⁴³⁹

(10) The 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, stipulates in article 7 that “[t]he Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution”. This “Hague formula” is a variation of the Geneva Conventions formula and has served as a model for several subsequent conventions aimed at the suppression of specific offences, principally in the fight against terrorism, but also in many other areas (including torture, mercenarism, crimes against United Nations and associated personnel, transnational crime, corruption, and enforced disappearance).⁴⁴⁰ However, many of those subsequent instruments have modified the original terminology which sometimes affect the substance of the obligations contained in the Hague formula.

(11) In his Separate Opinion in the Judgment of 20 July 2012 of the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*,

http://www.unodc.org/pdf/model_law_extradition.pdf. See also Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, available at: http://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf (visited on 3 June 2014).

⁴³⁷ Arts. 49, 50, 129, and 146, respectively, of the First, Second, Third, and Fourth Geneva Conventions. The reason these Geneva Conventions use the term “hand over” instead of “extradite” is explained in the Secretariat’s Survey (2010) at para. 54.

According to Claus Krefß (“Reflection on the *Judicare* Limb of the Grave Breaches Regime” *Journal of International Criminal Justice*, vol. 7 (2009), p. 789), what the *judicare* limb of the grave breaches regime actually entails is a duty to investigate and, where so warranted, to prosecute and convict.

⁴³⁸ See Jean S. Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary*, vol. IV (International Committee of the Red Cross 1958) p. 593.

⁴³⁹ Art. 85 (1), (3) and art. 88 (2) of Additional Protocol I of 1977.

⁴⁴⁰ These include, *inter alia*: (a) the 1971 Organization of American States (OAS) Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance; (b) the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; (c) the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; (d) the 1977 European Convention on the Suppression of Terrorism; (e) 1977 Organization of African Unity Convention for the Elimination of Mercenarism in Africa; (f) the 1979 International Convention against the Taking of Hostages; (g) the 1979 Convention on the Physical Protection of Nuclear Material; (h) the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; (i) the 1985 Inter-American Convention to Prevent and Punish Torture; (j) the 1987 South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism and the 2004 Additional Protocol thereto; (k) the 1988 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; (l) the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; (m) the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; (n) the 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries; (o) the 1994 Inter-American Convention on the Forced Disappearance of Persons; (p) the 1994 Convention on the Safety of United Nations and Associated Personnel and its 2005 Optional Protocol; (q) the 1996 Inter-American Convention against Corruption; (r) the 1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials; (s) the 1997 Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; (t) the 1997 International Convention for the Suppression of Terrorist Bombings; (u) the 1998 Convention on the Protection of the Environment through Criminal Law; (v) the 1999 Criminal Law Convention on Corruption; (w) the 1999 Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict; (x) the 1999 International Convention for the Suppression of the Financing of Terrorism; (y) the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; (z) the 2000 United Nations Convention against Transnational Organized Crime and its Protocols; (aa) the 2001 Council of Europe Convention on Cybercrime; (bb) the 2003 African Union Convention on Preventing and Combating Corruption; (cc) the 2003 United Nations Convention against Corruption; (dd) the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism; (ee) the 2005 Council of Europe Convention on the Prevention of Terrorism; (ff) the 2006 International Convention for the Protection of All Persons from Enforced Disappearance; (gg) the 2007 Association of Southeast Asian Nations (ASEAN) Convention on Counter-Terrorism; (hh) 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft; and (ii) the 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation.

Judge Yusuf also addressed the typology of “treaties containing the formula *aut dedere aut judicare*” and divided them into two broad categories.⁴⁴¹ The first category of international conventions contained clauses which impose an obligation to extradite, and in which submission to prosecution becomes an obligation only after the refusal of extradition. Those conventions are structured in such a way that gives priority to extradition to the State in whose territory the crime is committed. The majority of those conventions do not impose any general obligation on States parties to submit to prosecution the alleged offender, and such submission by the State on whose territory the alleged offender is present becomes an obligation only if a request for extradition has been refused, or some factors such as nationality of the alleged offender exist. Examples of the first category are article 9, paragraph 22 of the 1929 International Convention for the Suppression of Counterfeiting Currency, article 15 of the African Union Convention on Preventing and Combating Corruption, and article 5 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

The second category of international conventions contains clauses which impose an obligation to submit to prosecution, with extradition being an available option, as well as clauses which impose an obligation to submit to prosecution, with extradition becoming an obligation if the State fails to do so. Such clauses in that category can be found in, for example, the relevant provisions of the four Geneva Conventions of 1949, article 7, paragraph 1 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, and article 7, paragraph 1 of the Convention against Torture.

(12) In light of the above, the Commission considers that when drafting treaties, States can decide for themselves which conventional formula on the obligation to extradite or prosecute best suits their objective in a particular circumstance. Owing to the great diversity in the formulation, content, and scope of the obligation to extradite or prosecute in conventional practice, it would be futile for the Commission to engage in harmonizing the various treaty clauses on the obligation to extradite or prosecute.⁴⁴²

(13) Although the Commission finds that the scope of the obligation to extradite or prosecute under the relevant conventions should be analysed on a case-by-case basis, it acknowledges that there may be some general trends and common features in the more recent conventions containing the obligation to extradite or prosecute. One of the most relevant trends appears to be the use of “Hague formula” that serves “as a model for most of the contemporary conventions for the suppression of specific offences”.⁴⁴³ Of the conventions drafted on or after 1970, approximately three-quarters follow the “Hague formula”. In those post-1970 conventions, there is a common trend that the custodial State shall, without exception, submit the case of the alleged offender to a competent authority if it does not extradite. Such obligation is supplemented by additional provisions that require States parties: (a) to criminalize the relevant offence under its domestic laws; (b) to establish jurisdiction over the offence when there is a link to the crime or when the alleged offender is present on their territory and is not extradited; (c) to make provisions to ensure that the alleged offender is under custody and there is a preliminary enquiry; and (d) to treat the offence as extraditable.⁴⁴⁴ In particular, under the prosecution limb of the obligation, the conventions only emphasize that the case be submitted to a competent authority for the purpose of prosecution. To a lesser extent, there

⁴⁴¹ Separate Opinion of Judge Yusuf in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at pp. 567–568, paras. 19–22. See also Secretariat survey (2010), para. 126. Cf. also Belgium’s comments submitted to the Commission in 2009, where Belgium identified two types of treaties: (a) treaties which contain an *aut dedere aut judicare* clause with the obligation to prosecute conditional on refusal of a request for extradition of the alleged perpetrator of an offence; and (b) treaties which contain a *judicare vel dedere* clause with the obligation on States to exercise universal jurisdiction over perpetrators of the offences under the treaties, without making this obligation conditional on refusal to honour a prior extradition request (A/CN.4/612, para. 15), quoted by Special Rapporteur Galicki in his fourth report (A/CN.4/648, para. 85 and fn. 56).

⁴⁴² As the Secretariat’s Survey (2010) concludes (A/CN.4/630, para. 153):

“... The examination of conventional practice in this field shows that the degree of specificity of the various conventions in regulating these issues varies considerably, and that there exist very few conventions that adopt identical mechanisms for the punishment of offenders (including with respect to the relationship between extradition and prosecution). The variation in the provisions relating to prosecution and extradition appears to be determined by several factors, including the geographical, institutional and thematic framework in which each convention is negotiated ... and the development of related areas of international law, such as human rights and criminal justice. It follows that, while it is possible to identify some general trends and common features in the relevant provisions, conclusive findings regarding the precise scope of each provision need to be made on a case-by-case basis, taking into account the formulation of the provision, the general economy of the treaty in which it is contained and the relevant preparatory works.”

⁴⁴³ *Ibid.*, para. 91.

⁴⁴⁴ *Ibid.*, para. 109.

is also a trend of stipulating that, absent prosecution by the custodial State, the alleged offender must be extradited without exception whatsoever.

(14) The Commission observes that there are important gaps in the present conventional regime governing the obligation to extradite or prosecute which may need to be closed. Notably, there is a lack of international conventions with this obligation in relation to most crimes against humanity,⁴⁴⁵ war crimes other than grave breaches, and war crimes in non-international armed conflict.⁴⁴⁶ In relation to genocide, the international cooperation regime could be strengthened beyond the rudimentary regime under the Convention for the Prevention and Punishment of the Crime of Genocide of 1948. As explained by the International Court of Justice in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, article VI of the Genocide Convention only obligates Contracting Parties to institute and exercise territorial criminal jurisdiction as well as to cooperate with an “international penal tribunal” under certain circumstances.⁴⁴⁷

(b) Implementation of the obligation to extradite or prosecute

(15) *The Hague formula.* The Commission views the Judgment of the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* to be helpful in elucidating some aspects relevant to the implementation of the obligation to extradite or prosecute. The Judgment confines itself to an analysis of the mechanism to combat impunity under the Convention against Torture. In particular, the Judgment focuses on the relationship between the different articles on the establishment of jurisdiction (article 5), the obligation to engage in a preliminary inquiry (article 6), and the obligation to prosecute or extradite (article 7).⁴⁴⁸ While the Court’s reasoning relates to the specific implementation and application of issues surrounding that Convention, since the relevant prosecute-or-extradite provisions of the Convention against Torture are modelled upon those of the “Hague formula”, the Court’s ruling may also help to elucidate the meaning of the prosecute-or-extradite regime under the 1970 Hague Convention and other conventions which have followed the same formula.⁴⁴⁹ As the

⁴⁴⁵ The 2006 International Convention for the Protection of All Persons from Enforced Disappearance follows the Hague formula, and refers to the “extreme seriousness” of the offence, which it qualifies, when widespread or systematic, as a crime against humanity. However, outside of this, there appears to be a lack of international conventions with the obligation to extradite or prosecute in relation to crimes against humanity.

⁴⁴⁶ The underlying principle of the four Geneva Conventions of 1949 is the establishment of universal jurisdiction over grave breaches of the Conventions. Each Convention contains an article describing what acts constitute grave breaches that follows immediately after the extradite-or-prosecute provision.

For the First and Second Geneva Conventions, this article is identical (arts. 50 and 51, respectively): “Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

Art. 130 of the Third Geneva Convention stipulates: “Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.”

Art. 147 of the Fourth Geneva Convention provides: “Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

The four Conventions and the Additional Protocol I of 1977 do not establish an obligation to extradite or prosecute outside of grave breaches. No other international instruments relating to war crimes have this obligation, either.

⁴⁴⁷ *I.C.J. Reports 2007*, p. 43, at pp. 226–227 and 229, paras. 442, 449. Art. VI reads: “Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.” The Court at para. 442 did not exclude other bases when it observed that “Article VI only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so.”

⁴⁴⁸ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at pp. 450–461, paras. 71–121.

⁴⁴⁹ The Court notes that art. 7 (1) of the Convention against Torture is based on a similar provision contained in the 1970 Hague Convention (*ibid.*, para. 90). As Judge Donoghue puts it: “The dispositive paragraphs of today’s Judgment bind

Court also holds that the prohibition of torture is a peremptory norm (*jus cogens*),⁴⁵⁰ the prosecute-or-extradite formula under the Convention against Torture could serve as a model for new prosecute-or-extradite regimes governing prohibitions covered by peremptory norms (*jus cogens*), such as genocide, crimes against humanity, and serious war crimes.

(16) The Court determines that States parties to the Convention against Torture have obligations to criminalize torture, establish their jurisdiction over the crime of torture so as to equip themselves with the necessary legal tool to prosecute that offence, and make an inquiry into the facts immediately from the time the suspect is present in their respective territories. The Court declares: “These obligations, taken as a whole, might be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven”.⁴⁵¹ The obligation under article 7, paragraph 1, “to submit the case to the competent authorities for the purpose of prosecution”, which the Court calls the “obligation to prosecute”, arises regardless of the existence of a prior request for the extradition of the suspect. However, national authorities are left to decide whether to initiate proceedings in light of the evidence before them and the relevant rules of criminal procedure.⁴⁵² In particular, the Court rules that “[e]xtradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State”.⁴⁵³ The Court also notes that both the 1970 Hague Convention and the Convention against Torture emphasize “that the authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of the State concerned”.⁴⁵⁴

(17) *Basic elements of the obligation to extradite or prosecute to be included in national legislation.* The effective fulfilment of the obligation to extradite or prosecute requires undertaking necessary national measures to criminalize the relevant offences, establishing jurisdiction over the offences and the person present in the territory of the State, investigating or undertaking primary inquiry, apprehending the suspect, and submitting the case to the prosecuting authorities (which may or may not result in the institution of proceedings) or extraditing, if an extradition request is made by another State with the necessary jurisdiction and capability to prosecute the suspect.

(18) *Establishment of the necessary jurisdiction.* Establishing jurisdiction is “a logical prior step” to the implementation of an obligation to extradite or prosecute an alleged offender present in the territory of a State.⁴⁵⁵ For the purposes of the present topic, when the crime was allegedly committed abroad with no nexus to the forum State, the obligation to extradite or prosecute would necessarily reflect an exercise of universal jurisdiction,⁴⁵⁶ which is “the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events”⁴⁵⁷ where neither the victims nor alleged offenders are nationals of the forum State and no harm was allegedly caused to the forum State’s own national interests. However, the obligation to extradite or prosecute can also reflect an exercise of jurisdiction under other bases. Thus, if a State can exercise jurisdiction on another basis, universal jurisdiction may not necessarily be invoked in the fulfilment of the obligation to extradite or prosecute.

only the Parties. Nonetheless, the Court’s interpretation of a multilateral treaty (or of customary international law) can have implications for other States. The far-reaching nature of the legal issues presented by this case is revealed by the number of questions posed by Members of the Court during oral proceedings.” (Declaration of Judge Donoghue in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at p. 590, para. 21.)

⁴⁵⁰ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at p. 457, para. 99.

⁴⁵¹ *Ibid.*, p. 455, para. 91. See also pp. 451–452 and 456, paras. 74–75, 78, 94.

⁴⁵² *Ibid.*, pp. 454–456, paras. 90, 94.

⁴⁵³ *Ibid.*, p. 456, para. 95.

⁴⁵⁴ Art. 7, para. 2 of the Convention against Torture and art. 7 of the Hague Convention of 1970, *ibid.* para. 90.

⁴⁵⁵ Report of the AU-EU Technical *ad hoc* Expert Group on the Principle of Universal Jurisdiction (8672/1/09/Rev.1), annex, para. 11. The International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* holds that the performance by States parties to the Convention against Torture of their obligation to establish universal jurisdiction of their courts is a necessary condition for enabling a preliminary inquiry and for submitting the case to their competent authorities for the purpose of prosecution (*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at p. 451, para. 74).

⁴⁵⁶ According to one author, “The principle of *aut dedere aut judicare* overlaps with universal jurisdiction when a State has no other nexus to the alleged crime or to the suspect other than the mere presence of the person within its territory.” (Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia, 2005), p. 122).

⁴⁵⁷ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) I.C.J. Reports 2002*, p. 3, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, p. 75 para. 42.

Universal jurisdiction is a crucial component for prosecuting alleged perpetrators of crimes of international concern, particularly when the alleged perpetrator is not prosecuted in the territory where the crime was committed.⁴⁵⁸ Several international instruments, such as the very widely ratified four Geneva Conventions of 1949 and the Convention against Torture, require the exercise of universal jurisdiction over the offences covered by these instruments, or, alternatively to extradite alleged offenders to another State for the purpose of prosecution.

(19) *Delay in enacting legislation.* According to the Court in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, delay in enacting necessary legislation in order to prosecute suspects adversely affects the State party's implementation of the obligations to conduct a preliminary inquiry and to submit the case to its competent authorities for the purposes of prosecution.⁴⁵⁹ The State's obligation extends beyond merely enacting national legislation. The State must also actually exercise its jurisdiction over a suspect, starting by establishing the facts.⁴⁶⁰

(20) *Obligation to investigate.* According to the Court in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the obligation to investigate consists of several elements.

As a general rule, the obligation to investigate must be interpreted in light of the object and purpose of the applicable treaty, which is to make more effective the fight against impunity.⁴⁶¹

The obligation is intended to corroborate the suspicions regarding the person in question.⁴⁶² The starting point is the establishment of the relevant facts, which is an essential stage in the process of the fight against impunity.⁴⁶³

As soon as the authorities have reason to suspect that a person present in their territory may be responsible for acts subject to the obligation to extradite or prosecute, they must investigate. The preliminary inquiry must immediately be initiated. This point is reached, at the latest, when the first complaint is filed against the person,⁴⁶⁴ at which stage the establishment of the facts becomes imperative.⁴⁶⁵

However, simply questioning the suspect in order to establish his/her identity and inform him/her of the charges cannot be regarded as performance of the obligation to conduct a preliminary inquiry.⁴⁶⁶

The inquiry is to be conducted by the authorities who have the task of drawing up a case file and collecting facts and evidence (for example, documents and witness statements relating to the events at issue and to the suspect's possible involvement). These authorities are those of the State where the alleged crime was committed or of any other State where complaints have been filed in relation to the case. In order to fulfil its obligation to conduct a preliminary inquiry, the State in whose territory the suspect is present should seek cooperation of the authorities of the aforementioned States.⁴⁶⁷

An inquiry taking place on the basis of universal jurisdiction must be conducted according to the same standards in terms of evidence as when the State has jurisdiction by virtue of a link with the case in question.⁴⁶⁸

⁴⁵⁸ It should be recalled that the "Obligation to extradite or prosecute" in art. 9 of the 1996 draft code is closely related to the "Establishment of jurisdiction" under art. 8 of the draft code, which requires each State party thereto to take such measures as may be necessary to establish its jurisdiction over genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes, irrespective of where or by whom those crimes were committed. The Commission's commentary to art. 8 makes it clear that universal jurisdiction is envisaged (*Official Record of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10)*, para. 7).

⁴⁵⁹ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports* 2012, p. 422, at pp. 451–452, paras. 76, 77.

⁴⁶⁰ *Ibid.*, p. 453, para. 84.

⁴⁶¹ *Ibid.*, p. 454, para. 86.

⁴⁶² *Ibid.*, p. 453, para. 83.

⁴⁶³ *Ibid.*, pp. 453–454, paras. 85–86.

⁴⁶⁴ *Ibid.*, p. 454, para. 88.

⁴⁶⁵ *Ibid.*, p. 454, para. 86.

⁴⁶⁶ *Ibid.*, pp. 453–454, para. 85.

⁴⁶⁷ *Ibid.*, p. 453, para. 83.

⁴⁶⁸ *Ibid.*, p. 453, para. 84.

(21) *Obligation to prosecute.* According to the Court in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the obligation to prosecute consists of certain elements.

The obligation to prosecute is actually an obligation to submit the case to the prosecuting authorities; it does not involve an obligation to initiate a prosecution. Indeed, in light of the evidence, fulfilment of the obligation may or may not result in the institution of proceedings.⁴⁶⁹ The competent authorities decide whether to initiate proceedings, in the same manner as they would for any alleged offence of a serious nature under the law of the State concerned.⁴⁷⁰

Proceedings relating to the implementation of the obligation to prosecute should be undertaken without delay, as soon as possible, in particular once the first complaint has been filed against the suspect.⁴⁷¹

The timeliness of the prosecution must be such that it does not lead to injustice; hence, necessary actions must be undertaken within a reasonable time limit.⁴⁷²

(22) *Obligation to extradite.* With respect to the obligation to extradite:

Extradition may only be to a State that has jurisdiction in some capacity to prosecute and try the alleged offender pursuant to an international legal obligation binding on the State in whose territory the person is present.⁴⁷³

Fulfilling the obligation to extradite cannot be substituted by deportation, extraordinary rendition or other informal forms of dispatching the suspect to another State.⁴⁷⁴ Formal extradition requests entail important human rights protections which may be absent from informal forms of dispatching the suspect to another State, such as extraordinary renditions. Under extradition law of most, if not all, States, the necessary requirements to be satisfied include double criminality, *ne bis in idem*, *nullem crimen sine lege*, speciality, and non-extradition of the suspect to stand trial on the grounds of ethnic origin, religion, nationality or political views.

(23) *Compliance with object and purpose.* The steps to be taken by a State must be interpreted in light of the object and purpose of the relevant international instrument or other sources of international obligation binding on that State, rendering the fight against impunity more effective.⁴⁷⁵ It is also worth recalling that, by virtue of article 27 of the Vienna Convention on the Law of Treaties, which reflects customary international law, a State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty.⁴⁷⁶ Besides, the steps taken must be in accordance with the rule of law.

⁴⁶⁹ Cf. also *Chili Komitee Nederland v. Pinochet*, Court of Appeal of Amsterdam, 4 Jan. 1995 *Netherlands Yearbook of International Law*, vol. 28 (1997), pp. 363–365, in which the Court of Appeal held that the Dutch Public Prosecutor did not err in refusing to prosecute former Chilean President Pinochet while visiting Amsterdam because Pinochet might be entitled to immunity from prosecution and any necessary evidence to substantiate his prosecution would be in Chile with which the Netherlands had no cooperative arrangements regarding criminal proceedings. See Kimberley N. Trapp, *State Responsibility for International Terrorism* (Oxford: Oxford University Press 2011), p. 88, fn. 132.

⁴⁷⁰ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports* 2012, p. 422, at pp. 454 and 456, paras. 90, 94.

⁴⁷¹ *Ibid.*, paras. 115, 117.

⁴⁷² *Ibid.*, paras. 114, 115. Cf. Separate Opinion of Judge Çancado Trindade in that case at pp. 546–548, paras. 148, 151–153; Dissenting Opinion of Judge *ad hoc* Sur in the same case at p. 620, para. 50; and Dissenting Opinion of Judge Xue, at p. 578, para. 28.

⁴⁷³ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports* 2012, p. 422, at p. 461, para. 120.

⁴⁷⁴ Cf. Draft article 12 of the draft articles on the expulsion of aliens adopted by the Commission on second reading in 2014, see *Official Records of the General Assembly, Sixty-ninth Session, Supplement 10 (A/69/10)*, chap. IV and European Court of Human Rights, *Bozano v. France*, Judgment of 18 December 1986, Application No. 9990/82, paras. 52–60, where the European Court of Human Rights has held that extradition, disguised as deportation in order to circumvent the requirements of extradition, is illegal and incompatible with the right to security of person guaranteed under art. 5 of the European Convention on Human Rights.

⁴⁷⁵ See the reasoning in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports* 2012, p. 422, at pp. 453–454, paras. 85–86. Therefore, the Court rules that financial difficulties do not justify Senegal's failure to comply with the obligations under the Convention against Torture (*ibid.*, para. 112). Likewise, seeking guidance from the African Union does not justify Senegal's delay in complying with its obligation under the Convention (*ibid.*).

⁴⁷⁶ *Ibid.*, para. 113.

(24) In cases of serious crimes of international concern, the purpose of the obligation to extradite or prosecute is to prevent alleged perpetrators from going unpunished by ensuring that they cannot find refuge in any State.⁴⁷⁷

(25) *Temporal scope of the obligation.* The obligation to extradite or prosecute under a treaty applies only to facts having occurred after the entry into force of the said treaty for the State concerned, “unless a different intention appears from the treaty or is otherwise established”.⁴⁷⁸ After a State becomes party to a treaty containing the obligation to extradite or prosecute, it is entitled, with effect from the date of its becoming party to the treaty, to request another State party’s compliance with the obligation to extradite or prosecute.⁴⁷⁹ Thus, the obligation to criminalize and establish necessary jurisdiction over acts proscribed by a treaty containing the obligation to extradite or prosecute is to be implemented as soon as the State is bound by that treaty.⁴⁸⁰ However, nothing prevents the State from investigating or prosecuting acts committed before the entry into force of the treaty for that State.⁴⁸¹

(26) *Consequences of non-compliance with the obligation to extradite or prosecute.* In *Belgium v. Senegal*, the Court found that the violation of an international obligation under the Convention against Torture is a wrongful act engaging the responsibility of the State.⁴⁸² As long as all measures necessary for the implementation of the obligation have not been taken, the State remains in breach of its obligation.⁴⁸³ The Commission’s articles on responsibility of States for internationally wrongful acts stipulate that the commission of an internationally wrongful act attributable to a State involves legal consequences, including cessation and non-repetition of the act (art. 30), reparation (arts. 31, 34–39) and countermeasures (arts. 49–54).

(27) *Relationship between the obligation and the “third alternative”.* With the establishment of the International Criminal Court and various *ad hoc* international criminal tribunals, there is now the possibility that a State faced with an obligation to extradite or prosecute an accused person might have recourse to a third alternative – that of surrendering the suspect to a competent international criminal tribunal.⁴⁸⁴ This third alternative is stipulated, for example, in article 11, paragraph 1 of the International Convention for the Protection of All Persons from Enforced Disappearance, 2006.⁴⁸⁵

(28) In her dissenting opinion in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judge Xue opines that had Senegal surrendered the alleged offender to an international tribunal constituted by the African Union to try him, they would not have breached their obligation to prosecute under article 7 of the Convention against Torture, because such a tribunal would have been created to fulfil the purpose of the Convention, and this is not prohibited by the Convention itself or by State practice.⁴⁸⁶ Of course, if “a different intention appears from the treaty or is otherwise established”⁴⁸⁷ so as not to permit the surrender of an alleged offender to an international criminal tribunal,

⁴⁷⁷ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports* 2012, p. 422, at p. 461, para. 120. As also explained by Judge Cañado Trindade,

“... The conduct of the State ought to be one which is conducive to compliance with the obligations of result (in the *cas d’espèce*, the proscription of torture). The State cannot allege that, despite its good conduct, insufficiencies or difficulties of domestic law rendered it impossible the full compliance with its obligation (to outlaw torture and to prosecute perpetrators of it); and the Court cannot consider a case terminated, given the allegedly ‘good conduct’ of the State concerned.” (Separate Opinion of Judge Cañado Trindade in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports* 2012, p. 422, at p. 508, para. 50 and see also his full reasoning at pp. 505–508, paras. 44–51.)

⁴⁷⁸ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports* 2012, p. 422, at pp. 457–458, paras. 100–102, citing art. 28 of the Vienna Convention on the Law of Treaties, which reflects customary international law.

⁴⁷⁹ *Ibid.*, p. 458, paras. 103–105.

⁴⁸⁰ *Ibid.*, p. 451, para. 75.

⁴⁸¹ *Ibid.*, p. 458, paras. 102, 105.

⁴⁸² *Ibid.*, p. 456, para. 95.

⁴⁸³ *Ibid.*, pp. 460–461, para. 117.

⁴⁸⁴ Art. 9 of the 1996 Draft code of Crimes against the Peace of Mankind stipulates that the obligation to extradite or prosecute under that article is “[w]ithout prejudice to the jurisdiction of an international criminal court”.

⁴⁸⁵ “The State party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.”

⁴⁸⁶ Dissenting Opinion of Judge Xue, at p. 582, para. 42 (dissenting on other points).

⁴⁸⁷ Article 28 of the Vienna Convention on the Law of Treaties.

such surrender would not discharge the obligation of the States parties to the treaty to extradite or prosecute the person under their respective domestic legal systems.

(29) It is suggested that in light of the increasing significance of international criminal tribunals, new treaty provisions on the obligation to extradite or prosecute should include this third alternative, as should national legislation.

(30) *Additional observation.* A State might also wish to fulfil both parts of the obligation to extradite or prosecute, for example, by prosecuting, trying and sentencing an offender and then extraditing or surrendering the offender to another State for the purpose of enforcing the judgment.⁴⁸⁸

(c) Gaps in the existing conventional regime and the “third alternative”

(31) As noted in paragraph (14) above, the Commission reiterates that there are important gaps in the present conventional regime governing the obligation to extradite or prosecute, notably in relation to most crimes against humanity, war crimes other than grave breaches, and war crimes in non-international armed conflict. It also notes that it had placed on its programme of work in 2014 the topic “Crimes against humanity”, which would include as one element of a new treaty an obligation to extradite or prosecute for those crimes.⁴⁸⁹ It further suggested that, in relation to genocide, the international cooperation regime could be strengthened beyond the one that exists under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.⁴⁹⁰

(32) Instead of drafting a set of model provisions to close the gaps in the existing conventional regime regarding the obligation to extradite or prosecute, the Commission recalls that an obligation to extradite or prosecute for, *inter alia*, genocide, crimes against humanity and war crimes is already stipulated in article 9 of the 1996 Draft Code, which reads:

“Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17 [genocide], 18 [crimes against humanity], 19 [crimes against United Nations and associated personnel] or 20 [war crimes] is found shall extradite or prosecute that individual.”⁴⁹¹

(33) The Commission also refers to the “Hague formula”, quoted in paragraph (10) above. As noted in that paragraph, the “Hague formula”, has served as a model for most contemporary conventions containing the obligation to extradite or prosecute,⁴⁹² including the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption which have been mentioned by several delegations in the Sixth Committee in 2013 as a possible model to close the gaps in the conventional regime. In addition, the Judgment of the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* is helpful in construing the Hague formula.⁴⁹³ The Commission recommends that States consider the Hague formula in undertaking to close any gaps in the existing conventional regime.

(34) The Commission further acknowledges that some States⁴⁹⁴ have inquired about the link between the obligation to extradite or prosecute and the transfer of a suspect to an international or special court or tribunal, whereas other States⁴⁹⁵ treat such a transfer differently from extradition. As pointed out in

⁴⁸⁸ This possibility was raised by Special Rapporteur Galicki in his preliminary report (A/CN.4/571), paras. 49–50.

⁴⁸⁹ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10 (A/68/10)*, Annex B.

⁴⁹⁰ *Ibid.*, Annex A, para. 20. A study by the Chatham House suggested that the Commission’s future work on this topic should concentrate on drafting a treaty obligation to extradite or prosecute in respect of core international crimes and emulate the extradite-or-prosecute mechanism developed in Article 7 of the 1970 *Hague Convention for the Suppression of Unlawful Seizure of Aircraft* and incorporated in the 1984 *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment* and, most recently, in the 2006 *International Convention for the Protection of All Persons from Enforced Disappearance*. See Miša Zgonec-Rožej and Joanne Foakes, “International criminals: Extradite or Prosecute?” Chatham House Briefing Paper, Doc. IL BP 2013/01, Jul. 2013.

⁴⁹¹ See also the Commission’s commentary on this article in *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10)*, chap. II.

⁴⁹² *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10 (A/68/10)*, Annex A, para. 16 and accompanying footnote 28.

⁴⁹³ *Ibid.*, paras. 21–22.

⁴⁹⁴ Chile, France, and Thailand.

⁴⁹⁵ Canada and the United Kingdom of Great Britain and Northern Ireland.

paragraph (27) above, the obligation to extradite or prosecute may be satisfied by surrendering the alleged offender to a competent international criminal tribunal.⁴⁹⁶ A provision to this effect appears in article 11, paragraph 1, of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, which reads:

“The State party in the territory under whose jurisdiction a person alleged to have committed [an act of genocide/a crime against humanity/a war crime] is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to a competent international criminal tribunal or any other competent court whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.”

(35) Under such a provision, the obligation to extradite or prosecute may be satisfied by a “third alternative”, which would consist of the State surrendering the alleged offender to a competent international criminal tribunal or a competent court whose jurisdiction the State concerned has recognized. The competent tribunal or court may take a form similar in nature to the Extraordinary African Chambers, set up within the Senegalese court system by an agreement dated 22 August 2012 between Senegal and the African Union, to try Mr. Habré in the wake of the Judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*⁴⁹⁷ This kind of “internationalization” within a national court system is not unique. As a court established by the agreement between Senegal and the African Union, with the participation of national and foreign judges in these Chambers, the Extraordinary African Chambers follow the examples of the Extraordinary Chambers in the Courts of Cambodia, the Special Court for Sierra Leone and the Special Tribunal for Lebanon.

(36) The above examples highlight the essential elements of a provision containing the obligation to extradite or prosecute, and may assist States in choosing the formula that they consider to be most appropriate for a particular context.

(d) The priority between the obligation to prosecute and the obligation to extradite, and the scope of the obligation to prosecute

(37) The Commission takes note of the suggestion made by one delegation⁴⁹⁸ to the Sixth Committee in 2013 to analyze these two aspects of the topic. It also notes the suggestions of other delegations⁴⁹⁹ that the Commission establish a general framework of extraditable offences or guiding principles on the implementation of the obligation to extradite or prosecute. It wishes to draw attention to the Secretariat Survey (2010) and paragraphs (6)–(13) above, which have addressed these issues.

(38) To recapitulate, beyond the basic common features, provisions containing the obligation to extradite or prosecute in multilateral conventions vary considerably in their formulation, content and scope. This is particularly so in terms of the conditions imposed on States with respect to extradition and prosecution and the relationship between these two courses of action. Although the relationship between the obligation to extradite and the obligation to prosecute is not identical, the relevant provisions seem to fall into two main categories; namely, (a) those clauses pursuant to which the obligation to prosecute is only triggered by a refusal to surrender the alleged offender following a request for extradition; and (b) those imposing an obligation to prosecute *ipso facto* when the alleged offender is present in the territory of the State, which the latter may be liberated from by granting extradition.

⁴⁹⁶ See also the Council of Europe, *Extradition, European Standards: Explanatory notes on the Council of Europe convention and protocol and minimum standards protecting persons subject to transnational criminal proceedings* (Council of Europe Publishing, Strasbourg, 2006), where it is stated that: “... In the era of international criminal tribunals, the principle [*aut dedere aut judicare*] may be interpreted *lato sensu* to include the duty of the state to transfer the person to the jurisdiction of an international organ, such as the International Criminal Court” (*ibid.*, p. 119, footnote omitted).

⁴⁹⁷ The Extraordinary African Chambers have jurisdiction to try the person or persons most responsible for international crimes committed in Chad between 7 June 1982 and 1 December 1990. The Trial Chamber and the Appeals Chamber are each composed of two Senegalese judges and one non-Senegalese judge, who presides over the proceedings. The Trial Chamber and the Appeals Chamber are each composed of two Senegalese judges and one non-Senegalese judge, who presides over the proceedings, see *Statute of the Extraordinary African Chambers*, articles 3 and 11, *International Legal Materials*, vol. 52, (2013), pp. 1020–1036.

⁴⁹⁸ Mexico.

⁴⁹⁹ Cuba and Belarus, respectively.

(39) Instruments containing clauses in the first category impose on States Parties (at least those that do not have a special link with the offence) an obligation to prosecute only when extradition has been requested and not granted, as opposed to an obligation *ipso facto* to prosecute the alleged offender present in their territory. They recognize the possibility that a State may refuse to grant a request for extradition of an individual on grounds stipulated either in the instrument or in national legislation. However, in the event of refusal of extradition, the State is obliged to prosecute the individual. In other words, these instruments primarily focus on the option of extradition and provide the alternative of prosecution as a safeguard against impunity.⁵⁰⁰ In addition, instruments in this category may adopt very different mechanisms for the punishment of offenders, which may affect the interaction between extradition and prosecution. In some instances, there are detailed provisions concerning the prosecution of offences that are the subject of the instrument, while in other cases, the process of extradition is regulated in greater detail. The 1929 International Convention for the Suppression of Counterfeiting Currency and subsequent conventions inspired by it⁵⁰¹ belong to this first category.⁵⁰² Multilateral conventions on extradition also fall into this category.⁵⁰³

(40) Clauses in the second category impose upon States an obligation to prosecute *ipso facto* in that it arises as soon as the presence of the alleged offender in the territory of the State concerned is ascertained, regardless of any request for extradition. Only in the event that a request for extradition is made does the State concerned have the discretion to choose between extradition and prosecution.⁵⁰⁴ The clearest example of such clauses is the relevant common article of the 1949 Geneva Conventions, which provides that each State party “shall bring” persons alleged to have committed, or to have ordered to be committed, grave breaches to those Conventions, regardless of their nationality, before its own courts, but “may also, if it prefers”, hand such persons over for trial to another State party concerned.⁵⁰⁵ As for the Hague formula, its

⁵⁰⁰ Secretariat Survey (2010), para. 132. In effect, these conventions appear to follow what was originally foreseen by Hugo Grotius when he referred to the principle *aut dedere aut punire*. Hugo Grotius, *De Jure Belli ac Pacis*, Book II, chapter XXI, section IV (English translation by Francis W. Kelsey, Oxford/London, Clarendon Press/Humphrey Milford, 1925), pp. 527–529, at p. 527.

⁵⁰¹ E.g., the 1936 *Convention for the Suppression of the Illicit Traffic in Dangerous Drugs*; the 1937 *Convention for the Prevention and Punishment of Terrorism*; the 1950 *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*; the 1961 *Single Convention on Narcotic Drugs*; and the 1971 *Convention on Psychotropic Substances*. See also Secretariat Survey (2010), para. 29.

⁵⁰² The overall structure of the mechanism for the punishment of offenders in these conventions is based on the idea that the State in whose territory the crime was committed will request the extradition of the offender who has fled to another State and that extradition should, in principle, be granted. These conventions, however, recognise that States may be unable to extradite in some cases (most notably when the individual is their national or when they have granted asylum to him) and provide for the obligation to prosecute as an alternative. Secretariat Survey (2010), para. 133 and fn. 327 citing Marc Henzelin, *Le principe de l’universalité en droit pénal international. Droit et obligation pour les Etats de poursuivre et de juger selon le principe de l’universalité* (Basel/Geneva/Munich/Brussels, Helbing&Lichtenhahn/Faculté de droit de Genève/Bruylant, 2000), p. 286, who qualifies the system as *primo dedere secundo prosequi*.

⁵⁰³ E.g., the 1981 *Inter-American Convention on Extradition*; the 1957 *European Convention on Extradition*; the 1961 *General Convention on Judicial Cooperation (Convention générale de coopération en matière de justice)*; the 1994 *Economic Community of West African States (ECOWAS) Convention on Extradition*; and the *London Scheme for Extradition within the Commonwealth*. These conventions are based on the general undertaking by States Parties to surrender to one another all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted for the carrying out of a sentence or detention order. However, the obligation to extradite is subject to a number of conditions and exceptions, including when the request involves the national of the requested State. When extradition is refused, the conventions impose an alternative obligation to prosecute the alleged offender as a mechanism to avoid impunity. See also Secretariat Survey (2010), para. 134.

⁵⁰⁴ Secretariat Survey (2010), para. 127, and fn. 307. Those opining that the accused must be present in the territory of the State concerned as a precondition of the assertion of universal jurisdiction include Judges Higgins, Kooijmans and Buergenthal (Joint Separate Opinion in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *I.C.J. Reports 2002*, p. 80, para. 57). See also Separate Opinion of Judge Guillaume, *ibid.*, para. 9 and Gilbert Guillaume, “Terrorisme et droit international”, *Recueil des cours de l’Académie de droit international*, vol. 215, 1990, pp. 368–369. However, Marc Henzelin (*supra* note 502, p. 354) argues that the presence of the alleged offender in the territory of the State is not required for prosecution under the relevant provision of the 1949 *Geneva Conventions*.

⁵⁰⁵ While this provision appears to give a certain priority to prosecution by the custodial State, it also recognises that this State has the discretion to opt for extradition, provided that the requesting State has made out a *prima facie* case. Secretariat Survey (2010), para. 128, citing Declan Costello, “International Terrorism and the Development of the Principle *Aut Dedere Aut Judicare*”, *The Journal of International Law and Economics*, vol. 10, 1975, p. 486; M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht/Boston/London, Martinus Nijhoff, 1995), p. 15; and Christian Maierhöfer, “*Aut dedere – aut judicare*”, *Herkunft, Rechtsgrundlagen und Inhalt des völkerrechtlichen Gebotes zur Strafverfolgung oder Auslieferung* (Berlin, Duncker & Humblot, 2006), pp. 75–76. Authors who emphasize the priority attributed to prosecution in the 1949 Geneva Conventions are said to include Luigi Condorelli, “Il sistemadella repressione dei crimini di Guerra nelle Convenzioni di Ginevra del 1949 e nel primo protocollo addizionale del 1977”, in P. Lamberti Zanardi & G. Venturini, eds., *Crimini di guerra e competenza delle giurisdizioni nazionali: Atti del Convegno, Milano, 15–17 maggio 1997* (Milan, Giuffrè, 1998), pp. 35–36; and Henzelin, *supra*, p. 353 (who qualifies the model of the 1949 Geneva Conventions as *primo prosequi secundo dedere*). *C.f.* also art. 88 (2) of *Additional Protocol I* to the 1949 *Geneva Conventions*, which calls on States Parties to “give due consideration to the request of the State in whose territory

text does not unequivocally resolve the question of whether the obligation to prosecute arises *ipso facto* or only once a request for extradition is submitted and not granted.⁵⁰⁶ In this regard, the findings of the Committee against Torture and the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, in relation to a similar provision contained in article 7 of the 1984 Convention against Torture,⁵⁰⁷ are instructive. The Committee against Torture has explained that:

“... the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition. The alternative available to the State party under article 7 of the Convention exists only when a request for extradition has been made and puts the State party in the position of having to choose between (a) proceeding with extradition or (b) submitting the case to its own judicial authorities for the institution of criminal proceedings, the objective of the provision being to prevent any act of torture from going unpunished.”⁵⁰⁸

(41) Likewise, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the International Court of Justice considered article 7 (1) of the Convention against Torture as requiring:

“the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect. That is why Article 6, paragraph 2, obliges the State to make a preliminary inquiry immediately from the time that the suspect is present in its territory. The obligation to submit the case to the competent authorities, under Article 7, paragraph 1, may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect.

However, if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. ...”⁵⁰⁹

(42) Accordingly, it follows that the choice between extradition and submission for prosecution under the Convention did not mean that the two alternatives enjoyed the same weight. Extradition was an option offered to the State by the Convention while prosecution was an obligation under the Convention, the violation of which was a wrongful act resulting in State responsibility.⁵¹⁰

(43) With respect to the Commission’s 1996 Draft Code, article 9 provides that the State Party in whose territory an individual alleged to have committed these crimes is found “shall extradite or prosecute that individual”. The commentary to article 9 clarifies that the obligation to prosecute arises independently from any request for extradition.⁵¹¹

(44) The scope of the obligation to prosecute has already been elaborated in paragraphs (21) to (26) above.

the alleged offence has occurred”, thus implying that prosecution by the latter State would be preferable.

⁵⁰⁶ Art. 7 of the 1970 *Hague Convention for the Suppression of Unlawful Seizure of Aircraft* provides that “[t]he Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged ... to submit the case to its competent authorities for the purpose of prosecution”.

⁵⁰⁷ Art. 7 states: “The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.”

⁵⁰⁸ *Guengueng et al. v. Senegal*, Merits, Decision of the Committee Against Torture under Art. 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 36th Sess., Doc CAT/C/36/D/181/2001 dated 19 May 2006, para. 9.7.

⁵⁰⁹ In the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at p. 456, paras. 94–95.

⁵¹⁰ *Ibid.*, p. 456, para. 95.

⁵¹¹ The custodial State has an obligation “to take action to ensure that such an individual is prosecuted either by the national authorities of that State or by another State which indicated that it was willing to prosecute the case by requesting extradition”. Para. 3 of the commentary to art. 9, *Yearbook of the International Law Commission 1996*, vol. II (Part Two), p. 31. Reference should also be made to the commentary to art. 8 (whereby each State party “shall take such measures as may be necessary to establish its jurisdiction” over the crimes set out in the Draft Code “irrespective of where or by whom those crimes were committed”).

(e) The relationship of the obligation to extradite or prosecute with *erga omnes* obligations or *jus cogens* norms

(45) The Commission notes that one delegation⁵¹² to the Sixth Committee in 2013 raised the issue of the impact of the *aut dedere aut judicare* principle on international responsibility when it relates to *erga omnes* obligations or *jus cogens* norms, such as the prohibition of torture. The delegation suggested an analysis of the following questions: (a) in respect of whom the obligation exists; (b) who can request extradition; and (c) who has a legal interest in invoking the international responsibility of a State for being in breach of its “obligation to prosecute or extradite”.

(46) Several members of the Commission pointed out that this area was likely to concern the interpretation of conventional norms. The statements of the International Court of Justice in this regard in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* must be read within the specific context of that particular case. There, the Court interpreted the object and purpose of the Convention against Torture as giving rise to “obligations *erga omnes partes*”, whereby each State Party had a “common interest” in compliance with such obligations and, consequently, each State Party was entitled to make a claim concerning the cessation of an alleged breach by another State Party.⁵¹³ The issue of *jus cogens* was not central to this point. In the understanding of the Commission, the Court was saying that insofar as States were parties to the Convention against Torture, they had a common interest to prevent acts of torture and to ensure that, if they occurred, those responsible did not enjoy impunity.

(47) Other treaties, even if they may not involve *jus cogens* norms, may lead to *erga omnes* obligations as well. In other words, all States Parties may have a legal interest in invoking the international responsibility of a State Party for being in breach of its obligation to extradite or prosecute.

(48) The State that can request extradition normally will be a State Party to the relevant convention or have a reciprocal extradition undertaking/arrangement with the requested State, having jurisdiction over the offence, being willing and able to prosecute the alleged offender, and respecting applicable international norms protecting the human rights of the accused.⁵¹⁴

(f) The customary international law status of the obligation to extradite or prosecute

(49) The Commission notes that some delegations to the Sixth Committee opined that there was no obligation to extradite or prosecute under customary international law, whereas others were of the view that the customary international law status of the obligation merited further consideration by the Commission.⁵¹⁵

(50) It may be recalled that in 2011 the then Special Rapporteur Galicki, in his Fourth Report, proposed a draft article on international custom as a source of the obligation *aut dedere aut judicare*.⁵¹⁶

⁵¹² Mexico.

⁵¹³ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at pp. 449–450, paras. 67–70. See also Separate Opinion of Judge Cañado Trindade, pp. 527–529, paras. 104–108, and Declaration of Judge Donoghue, pp. 586–589, paras. 9–17. C.f. Dissenting Opinion of Judge Xue, pp. 571–577, paras. 2–23, and Dissenting Opinion of Judge *ad hoc* Sur, pp. 608 and 610–611, paras. 13, 19–20. Cf. also the Separate Opinion of Judge Skotnikov, pp. 482–485, paras. 9–22.

⁵¹⁴ See, e.g., Council of Europe, note 496 above, Chap. 4: Material human rights guarantees as limitations to extradition; Danai Azaria, *Code of Minimum Standards of Protection to Individuals Involved in Transnational Proceedings*, Report to the Committee of Experts on Transnational Criminal Justice, European Committee on Crime Problems, Council of Europe, PC-TJ/Docs 2005/PC-TJ (2005) 07 E. Azaria], Strasbourg, 16 Sept. 2005.

⁵¹⁵ A/CN.4/666, para. 60.

⁵¹⁶ A/CN.4/648, para. 95. The draft article read as follows:

“Article 4

International custom as a source of the obligation *aut dedere aut judicare*

1. Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is deriving from the customary norm of international law.
2. Such an obligation may derive, in particular, from customary norms of international law concerning [serious violations of international humanitarian law, genocide, crimes against humanity and war crimes].
3. The obligation to extradite or prosecute shall derive from the peremptory norm of general international law accepted and recognized by the international community of States (*jus cogens*), either in the form of international treaty or international custom, criminalizing any one of acts listed in paragraph 2.”

(51) However, the draft article was not well received either in the Commission⁵¹⁷ or the Sixth Committee.⁵¹⁸ There was general disagreement with the conclusion that the customary nature of the obligation to extradite or prosecute could be inferred from the existence of customary rules proscribing specific international crimes.

(52) Determining whether the obligation to extradite or prosecute has become or is becoming a rule of customary international law, or at least a regional customary law, may help indicate whether a draft article proposed by the Commission codifies or is progressive development of international law. However, since the Commission has decided not to have the outcome of the Commission's work on this topic take the form of draft articles, it has found it unnecessary to come up with alternative formulas to the one proposed by Mr. Galicki.

(53) The Commission wishes to make clear that the foregoing should not be construed as implying that it has found that the obligation to extradite or prosecute has not become or is not yet crystallising into a rule of customary international law, be it a general or regional one.

(54) When the Commission adopted the Draft Code in 1996, the provision on the obligation to extradite or prosecute thereunder represented progressive development of international law, as explained in paragraph (3) above. Since the completion of the Draft Code, there may have been further developments in international law that reflect State practice and *opinio juris* in this respect.

(55) The Commission notes that in 2012 the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* ruled that it had no jurisdiction to entertain Belgium's claims relating to Senegal's alleged breaches of obligations under customary international law because at the date of Belgium's filing of the Application the dispute between Belgium and Senegal did not relate to breaches of obligations under customary international law.⁵¹⁹ Thus, an opportunity has yet to arise for the Court to determine the customary international law status or otherwise of the obligation to extradite or prosecute.⁵²⁰

(g) Other matters of continued relevance in the 2009 General Framework

(56) The Commission observes that the 2009 General Framework⁵²¹ continued to be mentioned in the Sixth Committee⁵²² as relevant to the Commission's work on the topic.

⁵¹⁷ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10 (A/66/10)*, paras. 320–326.

⁵¹⁸ In particular, some States disagreed with the conclusion that the customary nature of the obligation to extradite or prosecute could necessarily be inferred from the existence of customary rules proscribing specific international crimes. *Topical summary of the discussion held in the Sixth Committee of the General Assembly during its Sixty-sixth Session, prepared by the Secretariat (A/CN.4/650)*, para. 48. See also the positions of Argentina, in A/C.6/62/SR.22, para. 58 and the Russian Federation, in A/CN.4/599, para. 54, respectively.

⁵¹⁹ *Judgment, I.C.J. Reports 2012*, p. 422, paras. 53–55, 122 (2), with Judge Abraham and Judge *ad hoc* Sur dissenting on this point (*ibid.*, Separate Opinion of Judge Abraham, pp. 471–476, paras. 3–20; Dissenting Opinion of Judge *ad hoc* Sur, p. 610, para. 17).

⁵²⁰ Judge Abraham and Judge *ad hoc* Sur concluded that the Court, if it had found jurisdiction, would not have upheld Belgium's claim of the existence of the customary international law obligation to prosecute or extradite. In his Separate Opinion, Judge Abraham considered there was insufficient evidence, based on State practice and *opinio juris*, of a customary obligation for States to prosecute before their domestic courts individuals suspected of war crimes or crimes against humanity on the basis of universal jurisdiction, even when limited to the case where the suspect was present in the territory of the forum State. (*ibid.*, Separate Opinion of Judge Abraham, pp. 611–617, paras. 21, 24–25, 31–39).

In his Dissenting Opinion, Judge *ad hoc* Sur said that despite the silence of the Court, or perhaps because of such silence, 'it seems clear that the existence of a customary obligation to prosecute or extradite, or even simply to prosecute, cannot be established in positive law' (*ibid.*, Dissenting Opinion of Judge *ad hoc* Sur, p. 610, para. 18).

By contrast, the Separate Opinions of Judge Cançado Trindade (*ibid.*, Separate Opinion of Judge Cançado Trindade, p. 544, para. 143) and of Judge Sebutinde (*ibid.*, Separate Opinion of Judge Sebutinde, p. 604, paras. 41–42) both stressed that the Court only found that it had no jurisdiction to address the merits of the customary international law issues given the facts presented in the case.

In any case, any reference to the existence or non-existence of the customary law obligation in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, was to the obligation in the cases of crimes against humanity and war crimes in internal armed conflicts. It did not touch upon such obligation in the context of genocide, war crimes in international armed conflicts, or other crimes of international concern like acts of terrorism.

⁵²¹ For ease of reference, the 2009 General Framework is reproduced here. It reads as follows:

List of questions/issues to be addressed

(a) The legal bases of the obligation to extradite or prosecute

- (i) The obligation to extradite or prosecute and the duty to cooperate in the fight against impunity;

- (ii) The obligation to extradite or prosecute in existing treaties: Typology of treaty provisions; differences and similarities between those provisions, and their evolution (cf. conventions on terrorism);
- (iii) Whether and to what extent the obligation to extradite or prosecute has a basis in customary international law;*
- (iv) Whether the obligation to extradite or prosecute is inextricably linked with certain particular “customary crimes” (e.g. piracy);*
- (v) Whether regional principles relating to the obligation to extradite or prosecute may be identified.*

(b) The material scope of the obligation to extradite or prosecute

Identification of the categories of crimes (e.g. crimes under international law; crimes against the peace and security of mankind; crimes of international concern; other serious crimes) covered by the obligation to extradite or prosecute according to conventional and/or customary international law:

- (i) Whether the recognition of an offence as an international crime is a sufficient basis for the existence of an obligation to extradite or prosecute under customary international law;*
- (ii) If not, what is/are the distinctive criterion/criteria? Relevance of the *jus cogens* character of a rule criminalizing certain conduct?*
- (iii) Whether and to what extent the obligation also exists in relation to crimes under domestic laws?

(c) The content of the obligation to extradite or prosecute

- (i) Definition of the two elements; meaning of the obligation to prosecute; steps that need to be taken in order for prosecution to be considered “sufficient”; question of timeliness of prosecution;
- (ii) Whether the order of the two elements matters;
- (iii) Whether one element has priority over the other – power of free appreciation (*pouvoir discrétionnaire*) of the requested State?

(d) Relationship between the obligation to extradite or prosecute and other principles

- (i) The obligation to extradite or prosecute and the principle of universal jurisdiction (does one necessarily imply the other?);
- (ii) The obligation to extradite or prosecute and the general question of “titles” to exercise jurisdiction (territoriality, nationality);
- (iii) The obligation to extradite or prosecute and the principles of *nullum crimen sine lege* and *nulla poena sine lege*;**
- (iv) The obligation to extradite or prosecute and the principle *non bis in idem* (double jeopardy);**
- (v) The obligation to extradite or prosecute and the principle of non-extradition of nationals;**
- (vi) What happens in case of conflicting principles (e.g.: non-extradition of nationals v. no indictment in national law? obstacles to prosecute v. risks for the accused to be tortured or lack of due process in the State to which extradition is envisaged?); constitutional limitations.**

(e) Conditions for the triggering of the obligation to extradite or prosecute

- (i) Presence of the alleged offender in the territory of the State;
- (ii) State’s jurisdiction over the crime concerned;
- (iii) Existence of a request for extradition (degree of formalism required); Relations with the right to expel foreigners;
- (iv) Existence/consequences of a previous request for extradition that had been rejected;
- (v) Standard of proof (to what extent must the request for extradition be substantiated);
- (vi) Existence of circumstances that might exclude the operation of the obligation (e.g. political offences or political nature of a request for extradition; emergency situations; immunities).

(f) The implementation of the obligation to extradite or prosecute

- (i) Respective roles of the judiciary and the executive;
- (ii) How to reconcile the obligation to extradite or prosecute with the discretion of the prosecuting authorities;
- (iii) Whether the availability of evidence affects the operation of the obligation;
- (iv) How to deal with multiple requests for extradition;
- (v) Guarantees in case of extradition;
- (vi) Whether the alleged offender should be kept in custody awaiting a decision on his or her extradition or prosecution; or possibilities of other restrictions to freedom?;
- (vii) Control of the implementation of the obligation;
- (viii) Consequences of non-compliance with the obligation to extradite or prosecute.

(g) The relationship between the obligation to extradite or prosecute and the surrender of the alleged offender to a competent international criminal tribunal (the “third alternative”)

To what extent the “third” alternative has an impact on the other two.

[* It might be that a final determination on these questions will only be possible at a later stage, in particular after a careful analysis of the scope and content of the obligation to extradite or prosecute under existing treaty regimes. It might also be advisable to examine the customary nature of the obligation in relation to specific crimes.

** This issue might need to be addressed also in relation to the implementation of the obligation to extradite or prosecute (f).]
⁵²² At the Sixth Committee debate in 2012, Austria, the Netherlands, and Vietnam considered the 2009 General Framework a valuable supplement to the work of the Commission. In the Netherlands’ opinion, the work of the Commission should eventually result in presenting draft articles based on that General Framework. At the Sixth Committee debate in 2013, Austria reiterated the usefulness of the 2009 General Framework to the work of the present Working Group.

(57) The 2009 General Framework raised several issues in relation to the obligation to extradite or prosecute that are covered in the preceding paragraphs, but some issues have not, namely: the obligation's relationship with the principles of *nullum crimen sine lege* and *nulla poena sine lege* and the principle *non bis in idem* (double jeopardy); the implications of a conflict between various principles (e.g. non-extradition of nationals versus no indictment in national law; obstacles to prosecution versus risks for the accused to be tortured or lack of due process in the State to which extradition is envisaged); constitutional limitations; circumstances excluding the operation of the obligation (e.g. political offences or political nature of a request for extradition; emergency situations; immunities); the problem of multiple requests for extradition; guarantees in case of extradition; and other issues related to extradition in general.

(58) The Commission notes that the United Nations Office on Drugs and Crime has prepared the 2004 Model Law on Extradition, which addresses most of these issues.⁵²³ The Secretariat Survey (2010) has also explained that multilateral conventions on extradition usually stipulate the conditions applicable to the extradition process.⁵²⁴ Nearly all such conventions subject extradition to the conditions provided by the law of the requested State. There may be grounds of refusal that are connected to the offence (e.g. the expiry of the statute of limitations, the failure to satisfy requirements of double criminality, specialty, *nullum crimen sine lege* and *nulla poena sine lege* or *non bis in idem*, or the fact that the crime is subject to death penalty in the requesting State) or not so connected (e.g. the granting of political asylum to the individual or the existence of humanitarian reasons to deny extradition). The degree of specificity of the conditions applicable to extradition varies depending on factors such as the specific concerns expressed during the course of negotiations (e.g. non-extradition of nationals, application or non-application of the political exception or fiscal exception clauses), the particular nature of the offence (e.g. the risk of refusal of extradition based on the political character of the offence appears to be more acute with respect to certain crimes), and drafting changes to take into account problems that may have been overlooked in the past (e.g. the possible triviality of the request for extradition or the protection of the rights of the alleged offender) or to take into account new developments or a changed environment.⁵²⁵

(59) The relationship between the obligation to extradite or prosecute and other principles as enumerated in the 2009 General Framework belongs not only to international law, but also to the constitutional law and domestic law of the States concerned. Whatever the conditions under domestic law or a treaty pertaining to extradition, they must not be applied in bad faith, with the effect of shielding an alleged offender from prosecution in or extradition to an appropriate criminal jurisdiction. In the case of core crimes, the object and purpose of the relevant domestic law and/or applicable treaty is to ensure that perpetrators of such crimes do not enjoy impunity, implying that such crimes can never be considered political offences and be exempted from extradition.⁵²⁶

⁵²³ Available at http://www.unodc.org/pdf/model_law_extradition.pdf. See also Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, available at: http://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf (visited on 3 June 2014).

⁵²⁴ Secretariat Survey (2010), para. 139.

⁵²⁵ *Ibid.*, para. 142.

⁵²⁶ A good example is art. 1 of the Additional Protocol, dated 15 Oct. 1975, to the 1957 European Convention on Extradition, which reads:

“For the application of Article 3 [on political offences] of the Convention, political offences shall not be considered to include the following:

(a) the crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 by the General Assembly of the United Nations;

(b) the violations specified in Article 50 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 51 of the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea, Article 130 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War and Article 147 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War;

(c) any comparable violations of the laws of war having effect at the time when this Protocol enters into force and of customs of war existing at that time, which are not already provided for in the above-mentioned provisions of the Geneva Conventions” (*Council of Europe Treaty Series No. 086*).

Annex 289

Briefing by ASG Ivan Šimonović to the UN Security Council (16 April 2014)

16 April 2014

Madam President,

Distinguished Members of the Security Council,

You were briefed over this past weekend on the latest political developments in Ukraine. My briefing today, at your request, will address the situation of human rights in Ukraine and update you on developments since my last briefing on 19 March. I will highlight key human rights issues, taking into account the most recent events in the East. My remarks are based on the findings of my two recent missions to Ukraine, as well as on the first few weeks of activities of the UN Human Rights Monitoring Mission in Ukraine.

At the outset, I wish to emphasise the strong inter-linkages between chronic human rights violations in Ukraine, the Maidan protests and the current situation in the East.

Almost a third of the population in Ukraine reportedly lives under the poverty line. Huge disparities in standards of living and inadequate access to basic social services, attributed to corruption and mismanagement, were amongst the underlying factors that led to the Maidan protests. Protests that started in Kyiv and swept across the rest of the country from November 2013 to February 2014 revealed a deep-rooted sense of dissatisfaction of the people of Ukraine.

Violence by the security forces against pro-European peaceful protesters in Kyiv on 30 November 2013, created outrage and led to the radicalisation of the protests and clashes between the protesters and police. Legislation that curtailed freedoms of expression and assembly and enhanced a sense of impunity by the police, was rushed through the Rada in mid- January and led to violent action by some radical protesters as well.

Progress is still to be made in bringing to justice the perpetrators of serious human rights violations committed during the period of the Maidan protests. During the protests, there were 121 persons killed and still over 100 persons remain unaccounted for. The General Prosecutor's Office has initiated criminal proceedings and it is important to ensure accountability of the perpetrators.

During the Maidan protests, there were some expressions of national, racial or religious hatred by some groups and individuals. Some attacks against the ethnic Russian community, in particular ethnic Russians that were affiliated to the former Government, were also reported. However, these were neither systematic nor widespread. They were isolated incidents which were then exaggerated through some biased media reporting, fuelling fear and insecurity amongst the ethnic Russian community.

There have also been some cases of incitement to hatred coming from the right wing extremists groups, such as the so-called Right Sector. Fear and insecurity breed when incitement to hatred, discrimination or violence is not curtailed. It is therefore crucial that this issue be addressed as a matter of priority and I welcome steps already undertaken by the Government and the Prosecutor General Office of Ukraine to publicly condemn and investigate any such instances. In this context, it is clearly unacceptable that one presidential candidate calls his followers to arm themselves to defend the East o the country, while another is beaten because of his political views. Monitors are verifying these serious allegations.

Madam President,

My visit from 21 to 22 March was the most recent visit to Crimea by a senior UN official. During my mission, I interacted with a wide range of interlocutors, including local authorities, civil society and especially victims themselves. This allowed me to obtain a first-hand impression of the situation.

The media manipulation significantly contributed to a climate of fear and insecurity in the period preceding the referendum.

The presence of paramilitary and so called self-defence groups, as well as soldiers in uniform without insignia, was not conducive to an environment in which voters could freely exercise their right to hold opinions and the right to freedom of expression during the referendum on 16 March. There were credible allegations of harassment, arbitrary arrests and torture by these groups that targeted activists and journalists who did not support the referendum.

While reiterating GA resolution 68/262 on the territorial integrity of Ukraine, I stress the obligations of the authorities in Crimea to respect international human rights norms.

It is also of concern that on 11 April, authorities in Crimea have rushed the adoption of a new constitution. The Crimean Tatar Mejlis has raised important human rights concerns about the total lack of public debate as well as the exclusion of Crimean Tatars from the drafting process of the new constitution. Concerns also continue to be raised with regard to citizenship issues, in particular that those who do not accept Russian citizenship will reportedly face many obstacles in guaranteeing their property and land rights, access to education and healthcare and the enjoyment of other civil and political rights.

Madam President,

When I visited eastern Ukraine in March, the situation was already very tense. Meanwhile, the situation has significantly deteriorated.

Reportedly, armed pro-Russian activists established a 'People's Republic of Donetsk', taking control of a number of Government buildings in several cities of the Donetsk region, using violence, including against law enforcement officers. In Luhansk, pro-Russian protesters

continue to occupy the local building of the security services, and in Kharkiv participants of a pro-Ukrainian rally were attacked and beaten by pro-Russian demonstrators who broke through the police cordon, resulting in some 50 persons being injured.

Ongoing incidents and clashes between various groups of protesters, as well as with security forces, are of serious concern. While reports indicate that the number of protesters, including some allegedly from outside of the region, has not significantly increased- we are speaking of a couple of thousand- the level of violence and the proportion of armed protesters has. This has significant human rights implications.

While protest-related human rights violations need to be urgently investigated and verified, security forces must play their role in maintaining public order in accordance with human rights standards. There are clear lines between what can be considered the exercise of the right to peaceful assembly and the violent behavior of armed protesters. However, in all cases, security forces should not use force unnecessarily or excessively.

The situation in the east, if not adequately addressed as a matter of priority, risks seriously destabilizing the country as a whole. Those who exercise influence over the situation should take immediate action to halt the violence. The arming of the protesters and their transformation in to quasi- paramilitary forces must be stopped. Anyone inciting violence and providing arms to protesters can be held accountable for the resulting tragic consequences.

In order to deescalate tensions across the country, all parties should be encouraged to start an inclusive, sustained and meaningful national dialogue based on the respect of legal obligations of Ukraine under international human rights treaties already ratified. Such a process should take into consideration the concerns of all those who live in Ukraine, including minorities, and address issues such as language rights and decentralisation of the country.

Finally, I cannot stress enough the important role that accurate human rights reporting can play in preventing violence and defusing tensions. Yesterday, we have issued our first report on the human rights situation in Ukraine, based on my two visits and the first month of the human rights monitoring. We intend to issue our second report on 15 May. Anyone with relevant information on human rights violations should share it with us, so that we can verify it, further investigate if necessary, and include it in our next report.

Thank you, Madam President.

Annex 290

U.N. Security Council, Records of 7165th Meeting, U.N. Doc. S/PV.7165 (29 Apr. 2014)



Security Council

Sixty-ninth year

Provisional

7165th meeting

Tuesday, 29 April 2014, 5.55 p.m.

New York

| | | |
|-------------------|--|----------------------|
| <i>President:</i> | Mrs. Ogwu | (Nigeria) |
| <i>Members:</i> | Argentina | Mrs. Perceval |
| | Australia | Mr. Quinlan |
| | Chad | Mr. Mangaral |
| | Chile | Mr. Barros |
| | China | Mr. Liu Jie-yi |
| | France | Mr. Araud |
| | Jordan | Mr. Hmoud |
| | Lithuania | Ms. Murmokaitė |
| | Luxembourg | Ms. Lucas |
| | Republic of Korea | Ms. Paik Ji-ah |
| | Russian Federation | Mr. Churkin |
| | Rwanda | Mr. Nduhungirehe |
| | United Kingdom of Great Britain and Northern Ireland | Sir Mark Lyall Grant |
| | United States of America | Ms. Power |

Agenda

Letter dated 28 February 2014 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council (S/2014/136)

This record contains the text of speeches delivered in English and of the interpretation of speeches delivered in the other languages. The final text will be printed in the *Official Records of the Security Council*. Corrections should be submitted to the original languages only. They should be incorporated in a copy of the record and sent under the signature of a member of the delegation concerned to the Chief of the Verbatim Reporting Service, room U-506.

14-31422 (E)



Accessible document

Please recycle



The meeting was called to order at 5.55 p.m.

Adoption of the agenda

The agenda was adopted.

Letter dated 28 February 2014 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council (S/2014/136)

The President: In accordance with rule 37 of the Council's provisional rules of procedure, I invite the representative of Ukraine to participate in this meeting.

In accordance with rule 39 of the Council's provisional rules of procedure, I invite Mr. Jeffrey Feltman, Under-Secretary-General for Political Affairs, to participate in this meeting.

The Security Council will now begin its consideration of the item on its agenda.

I now give the floor to Mr. Feltman.

Mr. Feltman: When we last met to discuss Ukraine on 16 April (see S/PV.7157), there was a glimmer of hope within the Council for the first time in weeks as we waited for the outcome of the four-party talks that were to be held in Geneva the following day, aimed at de-escalating the crisis.

Today, we regret that the emerging spirit of compromise of 17 April appears to have evaporated. The implementation of the Geneva statement has stalled as parties have sought to give different interpretations of what had been agreed upon. Unhelpful rhetoric on the part of many has further escalated the already high tensions. Meanwhile, the situation in parts of eastern and southern Ukraine continues to deteriorate.

On 25 April, a group of military monitors from the Organization for Security and Cooperation in Europe and accompanying Ukrainian staff were captured and detained. Although one monitor has since been released, the rest remain in detention. As the Secretary-General stated yesterday, the United Nations strongly condemns this act and urges those responsible to release monitors and staff immediately, unconditionally and unharmed. I urge all those with influence on this situation to assist urgently in resolving it. Lives are potentially at stake. Groups of militia and armed civilians are increasing in number and springing up in more and more cities across the region, seizing buildings, mounting roadblocks and shutting off whole towns and communities from the rest

of the country. There are increasing reports of torture, kidnappings and violent clashes.

Earlier today, self-declared separatist groups reportedly began an operation to take control of Lugansk. Just a few hours ago, they stormed the police headquarters in the city, opening fire with automatic weapons and throwing stun grenades at police officers still inside the building. Earlier in the day, they seized a number of other buildings, including the regional administration building and the prosecutor's office. The State security building in Lugansk, seized in early April, continues to be under the control of these groups.

Yesterday, 27 April, Hennadiy Kernes, the mayor of Kharkiv, was shot in the back by unknown assailants. he remains in critical condition. on the same day, self-declared separatists seized a local Government building in Kostiantynivka, also in Donetsk oblast, while in Donetsk itself a pro-unity rally turned violent when separatist elements reportedly attacked the group with clubs and chains. Also on 27 April in Kharkiv, clashes between about 400 opponents and 500-600 supporters of a unitary Ukraine broke out and resulted in a number of injuries.

What I just described are developments that have occurred only in the past four days. These developments should alarm us all.

In terms of the role of the United Nations and the international community, the United Nations human rights monitoring mission provides fact-based and publicly available information on the state of human rights in Ukraine. The Secretary-General has continued his high-level engagement with world leaders. He is the Council's partner in using his good offices to help bring about a return to diplomacy and a peaceful resolution. In this spirit, he has asked me to return to Ukraine next week.

As the Secretary-General stated yesterday,

“we must find a way back to the spirit of compromise exhibited on 17 April in Geneva. A diplomatic and political solution to this crisis is both imperative and long overdue”.

Time is of the essence. Let us work concertedly and expeditiously towards peace and stability.

The President: I thank Mr. Feltman for his briefing.

I shall now give the floor to the members of the Security Council.

Sir Mark Lyall Grant (United Kingdom): I am grateful to Under-Secretary-General Feltman for his briefing.

The United Kingdom requested this meeting because we are deeply concerned by the deteriorating security situation in southern and eastern Ukraine and by the fact that the Geneva agreement of 17 April is not yet achieving its objective to restore stability in Ukraine. It is vitally important that the Security Council maintain its close scrutiny of events in Ukraine and the consequent threat to international peace and security.

We will doubtless hear Russian claims that it is the actions of the Ukrainian Government that are destabilizing the south and east of the country. In fact, it is Russia that has taken further dangerous steps aimed at fomenting instability in Ukraine. It has directed paramilitary actions in Sloviansk, Kramatorsk, Lugansk and other towns in eastern Ukraine. Russian military jets and helicopters have made incursions into Ukrainian airspace. Russian armed forces have held further military exercises on Ukraine's border. These are all clear attempts to escalate tensions within Ukraine.

These steps have been matched with intensified rhetoric. The Permanent Representative of the Russian Federation has asserted that Russia has a legal basis to intervene in Ukraine in accordance with the right of self-defence under Article 51 of the Charter of the United Nations. This is a claim that takes Russia's distortion of international law to a new level. There is no justification or legal basis whatsoever for invoking Article 51. Russian nationals are not under threat in Ukraine — a fact that has been reaffirmed on numerous occasions, including by the United Nations Human Rights Monitoring Mission and by the Commissioner for National Minorities of the Organization for Security and Cooperation in Europe (OSCE). This is deeply irresponsible rhetoric intended to threaten and intimidate the Ukrainian Government and provide a bogus pretext for further illegal breaches of Ukrainian sovereignty and territorial integrity.

As a result of Russia's activities, there has been a further marked deterioration in the security situation in eastern and southern Ukraine, as Mr Feltman has just said. The United Kingdom condemns the abduction at gunpoint and public parading of an OSCE Vienna Document inspection team and its Ukrainian escorts. We call upon those responsible to ensure the safe treatment and immediate release of the team, and we

urge Russia, itself an OSCE member, to use its influence to ensure that this happens without further delay.

On 17 April, talks between Ukraine, Russia, the United States and the European Union succeeded in agreeing steps to reduce tensions. The United Kingdom welcomed that agreement and the opportunity it offered for restoring stability in Ukraine. But this opportunity has been spurned. Since 17 April, the actions undertaken by Kyiv and Moscow stand in stark contrast. Let us consider the facts.

First, the Geneva agreement called for all sides to refrain from violence, intimidation and provocative actions. For its part, the Ukrainian Government has acted with commendable restraint when undertaking measured and proportionate security operations to deal with armed groups illegally occupying Government buildings and forming checkpoints. The Ukrainian Government has the right and responsibility to uphold the rule of law and protect both its citizens and its officials on Ukrainian territory. Russia, on the other hand, continues its military manoeuvres and aggressive rhetoric.

Secondly, the agreement called for all illegal armed groups to be disarmed. The Ukrainian Government started to collect illegal weapons almost as soon as it came to power. There are now no illegally armed protesters on Maidan Square and no armed self-defence groups patrolling the streets of Kyiv. But in Sloviansk and other eastern cities, we continue to see, encouraged by Russia, heavily armed paramilitary forces armed with automatic rifles and rocket-propelled grenades.

Thirdly, the agreement called for all illegally seized buildings, occupied streets and public places to be vacated. The Ukrainian Government has been systematically and incrementally removing barricades around the Maidan and the protests there are gradually shrinking. By contrast, Russia has refused to use its influence to restrain armed groups in the east. In fact, Foreign Minister Lavrov stated on 23 April that Russia will not call for these illegal militias to put down their arms and vacate buildings. Instead, barricades and roadblocks in eastern and southern Ukraine have been steadily reinforced.

Furthermore, while Ukraine has put a draft law to the Ukrainian Parliament that would provide amnesty for protestors who vacate Government buildings and lay down their weapons, Russia has not rescinded the order by the Russian Parliament to authorize the use

of military force in Ukraine and will not condemn the widely reported abuses by pro-Russian armed groups in southern and eastern Ukraine. These abuses include at least 11 kidnappings, among them several Ukrainian and international journalists, and the torture and murder of a Ukrainian local official and two other local people. The deplorable shooting yesterday of the Mayor of Kharkiv was another sign of the violence being instigated against those who have opted to support a united Ukraine.

Finally, Ukraine has begun an inclusive process of constitutional reform on the decentralization of power. It has announced measures to guarantee the protection of the Russian language, and it has condemned instances of anti-Semitism and xenophobia, whereas Russian rhetoric continues to whip up tensions with false claims that the Russian language is under threat in Ukraine and allegations that the Kyiv Government is anti-Semitic.

When one lays out the facts, they cut through the fiction of Russian propaganda. Having illegally annexed Crimea, Russia is now destabilizing southern and eastern Ukraine as part of its plan to undermine the ability of the people of Ukraine to determine peacefully their own future. In doing so, it is threatening international peace and security. But the doors of diplomacy remain open. We urge Russia to abandon the dangerous course it is pursuing and to take urgent steps to implement the Geneva agreement.

In the extremely difficult circumstances which now confront it, the Ukrainian Government is striving to take forward a programme of democratization and inclusive constitutional and economic reform that aims to correct the long period of misgovernment and corruption that preceded it. It is in all our interests to support this process. This is not about zero-sum game politics; it is about restoring stability to Ukraine and to the wider region and allowing all the people of Ukraine to determine their own future. We urge Russia to become part of this collective international effort.

Mr. Araud (France) (*spoke in French*): I thank Mr. Feltman for his briefing.

Since early April, the situation in Ukraine has deteriorated continuously. In several eastern cities, armed militants, acting in a professional and synchronized manner, have taken possession of public buildings. The similarity of the operations that were observed in Crimea is striking. The violence continues.

Seven observers of the Organization for Security and Cooperation in Europe (OSCE) were taken hostage on 25 April. They must be released without delay. On Sunday, the mayor of Kharkiv was the target of an attack and is in a serious condition.

We are witnessing a subversive operation that has been planned, barely disguised and orchestrated by Russia. Russian special forces do not even hide anymore. Some time ago, our Russian colleague denied their involvement in Crimea, while his President recognized it a few days later. No doubt, he will do the same with respect to current events in Ukraine. France strongly and unequivocally condemns those unacceptable attempts by Russia to destabilize Ukraine. We must halt this course of confrontation and work towards de-escalation. The joint declaration agreed on in Geneva on 17 April by Ukraine, Russia, the United States and the European Union shows the way forward. It calls on all parties to refrain from violence and acts of intimidation or provocation. It provides for the disarmament of illegal armed groups, evacuation of occupied buildings and public places and amnesty for those who lay down their arms, with the exception of individuals with blood on their hands. It is essential that the declaration be implemented by all parties without delay and in good faith, so that the Ukrainian State can re-establish its sovereignty over its territory. The OSCE's special monitoring mission has been asked to play an important role in implementing those de-escalation measures, and it is essential that it be allowed to act without hindrance.

However, since the declaration's adoption we have seen two distinct attitudes. On the one hand, the Ukrainian Government has shown its good faith in implementing the declaration by drafting an amnesty law, launching the process of constitutional reform and accelerating the dismantling of barricades and armed groups in Kyiv. In that regard, I commend the restraint and composure of the Ukrainian security forces, who have responded appropriately to the repeated destabilizing actions they are dealing with. We can only imagine what any other Government would have done in the face of such provocation on its national territory.

On the other hand, the Russian side has complied with none of the 17 April commitments. There has been no condemnation of the separatist actions that have spawned new violence and no call for public buildings to be evacuated. There has been no appeal to the pro-Russian militants to exercise restraint and end their

attacks on munitions depots and on their compatriots, some of whom are said to have been tortured, and on journalists as well. Far from condemning those who took the OSCE observers hostage, today Russia is calling the mission's presence in eastern Ukraine a provocation. However, we sincerely hope that the announcement yesterday of a halt to the Russian military manoeuvres on the Ukrainian border is true and will be the first step in a genuine de-escalation.

We are at a turning point. With every moment that passes, the risk of anarchy and bloody incidents grows. That is why we call on the Russian authorities to choose the path of de-escalation through the immediate demonstration of respect for the commitments made in the Geneva declaration. Yesterday, together with our European Union partners and the United States, we adopted new targeted sanctions. If the situation worsens, we will be forced to ratchet up the sanctions once again. That is not what we would prefer. Our goal is to ensure the holding on 25 May of free, inclusive and transparent presidential elections, whose good conduct will be guaranteed by the presence of international observers. The possibility that the actions of some violent groups could threaten the holding of this democratic exercise is unacceptable.

We also support constitutional reform that would ensure respect for minorities and some decentralization. It is up to all Ukrainians to decide their future. Then history and geography can bring about an inevitable and desirable reconciliation between a democratic, peaceful and independent Ukraine and a Russian Federation that will renounce its dangerous nationalist illusions.

Mr. Nduhungerehe (Rwanda): I would like to thank you, Madam President, for convening this emergency meeting on Ukraine, and Mr. Jeffrey Feltman, Under-Secretary-General for Political Affairs, for his briefing on the developments in the situation in eastern Ukraine. We believe, however, that the Ukrainian people and the international community will not judge us on the number of public briefings we organize in the Council or the toughness of our statements, but on our political will and how we use our influence to effectively help Ukrainians resolve the crisis in their country.

We are witnessing a situation that is deteriorating every day and leading slowly to an open war that might involve countries of the region and beyond. Indeed, the developments of the last few weeks are alarming and have immensely undermined the diplomatic efforts to defuse the situation. We condemn in the strongest terms

the attempt made to assassinate Hennadiy Kernes, the Mayor of Kharkiv, Ukraine's second-largest city, as well as the illegal detention of the military monitors from the Organization for Security and Cooperation in Europe (OSCE) and their Ukrainian staff, which is a serious violation of the current agreement, and we demand their immediate release.

While we welcome the joint de-escalation measures agreed on in Geneva on 17 April and involving the main stakeholders as a step towards a tangible solution to the crisis, we are concerned about the fact that many of those measures have not been implemented. We urge all parties to implement their parts of the agreement, and especially to disarm all military groups and restore all seized buildings. The OSCE monitors must be allowed to play a role and to fulfil their mandate, as stipulated in the joint declaration.

In the meantime, Rwanda reiterates its call for respect for Ukraine's independence, sovereignty and territorial integrity. We believe in the right to peaceful demonstration, but we firmly condemn the use of violence, the seizure of public buildings and the installation of illegal checkpoints by armed protesters. We therefore believe that Ukraine, like any other country, has a right to restore public order, provided that right is exercised in a proportionate manner. Nonetheless, the crisis in eastern Ukraine is not merely a matter of public order but a political issue that must be resolved through genuine dialogue with all Ukrainian parties, with a view to ensuring sustainable peace and equal rights for all, including the Russian-speaking minority.

To conclude, we reiterate our strong belief that while public meetings of the Council are important for its members to continue monitoring this crisis, the only way to solve the crisis in Ukraine is through the exercise of political will and the influence of all the countries and regional organizations involved, in order to ensure a political and diplomatic solution to the conflict.

Mrs. Perceval (Argentina) (*spoke in Spanish*): I would like to thank Mr. Feltman for his update on the difficult situation in Ukraine.

I am wondering, and I would also like to ask the Council, why we are having this meeting. Going over the difficult situation and the worsening of the crisis once again is undoubtedly one reason, although I know there are clear, decisive reasons behind the initiative of the United Kingdom to convene this meeting that brings

us all together. I also ask myself another question, not out of false piety but out of sincerity. It is the question Pope Francis asked a few days ago when he received Mr. Yatsenyuk — who has not sped up hatred and violence — and gave him a pen with which he might sign a peace.

Are we acting in the Council to help overcome misunderstandings? I am certain that we are. It is for that reason that today my country will merely reaffirm two convictions. That is, that in the dialogue of constructive diplomacy that was initiated on 17 April with a view to finding a peaceful and political solution to this critical situation, Russia, the United States, the European Union and Ukraine all expressed at Geneva a willingness to reach an agreement. What we saw as willingness to agree, the whole world saw as a source of hope.

Today, however, we must urge the parties to return to a constructive dialogue. The difficult situation facing Ukraine cannot be resolved through unilateral actions of any sort. It is essential that we strictly abide by the principles of the Charter of the United Nations and not intervene in matters under the domestic jurisdiction of States in any way, including military, political and economic. We have already said that, and we have not come here to repeat things. We have come to say that it is understandable that the Council is meeting today.

The other reason we are here is to reject violence involving two concrete events, namely, the attack against the Mayor of Kharkiv, in eastern Ukraine, and, as requested by the Secretary-General, Argentina calls for the immediate and unconditional release of the military observers of the Organization for Security and Cooperation in Europe who are being held hostage.

Again we reiterate that the Council meets in order to promote peace. With a pen in hand and with our good faith, we stand ready to help Ukraine emerge from this difficult situation so that it can achieve the peace that its people deserve.

Ms. Power (United States of America): I thank Under-Secretary-General Feltman for his briefing.

On 17 April, Ukraine, the Russian Federation, the European Union and the United States issued the Geneva joint statement to de-escalate the crisis that brings us together this evening. That statement outlined a series of concrete steps to end the violence, halt provocative actions and protect the rights and security

of all Ukrainian citizens. As Secretary Kerry said on 17 April,

“All of this, we are convinced, represents a good day’s work. The day’s work has produced principles and it has produced commitments and it has produced words on paper. And we are the first to understand and to agree that words on paper will only mean what the actions that are taken as a result of those words produce.”

Secretary Kerry also commended Foreign Minister Lavrov and the Ukrainian Foreign Minister for their cooperation in achieving that hard-negotiated agreement. It was a moment of hope. Since then, the Government of Ukraine has been implementing its commitments in good faith. Regrettably, the same cannot be said of the Russian Federation.

As we meet, observers from the special monitoring mission of the Organization for Security and Cooperation in Europe (OSCE) are reporting that most of Ukraine, including eastern Ukraine, is peaceful. The exceptions are in such areas as Donetsk, Luhansk and Sloviansk, where pro-Russian separatists continue to occupy buildings and attack local officials. There we have seen a sharp deterioration in law and order.

Just today, pro-Russian separatists armed with baseball bats, stormed the Government buildings in Luhansk, seizing control of the centre of municipal activity in one of the largest cities in eastern Ukraine. That kind of thuggery mimics the seizures of police stations, city halls and other Government buildings in cities and towns in Donetsk oblast and surrounding areas.

In addition to occupying Government buildings, over the past two weeks, gunmen kidnapped a senior police officer in Luhansk. In Donetsk, pro-Russian thugs armed with baseball bats attacked peaceful participants at a pro-unity rally, seriously injuring at least 15. Also in Donetsk, pro-Russian groups continue to hold 17 buildings, including the regional television broadcasting centre.

In the city of Sloviansk, the mayor was kidnapped, as were several journalists. The separatists in that area now hold an estimated 40 hostages. Nearby, three bodies were recently pulled from a river, each showing unmistakable signs of physical abuse; one has been identified as a local politician, another as a 19 year-old pro-unity student activist. Yesterday, gunmen

reportedly chased members of the Sloviansk Roma community from their homes. Make no mistake: those are not peaceful protests. It is not an eastern Ukrainian spring. It is a well-orchestrated campaign, with external support, to destabilize the Ukrainian State.

Finally, as all the world knows, pro-Russian separatists in Donetsk have kidnapped and continue to hold seven international inspectors, openly declared as members of a Vienna document mission, along with their Ukrainian escorts. My Government joins with responsible Governments everywhere in condemning that unlawful act and in being outraged by the shameful exhibition before the media of those international public servants.

The Vienna document, agreed upon by all 57 participating States of the OSCE, has been a lasting source of cooperation and military transparency. We call, with others, for the immediate and unconditional release of the inspectors and their Ukrainian escorts and the immediate end to their mistreatment while in captivity. We also call upon Russia, as a signatory to the Vienna document, to help secure their release and to confirm publicly, even if belatedly, for the record that the abducted monitors were part of a legitimate mission on behalf of the international community.

Since 17 April, the Government of Ukraine has acted in good faith and with admirable restraint to fulfil its commitments. The Kyiv city hall and its surrounding area are now clear of all Maidan barricades and protestors. Over the Easter holiday, Ukraine voluntarily suspended its counter-terrorism initiative, choosing to de-escalate despite its fundamental right to provide security on its own territory and for its own people. Unlike the separatists, Ukraine has cooperated fully with the OSCE special monitoring mission and allowed its observers to operate in regions about which Moscow had voiced concerns regarding the treatment of ethnic Russians.

In addition, Prime Minister Yatsenyuk has publicly committed his Government to undertake far-reaching constitutional reforms that will strengthen the power of the regions. He has appealed personally to Russian-speaking Ukrainians, pledging to support special status for the Russian language and to protect those who use it. He announced legislation to grant amnesty to those who surrender arms.

All of that should be cause for optimism and hope. Tragically, what we have seen from Russia since

17 April is exactly what we saw from Russia prior to 17 April: more attempts to stir up trouble, more efforts to undermine the Government of Ukraine and statement after statement at odds with the facts. What we have not seen is a single positive step by Russia to fulfil its Geneva commitments.

Instead, Russian officials have refused to publicly call on the separatists to give up their weapons and relinquish their illegal control of Ukrainian Government buildings. In fact, Russia continues to fund, to coordinate and to fuel the heavily armed separatist movement. In addition, just outside of Ukraine's border, Russia has continued to engage in threatening troop movements that are designed not to calm tensions, but to embolden the separatists and to intimidate the Government.

In conclusion, I emphasize that the United States remains committed to supporting the principles of the Charter of the United Nations and will continue to uphold the territorial integrity and sovereignty of Ukraine. We continue to seek stability within a peaceful, democratic, inclusive and united Ukraine, especially in advance of the upcoming important elections.

We remain committed to a diplomatic process, but Russia seems committed to destabilization and fantastical justifications for its actions. The truth about what is happening in Ukraine should guide our discussion, because truth is the only foundation on which an equitable and lasting solution to this crisis can be based.

Mr. Liu Jieyi (China) (*spoke in Chinese*): I wish to thank Under-Secretary-General Feltman for his briefing.

The crisis in Ukraine is the result of a complex fabric of historical and contemporary factors. A political solution is the only way to end the crisis. To tackle the crisis at its roots, both the current situation and the historical facts must be considered, taking into account the legitimate rights, interests and demands of the various regions and ethnic communities of Ukraine and the legitimate concerns of all the parties concerned, with a view to achieving a balance of interests for all.

For some time now, various parties including China, have been vigorously engaged in mediation efforts and pushing for talks in order to ease the crisis in Ukraine. The Geneva agreement reached between Russia, the United States, the European Union and Ukraine calls for measures to de-escalate the Ukrainian situation, thereby sending a positive signal for a political solution

to the crisis. Regrettably, tensions in eastern and south-eastern Ukraine have worsened, with each side more vehemently accusing the other. Threats and sanctions have again replaced dialogue and negotiation.

China hopes that all parties concerned will keep in mind the broader picture of regional peace and stability, and the fundamental interests of all ethnic groups in Ukraine, maintain restraint, persevere in dialogue and consultations, effectively implement the agreement already reached by all of the parties and continue to push for a political solution to the crisis so as to achieve stability and development in Ukraine as soon as possible.

China's position on the question of Ukraine remains objective, impartial and responsible. From the very beginning, China has called on all parties to seek a political solution through dialogue rather than confrontation, and we support international mediation efforts conducive to de-escalating the situation and seeking a political solution. China will continue to play a constructive role in mediation efforts and pushing for talks.

Ms. Paik Ji-ah (Republic of Korea): The Republic of Korea is deeply concerned over the continuing tensions in eastern Ukraine. Despite the agreement reached in Geneva on 17 April, the situation in Ukraine is showing no signs of abating. We are troubled in particular by the continuing violence and aggressive provocations by illegal armed groups, including the seizure of key public buildings and the recent assassination attempt against the Mayor of the eastern city of Kharkiv.

All provocative actions and hostile rhetoric aimed at destabilizing Ukraine must cease immediately. As agreed in the Geneva statement, all illegal armed groups must be disarmed and all illegally seized key public buildings vacated.

We strongly condemn the detention of military monitors of the Organization for Security and Cooperation in Europe (OSCE), as well as of Ukrainian staff by illegal armed groups. It should be noted that the OSCE monitoring mechanism is an indispensable tool for implementing the Geneva statement. It is unacceptable to target international observers who are working to de-escalate the volatile situation. They must be released immediately and unconditionally. The safety and security of all international personnel must be fully guaranteed by all actors on the ground.

In the light of the ongoing situation in Ukraine, we reiterate that constructive dialogue among all concerned parties will be the only way to achieve a peaceful solution. In that regard, we call for all parties to the Geneva statement to implement their commitments. As Ukraine moves towards critical elections in May, it is all the more important to ensure the holding of fair and free elections in the country, without any intervention or influence by outside forces. We hope that the Ukrainian Government will lead an inclusive and transparent constitutional process.

We once again reaffirm our full support for Ukraine's sovereignty, independence and territorial integrity.

Ms. Lucas (Luxembourg) (*spoke in French*): I join others in thanking Assistant Secretary-General for Political Affairs Jeffrey Feltman for his briefing on the developments concerning Ukraine. We share his assessment that the situation in eastern Ukraine is deteriorating alarmingly, especially in Kharkiv, Luhansk and in the Donetsk area. We are deeply concerned by the actions of the pro-Russian separatist militias backed by Russia, aimed at destabilizing eastern Ukraine and, it seems, preventing the holding of the presidential elections on 25 May.

These destabilizing actions have intensified again in recent days, with the proliferation of the illegal occupation of public buildings, an increasing number of attacks against the Ukrainian security forces and an increase in violence against the local population. As others have already mentioned, just yesterday peaceful demonstrators in favour of the unity of the Ukraine were violently attacked by armed pro-Russian gangs armed with clubs and baseball bats in the city of Donetsk. Today hundreds of pro-Russian demonstrators seized the building of the regional administration and the prosecutor's office in the city of Luhansk, and stormed the police station.

We condemn those actions and the attacks targeting political figures in the strongest terms. The torture and murder of the Horlivka city councillor, Volodymyr Rybak, whose remains were found last week near Sloviansk together with those of a young student from Kyiv, Yuriy Popravko, attest to the high level of violence. Yesterday, the mayor of Kharkiv, Henadiy Kernes, was the target of an assassination attempt — there are differing interpretations with regard to the party responsible. These crimes must be

investigated and everything possible must be done to prevent similar cases in the future.

The violence of recent days shows once again the need to urgently de-escalate the situation. We welcome the positive steps taken by Ukraine to fulfil the commitments set out in the Geneva statement adopted on 17 April by Ukraine, Russia, the European Union and the United States. The Ukrainian Government has proposed an amnesty for those who leave the buildings they occupy in eastern Ukraine, as long as they have not committed crimes. It is ready to launch an inclusive national dialogue on constitutional reform and decentralization, and has acted with restraint in response to the actions of armed militias in the east.

The international community expects Russia, for its part, to take concrete steps to bring the separatists in eastern Ukraine to de-escalate in accordance with the commitments undertaken in the Geneva statement. We expect Russia to use its influence over the separatist movements to convince them to seek dialogue with the Ukrainian Government instead of fighting. Russia should publicly condemn the actions of the separatists aimed at destabilizing Ukraine and call on armed militants to leave the illegally occupied buildings. Finally, the withdrawal of Russian forces from the Ukrainian border is an essential step for de-escalating tensions, especially in eastern Ukraine.

We strongly condemn the kidnapping near the town of Sloviansk on 25 April of a team of military inspectors deployed under the 2011 Vienna document of the Organization for Security and Cooperation in Europe (OSCE). We also condemn the temporary detention, on 27 April, of two members of the OSCE special monitoring mission in Yenakiyev. The safety of international observers deployed anywhere in Ukraine must be ensured by all parties. The OSCE monitoring mission must be able to fulfil its role in the implementation of the Geneva statement.

We call on Russia to continue to use all of its influence on the pro-Russian separatists to encourage them to release unconditionally and promptly the seven inspectors from OSCE participating States that they have been holding hostage in Sloviansk for the past four days, as well as the Ukrainian personnel accompanying them.

We also condemn the restrictions on media freedom and on the freedom of expression. The detention and intimidation of journalists have increased over the

past two weeks in the east of the country. The day before yesterday, pro-Russian separatists took control of the regional public television station in Donetsk. The OSCE Representative on Freedom of the Media, Ms. Dunja Mijatović, has repeatedly warned against misinformation and propaganda. I would like to join her appeal and highlight that any limitations on the freedom of the press is unacceptable.

Nothing can take the place of direct, substantive dialogue between Kyiv and Moscow to find a diplomatic solution to the Ukraine crisis. The crisis continues to worsen. It will have harmful consequences for the entire region, Europe and beyond. The Geneva declaration of 17 April cannot remain a dead letter. The alternative to dialogue and to de-escalation would have incalculable consequences for international peace and security.

Mr. Hmoud (Jordan) (*spoke in Arabic*): I would like to thank Under-Secretary-General Jeffrey Feltman, for his briefing and to express our grave concern over the deterioration of the situation in eastern Ukraine.

Jordan would like to reaffirm Ukraine's right to protect its territorial integrity and sovereignty and its citizens from threats by the rebels in eastern Ukraine. That is a right that is enshrined in international law. What is happening in eastern Ukraine at the hand of the rebels is a breach of law. The occupation of buildings and installations by means of armed force and the threat to the lives and security of people is not a peaceful expression of opinion. If those committing those acts believe that their claims are legitimate, their resort to force removes any legitimacy from their actions.

Jordan would like to call for the immediate release of the hostages detained by the rebels in Sloviansk, in eastern Ukraine, including the monitors from the Organization for Security and Cooperation in Europe. We call on the parties concerned to implement the agreement concluded in Geneva on 17 April and to bring pressure to bear on the rebels to disarm, withdraw from the installations and buildings they occupy and immediately cease, together with all parties and actors in eastern Ukraine, from discriminatory and hate speech.

We call upon the Ukrainian authorities to work for a peaceful solution to the crisis, to abide by international norms in dealing with the mutiny and to respect the relevant human rights laws and principles.

We note the announcement by the Government of Ukraine accepting the competence of the International

Criminal Court over the events that occurred from November 2013 to 22 February 2014. That indicates the readiness of the Ukrainian authorities to respect international sanctions criteria and the primacy of international law.

We call on all the parties concerned to push for the restoration of stability and security in eastern Ukraine and to assist the Ukrainian authorities in implementing a successful political transition process and beginning a comprehensive dialogue with all linguistic groups and communities. We stress the importance of the holding of the presidential elections as scheduled in May 2014.

Mr. Barros (Chile) (*spoke in Spanish*): We welcome the briefing by Under-Secretary-General Feltman and the convening of this meeting at this delicate moment for Ukraine and the region.

Since the last time the Council met to discuss the situation in Ukraine (see S/PV.7157), the crisis has intensified in the eastern area of the country, in particular in Donetsk, Sloviansk, Kharkiv and Luhansk, owing to the acts of violence committed by separatist groups.

Chile would like to express its serious concern regarding the grave and even fatal consequences of the escalation of the crisis. In that respect, we condemn the kidnapping of the military monitors from the Organization for Security and Cooperation in Europe (OSCE) and Ukrainian security staff in Sloviansk. We call for their physical and psychological health to be preserved and for their immediate and unconditional release.

It is essential that the Council contribute to promoting maximum restraint and moderation by the parties, and we call upon all those with influence on the parties to take actions aimed at stopping the crisis. It is urgent that tensions be reduced and that we return to the spirit of compromise evidenced in the Geneva talks of 17 April, which led to the joint statement by the Ministers for Foreign Affairs of Russia and Ukraine, the Secretary of State of the United States and the High Representative for Foreign Affairs and Security Policy of the European Union. That statement listed concrete steps that Chile believes to be essential to reducing tensions and restoring security for all citizens, including abstaining from violence and intimidation, disarming the armed groups and vacating the illegally occupied buildings, among other things. We also believe that it is equally important that a broad and

transparent constitutional process be launched, leading to the immediate establishment of an inclusive national dialogue.

We reiterate again the need to respect the sovereignty, independence and territorial integrity of Ukraine. Furthermore, we reiterate the obligation of Member States to abstain from resorting to the use or threat of use of force against the territorial integrity and political independence of any State.

Once again, we call for the parties to find a peaceful solution to the crisis through direct political dialogue, abstain from taking unilateral measures and support the international mediation initiatives, in accordance with General Assembly resolution 68/262. That process should be inclusive and ensure respect for the rule of law, human rights and fundamental freedoms and full respect for the rights of minorities.

I would like to conclude by expressing my appreciation for the good offices of the Secretary-General and by underscoring the work of the United Nations human rights monitoring group for Ukraine and of the OSCE aimed at establishing the facts, reducing tensions and helping to create a climate conducive to the holding of presidential elections on 25 May.

Mr. Quinlan (Australia): I thank Under-Secretary-General Feltman for his briefing and his warning to the Council. Australia strongly supported calls for the holding of tonight's briefing to give the Council an up-to-date sense of the continuing destabilization and increased tensions in eastern Ukraine, much of which has evidently been sponsored and condoned by the Russian Federation.

We, with the rest of the Council, welcomed the 17 April agreement reached in Geneva on steps to de-escalate the crisis, including commitments to refrain from further acts of violence and provocation. That was a positive development and, we hoped, a demonstration of serious commitment to reduce tensions and work cooperatively towards a diplomatic and political solution to the crisis.

Ukraine is living up to its Geneva commitments. It has submitted to Parliament a draft law on amnesty for protesters who surrender their weapons. It has initiated a process of constitutional reform aimed at decentralizing power. It has committed to holding a broad public debate on possible constitutional changes and sought proposals for constitutional reform. It is working to disarm radical movements. The Ukrainian

Government has also said that it will guarantee the rights of Russian speakers to use their own language. It has strongly condemned xenophobia, intolerance and anti-Semitism and begun an investigation into the distribution of anti-Semitic leaflets in Donetsk. It has invited all political groups to discuss ways to resolve the crisis in eastern Ukraine and it has supported the Organization for Security and Cooperation in Europe (OSCE) in its work to de-escalate tensions.

But what has Russia done since 17 April to honour its Geneva commitments? Disappointingly, all evidence at hand points to Russia's continued determination to promote instability and challenge Ukraine's authority over its sovereign territory. Russia's claims that it has no agency in or influence over the actions of armed militia groups operating in eastern Ukraine are not credible. The seizure of OSCE observers on 25 April in Sloviansk and their mistreatment and their continued detention is a deplorable and cynical act against impartial international personnel working to bring peace and stability to the region, an act clearly intended to impede the ability of all OSCE monitors to work in eastern Ukraine. We call for their immediate release.

We have also witnessed continued and extreme provocations, including military manoeuvres on the Russian side of the Ukrainian border and reported multiple violations of Ukrainian air space by Russian military aircraft. We have witnessed the deplorable shooting on 28 April of the Mayor of Kharkiv and the abduction and killing of a Horlivka City Council representative. We are seeing continued occupation of Government buildings by well-armed and coordinated paramilitary groups, including, today, the occupation of Government buildings in Lugansk. We are seeing the increasing intimidation of local populations and illegal detentions. Under-Secretary-General Feltman has just reported to us increasing reports of violence, with people killed, wounded, beaten and tortured.

In those circumstances, it is appropriate and necessary for the Ukrainian Government itself to take measures to try to ensure security and protect its citizens in its own territory. It has shown considerable restraint in the face of extreme provocation, but it has a right to enforce the rule of law and respond in a manner proportionate to the circumstances.

We welcome Deputy Minister for Foreign Affairs Lubkivsky's statement during his 25 April press conference at the United Nations that Ukraine would protect its people from provocation in a civilized manner

so as to avoid bloodshed. We welcome Ukraine's recent acceptance of jurisdiction of the International Criminal Court (ICC) with respect to crimes committed in its territory from November last year to February 2014. We urge Ukraine to extend the ICC's jurisdiction to crimes committed beyond that date and to accede to the ICC Statute.

For its part, overwhelmingly, the international community remains united in its support for Ukraine's sovereignty and territory integrity and in its position that Russia cease its illegal intervention, interference and provocative actions in Ukraine. Statements by other Security Council members tonight are further confirmation of that.

To conclude, Australia continues to call on Russia to meet its Geneva commitments, to allow Ukraine's elections on 25 May to proceed without interference or obstruction, which is the right of every sovereign nation, and to exercise its influence over separatist activists in Ukraine towards those ends. The crisis remains very dangerously poised. Active, genuine and immediate efforts by Russia to defuse it are imperative.

Mr. Churkin (Russian Federation) (*spoke in Russian*): The recent events in south-eastern Ukraine and the country as a whole are of the most serious concern. The Kyiv regime, spurred on by Western well-wishers, are stubbornly pushing the country to disaster. Today, Western colleagues have spoken many critical words regarding the activities of protesters in south-eastern Ukraine. If our Western colleagues had actually demonstrated a tenth of that commitment to maintaining order during the events at the Maidan then perhaps the current crisis could have been prevented.

On 17 April in Geneva, agreement was reached that all sides should refrain from any types of violence, intimidation or provocation. However, in just a matter of days, there was a resumption of the so-called counter-terrorist, but actually punitive, operations — out and out violations of that agreement. In the south-east, there was a deployment of roughly 15,000 military personnel, tanks, armed vehicles, artillery, aircraft and subdivisions of Right Sector Banderists. As the first attempts to bring military pressure to bear on the south-east led to the defection of some Ukrainian military to the side of the protesters, today the sub-units are staffed by those from the west of the country. One might wonder what political and psychological effect that has had on the south-east and how it ties in with the task of ensuring the territorial integrity of the country.

In Geneva, it seemed that there was a window of opportunity for a significant de-escalation of the situation in Ukraine at the beginning of broad national dialogue. However, almost immediately following the declarations and actions of the Kyiv Government authorities, it became clear that they had no intention of implementing the agreement, just as they did not intend to implement the agreement of 21 February. In both cases, that treachery led to bloodshed. Unfortunately, it is difficult to speak of confidence in the current coalition in Kyiv when the defence and law-enforcement agencies are essentially controlled by the Svoboda Party, whose political platform is based on declarations issued by Nazi collaborators in June 1941. Pursuant to those declarations, real Ukrainians should have collaborated with Hitler to establish a new order in Europe. I would recall that the collaborators and the followers of Bandera killed not only Jews, Poles and Soviet soldiers but also Ukrainians who refused to subscribe to their sloganeering.

In Geneva, there was agreement on the need for a full rejection of extremism. However, the Right Sector Banderists, instead of laying down their weapons, headed to the east of Ukraine. As was declared, the Banderist army crossed the Dnepr. Neither the Right Sector with its Nazi slogans nor any other radical organizations have laid down their arms. On the contrary, those groups have become legal. They are forming military battalions with names like Dnepr and Donbass in their ranks. How could the militias in the east be convinced to disarm or vacate buildings if they have been surrounded, as has happened in Sloviansk, by subdivisions of the Ukrainian armed forces and the so-called National Guard, comprised of fighters from the Right Sector.

In Geneva, there was agreement that there had to be a single approach to all illicit activities in Ukraine from whichever side they might emanate — that is, from Kyiv, the west, the east or the south. However, the Maidan remains occupied — cement blockades are still in place — as are several buildings in Kyiv. No one has liberated anything in Kyiv. In Washington, D.C., they are saying, uncritically, that the buildings have been legally rented. But by whom? They have been rented by armed fighters.

In Geneva, there was agreement that there should be amnesty for protestors. However, instead of that, the People's Governor of Donetsk, Pavel Gubarev, who never had weapons in his hand, remains in prison. He

is a political prisoner, arrested just because he called for a referendum on the federalization of Ukraine. The monitors of the Organization for Security and Cooperation in Europe (OSCE) confirm that he was tortured and that he is now engaged in an indefinite hunger strike. Mr. Gubarev is far from being the only political prisoner of the Kyiv regime. One can speak of widespread witch hunts for those who have dared to express their disagreement with the Government in the Maidan. According to our sources, in the Donetsk region there are already about 10 cases of politically motivated kidnappings of people who were later transported to Kyiv by the special services.

On 28 April, there was an attack on the life of the popular mayor of Kharkiv, Hennadiy Kernes. My colleague from the United Kingdom rushed to say that the protesters in the south-east participated in that crime. That demands a careful investigation of the case. Let us not try to prejudge the outcome. It is true that Mr. Kernes had indeed spoken out about the chaos in other regions of Ukraine, and there were serious political battles between him and one of the heads of the defence and law-enforcement agencies. On the same day — 28 April — at the Kherson airport, the presidential candidate's plane was blocked. He had been travelling as part of the presidential campaign. He was attacked. In early April another candidate, Oleh Tsarev, was severely beaten. He was the only candidate for the presidential election without State protection. Mr. Tsarev was stripped of his right to participate in the televised debates. In that context, can we speak about the peaceful nature of the electoral campaign in Ukraine and of freedom of expression for its civilians?

The key point of the Geneva agreement was broad national dialogue, which was to take into account the interests of all regions and political formations. The Kyiv Government made certain promises with regard to constitutional reforms and upholding the rights of minorities. But what about national dialogue and reform? According to media reports, today Mr. Yatsenyuk submitted to the Rada some sort of draft constitution. It is not really clear how it was prepared. What is certain is that it was not an open and inclusive process. In fact, the Party of Regions, which represents the rest of the east of the country, was excluded from the process. It is no surprise that the draft was immediately criticized in the Rada by all sides. We did not hear any reasonable answers to key questions, such as how the federalization or decentralization of the country would

take place. It seems such things are to be substituted by some type of broadening of municipalities. How is the issue of the status of the Russian language to be resolved?

Can anyone seriously assert that all those activities by Kyiv are a solution to the political crisis aimed at stabilizing Ukraine? Instead of genuine collective work to bring Ukraine out of the crisis, which was brought about by political misadventurism, our colleagues from the United States and the European Union have preferred to make strong insinuations against Russia and thinking up some sort of sanctions that are pointless and counterproductive. Perhaps they are satisfactory to some one, but the responsibility for the future of Ukraine, Europe and the world is not being considered — at least not by these people.

The result is that the Government in Kyiv has done nothing to implement the Geneva document. Our Western colleagues, first and foremost our American colleagues, which have an unprecedented impact on the situation in Kyiv, do not want, or have not been able, to convince the Government to uphold its obligations under the document. They must clearly understand the scope of their responsibility if the situation in Ukraine continues to deteriorate.

It is very difficult for us in Russia to see the chaos in such a close, fraternal country. But we understand the reason that brought about the protests in the east and south. People do not want a repeat of the Kyiv scenario. They do not recognize the legitimacy of the Kyiv Government, which is made up of oligarchs. They have decided to create their own governing bodies. In response, they have been accused of terrorism and punished by military operations.

We call upon the Kyiv regime and its Western sponsors to think twice. There is a need to lift the order on using arms against civilians, as well as to free the political prisoners and disarm the Right Sector. A full constitutional process must take place, including representatives from all regions. We hope that the OSCE mission, headed by Mr. Apakan, which plays a particular role in the implementation of the Geneva agreement, will provide the Kyiv Government with assistance in establishing national dialogue and seeking understanding with the people in the south-east. However, the most important work to de-escalate should be done by the Kyiv Government — as they call themselves.

I should now like to say a few words with regard to the issues touched on by colleagues.

On the OSCE monitors in Sloviansk, they were requested by the Kyiv Government, and as such were responsible for their security. How can people be sent on a bus to an area controlled by self-defence forces, without even providing documents that would confirm their status? That was either a provocation by the Kyiv Government or just simple stupidity. We are doing everything we can for the freeing of those prisoners, and one has already been released due to health reasons.

With regard to armed forces, our armed forces are on Russian territory. American forces are hardly at home. They are in Australia, Lithuania, Poland and on the Black Sea, where an American vessel has remained longer than it was invited to do. Yes, our troops do conduct training exercises. But they do so in a transparent manner and while upholding all existing international agreements. We do not have any aggressive intentions towards Ukraine. The Kyiv Government should keep a cool head and not engage in reckless activities with respect to the people in the south-east of the country, where there are many Russian citizens as well.

Ms. Murmokaitė (Lithuania): Let me thank the Nigerian presidency for convening this open meeting, which does not cease to surprise us, judging by some of the statements we have heard. I might refer to some of the comments by our colleague from the Russian Federation. I would also like to thank Under Secretary-General Jeffrey Feltman for his briefing.

As so many of us have said here, the international community had placed high hopes on international mediation and monitoring efforts and on the 17 April Geneva statement on Ukraine. But, as we know today, the Geneva statement is just another document to be signed and discarded by Russia, adding to the growing list of breaches of Russia's international commitments, such as the Helsinki Final Act, the 1991 Almaty Declaration, the Budapest Memorandum of 1994, the Treaty of Friendship and Cooperation between Russia and Ukraine of 1997 and the Charter of the United Nations itself.

Despite growing provocations, the Ukrainian authorities have taken a number of concrete steps to follow up on the Geneva statement. Barricades in Maidan Square are being dismantled. I recall my French colleague referring a number of times to the Internet and Google. Users of those will see that there

is a significant difference in terms of what is happening on the streets of Kyiv. As I said, barricades are being dismantled. The Kyiv city administration building has re-opened, as has the main thoroughfare of the city, Khreschatik.

Important proposals regarding the status of the Russian language, amnesty, greater rights for the regions, as well as limitations on the President's power, have been put forward by the transitional Government. Indeed, as Ambassador Churkin referred to earlier today, constitutional reform was being discussed by the Parliament in a public session accessible to all. There has been a major debate on what was being proposed. But, again, a major debate that includes criticism is a sign of democracy. Unanimous decisions and acceptance of whatever is put on the table is something that belongs to regimes, not democratic Governments. We therefore welcome the discussion. It is necessary and it is something Kyiv has to do, and should be doing actively while involving all the regions and populations, because it affects the lives of the entire population of Ukraine.

Other issues discussed today include decentralization, constitutional reform, checks and balances, the powers of the President in the future, a stronger role for and the reinforcement of the independence of the judiciary, and so forth. Preparations are taking place for the national elections to be held on 25 May.

In a stark contrast to those efforts, armed separatists, aided and abetted by Russia, are continuing their assault on Ukraine, adding violence to force and lawlessness to impunity. As many noted earlier, yesterday and today saw more violent attacks in the city of Luhansk and elsewhere — in Mykolaiv and in Konstantynivka — where men armed with clubs and metal bars smashed windows and doors. A pro-unity rally was attacked by men in military fatigues, leading to over a dozen injuries among pro-Ukrainian protesters. A few days ago, a Ukrainian helicopter was downed by a rocket-propelled grenade, hardly a weapon so-called peaceful protesters — as labelled by the Russian side — can buy at the local corner market. That certainly does not sound like the implementation of Geneva agreement by the separatists and their state sponsors?

Displays of brutal force, beatings, disappearances, torture, killings and hostage-taking have become a daily reality in eastern Ukraine under militant separatist rule. While quick to condemn and brand Ukrainian

authorities for alleged crimes, Russia has yet to issue a single condemnation of the violence carried out by armed separatists. The legitimate right of Ukraine, to which our Australian colleague has referred, to defend its territory and its State has been exercised with incredible restraint and caution, although portrayed by the Russian propaganda machinery as a bloodbath and a valid cause for intervention.

From the speaker before me, we heard references to military punitive operations and acts. If what Ukraine is carrying out in the eastern part of its country is a military punitive action, it is probably the most invisible, impossible military action on Earth. Nothing has happened in that sense. To exaggerate to such an extent is going a long way in terms of exaggeration. On the other hand, in a threatening tone, Russia recently ordered Ukraine to withdraw Ukrainian troops stationed on Ukraine's own soil, or else — so much for respect for Ukraine's international sovereignty.

We firmly reject all of Russia's attempts to validate its intentions and threats to use armed forces or to send so-called Russian peacekeepers into Ukraine. As a permanent member of the Security Council, Russia should know better than to exploit the name of peacekeeping to cover up its aggressive expansionist aims.

Now I would like to turn to human rights and the media. The Organization for Security and Cooperation in Europe (OSCE) Representative on the Freedom of the Media, Mr. Dunja Mijatović, is sounding increasing alarm regarding the treatment of journalists and the deterioration of media freedom in eastern Ukraine. In areas under the control of pro-Russian militants, journalists are attacked, detained, harassed and their equipment taken or smashed. There is probably something to hide if there is such a distaste and dislike of free media in that part of Ukraine. We reiterate our call to end impunity for attacks against journalists. We also call for a thorough investigation of kidnappings, torture and killings, committed by whomever, and to insist that the perpetrators of all such acts be brought to justice.

We hope that the next report of the United Nations human rights monitoring mission in Ukraine, to be issued in mid-May, will address the growing cases of human rights violations, violent deaths, causes for torture, abductions and activist disappearances in eastern Ukraine. We also hope the report will look into the human rights situation in occupied Crimea. As

has been reported, the Crimean Tatar leader Mustafa Dzhemilev has been barred from returning home to Crimea. A group of camouflage-clad men stormed the Tatar Assembly offices and tore down the Ukrainian flag there. The director and editor of Crimean Tatar programmes on Crimean State television have been forced out by local authorities because they had spoken against increasing censorship.

A new level of banditry by the separatists in eastern Ukraine was reached on 25 April, when they kidnapped a group of OSCE representatives. Notably, when asked to release the hostages, the separatists were quoted as saying that they needed to speak to the competent authorities in the Russian Federation. My delegation strongly condemns the kidnapping of unarmed OSCE military verification mission observers and Ukrainian security personnel. Such acts, as well as the public parading of the hostages, speak loudly to the true character and intentions of the separatists, who seek to disrupt international observation so that they can continue attacking Ukraine out of sight of the international community.

The parties with influence on the militant separatists, first and foremost Russia, must take all necessary steps to bring about the immediate release of all hostages, without preconditions. The international monitoring and mediation efforts of the United Nations, OSCE and other regional bodies must be fully supported, guaranteed safety and security, and allowed full freedom of access on all of Ukraine's territory.

As Ukraine prepares for the 25 May nation-wide elections, those opposed to Ukraine's independence, sovereignty and territorial integrity are at it again. To quote the self-proclaimed people's mayor of Sloviansk, Vyacheslav Ponomarev, "We will take all necessary measures so that elections do not take place in the south-east". When asked what they would be ready to do, he said: "We will take somebody hostage and hang them up by the balls. It is real, you understand?"

The intent here could not be more clear — it is to prevent Ukraine's return to normality. We all understand that there are legitimate complaints in south-eastern Ukraine, borne out of decades of mismanagement and corruption and misrule, including the rule of the previous President, Yanukovich, who fled the country in disgrace. It is time for the current Government to start seriously addressing issues of socioeconomic development because a lot of that discontent is based on the socioeconomic concerns of the population.

Once those issues are addressed, the level of so-called separatism, I am sure, will diminish. That should not happen, according to some, because it would go against the scenario.

My Government condemns the actions of armed separatists and their external sponsors, aimed at further undermining and threatening the territorial integrity, sovereignty and independence of Ukraine. The onus is now on Russia to stop interfering in Ukraine's internal affairs and fomenting unrest in Ukraine, and to abandon its threats of the use of force. Ukraine is doing its part to implement the Geneva agreement on Ukraine. It is time for Russia to live up to its own commitments and to reclaim respect for the Charter of the United Nations and international law.

Mr. Mangaral (Chad) (*spoke in French*): I would like to thank Under-Secretary-General for Political Affairs, Mr. Feltman, for his briefing.

Chad, like other Member States, is extremely concerned by the deterioration of the situation in eastern Ukraine. Following a period of relative calm following the Geneva declaration, we are today faced with new circumstances, marked by the kidnapping of members of the Organization for Security and Cooperation in Europe mission, the attempted assassination of the mayor of Kharkiv, and the occupation of public buildings in Lugansk and elsewhere by pro-Russian elements. Chad condemns those violent acts, which undermine the negotiation and reconciliation efforts in Ukraine. Chad calls for the release of the hostages and for all parties to be calm and restrained.

Given the serious situation, Chad reiterates its appeal to those countries with influence over the parties to use every possible means at their disposal to give initiate dialogue between them. We are convinced that the solution to the problem in Ukraine can only be political. It should be sought with respect for the territorial integrity, sovereignty and unity of Ukraine, pursuant to the Charter of the United Nations. To that end, we urge the international community, and the Security Council in particular, to redouble their efforts to pursue mediation so as to bring the two sides closer together in seeking a peaceful solution in full respect for human rights and particularly for the rights minorities in Ukraine.

The President: I shall now make a statement in my national capacity.

I want to join other Council members in thanking Under-Secretary-General for Political Affairs, Mr. Feltman, for his update on the situation in Ukraine.

The situation in Ukraine remains tense, and the risk of further escalation remains a matter of grave concern to the international community. Utmost care needs to be taken to ensure that the crisis does not degenerate into a civil war. If it does, it might become an internationalized conflict, with attendant reverberations everywhere. We followed with keen interest the talks held about two weeks ago in Geneva between Ukraine, the European Union, the United States and the Russian Federation.

At the meeting, they agreed on initial concrete steps to de-escalate tensions and restore security for all citizens. It was decided that all sides must refrain from violence, intimidation and provocative actions. The meeting specifically called for the disarmament of all illegal armed groups and the return of all illegally seized buildings to the legitimate owners. Significantly, it was agreed that protesters who laid down their arms and vacated the buildings they occupied would be granted amnesty.

We believe that the agreement reached in Geneva constitutes the basis for the peaceful resolution of the crisis in Ukraine. That scenario offered a glimmer of hope, as Under-Secretary-General Feltman has aptly characterized it. That glimmer of hope, I am afraid, is fast fading before our eyes. Armed men continue to occupy buildings in cities across eastern Ukraine, and the level of violence is escalating. The capture and detention of monitors from the Organization for Security and Cooperation in Europe (OSCE), who are designated and expected to play a leading role in implementing the de-escalation measures agreed on at the Geneva talks is, in our view, an affront to the international community. We support the position of the Secretary-General that international missions working in Ukraine must be allowed to perform their duties unimpeded. We call for the immediate release of the OSCE monitors and urge those with influence in the capitals to use it to that end.

As in every conflict, the way forward to lasting peace, security and stability in Ukraine lies in dialogue between all the parties concerned. The alternative of a military option would only bleed Ukraine's already open veins. We believe that the Geneva agreement provides a strong surgical procedure that can mend those veins. The clock is ticking. Ukraine is the patient. The Security Council and the international community

constitute the surgical team. Let us stabilize and restore the patient to health, or many more may bleed. That is our collective responsibility.

I now resume my functions as President of the Council.

I give the floor to the representative of Ukraine.

Mr. Sergeev (Ukraine): I thank you for convening this meeting, Madam President, and for the opportunity to address the Security Council. I would also like to thank Under-Secretary-General Feltman for his briefing, and all the members of the Council for their statement.

It has been a month since Russia illegally occupied and annexed Crimea, using its military forces and brutally violating international law. Unfortunately, Russia has not stopped there, and apparently its leaders are now targeting other parts of Ukraine and brazenly interfering in its internal affairs. The agreements reached at the Geneva meeting of the Foreign Ministers of Ukraine, the Russian Federation, the United States and the European Union on 17 April provided a faint beam of hope for a diplomatic solution.

In order to implement the Geneva statement for the de-escalation of the situation in the eastern regions of Ukraine, the Government of Ukraine immediately took the necessary practical steps. Within just one week, the Government suspended the active phase of its anti-terrorist operation, whose main objective was the restoration of law and order and the protection of civilians. It initiated constitutional reform. It approved the concept of local administrative reform, whose main principles are decentralizing power in the country, significantly empowering local communities and improving management at the regional and district levels. A draft law on amnesty for participants in the uprisings in the eastern regions has been prepared and would apply to those protesters who surrender their weapons and evacuate illegally seized administrative buildings, except for those suspected of committing serious crimes. The parliamentary coalition has invited all political parties represented in the Ukrainian Parliament to sign a memorandum of understanding on ways to resolve the situation in eastern Ukraine. The Minister of Internal Affairs and Security Services has continued implementing a nationwide campaign to seize illegal arms from the population, and more than 6,000 weapons have been handed over recently. Ukraine is demonstrating its commitment to constructive

cooperation with human-rights institutions and international organizations.

What has Russia done for its part of the Geneva document? It has done nothing. Because of the lack of support for the separatists among the population of eastern Ukraine, Russia is seeking new ways to destabilize the situation in the region, preparing and carrying out numerous armed provocations through its agents. Russian-sponsored illegal paramilitary units have continued to destabilize the situation in eastern Ukraine, preparing the ground for a new stage of military aggression. The Russian leadership has done nothing to publicly dissociate itself from the armed separatists and provocateurs or to urge them to immediately lay down their arms and release captured administrative buildings. Russia has not even condemned the seizure of hostages, including journalists, or separatists' open acts of xenophobia and anti-Semitism. Any attempts by Russia to show that the Ukrainian Government is trying to use force against the peaceful Ukrainian population are lies.

Our Government respects freedom of expression and the right to peaceful assembly, which are guaranteed by the Constitution of Ukraine. However, when heavily armed, professionally trained groups led by Russian military seize law-enforcement facilities and administrative offices, kill Ukrainian police officers and take hostages, they are operating like terrorists and must be treated accordingly. Ukrainian counter-terrorism operations are targeted exclusively at illegal armed groups threatening civilians. Meanwhile, the Russian-controlled army groups are in fact holding the entire civilian population of several towns in the eastern region hostage and have thus transgressed the bounds of humanity.

I will list some facts. Three Ukrainian law-enforcement officers were abducted, brutally beaten, tortured and later presented to the Russian media as Ukrainian spies, blindfolded and with their hands tied. Ukrainian and foreign journalists are being systematically kidnapped, while Russian journalists are allowed to operate in the areas controlled by the illegal armed groups. A military helicopter was destroyed with a man-portable air defence (MANPAD) guided missile. It should be understood that peaceful protesters cannot buy MANPADs in shops. Representatives of the military verification mission of the Organization for Security and Cooperation in Europe (OSCE) were taken hostage in Sloviansk. The detention by force of

international observers is yet another testament to the criminal and terrorist nature of the separatist armed groups. In contrast to the demand voiced in many of the statements in the Council today that those hostages be released, the Russian Federation, as might be expected, made no such demand; nor have its leaders in Moscow.

What is important is that the leaders of the illegal armed groups have publicly admitted responsibility for all the aforementioned crimes — even on television. Many members of the illegal militant groups are citizens of the Russian Federation, and they are not even trying to hide it, publicly displaying their identification. We recently read an article in *The New York Times* in which the Kuban Cossack Mozhaev declared his presence and that of an armed group from his region, which we had noticed in Crimea as well.

Ukrainian law-enforcement agencies have credible evidence of these persons' involvement in serious crimes. Today, some of those crimes have been described. Among them was the brutal story of Volodymyr Rybak, a member of Horlivka's City Council, and Yuriy Popravko, a 19-year-old activist from Kyiv, who were martyred by members of terrorist groups. Their bodies, mutilated by torture, were found in the Torets River in the vicinity of Sloviansk. Volodymyr Rybak disappeared on 17 April in Horlivka after he tried to remove the separatists' flag from the building of Horlivka City Council. A video of the kidnapping, as well as audio recordings of phone conversations intercepted by Ukraine's Security Service, provided sufficient proof that terrorist leaders, notably the self-proclaimed mayor of Sloviansk, Vyacheslav Ponomaryov, and the military commander of the terrorists, the Russian agent Igor Strelkov, were involved in the murder. The true identity of the Russian agent has been established as Colonel Igor Girkin of Russian military intelligence, who is registered as a permanent resident of Moscow.

The Government of Ukraine strongly condemns the aforementioned acts of terror and violence, including yesterday's attempt to assassinate the Mayor of Kharkiv, Hennadiy Kernes, who publicly supported the unity and territorial integrity of Ukraine. Unfortunately, Russia has not even publicly condemned or dissociated itself from those acts of terror and violence perpetrated by illegal militants since the Geneva agreement. I would like to remind the Council that Russia used to deny that its armed forces participated in the occupation of Crimea. However, President Putin now openly admits the use of Russian military forces and praises

them for their heroism and the successful completion of the operation aimed at the reunification of Crimea with Russia. They have even issued a special medal of honour. And now, in spite of numerous irrefutable facts concerning Russian military involvement in organizing and guiding illegal armed groups in eastern Ukraine, Moscow denies any Russian military participation just as hard.

Furthermore, Russia is now threatening to use force, as demonstrated by its concentration of armed forces directly on the eastern border of our country. The number of units along Ukraine's borders has increased. Last week, we all heard intensified militaristic rhetoric from senior Russian officials, including President Putin, Minister Lavrov and Minister Shoigu, threatening to send Russian troops into the territory of Ukraine under various pretexts. Defence Minister Shoigu reported the start of new military exercises by battalion tactical groups from the southern and western military districts of the Russian armed forces in connection with "the deteriorating situation in southeastern Ukraine". With that the Russian side has in fact confirmed that its military activity near the Ukrainian border in the past month has not been routine in nature, but directly related to the developments in Ukraine. Unfortunately, the withdrawal of troops announced by Minister Shoigu yesterday has not come true. We still observe those troops near our borders.

My British colleague has given us information about the strange statement by our Russian partner here, who said that, in case of events taking a bad turn in Ukraine's south-east, Russia would remember the provision to use armed forces in Ukraine given to President Vladimir Putin by the Federation Council. He also said that Russia had an international legal basis for sending its peacekeeping troops into Ukraine. And he referred to the right to self-defence under Article 51 of the Charter of the United Nations, which Russia used during the conflict in the Caucasus in 2008. The right to self-defence on the territory of another country? Let me remind him that Ukraine has never threatened Russia, and never will. Ukrainians want to live in peace and to be left alone. The highest level of cynicism is the Russian reference to the right of self-defence in a situation in which it is Russia that is acting as aggressor, having occupied Crimea, as is brutally interfering in the internal affairs of Ukraine, destabilizing it and trying to create an explosive situation in the eastern regions.

Unfortunately, we are deeply concerned that the scenario that is prepared for eastern Ukraine might be similar to the one implemented by Russia in Abkhazia. That scenario might include several steps.

Step one: a small group of local separatists, supported by Russian-controlled armed groups, would seize control over regional councils and make them illegally proclaim the creation of a so-called independent Novorossiia within the boundaries described by President Putin at his recent press interview. We have already seen that step taken in Donetsk, Slovansk and Kharkiv, against the will of the vast majority of the local population and against the Ukrainian Constitution.

Step two: the Russian Federation would immediately recognize such a regional unit as an independent State.

Step three: upon a request from the newly self-proclaimed authorities, the Russian Federation would send its troops to Ukraine under the guise of peacekeepers or collective self-defence.

Unfortunately, I must say that such a scenario is realistic, as it has been reported that some Russian heavy military vehicles had been spotted near Ukraine's borders bearing signs indicating "Peacekeeping Mission" in the Russian and Ukrainian languages, exactly as happened in Abkhazia. One of the main purposes of that scenario is to disrupt the presidential elections scheduled for 25 May, which are a top priority for the Government and for the people of Ukraine.

Let me sum up my statement by making some short conclusions. Twelve days have already passed since the Geneva meeting. Ukraine has done its utmost to de-escalate the situation. Our steps have been acknowledged and supported by the Organization for Security and Cooperation in Europe and other parties involved. Russia has done nothing.

How should the problem be solved? The answer is simple: Russia has to implement the Geneva agreements. First, Russia should withdraw its army from Ukraine's borders. Secondly, it should make a high-level statement calling on its protégés to free all hostages, to disarm and to vacate all seized administrative premises. It also has to condemn all terror and violence committed by those groups and to disassociate itself from such activities. Thirdly, it should stop its war-like rhetoric and start to act in a constructive and civilized manner. Last, but not least, Russia must refrain from any actions

aimed at undermining the 25 May presidential elections in Ukraine.

We call on the Security Council to give the most serious assessment of the actions and statements by Russia regarding Ukraine, and to take the most decisive steps to stop its aggressive appetite and to protect Ukrainian territorial integrity, which has been challenged once again.

The President: The representative of the Russian Federation has asked for the floor to make a further statement.

Mr. Churkin (Russian Federation) (*spoke in Russian*): I certainly do not want to prolong our meeting here this evening. The simplest of answers would be to again read the statement I made earlier, which reflects our vision and position. However, allow me a very brief comment.

A great deal has been said here about some sort of wrong interpretation of our positions and statements in

various forums and situations. Our Ukrainian colleague even began to depict some fantastic scenario of how he views the further developments unfolding in Ukraine. The only scenario that I would want to hear — but do not — is one that includes genuine efforts by the authorities in Kyiv to implement the Geneva document. Mr. Feltman began by saying that there were various interpretations of that document. The document is so simple, there is nothing to interpret. There is nothing to be done but to implement it. Let us do so. Russia helped to draw it up. But the actions backing it up need to be taken, first and foremost, by the authorities in Kyiv, if that is what they are. Unfortunately, their lack of action is reflected in the statement I made here earlier today.

The President: There are no more names inscribed on my list. The Security Council has thus concluded the present stage of its consideration of the item on its agenda.

The meeting rose at 7.35 p.m.

Annex 291

Press Statement by the ASG Ivan Simonovic, UN Office of the High Commissioner for Human Rights, Launch of the Second Report on the Human Rights Situation in Ukraine (16 May 2014)

Kyiv, 16 May 2014

Ladies and gentlemen,

This is my third visit to Ukraine since the start of the crisis. It coincides with the launch by the Office of the United Nations High Commissioner for Human Rights of the second report on the human rights situation in Ukraine, which is based on the findings of the UN Human Rights Monitoring Mission in Ukraine. The report lays out the progress made, but also the current human rights challenges in Ukraine, particularly in the East and the South of the country.

Yesterday, I had the opportunity to discuss the report and its recommendations with Government officials, the Ombudsperson, and representatives of civil society.

My discussions have been constructive and we have been able to exchange views on a number of concrete ways in which the Government can take immediate steps to implement these important recommendations. I have stressed that it is critical for the Government to react immediately to the recommendations in order to contribute to the de-escalation of tensions ahead of the presidential elections.

The first report issued by the Office of the United Nations High Commissioner for Human Rights on 15 April, was based on my two previous missions and the first weeks of monitoring by the UN Human Rights Monitoring Mission in Ukraine. We tried to reflect the larger picture, focusing on root causes of human rights violations, including the long-term failure to respect the rule of law, lack of accountability of the security forces, corruption, mismanagement and its impact on economic and social and rights. We also raised the importance of accountability for Maidan protest-related violations and other human rights violations at the time, especially in Crimea and in the East. The previous report also contained quite broad, short and, long term recommendations.

In this second report, being released today, we first and foremost focus on current human rights challenges in the East and the South of Ukraine, and developments with regard to recommendations made in the first report. It also contains its own concrete recommendations, which are especially important ahead of the forthcoming presidential elections.

The report describes the deeply disturbing deterioration of the human rights situation in the East and South of the country: the increase in the number of armed groups undertaking illegal acts – the Human Rights Monitoring Mission in Ukraine has been informed of 112 cases of unlawful detention, of which we are still concerned for the whereabouts and condition of 49 people. Such abuses clearly indicate the breakdown in law and order in this part of the country. In addition, according to our information obtained through Government and civil society sources, during violent clashes and the security and law enforcement operations in the East and South, 127 people have been killed. This is deeply disturbing.

Why is this happening? Although the number of protesters has not sharply increased - we are still speaking of only a couple of thousands in a few cities - there are more and more armed people around such protests, and more weapons available.

All too often, the police is either inefficient or takes no steps to prevent the clashes. In Odesa, it seems to have contributed to the tragic events of 2 May. The death of 48 people should, and could, have been prevented. I am calling on the authorities to investigate who are the direct perpetrators of the killings, and why security forces did not act in a more timely and decisive manner: this tragedy requires full clarity and broad accountability. In a number of other, fortunately less dramatic cases, the lack of a specific law regulating the exercise of the freedom of assembly exacerbates the situation, as any limitations placed on the freedom of assembly become at times arbitrary, and thus more controversial. However, there is a clear difference between peaceful assembly and what can only be characterised as violence, constituting a clear threat to security and public order. Peaceful demonstrations must be permitted, as a matter of international law, and law enforcement officers must receive adequate training for handling rallies and protests in line with international human rights standards. On the other hand, the use of force by the Government, when absolutely needed, is strictly regulated by international laws and standards.

In the East, there seems to be a mutual reinforcing effect between hate speech inciting violence, and the ensuing violence, which then serves as a justification for further hate speech. This is a vicious cycle that must be broken. Since the beginning of the crisis in Ukraine, going back to the Maidan protests (from November 2013 to February 2014), and including the situation in Crimea, the current illegal acts of the armed groups and the response of the security and law enforcement operation in the eastern regions, as well as the 2 May violence in Odesa – the UN Human Rights Monitoring Mission has received information that about 250 people have been killed, including local residents, national security forces and armed groups.

Any further arming of protesters and their transformation into paramilitary groups must immediately stop. Armed groups should be urgently disarmed. All who have influence on these armed groups should use their influence constructively in order to prevent further violence. Whoever incites violence and arms protesters, transforming them into paramilitary troops, can be held accountable for the tragic consequences.

From the beginning, I have continuously raised the need to urgently curb the use of hate speech. This becomes doubly important ahead of the forthcoming Presidential elections on 25 May. I am calling on all Presidential candidates to use the days remaining until the Presidential elections to send the message of peace and reconciliation to the people of Ukraine.

Constitutional amendments that were announced and the intention to discuss them through national consultations is the right approach to de-escalate tensions and create an atmosphere conducive to the implementation of the Geneva agreement. However, as civil society representatives whom I met yesterday conveyed to me, these national consultations should be inclusive and open to civil society, including peaceful representatives from the East of the country, critical of the Government.

The Government, as well as the international community, should send a clear message that there will be accountability for crimes committed, regardless of the ethnicity or political affiliation of the perpetrators. In this current situation everyone is losing: be they ethnic Ukrainians or Russians, Russian or Ukrainian speaking, with wider negative regional consequences. However, I firmly believe that the point of no return has not been reached, and we cannot allow it to be reached. The UN stands with all Ukrainians, regardless of their ethnicity and political affiliation - to help to prevent such an outcome.

The report also contains a chapter on the situation in Crimea, in light of the UN GA resolution 68/262 on the territorial integrity of Ukraine. From a human rights perspective, it is essential that resident of Crimea are not negatively affected by the implications of the changing effective legal framework on their human rights. No matter their citizenship, people who live in Crimea should have equal access to employment, education, health and other social services.

Special attention should be paid to the situation of the Crimean Tatar people and their rights as an indigenous people. Yesterday I had the opportunity to speak to Mr. Jemiliev, the historical Tatar leader. It is highly important that their 70th anniversary commemoration of their forceful deportation from Crimea, scheduled for 18 May, remains calm and that their right to freedom of assembly is fully respected. All those involved should use restraint: the situation is already difficult enough.

Over the next few days, I plan to travel to Donetsk and to Odesa, before returning to Kyiv on 19 May. This will enable me to follow-up on some of the serious human rights violations that have been highlighted in this report, as well as some human rights concerns that have arisen since the 6 May - the cut-off date for the report of the UN Human Rights Monitoring Mission.

It is highly important to diffuse tensions after the unlawful referenda in the regions of Donetsk and Luhansk, and ahead of the presidential elections.

The next public report on human rights in Ukraine is due in June. It will, inter alia, highlight any progress made in the human rights situation, as well as any negative consequences of the political and security tensions on social and economic rights for those who live in Ukraine, especially in the East of the country.

Thank you, and I stand ready for your questions.

ENDS

UN Human Rights, follow us on social media:

Facebook: <https://www.facebook.com/unitednationshumanrights>

Twitter: <http://twitter.com/UNrightswire>

Google+ [gplus.to/unitednationshumanrights](https://plus.google.com/unitednationshumanrights)

YouTube: <http://www.youtube.com/UNOHCHR>

Storify: <http://storify.com/UNrightswire>

Check the Universal Human Rights Index: <http://uhri.ohchr.org/en>

Annex 292

OHCHR, UN Official Cites 'Worsening' Human Rights Situation in Southern, Eastern Regions
(21 May 2014)

UN official cites 'worsening' human rights situation in southern, eastern regions

[rw reliefweb.int/report/ukraine/un-official-cites-worsening-human-rights-situation-southern-eastern-regions](http://rw.reliefweb.int/report/ukraine/un-official-cites-worsening-human-rights-situation-southern-eastern-regions)

21 May 2014 – The southern and eastern regions of crisis-racked Ukraine are now awash in weapons and the scene of numerous cases of illegal detentions and abductions, a senior United Nations human rights official warned today, noting that he had discussed with the parties some rights-based and humanitarian de-escalation measures.

"The human rights situation in the east of the country has worsened. There are more arms being used as well as numerous violations being committed," Ivan Šimonović, Assistant Secretary-General for Human Rights, told reporters following his briefing to the Security Council on his latest [report](#) on the situation in the country as well as his recent visit to Kyiv and strife-torn Donetsk and Odessa.

The 36-page report was released on 16 May and is the second to be produced by the UN Human Rights Monitoring Mission, based in five Ukrainian cities, and covers the period from 2 April to 6 May. It documented an "alarming" deterioration of the human rights situation in eastern Ukraine, including serious problems emerging in Crimea, citing numerous examples of targeted killings, torture and beatings, intimidation and some cases of sexual harassment, committed mostly by anti-Government groups.

"As a result of violence in the east and south of the country 127 people have died," said Mr. Šimonović today, echoing the report's findings of illegal detentions and abductions, especially affecting journalists as well as members of the electoral commissions, "which make elections in the east more difficult."

Continuing, he said that in the east of the country, apart from security challenges, the situation has worsened due to common criminality and its rise. In addition, social and economic rights are being affected, although social services do work "but with some disruptions." Yet, there is a serious danger that such services could break down, and if the overall situation deteriorates further, there is a likelihood that such a breakdown could spark a massive outpouring of people from the region.

As for the situation in Odessa, where reportedly clashes at a trade union building in the Black Sea city sparked a fire that killed and wounded dozens of people earlier this month, Mr. Šimonović said that what seems to be "beyond doubt is now the number of victims: 48 victims – six of them – and all of them were among pro-Ukrainians, died from gunshot wounds."

"That happened previously during conflicts between the two groups in the centre of the city," he said, explaining that the other victims were anti-Government protesters that were either in the Trade Union building that were affected by the fire, or people who were jumping from the building to escape the consequences.

“About [the] causes of the fire, it is being examined and it's very technical, however, it is also beyond doubt that Molotov cocktails have been thrown by both sides, flying from the building and into the building,” he said, telling reporters that there were five investigations under way on the events, including those being carried out by national authorities in Kyiv and by independent bodies.

Asked whether the dire conditions he had spoken of were the right atmosphere for the holding of elections, he said “it is certainly not a favourable climate” but the UN human rights team was not involved in the actual polls. “We observe violations related to elections.”

In that regard, he said that a “striking example” had been the abduction of members of the electoral commissions and “intimidation of [those officials], which negatively impacts the possibility of organization elections in the east of the country.

Annex 293

OHCHR, Report on the Human Rights Situation in Ukraine (15 June 2014)

**Office of the United Nations High Commissioner
for Human Rights**

**Report on the human rights situation in Ukraine
15 June 2014**

TABLE OF CONTENTS

| | | |
|-------------|--|----|
| I. | EXECUTIVE SUMMARY | 3 |
| II. | METHODOLOGY | 6 |
| III. | ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS | 7 |
| | A. Investigations into human rights violations related to the Maidan protests | 7 |
| | B. Investigations into human rights violations related to the violence in Odesa on 2 May | 9 |
| | C. Investigations into other human rights violations | 17 |
| IV. | HUMAN RIGHTS CHALLENGES | 18 |
| | A. Rule of law | 18 |
| | B. Freedom of peaceful assembly | 22 |
| | C. Freedom of expression | 23 |
| | D. Minority rights | 23 |
| | E. Political rights | 24 |
| | F. Internally displaced persons | 25 |
| V. | PARTICULAR HUMAN RIGHTS CHALLENGES IN THE EAST | 27 |
| | A. Impact of the security situation on human rights | 27 |
| | B. Right to life, liberty and security | 32 |
| | C. Freedom of expression | 37 |
| | D. Freedom of religion or belief | 41 |
| | E. Economic, social and cultural rights | 41 |
| VI. | PARTICULAR HUMAN RIGHTS CHALLENGES IN CRIMEA | 48 |
| | A. Civil and political rights of Crimean residents | 48 |
| | B. Economic, social and cultural rights | 53 |
| | C. Rights of indigenous peoples | 55 |
| VII. | CONCLUSIONS AND RECOMMENDATIONS | 55 |

I. EXECUTIVE SUMMARY

1. The present report is based on findings of the United Nations (UN) Human Rights Monitoring Mission in Ukraine (HRMMU) covering the period of 7 May – 7 June 2014. It follows two reports on the human rights situation in Ukraine released by the Office of the UN High Commissioner for Human Rights (OHCHR) on 15 April and 16 May 2014.
2. During the reporting period, the human rights situation in the Donetsk and Luhansk regions has continued to deteriorate. The 11 March “referendum” on “self-rule” held by the self-proclaimed “Donetsk People’s Republic” and “Luhansk People’s Republic”,¹ albeit without effect under international law, was seen by their representatives as the first step to the creation of a “Novorossia”. In addition, armed groups have continued to physically occupy most of the key public and administrative buildings in many cities and towns of the Donetsk and Luhansk regions, and have declared virtual “independence”, however, the provision of administrative services to the local population remains with the State.
3. The presence of armed people and weapons in the regions of Donetsk and Luhansk has increased. Representatives of the “Donetsk People’s Republic” have recognised the presence within their armed groups of citizens of the Russian Federation, including from Chechnya and other republics of the North Caucasus. In the period following the elections, the HRMMU observed armed men on trucks and armoured vehicles moving around downtown Donetsk in daylight.
4. The escalation in criminal activity resulting in human rights abuses is no longer limited to targeting journalists, elected representatives, local politicians, civil servants and civil society activists. Abductions, detentions, acts of ill-treatment and torture, and killings by armed groups are now affecting the broader population of the two eastern regions, which are now marked by an atmosphere of intimidation and consequent fear. Armed groups must be urged to stop their illegal activities and lay down their arms.
5. There has also been more regular and intense fighting as the Government has been trying to restore peace and security over the eastern regions of Donetsk and Luhansk through security operations involving its armed forces. Local residents of areas affected by the fighting are increasingly being caught in the cross-fire between the Ukrainian military and armed groups, with a growing number of residents killed and wounded, and damage to property. The HRMMU is concerned at the increasing number of reports of enforced disappearances as a result of the security operations. The Government must further use restraint of force, and ensure that its security operations are at all times in line with international standards.²
6. As a result of these developments, residents of the Donetsk and Luhansk regions live in a very insecure environment, coupled with social and economic hardships. Daily life is more and more of a challenge. The HRMMU is gravely concerned that the combination of the increased number of illegal acts by the armed groups, and the intensification of fighting between armed groups and Ukrainian forces is raising serious human rights

¹ Hereafter referred to as the “Donetsk People’s Republic” and the “Luhansk People’s Republic”.

² Human Rights Watch Letter to former Acting President Turchynov and President-Elect Poroshenko dated 6 June 2014, on the conduct of security operations in south-eastern Ukraine in light of the growing number of credible reports regarding Ukrainian forces’ use of mortars and other weapons in and around populated areas, and the recent intensifying of hostilities between Ukrainian forces and armed groups.

concerns, including but not limited to, the fate of the general population, especially women and children, in the areas under the control of armed groups.

7. As of 6 June, the departments of social protection in Ukraine's regions had identified over 12,700 internally displaced persons (IDPs)³. However, the actual number of people who have fled the violence and fighting in the regions of Donetsk and Luhansk is believed to be higher and increasing daily.
8. Freedom of expression continues to be threatened, particularly in the eastern regions, where journalists face ongoing intimidation and threats to their physical security. Hate speech, particularly through social media, continue to fuel tensions and to deepen division between communities.
9. In Crimea, the introduction of Russian Federation legislation, in contradiction with the United Nations General Assembly resolution 68/262 and applicable bodies of international law, hampers the enjoyment of human rights and fundamental freedoms. It has created a legislative limbo as, while Ukrainian legislation was supposed to remain in force until 1 January 2015, the legal institutions and framework are already required to comply with the provisions of legislation of the Russian Federation.
10. Residents in Crimea known for their "Pro-Ukrainian" position are intimidated. The HRMMU is concerned that many may face increasing discrimination, particularly in the areas of education and employment. Leaders and activists of the indigenous Crimean Tatar people face prosecution and limitations on the enjoyment of their cultural rights. During the reporting period, the situation of all residents of Crimea has deteriorated with regard to their right to freedoms of expression, peaceful assembly, association, religion or belief.
11. From 14 to 19 May, Assistant Secretary-General (ASG) for Human Rights Ivan Šimonović travelled to Ukraine. During his visits to Kyiv, Donetsk and Odesa, he discussed the 16 May report with the Government, regional and local officials, the Ombudsperson and representatives of civil society, and the international community. The ASG highlighted the importance of prompt follow-up to the recommendations made in the OHCHR report as a means to de-escalate tensions, in particular ahead of the Presidential elections.
12. The investigations under the Office of the Prosecutor General into the Maidan events continued. On 28 May, a Kyiv court sentenced two police officers who subjected a Maidan demonstrator to ill-treatment. On 15 May, relatives of those killed on Maidan, dissatisfied with the perceived slowness of the official investigation, created an initiative group to conduct their own investigation. The HRMMU remains in regular contact with the Office of the Prosecutor General and emphasizes the need for the investigation to be transparent, comprehensive and timely.
13. With respect to the incidents that took place in Odesa on 2 May, it should be noted that six official investigations have been established. The main bodies undertaking such investigations are the Ministry of Interior (MoI) and the State Security Service in Ukraine (SBU). It is with regret that the HRMMU reports a lack of cooperation from both governmental bodies, particularly at the central level with the HRMMU, which has been preventing the HRMMU from conducting a proper assessment of the progress

³ As of 16 June, UNHCR estimate there to be 34,336 IDPs in Ukraine.

According to the Russian Federation Federal Migration Service, as of 6 June, 2014, 837 persons had applied and were granted refugee status; and 3,750 persons had applied and were granted Temporary Asylum. Approximately 15% were minors under the age of 18. These figures do not include people from Crimea.

made. The HRMMU reiterates the need for prompt and thorough investigations into the violent incidents on 2 May in Odesa. Some key questions must be addressed to ensure confidence in the investigation and to guarantee accountability, due process and to enable the communities to accept fully the results of such an investigation. Among those questions are the conduct of the police on 2 May: why it, and the fire brigade, either did not react, or were slow to react; what caused the fire in the Trade Union building; who are the perpetrators of the killings in the afternoon and the fire in the evening; and what measures are being taken to guarantee justice for the victims, and due process for the people detained in connection with these events. Furthermore, the Government must pay particular attention to ensure social media is not used for hate speech or incitement to hatred.

14. A key development during the reporting period was the Presidential election held on 25 May 2014. There were 21 candidates officially on the ballot. On 3 June, the Central Election Commission (CEC) confirmed that Mr. Petro Poroshenko had won with 54.7% of the vote. In the regions of Donetsk and Luhansk, attacks had taken place every day during the week preceding the elections and multiplied on election day, with violent obstruction of polling stations. The pattern of such attacks consisted of representatives of the “Donetsk People’s Republic” and the “Luhansk People’s Republic” and armed men entering the premises of the district election commissions, threatening staff and sometimes beating and/or abducting them, often taking away voters’ lists, computers and official documents. In some cases, the premises of these commissions were seized and blocked; others had to close either because they became inoperative, or for security reasons the staff were frightened to come back. Several attacks against district election commissions and polling stations were reported just prior to, and on, the election day, with armed men entering polling stations, forcing them to close and/or destroying or stealing ballot boxes. These illegal acts prevented many people living in the Donetsk and Luhansk regions to exercise their right to vote.
15. Residents of Crimea had to go to mainland Ukraine to vote. The HRMMU monitored the situation in the Kherson region, where most of the Crimean voters had registered, and spoke to representatives of the Crimean Tatars. As they crossed the administrative border by car to go to vote, representatives of “self-defence forces” reportedly recorded various personal details, including car license plates and passport numbers. The HRMMU was informed that many Crimean Tatars did not go to vote due to the cost of travelling, concerns about crossing the administrative border, and fear of reprisals by the authorities in Crimea.
16. During the reporting period, the Government of Ukraine continued to implement the Geneva Statement.⁴ National roundtables on constitutional reform, decentralization, minority rights and the rule of law were held in Kyiv on 14 May, in Kharkiv on 17 May, and in Mykolaiv on 21 May. These meetings brought together former Presidents Kravchuk and Kuchma, Prime Minister Yatsenyuk, political party leaders, members of the business community and other civil society organizations. In Kharkiv, Prime

⁴ The Geneva Statement on Ukraine was issued on 17 April 2014 by representatives of the European Union, United States, Ukraine and the Russian Federation. It sets out the agreed initial concrete steps to de-escalate tensions and restore security for all: (1) All sides must refrain from any violence, intimidation or provocative actions; (2) All illegal armed groups must be disarmed; all illegally seized buildings must be returned to legitimate owners; all illegally occupied public offices must be vacated; (3) Amnesty should be granted to the protestors who left seized buildings and surrendered weapons, with the exception of those found guilty of capital crimes; and (4) The announced constitutional process will be inclusive, transparent and accountable carried out through a broad national dialogue.

Minister Yatsenyuk declared that the Constitution should be amended in order to provide a special status for the Russian language and national minority languages.

17. On 13 May, the Parliament adopted the Law “On amending some legislative acts in the area of state anti-corruption policy in connection with the implementation of the European Union (EU) Action Plan on the liberalisation of the visa regime for Ukraine”. The Law provides for more stringent penalties for corruption offences committed by individuals or legal entities.
18. On 20 May, Parliament adopted by resolution № 4904 the Memorandum of Concord and Peace, which was drafted during the roundtable on national unity in Kharkiv on 17 May, and discussed on 21 May in Mykolaiv. Supported by 252 votes (all deputies except the Communist Party of Ukraine and Svoboda), the document foresees that the adoption of a constitutional reform package, including the decentralization of power and a special status for the Russian language; judicial and police reform, and the adoption of an amnesty law for anti-government protesters in the east who would accept giving up weapons, except for those who have committed serious crimes against life and physical integrity. The Parliament called on all to work together to protect, promote and build a democratic Ukraine, and the peaceful coexistence of all nationalities, religions and political convictions.

II. METHODOLOGY

19. The present report was prepared by the HRMMU on the basis of information collected during the period of 7 May to 7 June 2014. During this period, the HRMMU continued to operate pursuant to the objectives as set out at the time of its deployment in March 2014, and in accordance with the same methodology as outlined in its second monthly report on the situation of human rights in Ukraine issued by OHCHR on 16 May.⁵ The present report does not intend to present an exhaustive account of all human rights concerns in Ukraine that have been followed by HRMMU during the reporting period. It rather focuses on those violations and developments which represent particular human rights challenges at the current juncture or demonstrate trends for potentially longer-term human rights concerns in the country.
20. The HRMMU continued to work closely with the United Nations entities in Ukraine. It is grateful for the support and contributions received for the report from the Office of the United Nations Resident Coordinator, the Department for Political Affairs (DPA), the United Nations High Commissioner for Refugees (UNHCR), the World Health Organisation (WHO), the United Nations Children’s Fund (UNICEF), the United Nations Development Fund (UNDP), the World Food Programme (WFP), the United Nations Population Fund (UNFPA), the United Nations Office on Drugs and Crime (UNODC), the International Labour Organisation (ILO), the International Organisation for Migration (IOM), and the Office for the Coordination of Humanitarian Affairs (OCHA).
21. The HRMMU appreciates the close cooperation with international and national partners, including among others, the Organisation for Security and Cooperation in Europe (OSCE).

⁵ <http://www.ohchr.org/Documents/Countries/UA/HRMMUReport15May2014.pdf>

III. ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS

A. Investigations into human rights violations related to Maidan protests

22. Five separate initiatives are ongoing in connection with the investigations into human rights violations committed during the Maidan events: (1) the official State investigation is undertaken by the Office of the Prosecutor General of Ukraine in cooperation with the MoI; (2) a temporary “*commission on the investigation of illegal actions of the law enforcement bodies and individual officials and attacks on the rights and freedoms, lives and health of citizens during the events connected with the mass actions of political and civil protests that have been taking place in Ukraine since 21 November 2013*” was established by Parliament on 26 December 2013; (3) the Secretary-General of the Council of Europe initiated, in December 2013, a three-member International Advisory Panel to oversee that the investigations of the violent incidents which have taken place in Ukraine from November 2013 onwards meet the requirements of the European Convention on Human Rights and the case-law of the European Court of Human Rights; (4) a Public Commission on the investigation and prevention of human rights violations in Ukraine was created on 27 January 2014, initiated by a group of Ukrainian legal academics; and (5) an initiative group comprising family members of people who died on Maidan.
23. The Ukrainian Ombudsperson issued a special report on “Infringement of Human Rights and Freedoms in Ukraine - The Events of November 2013 – February 2014”.⁶
Forceful dispersal of Maidan protesters on 30 November 2013
24. As noted in the previous reports, the violent dispersal of protesters on 30 November was the first instance of the excessive use of force against peaceful demonstrators, and triggered further protests.
25. On 14 May, the Kyiv Pechersky Court postponed a hearing of Oleksandr Popov, former Head of the Kyiv City administration, and of Volodymyr Sivkovich, former Deputy Secretary of the National Security and Defence Council, who are under suspicion of being responsible for the forced dispersal of Maidan protesters on the night of 30 November 2013. The hearing was scheduled after the Kyiv city Court of Appeal cancelled the decision of the Kyiv Pechersky Court of 31 January 2014 to amnesty persons responsible for ordering the crackdown of demonstrators by the “Berkut” riot police under the law of 19 December, which has since then been rescinded.
26. The hearing planned for 14 May eventually took place on 26 May but was followed by an incident. About 15 members of the “Maidan self-defence” attacked Oleksandr Popov after he left the court room. He was doused with water, alcohol and iodine, and insulted. Members of the police, who were standing by, did not intervene.
27. During the following hearing, on 5 June, the plaintiffs (representing Maidan victims) submitted a petition for the revocation of the judge considering the case. The petition was accepted by the court, leading to the postponement of the hearings until a decision on the revocation.

⁶ Ukrainian Parliament Commissioner for Human Rights, Special Report on ‘Infringement of Human Rights and Freedoms in Ukraine - The events of November 2013 – February 2014’, issued on 28 February, 2014.

Criminal proceedings into the killings of 19-21 January and 18-20 February 2014

28. During 19-21 January 2014, fierce clashes broke out in central Kyiv between the police and protesters, resulting in the first three casualties among demonstrators. The death toll rose significantly between 18-20 February, with confrontations taking the lives of dozens of persons, mostly protesters.
29. Different figures continue being reported regarding the number of deaths during the protests in January and February. According to information from the Office of the Prosecutor General communicated to the HRMMU on 27 May, 76 protesters were killed as a result of firearm wounds on Hrushevskoho and Institutaska streets due to armed confrontations. On 21 May, the Ministry of Health announced that 106 demonstrators had died during the protests. Information from the NGO “Euromaidan SOS”, dated 3 June, refers to 113 casualties among protesters (109 in Kyiv and 4 in the regions).
30. There are also discrepancies concerning casualties among law enforcement officers: 14 according to the Office of the Prosecutor General; 17 according to the Investigation Commission of the Parliament of Ukraine on the Maidan events; and 20 according to the NGO “Euromaidan SOS”.
31. For investigation purposes, all the killings of protesters by firearms were merged by the Office of the General Prosecutor into one criminal proceeding. As of 24 April, three “Berkut” officers had been arrested and officially charged with Article 115 (Murder) of the Criminal Code. The situation has not changed over the past month and a half. The killing of law enforcement officers is being investigated by a separate team within the Office of the Prosecutor General. As of 6 June, no suspects had been identified.
32. On 20 May, the deputy head of the Kyiv Department of the MoI, Sergiy Boyko, declared that all documentation related to the activities of the special police unit “Berkut” during Maidan had been destroyed upon the order of the unit commander in the last days of February 2014.
33. On 5 June, the HRMMU met with a representative of an initiative group claiming to represent about 320 relatives of people killed on Maidan. The group held its first meeting on 15-16 May, and is planning to initiate an independent investigation into the events, with the involvement of lawyers and journalists. They consider their initiative as necessary as they are not satisfied with the ongoing investigations. The group, which plans to register an NGO entitled “Family Maidan” also intends to support families of Maidan victims.
34. On 21 May, the Head of the Parliamentary Investigation Commission on the Maidan events reported that two persons who had participated in the protests were still missing. Eleven persons suspected in the killing of demonstrators have been identified, of whom three were arrested and eight remain at large, allegedly in the Russian Federation. The Commission is seeking to obtain full and reliable information on violations during Maidan and will forward evidence to the General Prosecutor’s Office. It has a one-year mandate and must issue a report to Parliament no later than six months after its establishment that is by 26 June 2014.
35. The International Advisory Panel (IAP) of the Council of Europe overseeing the Maidan investigations held two working sessions in Strasbourg on 9-11 April and 5-7 May 2014. On 16 May, it issued guidelines for NGO submissions and requested input by 11 June 2014. It also decided to request ‘certain authorities’ to submit information

mainly concerning the Maidan investigations. The first meetings of the IAP in Kyiv will take place at the end of June 2014.

Torture and ill-treatment

36. On 28 May, the Kyiv Pechersky Court sentenced two police officers for abuse of power and violence against a demonstrator, Mykhailo Havrylyuk, during the Maidan protests. Mr. Havrylyuk had been stripped naked in the street by the police in freezing conditions and forced to stand in the snow while being mocked, assaulted and filmed with a mobile phone. During the hearings, the defendants pleaded guilty. One of them was sentenced to three years of imprisonment with a probation period of one year, and the other to two years, including a one-year probation period.

B. Investigations into human rights violations related to 2 May Odesa violence

Summary of events

37. The most serious single incident of significant loss of life in Ukraine since the killings on Maidan occurred in Odesa on 2 May 2014.⁷ The events occurred on the same day that a football match was due to take place between the Kharkiv football team “Metallist” and the Odesa football team “Chernomorets”. On 1 May, the police authorities issued an official statement announcing that due to possible disorder because of the football game, an additional 2,000 police officers would patrol the streets of Odesa.
38. Early in the morning of 2 May, at least 600 football fans arrived from Kharkiv. Football fans from both teams are known to have strong “Pro-Unity”⁸ sympathies. A pre-match rally for “United Ukraine” had been planned for 3.00 p.m. on Sobornaya square and gathered, at least, 2,000 people, including supporters of the two football teams, Right Sector activists, members of so-called self-defence units, and other “Pro-Unity” supporters. Right Sector and “self-defence” unit supporters were observed by the HRMMU wearing helmets and masks, and armed with shields, axes, wooden/metallic sticks and some with firearms. By 3:00 p.m. the HRMMU had observed 15 police officers on Sobornaya square and two buses of riot police officers parked nearby.
39. Meanwhile, the HRMMU observed that about 450 metres away from Sobornaya street, “Pro-Federalism” activists, comprising approximately 300 activists from “Odesskaya Druzhina” (radical “Pro-Federalism” movement), had also gathered one hour earlier. They reportedly intended to prevent the “Pro-Unity” rally; and were wearing helmets, shields, masks, axes, wooden/metal sticks and some of them with firearms.
40. The HRMMU observed an insufficient and inadequate police presence to manage and ensure security, and crowd control of the “United Ukraine” march towards the football stadium. The HRMMU noted that additional police officers arrived at the scene, but were unable to stop the violent confrontation.
41. At 3.15 p.m., the “Pro-Federalism Odesskaya Druzhina”, “Narodnaya Druzhina” and other activists approached the Sobornaya square and started to provoke the participants of the “United Ukraine” rally. Clashes arose and quickly turned into mass disorder, which

⁷ See also OHCHR report on the human rights situation in Ukraine, 15 May 2014 (<http://www.ohchr.org/Documents/Countries/UA/HRMMUReport15May2014.pdf>)

⁸ The terms “Pro-Unity” and “Pro-Federalism” are used in the context as describing the motivations and orientation of the supporters / activists.

lasted for several hours until 6.30 p.m. Police officers and supporters from both sides were injured during the afternoon. Six men were killed by gunshots fired by activists.

42. The HRMMU observed that following the clashes in the city centre, some “Pro-Federalism” activists ran from the area chased by “Pro-Unity” supporters. Approximately 60 “Pro-Federalism” activists took refuge in the “Afina” shopping centre, which had been closed during the day. The “Afina” shopping centre was then surrounded by “Pro-Unity” activists. Riot police (Special Forces “SOKOL”) arrived on the scene, and reportedly took away 47 “Pro-Federalism” activists, while letting women out of the complex. Other “Pro-Federalism” supporters ran from the clashes to the tent camp at the Kulikovo Pole square, where approximately 200 supporters had gathered (including all the “Pro-Federalism” leaders) during the afternoon.
43. Some “Pro-Unity” politicians called upon their supporters to march towards the Kulikovo Pole square. At 7.00 p.m., the “Pro-Unity” supporters marched in that direction, accompanied behind them by approximately 60 riot police.
44. The “Pro-Federalism” leaders were informed that “Pro-Unity” supporters were heading towards the tent camp, and between 6.00 – 6.30 p.m., they decided to take refuge in the nearby Trade Union Building.
45. At 7.30 p.m., when the “Pro-Unity” supporters reached Kulikovo Pole square, they burned all the “Pro-Federalism” tents. The “Pro-Federalism” activists, who had hidden in the Trade Union Building, and the “Pro-Unity” activists, then reportedly started throwing Molotov cocktails at each other. Gunshots could reportedly be heard coming from both sides. At around 8.00 p.m., the “Pro-Unity” activists entered the Trade Union Building where the “Pro-Federalism” supporters had sought refuge.
46. During the evening a fire broke out in the Trade Union Building. At 7.43 p.m., the HRMMU called the fire brigade, which has its base located 650 metres from the Trade Union Building. Reportedly, the fire brigade only arrived 40 minutes after receiving the first phone call about the fire. According to fire brigade officials, this was due to the fact that the police did not create a safe and secure perimeter allowing the fire brigade to easily access the Trade Union Building. The cause of the fire remains unclear at this stage.
47. As a result of the fire, officially 42 people died: 32 (including 6 females) were trapped and unable to leave the building and 10 (including one female and one minor) died jumping from windows.
48. The HRMMU has received information from credible resources that some “Pro-Unity” protesters were beating up “Pro-Federalism” supporters as they were trying to escape the Trade Union Building, while others were trying to help them.
49. 247 other people were brought from the scene requiring medical assistance: 27 people with gunshot wounds, 31 with stab wounds, 26 with burns and intoxication caused by combustible products and 163 with injuries by blunt objects. Of these, 99 people were hospitalised, including 22 policemen, with 35 in serious condition. According to various sources, all those who died were Ukrainian citizens. There are no more official reports of people missing in relation to 2 May events. Seven of those injured remain in hospital. The HRMMU received allegations that many who were treated in hospitals did not give their real names and addresses. Moreover, some people who were heavily injured from the violence did not go to hospital for fear of retaliation.

50. During the evening, it was reported to the HRMMU that a bare minimum police force was present at the Kulikovo Pole square. Even when the special riot police force arrived at the scene, the officers did not intervene in the violence that took place on the Kulikovo Pole square. The HRMMU was told by high ranking police officers that the reason for this is that they did not receive any formal order to intervene.

Detentions

51. The HRMMU has noted slight discrepancies regarding the number of people arrested/detained/transferred during, and in the aftermath of, the 2 May violence. The Regional Prosecution Office and the Regional Ministry of Interior present different figures relating to these events. For example, figures for those arrested in the centre of town vary from 42 to 47 people, and figures for those arrested at the Trade Union Building from 63 to 67 people.
52. Criminal investigations have been launched under the following articles of the Criminal Code of Ukraine: Article 115/1 (Intentional homicide); Article 194/2 (Intentional destruction or damage of property); Article 294/2 (Mass riots/unrest); Article 296 (Hooliganism); Article 341/2 (Capturing of the state or public buildings or constructions); Article 345 (Threat or violence against a law enforcement officer), Article 365 (Excess of authority or official powers) and Article 367 (Neglect of official duty).
53. The 47 “Pro-Federalism” activists who took refuge in the “Afina” shopping centre were taken away (for so-called protection reasons) by Police Special Forces “SOKOL” and transferred to two police stations outside Odesa (Ovidiopol and Bilhorod-Dnistrovki) where they were detained for two days.
54. During this 48 hour period in police custody, detainees were not given food or water on a regular basis, nor were they provided a one-hour walk per day, as per internal MoI regulations⁹.
55. On 4 May, all 47 detainees were transferred to Vinnitsa (424 km from Odesa). According to information provided to the HRMMU by credible sources, during the transfer, which lasted for 12 hours, they received neither food nor water, nor were they allowed to use toilet facilities (they had to urinate in the detainees van). According to Ukrainian internal regulations, detainees during transfer should receive food and water.
56. On 6 May, video court hearings of the “Pro-Federalism” activists were organised with the Primorsky District Court of Odesa. All were charged with Article 294 (Mass riots) and/or Article 115 (Intentional homicide) of the Criminal Code; and during the following days some were given additional criminal charges of either: Article 194/2 (Intentional destruction or damage of property); Article 296 (Hooliganism); Article 341/2 (Capturing of the state or public buildings or constructions); or Article 345 (Threat or violence against a law enforcement officer). According to the court decisions of the 47 arrested, 14 were placed in the Vinnitsa pre-trial detention centre. Four of these, after appealing the court decision, were placed under house arrest and have since reportedly returned to Odesa. 33 of the 47 individuals originally arrested were placed under house arrest as of 10 June 2014. Late in the evening of 2 May, 67 people were arrested at the Trade Union Building and transferred to the Odesa City Police Station, where they were detained for two days. On 2 and 3 May, all were

⁹ Ministry of Interior regulation Number 60 dated 20/01/2001: warm food three times per day, and one hour walk per day.

charged with either Articles 115 (Intentional homicide) or Article 294 (Mass riots) of the Criminal Code. On 4 May at 5.00 p.m., the Odesa City Police Station was stormed by relatives and friends of the “Pro-Federalism” movement. Under unclear circumstances all of the 67 detainees were “released” by the police.

57. In addition to those arrested on 2 May, the MoI arrested at least four other people. On 6 May, one of the leaders of the “Pro-Federalism” movement was arrested and charged under Article 294 of the Criminal Code. He is currently detained in a pre-trial detention centre. On 18 May, a “Pro-Unity” activist was arrested, accused of firing at, and injuring several people in the city centre on 2 May, including police officers, “Pro-Federalism” activists and journalists. He was first transferred to the Investigation Department of Odesa Regional Police Office, before being transferred to Kyiv. He is accused under Article 115 (Murder) and Article 294-2 (Mass riots) of the Criminal Code and on 21 May, he was placed under house arrest in Odesa by the Kyiv Pechersky District Court.
58. Of the arrests conducted between 2 May and 3 June, in connection with the investigations into the 2 May violence, 13 persons remain in pre-trial detention centres under the Penitentiary Services (either in Vinnitsa, Odesa or Kyiv) charged with one or more of the following six articles of the Criminal Code: Article 115/1 (Intentional homicide); Article 194/2 (Intentional destruction or damage of property); Article 294/2 (Mass riots/unrest); Article 296 (Hooliganism); Article 341/2 (Capturing of the state or public buildings or constructions); and Article 345 (Threat or violence against law enforcement officer).
59. In addition, reportedly 40 people were placed under house arrest in Odesa charged with the following articles of the Criminal Code: Article 115/1 (Intentional homicide); Article 194/2 (Intentional destruction or damage of property); Article 294/2 (Mass riots/unrest); Article 296 (Hooliganism); Article 341/2 (Capturing of the state or public buildings or constructions); and Article 345 (Threat or violence against law enforcement officer).
60. Two cases concerning “Pro-Unity” activists suspected of shooting and killing persons during the 2 May violence, were heard by the Pechersky District Court of Kyiv, following the arrest of two suspects on 18 and 26 May. Both were given house arrest; both are charged under Article 294 (Mass riots), and one has been additionally charged under Article 115 (Murder) of the Criminal Code.

Due process rights during, and after, the 2 May violence

61. The HRMMU visited detainees held in the pre-trial detention centre in Odesa. The Penitentiary Services administration fully cooperated with the HRMMU and granted access to several detainees (including one female) with whom private interviews were carried out. The detainees did not complain about their conditions of detention or physical treatment in the pre-trial detention centre in Odesa. They confirmed they were able to meet privately with their lawyers.
62. The HRMMU also met with lawyers, victims, witnesses, detainees and relatives with regard to the 2 May violence. It also held numerous meetings with the Ombudsperson’s team, as well as representatives of law enforcement agencies, mass media, local politicians and officials, activists and local officials. Through its monitoring, the HRMMU has identified various human rights concerns with regard to the on-going criminal investigations, which include some of the following.

Timely notification of reasons for arrest and charges within short period of time

63. On 15 May, the SBU apprehended five additional people. Although this took place at 9.00 a.m., the official arrest time has been recorded as 11.50 p.m. – over 12 hours later. According to Article 208/4 of the Criminal Procedure Code ‘a competent official who apprehended the person, shall be required to immediately inform the apprehended person, in a language known to him, of the grounds for the apprehension and of the commission of what crime he is suspected’. Furthermore, the procedure applied for the arrest was not in line with Articles 9.2 and 9.3 of the International Covenant on Civil and Political Rights (ICCPR).
64. Similarly eight people apprehended by the SBU on 27 May at the Odesa railway station did not receive prompt notification of the reasons for their arrest.

Right to a fair trial

65. Law enforcement agencies resorted to an illegal practice in order to prevent prompt access to legal counsel. Indeed, during criminal interrogation procedures, police and SBU officers summoned individuals as “witness” and later then substituted their status as “suspect” and/or substituted their interrogation by interviewing. This resulted in violating the persons’ right to see and consult a legal counsel (as provided for in Article 208/4 of the Criminal Procedural Code) and gave an opportunity to “delay” the official time of apprehension.
66. For instance, the eight people who were arrested by the SBU at the Odesa railway station were transferred to the SBU for an alleged “interview”. They were not informed about their rights with regard to apprehension, nor were they provided with legal counsel, nor could they contact their lawyers before and during interrogation.
67. The HRMMU observed, based on interviews with detainees and their relatives, that the governmental Free Legal Aid scheme (established in connection with the new Criminal Procedural Code of November 2012) encountered gaps in its system. For the legal defence of detainees arrested during and after 2 May violence, the Free Legal Aid system could not provide enough lawyers.
68. As of 4 June, the legal status of the 67 “detainees” released on 4 May from Odesa city Police Station remained unclear. Due to procedural gaps following their alleged illegal release (i.e. without a court decision), they remain suspects. The measure of restraint was not applied to them as required in accordance with the Criminal Procedural Code.

Right to medical care

69. In Ovidiopol and Bilhorod-Dnistrovskiyi Police Stations medical care was not provided to those among the 47 detainees who required such assistance due to illness. The relatives of detainees placed in custody in the Vinnitsa pre-trial detention centre also reported about the lack of medical care provided to their kin.

Personal data

70. Concerns have been raised with the HRMMU that on 19 May, the presumption of innocence may have been violated during an official press conference of the MoI, by the Deputy Minister of Interior/Head of Main Investigation Unit by disclosing personal data of 12 detainees. The HRMMU reminds the authorities of the importance of respecting international standards concerning the presumption of innocence and the prohibition of arbitrary interference with one’s privacy or attacks upon his/her honour and reputation.

71. Also on 3 May, the SBU published the names and passports of three citizens from the Russian Federation allegedly involved in the 2 May violence.

Legality of arrest

72. On 15 May, the SBU conducted an illegal search of an apartment from 8.00 p.m. to 3.00 a.m., without a search warrant and without preparing a report/protocol on the search. During the search, they broke the door, forced the family, including a girl to lie down on the floor. A woman (wife/mother) was subsequently arrested and taken to the SBU Office. The next day she was transferred to the Odesa Police Station. On 17 May, the Primorsky District Court placed her in custody under Articles 294 (Mass riots) and 110 (Trespass against territorial integrity and inviolability of Ukraine) of the Criminal Code. She is currently detained in Odesa pre-trial detention centre.

Accountability: Update on investigations into the Odesa incidents

73. Six official investigations have been initiated to look into the incidents of 2 May in Odesa and are ongoing: 1) a criminal investigation by the MoI; 2) an investigation of the General Prosecution Investigation Unit into police conduct; 3) a criminal investigation by the SBU into alleged state level crimes (including actions aimed at forceful change or overthrow of the constitutional order); 4) an investigation by the Ombudsperson; 5) an investigation by the Parliamentary Commission; and 6) an investigation by a commission comprising civil society representatives under the auspices of the Governor. During his visit in May, ASG Šimonović met with interlocutors involved in these various investigations.
74. These parallel investigations by different bodies present a high risk of miscommunication between the various law enforcement agencies' commissions, which may impact the integrity of the criminal investigations. Furthermore, there appear to be widespread concerns among citizens regarding the ability of local law enforcement agencies to conduct independent and thorough investigations due to the politicisation of the 2 May events. The day after the violence, the former acting President dismissed several local high-ranking officials on the grounds of Article 365 (Excess of authority or official powers) and Article 367 (Neglect of official duty) of the Criminal Code). An interim government and new officials were appointed at the local level: the Governor of Odesa, the Head of the Regional MoI, the Head of the Odesa City Police, and the Head of the Regional Prosecution Office.

Governmental Commission on the issues of numerous deaths of people during "Pro-Ukrainian" protests and fire in the Trade Union Building in Odesa City

75. During the late evening of 2 May, Vice-Prime Minister Vitalii Yarema was appointed Head of the Governmental Commission on the issues of numerous deaths of people during "Pro-Ukrainian" protests and the fire in the Trade Union Building in Odesa City, which is responsible for overseeing the investigation carried out by the law enforcement agencies at the Odesa regional and city level. The HRMMU has officially requested to meet with this Commission, but had not received a response as of 7 June 2014.

Criminal investigation by the Ministry of Interior Investigation Unit

76. On 2 May, a criminal investigation was launched by the Odesa Regional Police Investigation Department. On 6 May, the responsibility for the investigation was transferred to the Main Investigation Department of the MoI in Kyiv (under the lead of Deputy Minister of Interior). According to the law, the investigation process should be

completed in 60 days. Investigators from Kyiv, Odesa and other regions are cooperating on this investigation, which has been launched under the following articles of the Criminal Code of Ukraine: Article 115/1 (Intentional homicide); Article 194/2 (Intentional destruction or damage of property); Article 294/2 (Mass riots/unrest); Article 296 (Hooliganism); Article 341/2 (Capturing of the state or public buildings or constructions); and Article 345 (Threat or violence against law enforcement officer).

General Prosecution Investigation Unit regarding police duty performance

77. On 3 May, the Odesa Regional Prosecutor Office launched a criminal case against four police officials under Article 365 (Excess of authority or official powers) and Article 367 (Neglect of official duty) of the Criminal code. On 6 May, this investigation was transferred to the Investigation Unit of the General Prosecutor.
78. According to information provided to the HRMMU by credible sources, the regional MoI did not enforce the special police tactical plan called “Wave” (“Khvyliya”), which would have allowed the use of special police means and forces, and ensured coordination of all official emergency units (e.g. health, and the department of emergency situations).
79. Furthermore, there are credible reports that during the 2 May violence, all high ranking officials from the Regional MoI and Regional Prosecutor’s Office were holding a meeting and were unavailable.
80. Since then, several criminal proceedings have been initiated against high-ranking police officials and policemen. The Deputy Head of the Regional MoI was placed under house arrest in relation with the 2 May violence and the “release” of the 67 detainees held in the Odesa Police Station on 4 May. His current whereabouts remain unknown but he is thought to be outside Ukraine. On 8 May, the Head of the Odesa City Police, the Head of the Odesa Police Detention Centre and the duty officer were apprehended and transferred to Kyiv. On 9 May, the Head of the Odesa City Police was released on bail. Both The Head of the Odesa Police Detention Centre and the duty officer were also released under obligations to make a personal commitment not to leave Ukraine.

Criminal investigation under the State Security Service of Ukraine (SBU)

81. In mid-March, the SBU initiated a criminal investigation throughout the country under Articles 109 (Actions aimed at forceful change or overthrow of the constitutional order or take-over of government) and 110 (Trespass against territorial integrity and inviolability of Ukraine) of the Criminal Code in relation to threats to national security and national integrity. As of 15 May, the SBU arrested several people in Odesa region. According to the HRMMU informal sources, 18 people were placed under investigation by the SBU and detained in the Odesa pre-trial detention centre between 2 May and 3 June.
82. On 15 May, the SBU arrested five people (four male and one female) who were allegedly leaving the Odesa region to join armed groups in eastern Ukraine. The woman was placed under house arrest. Later that day another female “Pro-Federalism” supporter, allegedly the organiser of the expedition, was arrested and placed in pre-trial detention in Odesa. One more person was arrested the following day in connection with the same case. As of 7 June, the HRMMU had no information on his whereabouts.
83. On 27 May, eight men were arrested at the Odesa railway station from a train about to depart for Moscow. The SBU stated that these people were planning to attend a “paramilitary training” in Moscow before joining the armed groups in eastern Ukraine.

On 29 May, the Primorsky District Court charged all of them under Articles 109 (Actions aimed at forceful change or overthrow of the constitutional order or take-over of government) and 110 (Trespass against territorial integrity and inviolability of Ukraine) of the Criminal Code. They have been placed in custody in the pre-trial detention centre in Odesa. One more person was arrested the following day in connection with the same case. As of 7 June, the HRMMU had no updated information on his whereabouts.

84. On 28 May, three men, members of the NGO "Orthodox Cossacks", were arrested in Odesa and on 31 May, they were charged by the Primorsky District Court under Articles 109 and 110 of the Criminal Code, and placed in custody at the pre-trial detention centre in Odesa.

Parliamentary Interim Commission of inquiry into the investigation of the death of citizens in the cities of Odesa, Mariupol and other cities of the Donetsk and Luhansk regions of Ukraine.

85. On 13 May, the Parliament adopted decision 4852 establishing an "Interim Inquiry Parliamentary Commission on the investigation of the death of citizens in the cities of Odesa, Mariupol and other cities of the Donetsk and Luhansk regions of Ukraine", further to a proposal by parliamentarians representing the Odesa region. The mandate of this Commission expires on 15 June, by which date it is to submit its report to Parliament.

86. The Commission informed the HRMMU that it had already gathered a lot of information on the violence of 2 May in Odesa, which should be properly analysed and processed. According to the Head of the Parliamentary Commission, its members met with officials from Odesa, including the regional SBU divisions, MoI, Prosecutor's Office, independent experts, NGOs and suspects under house arrest. He believes many people are still frightened by the events with some afraid to share important information. Moreover, he highlighted that the situation in Odesa is not stable yet, and it is important to optimise the activities of law enforcement bodies in the investigation. According to him, the criminal investigation by the MoI had only conducted approximately 7% of the necessary work. The perpetrators of the Odesa events have still not been identified, with some suspects detained for a few days and then released by courts. From information gathered by the Commission, there is much questioning within local communities as to why this happened. There is also a fear that the local population will use reprisals against suspected persons for the restoration of justice. Thus, according to the Head of the Commission, the Special Interim Parliamentary Commission has intensified its contacts with the local community representatives.

Investigation by the Ombudsperson's Office

87. The Ombudsperson's Office initiated an evaluation on human rights violations by law enforcement agencies during the 2 May violence in Odesa. The Ombudsperson and her team visited Odesa on several occasions and were provided with official documents from all law enforcement agencies.¹⁰

¹⁰ The Ombudsperson submitted a report of her findings to the Prosecutor General on 10 June 2014. It is not a public document.

Commission investigating the 2 May violence

88. A commission was established under the auspices of the Head of the Odesa Regional State Administration (Governor). This commission, which includes civil society activists, journalists and experts, is conducting its own investigation and intends to play a public oversight role concerning the official investigation.
89. The commission members are undertaking their work through open sources, without interfering with the official investigation. It is foreseen that their conclusions will be published only if all members agree on its content. A first official briefing took place on 30 May.

Specialised Headquarters providing assistance in the aftermath of 2 May

90. In the aftermath of the 2 May events, the former acting Mayor of Odesa established an emergency headquarters (HQ) encompassing various departments of the City Council Executive Committee. It provided assistance to victims and their relatives, such as healthcare, information, social services. It also ran an emergency hotline in the aftermath of 2 May incidents. The HRMMU has been in daily contact with the staff on follow-up required, and to enquire about the situation of the victims, particularly medical care and the list of those declared missing. As of 7 June, the Social Welfare Department remained the only operational part of this emergency HQ.
91. After the 2 May violence the HRMMU has been monitoring the criminal proceedings launched by the Office of the General Prosecutor, the MoI and the SBU.
92. As the investigations continue, some key questions must be addressed to ensure confidence in the investigation and to guarantee accountability, due process and to enable the communities to fully accept the results of such an investigation. Issues to be clarified include:
 - a. the identification of the perpetrators who were shooting at protesters during the afternoon;
 - b. the conduct of the police on 2 May - why the police and the fire brigade either did not react, or were slow to react and who ordered what action;
 - c. what happened in the Trade Union Building and what caused the fire there;
 - d. what was the cause of the deaths in the Trade Union Building;
 - e. the identification of the perpetrators of the incidents and violence surrounding the fire in the Trade Union Building;
 - f. the need to guarantee justice for the victims and due process for the detainees.
92. The HRMMU regretfully reports the lack of cooperation from the MoI and the SBU at the central level.
93. The HRMMU reiterates the need for prompt, thorough and impartial investigations into the events so as to ensure accountability of all those concerned and to provide redress and reparations for victims and their families. This process is critical to restore people's confidence in the authorities.

C. Investigation into other human rights violations

94. The HRMMU continues to follow closely the investigation into the human rights violations that occurred in March in 2014 in Kharkiv, including into the "Rymarska case", a clash between pro-Russian and pro-Ukrainian organizations "Oplot" and "Patriots of Ukraine" on 13 March. On 7 May, it was confirmed that the case had been transferred from the police to the SBU. Investigations were opened in connection with

the role of the police in this case, as well as during the attack by protesters against the ATN TV station on 7 April. On 5 June, the Deputy Head of the regional SBU informed the HRMMU that the investigation into “Rymarska case” was ongoing - there were two suspects, who still had to be detained. The challenging aspect of the investigation is that many minors participated in the incident, which requires additional measures to ensure due process.

IV. HUMAN RIGHTS CHALLENGES

A. Rule of law

95. During the reporting period, the HRMMU monitored legal and policy developments affecting human rights and the rule of law. These include the adoption of a “Memorandum on Concord and Peace” resulting from national roundtable discussions; legislative amendments to combat discrimination, corruption, and on the situation of refugees; developments relating to amnesty, lustration of judges, language rights, internally displaced persons (IDPs) from Crimea, ethnic policy, torture and ill-treatment, the media and the reform of law enforcement agencies.

Constitutional reform

96. Pursuant to an Order of the Cabinet of Ministers of 17 April 2014, debates were organized on constitutional amendments proposing the decentralization of power to regions. In accordance with the Geneva Statement of 17 April, roundtables on national unity, co-organized by the Government of Ukraine and the OSCE, were held on 14, 17 and 21 May. At the first roundtable in Kyiv, the eastern regions of the country were largely under-represented, with the only official being the Mayor of Donetsk, Mr. Lukyanchenko (Party of Regions). During the roundtable in Kharkiv, acting Prime Minister Yatsenyuk declared that the constitution should be amended in order to provide a special status for the Russian language and national minority languages. With more representatives present from the east, including local parliamentarians, various perspectives were raised; at the same time, this brought to the fore an array of diverging views on the way forward. The roundtable also prepared a Memorandum containing provisions for a unified society, changes to the Constitution, increasing the local authorities’ role, and decentralisation of state power.
97. On 20 May, through resolution 4904, Parliament adopted the “Memorandum of Concord and Peace”, which was drafted during the second roundtable discussion in Kharkiv. This document foresees the adoption by Parliament of a constitutional reform package, including the decentralization of power, a special status for the Russian language, judicial and police reform, and an amnesty law for anti-government protesters in the east who accept to give up their weapons (except for the perpetrators of serious crimes against life and physical integrity). The Parliament called on all to work together to protect, promote and build a democratic Ukraine, and the peaceful coexistence of all nationalities, religions and political convictions.

International Criminal Court

98. On 23 May, former acting President Oleksandr Turchynov requested the Constitutional Court to assess whether the Constitution of Ukraine would preclude the ratification of the Rome Statute of the International Criminal Court (ICC). The document was signed on 20 January 2000. On 25 February 2014, the Parliament recognised the jurisdiction of the ICC for acts committed in Ukraine from 21 November 2013 to 22 February 2014.

On 9 April, Ukraine informed the Registrar of the Court about this decision. On 25 April, the Office of the Prosecutor of the ICC announced a preliminary examination on the situation in Ukraine to establish whether all the statutory requirements for the opening of an investigation are met.

99. A Member of the Parliament of Ukraine from Odesa, Sergey Kivalov, registered on 15 May a draft resolution which aims to create the legal and institutional conditions for those responsible for the deaths of dozens of people in Odesa, on 2 May, to be tried by the ICC. As of 7 June, the draft resolution¹¹ had not been considered by Parliament.

Crimea

100. On 5 June, Parliament adopted, on first reading, amendments to the Law of Ukraine “On Securing Citizens’ Rights and Freedoms and the Legal Regime on the Temporary Occupied Territory of Ukraine”. These amendments aim at making the registration procedure for those displaced from Crimea easier and faster, especially for those who wish to re-register their business. Thus, IDPs from Crimea in mainland Ukraine will no longer need other documents than the national passport.

Amnesty

101. During the reporting period, no actual progress was made in adopting an amnesty law in relation to the events in the east of the country. On 18 April 2014, the Cabinet of Ministers prepared a draft law “On the prevention of harassment and punishment of persons in relation to the events that took place during mass actions of civil resistance which began on 22 February 2014”. The text would exempt from criminal liability all those who attempted to overthrow the legal government; took part in riots; seized administrative and public buildings; and violated the territorial integrity of Ukraine, provided they agreed to voluntarily cease all illegal actions and were not guilty of “particularly serious crimes”. Four other so-called “amnesty laws” were registered in Parliament by different political parties between 9 and 23 April. On 6 May, a draft resolution was registered, calling on Parliament to make the draft law submitted by the Cabinet of Minister the basis for the adoption of an amnesty law. During his inauguration speech, on 7 June, President Poroshenko offered to amnesty protesters who did not have “blood on their hands”.

Discrimination

102. On 13 May, Parliament adopted amendments to the Law “On preventing and countering discrimination”. The amendments bring the definitions of direct and indirect discrimination in line with Ukraine’s obligations under the ICCPR and other international human rights instruments. They include, in particular, the prohibited grounds listed in Article 2(1) of the Covenant (except “birth”). It should be noted, however, that the amendments do not integrate the jurisprudence of the UN Human Rights Committee on the prevention of discrimination on the basis of sexual orientation. The amendments also provide for criminal, civil and administrative liability in case of discrimination. While these are positive changes, other legal texts, notably the Criminal Code, must be brought in line with the anti-discrimination amendments in

¹¹ Draft resolution “On the recognition by Ukraine of the jurisdiction of the International Criminal Court concerning crimes against humanity having led to very serious consequences, deliberate and planned of mass killing of citizens in a particularly brutal and cynical way during the peaceful protests on 2 May 2014 in Odesa, and concerning all perpetrators of these crimes, and on the request to the International Criminal Court to bring the perpetrators to justice”.

order to ensure effective remedies for victims and contribute to enhanced prevention of discrimination.

Anti-corruption

103. On 13 May, Parliament adopted the Law "On amending some legislative acts Ukraine in the area of state anti-corruption policy in connection with the implementation of the EU Action Plan on the liberalisation of the visa regime for Ukraine". The Law provides for more stringent penalties for corruption offences committed by individuals or legal entities. In particular, the liability for providing knowingly false data in the declaration of assets, income and expenses is introduced to the Code on Administrative Offences. The Law also strengthens the protection of persons reporting on corruption, for instance, providing for anonymous phone lines for reporting corruption. An external control of declarations of assets, income, expenses and financial obligations is also to be introduced. While the amendments are welcome, the key to combatting corruption lies in the readiness of all government institutions to effectively tackle this phenomenon and to implement anti-corruption norms in place. In this regard, the HRMMU recalls that in its concluding observations adopted in May 2014, the UN Committee on Economic, Social and Cultural Rights called on Ukraine to "make politicians, members of parliament and national and local government officials aware of the economic and social costs of corruption, and make judges, prosecutors and the police aware of the need for strict enforcement of the law".

Torture and ill-treatment

101. On 3 June, the Minister of Justice announced at a press-conference the establishment of a Special Committee to carry out random inspections of penitentiary institutions, with broad powers to check violations of human rights and the detention conditions of prisoners. The Committee will be a permanent body and is to produce monthly reports. It will comprise representatives of the Ministry of Justice and representatives of civil society.
102. While welcoming this step, the HRMMU notes that the Ombudsperson was designated by law as the National Preventive Mechanism (NPM) against torture, in line with the Optional Protocol to the United Nations Convention against Torture. As such, it is entrusted to conduct visits to places of deprivation of liberty, with the involvement of civil society, and with a view to preventing human rights violations affecting detainees or contributing to their elimination. Due to the obvious similarities between mandates of the Special Committee and the NPM, proper coordination and consultations between these bodies will be required to ensure the effectiveness of efforts to combat torture and ill-treatment.

Lustration

103. The Interim Special Commission on the vetting of judges was established on 4 June, pursuant to Article 3 of the Law "On the restoration of trust in the judiciary in Ukraine", which entered into force on 10 May. The Commission consists of five representatives from the Supreme Court, the Parliament and the Governmental Commissioner on the Issues of the Anti-Corruption Policy. Legal entities and individuals will have six months from the date of advertisement of the establishment of the Commission in the newspaper "Voice of Ukraine" to request examination (vetting) of judges. Public information about the activities of the Interim Special Commission will be published on the official website of the High Council of Justice of Ukraine. The HRMMU reiterates its concern that the immediate dismissal of judges by the Special

Commission may put in jeopardy the administration of justice. Any lustration initiatives should be pursued in full compliance with the fundamental human rights of the people concerned, including the right to individual review and the right of appeal.

Ethnic and national policy

104. The Minister of Culture stated on 4 June that the Cabinet of Ministers decided to establish a ‘Council of interethnic consensus’ and to create the position of a Government commissioner for ethnic and national policy. This official, who has not been appointed yet, will reportedly be responsible for the implementation of the ethnic and national policy developed by the Government.

Language

105. On 4 June, a draft law was submitted to Parliament “On the official status of the Russian language in Ukraine”. The draft law proposes to give “official status” to the Russian language without compromising the position of Ukrainian as the state language. The bill proposes to introduce the wide usage of Russian language in state institutions, courts, educational institutions, mass media, official publications of legislation and by-laws, pre-trial investigation, advertising and labelling of goods.

Media

106. On 4 June, the Cabinet of Ministers instructed the State Committee on television and radio broadcasting to prepare a draft law "On Amending Certain Legislative Acts of Ukraine regarding resisting informational aggression of foreign states". Other ministries and agencies that will participate in the drafting of the bill will include the Ministry of Economic Development, Ministry of Finance, Ministry of Justice, Ministry of Foreign Affairs, MoI, State Security Service, the National Council on Television and Radio Broadcasting, and the State Committee on Entrepreneurship of Ukraine. This development comes after a Ukrainian court banned, in March 2014, broadcasting by four Russian TV channels in Ukraine, and armed groups in the east having disrupted broadcasting of Ukrainian channels.
107. The HRMMU is of the view that professional journalism and critical thinking, not prohibition, are the proper answers to the attempts to distort or manipulate facts. Everyone, in accordance with article 19 of the ICCPR, should have the right to hold opinions without interference and to freedom of expression, which includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers.

Refugees

108. On 13 May, Parliament adopted amendments to the refugee Law extending the definition of complementary protection to include persons fleeing armed conflict and other serious human rights violations. This brings the definition of complementary protection into line with international and European standards.
109. The HRMMU notes, that certain legal gaps remain, affecting particularly the quality of due process in the asylum procedure and the reception conditions for asylum-seekers. The quality of decision-making on asylum applications also remains of concern, as well as the fact that State funding for asylum matters is inadequate.

Martial law

110. On 3 June, former acting President Oleksandr Turchynov signed decree № 936/2014 “About considering the question of the introduction of martial law in certain areas of Ukraine”. The decree requests the Secretary of the Council of the National Security and

Defence of Ukraine to “*immediately cooperate with the Ministry of Defence of Ukraine, the Ministry of Interior of Ukraine, the Security Service of Ukraine, the Administration of the State Border Service of Ukraine to consider the question about the need to impose martial law in the Donetsk and Luhansk Regions, where the security operation is taking place, to prevent further development and ensure the ending of the armed conflict on the territory of Ukraine, to prevent mass deaths of civilians, military personnel and members of law enforcement agencies, to stabilize the situation and restore normal life in these regions*”.

Law enforcement sector reform

111. On 4 June, Prime Minister Arseniy Yatseniuk instructed the Cabinet of Ministers to set up a working group that will prepare legislation to reform the law enforcement system by 1 August 2014. The working group will be headed by First Vice-Prime Minister, Vitaliy Yarema, who stressed the need to develop draft laws on the police, the security service and the prosecutor’s office. Experts from the European Commission and Poland will assist the working group.
112. On 5 June, Parliament adopted the Law "On Amendments to the Law of Ukraine on combating terrorism". The law provides a definition of a Counter-Terrorist Operation (CTO), the authority of the CTO participants and other innovations. It also prescribes the possibility of "physical elimination of the terrorists" in case of resistance. Speaking at a press conference, the former acting Head of the Presidential Administration gave his support to the introduction of martial law in the Donetsk and Luhansk regions, as well as in the border areas of seven other regions of Ukraine.

B. Freedom of peaceful assembly

113. After the 2 May events in Odesa, a police presence has been highly visible during peaceful assemblies in all major cities of Ukraine. However, the real or perceived inaction of law enforcement is a further challenge to ensuring accountability at such events such as demonstrations, rallies and pickets.
114. Ahead of 9 May (Victory Day), for instance, security was heightened with numerous checkpoints on roads in several cities the programme of celebrations was changed in order to avoid situations that could provoke unrests, for example by cancelling parades. Public commemorations and rallies took place in Kyiv, Kharkiv, Lviv and in many cities in western and central Ukraine. In Donetsk, a rally gathering 2,000 persons went peacefully.
115. However, legislation is required to regulate the conduct of assemblies in line with international standards, as previously recommended by the HRMMU.¹²
116. A trend of local administration requesting courts to take measures to prevent peaceful assemblies illustrates the need for relevant legislation. For instance, on 4 June, the Mykolaiv District Administrative court decided to ban until 30 June all rallies planned in the city centre further to a request from the City Council. The Mykolaiv City Council had requested such a prohibition after 2 June when the police intervened to prevent clashes between participants of two rallies running in parallel. The court justified the ban, arguing that the right to life and health was more important than the right to peaceful assembly.

¹² The OHCHR report on the human rights situation in Ukraine report, 15 April 2014, paras. 52-54.

C. Freedom of expression

117. The HRMMU remains concerned about the curtailment of freedom of expression, including harassment and threats to targeting journalists working in Ukraine, mostly in eastern regions (see section C, in Chapter V).
118. During the reporting period, a few isolated cases of obstruction to media work and attacks on journalists were registered across Ukraine.
119. On 23 May, two journalists of “Russia Today”, who were travelling to Ukraine to cover the elections, were denied entry at Odesa airport. The border officers reportedly forced them to buy return tickets to Moscow and fly back, without providing any reason.
120. On 25 May and shortly after, journalists were prevented from filming the vote counting. The HRMMU is aware of such cases having occurred in Sumy, Dnipropetrovsk, Kremenchuk (Poltava region), Lviv, Mykolaiv, Uzhgorod and Kyiv. To the knowledge of the HRMMU, none of these instances resulted in physical violence or damage to equipment.
121. On 23 May, the holding “Multimedia invest group”, based in Kyiv, reported that the accounts of the company were blocked and its building was searched by tax police. The management sees this as pressure against its media outlets (newspaper and website “Vesti”, TV Channel UBR and Radio Vesti) which are critical of the Government.
122. In general, the developments in eastern and southern regions of Ukraine and the large number of casualties have generated an escalation of hate speech and tension between the two rival sides. This is particularly obvious in social media.

D. Minority rights

123. The HRMMU regularly meets representatives of various minorities in Ukraine. In the reporting period no major incidents and human rights violations were reported in that regard.

National and Ethnic minorities

124. Ethnic minorities generally speak of positive relations and atmosphere conducive to exercising their human rights, including cultural rights. Some communities, particularly Russian, expressed concerns with the lack of financial allocations for the needs of ethnic minorities or bureaucratic obstructions by local authorities, for example, in establishing additional schools, churches, newspapers, etc.
125. On 20 May, during a press-conference, Josyf Zisels, the Head of the Association of the Jewish Organisations and Communities of Ukraine, underlined that there was no increase in anti-Semitism in Ukraine. He noted that the number of anti-Semitic incidents is declining since 2007. While pointing out that in the first half of 2014 more Ukrainian Jews had migrated to Israel compared to the previous year, he attributed this to the social-economic impact of the situation in Crimea and in the eastern regions.

Linguistic rights

126. The guarantees of using one’s mother tongue freely in private and public life without discrimination remain high on the public agenda. The Law “On the Basics of State Language Policy” currently in force (provides for the introduction of a “regional language” based on ethnic composition). However, the Government has recognised that a new language law was needed, reflecting broad consensus as well as the

expectations of the Russian-speaking population. There have been attempts to amend legislation and a draft law has been developed. The latest draft law was submitted on 4 June, which proposes to provide Russian language with “official status” through extensive usage in State institutions and public documents (see section D, Chapter IV).

127. On 30 May, the Ministry of Education amended the framework curriculum and study plans for secondary school students of grades 5-9 for the learning of minority languages, such as Armenian, Bulgarian, Crimean Tatar, Gagauz, Greek, German, Hebrew, Hungarian, Korean, Moldovan, Polish, Romanian, Russian and Slovak. The Ministry also increased significantly the number of hours prescribed for learning of a minority language in schools where the relevant language is the working one (it is now equal to the hours of learning Ukrainian language).

Sexual minorities

128. The HRMMU continues to receive reports from the LGBT community regarding lack of tolerance and daily discrimination based on their sexual orientation and gender identity, mainly bullying at school/university, difficulties in finding and/or preserving employment especially when persons disclose their sexual orientation and gender identity; access to health services, particularly for transgender people; and physical attacks.
129. On 7 May, the High Specialized Court of Ukraine for Civil and Criminal Cases issued a letter (N 10-644/0/4-14) to appellate courts, explicitly prohibiting discrimination in employment on the basis of sexual orientation. The Court stressed that, when considering cases of labour discrimination, it is important to take into consideration the existing anti-discrimination law, which prohibits discrimination on any basis.

E. Political rights

Human rights in the electoral process

130. On 25 May, the population of Ukraine voted to elect a new President among 21 candidates. On 3 June, the Central Election Commission (CEC) confirmed that Mr. Petro Poroshenko had won with 54.7% of the vote.
131. The elections took place in a challenging political, economic and, in particular, security environment, due to continued unrest and violence in the east of Ukraine, where armed groups control some areas, and the Government has been conducting security operations. This situation affected the general human rights situation and seriously impacted the election environment, also obstructing meaningful observation.
132. Notwithstanding, elections were characterised by a 60% voter turnout and the clear resolve of the authorities to hold elections in line with international commitments and with a respect for fundamental freedoms in the vast majority of the country. The voting and counting process were transparent, despite large queues of voters at polling stations in some parts of the country.
133. Despite efforts of the election administration to ensure voting throughout the country, polling did not take place in 10 of the 12 election districts in Luhansk region and 14 of the 22 election districts in Donetsk region. This was due to illegal activities by armed groups before, and on, the election day, including death threats and intimidation of election officials, seizure and destruction of polling materials, as well as the impossibility to distribute ballots to polling stations due to the general insecurity caused

by these groups (see Chapter V). The majority of Ukrainian citizens resident in these regions were thus deprived of the right to vote. Elsewhere, a few isolated attempts to disrupt voting were reported.

134. The HRMMU followed the participation of Crimean residents in the Presidential elections. Simplified registration procedures were put in place to ensure that residents of Crimea and persons who resettled from Crimea to other regions could take part in the elections. According to the CEC, 6,000 Crimean residents voted on 25 May.

Political parties/ Freedom of association

135. On 7 May, several political parties were allegedly banned in Luhansk region by a decision of the “people’s council”, including Batkivchyna, Udar, Svoboda and Oleg Lyashko’s Radical Party, as well as Right Sector. It also inferred “extended powers” on Valeriy Bolotov, the self-proclaimed “people’s governor”.
136. On 13 May, the Kyiv District Administrative Court banned the party Russian Bloc based on the fact that the party leaders had called for the overthrow of the constitutional order and violations of the territorial integrity of the country.¹³
137. It appears that the Communist Party of Ukraine is coming under increasing pressure. On 7 May, the Communist faction of the Parliament was expelled from a closed-door parliamentary hearing, which was denounced by the Party of Regions faction, allegedly, because of the “separatist” statements by its head, Petro Symonenko. The hearing was reportedly about the security operations in the east. Party of the Regions pointed out that information on these security operations should be made public.
138. On 18 May, former acting President Turchynov called on the Ministry of Justice to review documents gathered by the law enforcement bodies relating to the alleged illegal and unconstitutional activities of the Communist Party of Ukraine aimed at violating the sovereignty and territorial integrity of the country, undermining State security and illegal seizure of State power. On 19 May, the Ministry of Justice sent a request to the General Prosecutor’s Office and the SBU to investigate possible crimes by the leadership of the Communist Party of Ukraine.

F. Internally displaced persons

139. As of 6 June, the departments of social protection in the Ukrainian regions had identified over 12,700¹⁴ internally displaced persons (IDPs)¹⁵. However, the actual number of people who have fled the violence and fighting in the regions of Donetsk and Luhansk is believed to be higher and increasing daily. According to various estimates, around 64% are women; many are with children, including infants. The IDPs live dispersed across the entire territory, with significant concentrations in Kyiv and Lviv.

¹³ On 15 April, the Ministry of Justice filed a lawsuit to prohibit the activities of the political parties Russian Bloc and Russian Unity in Ukraine. The activity of Russian Unity was banned on 30 April. According to Ukrainian law, a court can ban the activities of a political party upon a request filed by the Ministry of Justice.

¹⁴ UNHCR estimated that, as of 16 June, there were 34,336 IDPs in Ukraine, with 15,200 located in the Donetsk and Luhansk regions.

¹⁵ According to the Russian Federation Federal Migration Service, as of 6 June 2014, 837 persons had applied and were granted refugee status; and 3,750 persons had applied and were granted Temporary Asylum. Approximately 15% were minors under the age of 18. These figures do not include people from Crimea.

140. People have left Crimea for different reasons. The majority have economic, professional or family ties within Ukraine and do not wish to acquire Russian citizenship, which many feel compelled to do in order to continue a normal life in Crimea. Some Crimean Tatars fear limitations to their religious and cultural expression. Activists and journalists have been exposed to, or fear, harassment.
141. The main difficulties the IDPs from Crimea continue to face are: lack of temporary and permanent housing; access to social allocations, medical and educational services; access to bank accounts / deposits; possibility to continue entrepreneurship activity, and employment opportunities.
142. Despite efforts made, some of these issues, particularly housing, are very difficult to resolve without systemic changes and involvement of the Government. The HRMMU has been made aware of some instances when IDPs had to return to Crimea, since their basic needs could not be met in Ukraine.
143. Displacement from the Donetsk and Luhansk regions started in the days leading up to the “referendum” held in both regions on 11 May. People have been trying to leave the violence affected areas, particularly Slovyansk and Kramatorsk, after witnessing violence on the streets. Armed groups and increasing criminality have generated fear.
144. The HRMMU interviewed several IDPs from the eastern regions, who reported that apart from random violence, there were targeted attacks and intimidation of activists and increasingly of “ordinary” residents, known for their “Pro-Ukrainian” stance. Local NGOs confirmed that while seizing administrative buildings, armed groups obtained access to personal data of activists who participated in rallies. The latter and their families were reportedly being threatened and harassed.
145. One of the few interviewed activists reported being threatened and having to stay in a friend’s house for nine days without food, as her own apartment was under surveillance. Then other activists helped her escape and settle in another town. She has no information about her family and suffers from insomnia and anxiety attacks.
146. Political activists and journalists began to feel pressure from the armed groups who were consolidating their position in the region. After the “referendum” and with the intensification of violence, other residents of the region have started leaving their homes in areas affected by violence due to the illegal activities of armed groups and the security operations, particularly in the areas of Slovyansk and Kramatorsk. Many remain within the eastern regions in rural areas, as IDPs have been reporting harassment at checkpoints if they were perceived to be leaving the region to seek protection.
147. The majority of international humanitarian actors, due to security reasons, are unable to access persons displaced within the Donetsk and Luhansk regions and thus only some very limited assistance has been provided. IDPs, who leave the eastern regions, have generally maintained a low profile, fearing retribution against their relatives who have remained at home.
148. There are considerable gaps in the State’s ability to protect IDPs. The central authorities have not issued formal instructions regarding how to register and assist persons displaced from Donetsk and Luhansk regions, leading to different practices across the country. The system for registering the IDPs is rudimentary, so the number and profile of IDPs and their needs remain largely invisible. As a result, the actual number of displaced persons is difficult to estimate.

149. Regional authorities are waiting for instructions on funding allocations for IDPs from the Luhansk and Donetsk regions. Temporary accommodation, while theoretically available, cannot be paid for and is thus rationed in many regions. Several administrative matters remain unresolved, hindering IDPs' ability to resume a normal life: many cannot obtain temporary residence registration; register business activities; or in the case of IDPs from Crimea, who have not registered on the mainland, they may find that they cannot access their personal savings in bank accounts in Crimea.
150. IDPs from the Donetsk and Luhansk regions describe leaving the region with few personal belongings in order to disguise the purpose of their departure. Many report having witnessed violence and experiencing feelings of fear. In dozens of interviews with UNHCR, IDPs have reported significant deterioration of the humanitarian situation in the areas affected by violence and the security operations. They are mostly concerned about security: people report staying in cellars to keep away from the fighting, facing harassment at checkpoints and fearing the increasingly common abductions, threats and extortion. They have been reporting to UNHCR and the HRMMU about the serious social and economic impact of the conflict. Families have run out of money since jobs are lost, banks closed and pensions unpaid. Public utilities like electricity and water work only intermittently. Thus, the IDPs from the eastern regions are particularly vulnerable. There are multiple reports that thousands of people are eager to escape the areas affected by violence and the security operations as soon as they can safely move.
151. Many IDPs have exhausted their resources. Having originally been hosted by friends, family or even generous strangers identified through social networks, they find themselves under pressure to move out of these temporary housing arrangements, as conditions are overcrowded and hospitality reaches its limits. Without sufficient support to find jobs and housing, IDPs report increasing levels of frustration and humanitarian needs. Increasingly, IDPs are trying to self-organise into NGOs to help each other, as illustrated by Crimea SOS, Vostok SOS, the Unified Coordination Centre of Donbas. On 23 May, the HRMMU attended the first all-Ukrainian meeting organized by an initiative group of IDPs from Crimea to bring the problems faced by IDPs to the attention of the Government and local authorities so as to develop joint solutions.

V. PARTICULAR HUMAN RIGHTS CHALLENGES IN THE EAST

A. Impact of the security situation on human rights

Deterioration of the security situation

152. The reporting period was marked by a significant deterioration in the security situation in eastern Ukraine. The HRMMU received credible reports illustrating an escalation of abductions, arbitrary detentions, ill-treatment, looting, as well as the occupation of public and administration buildings (with certain fluctuations, as some buildings are recovered by the Ukrainian military and law enforcement bodies, and some then again re-seized by armed groups). The period since the Presidential elections can be characterized by an increase of fighting in eastern Ukraine, with fluctuations in intensity.

153. The regularity and intensification of fighting between the armed groups and Ukrainian armed forces raises serious human rights concerns, including but not limited to: the fate of persons not involved in the fighting, especially children; the necessity and proportionality of the use of force; and the large-scale destructions, which only add to the social and economic hardship and a general lack of respect for international humanitarian law, when and where applicable to the fighting.
154. Violence and lawlessness have spread in the regions of Donetsk and Luhansk. Having gained access to deposits of weapons, including from the SBU building, the armed groups increasingly started spreading violence. Abductions of persons not involved in any fighting and related acts of arbitrary detentions, looting, and killings of persons not involved in any fighting and other activities in violation of international law have been carried out by the armed groups. Moreover there are reports of victims being subjected to degrading treatment, random shooting and provocations, particularly near the Ukrainian-Russian border. Increasingly, attacks target ordinary people, who take no part in the fighting.
155. The security operations by the Government, with military and National Guard forces particularly concentrated around the town of Slovyansk, are present in the regions of Donetsk and Luhansk. With their superior manpower and military hardware, the Ukrainian armed forces have controlled access to the cities through multiple layers of check-points.
156. Skirmishes between armed groups and the Ukrainian military also saw the inclusion of various territorial defence battalions under the command of the MoI.
157. The HRMMU observed an increasing presence of armed men on trucks and armoured vehicles moving around the city of Donetsk during daylight. For the first time, the HRMMU team members were stopped as they drove in their vehicle through Donetsk by armed persons who demanded to see their identity.
158. In the two regions, the situation has been made complex as some of the armed groups operating in the regions have reportedly slipped out of the control and influence of the self-proclaimed republics and their leaders. Examples of this can reportedly be found with the armed groups in the area surrounding the town of Horlivka¹⁶ in the Donetsk region, and the armed groups operating in the border area of the Luhansk region near the border with the Russian Federation. Moreover, on the “official” “Donetsk People’s Republic” media outlet “Anna Info News”, the Slovyansk commander “Strelkov” Igor Girkin referred to “criminal groups” operating in the regions and that the “Donetsk People’s Republic” was lacking volunteers.
159. Regardless of the veracity of this information, the proliferation of armed groups has clearly exacerbated threats to the security of the population, posing a further challenge in ensuring the rule of law and accountability for the numerous illegal acts committed. The “Donetsk People’s Republic” has reported the presence among them of citizens of the Russian Federation, including from Chechnya and other republics in the North Caucasus. A particular call for women to join the armed groups was made on 17 May through a video released with Igor Girkin “Strelkov”, urging women of the Donetsk region to enlist in combat units.

¹⁶ Now reportedly under the control of an armed group led by Igor Bezler.

“Referendum” on “self-rule” held in the Donetsk and Luhansk regions on 11 May

160. On 11 May, a “referendum” on “self-rule” that was neither in accordance with the Constitution of Ukraine nor with effect under international law, took place in the Donetsk and Luhansk regions. The following question was asked: “Do you support the act of self-rule of the People’s Republic of Donetsk / People’s Republic of Luhansk?” The Government of Ukraine deemed the “referendum” illegal.
161. Reports suggest that there were a limited number of polling stations for the two regions. The official voter registration of the Central Election Commission was not used as a basis for the vote. Media outlets and journalists observing the “referendum” reported a number of violations (e.g. one person filling out several ballots; multiple voting; voting without documentation).
162. In the aftermath of the “referendum” of 11 May, the level of violence by armed groups intensified. At the same time, a new “government” was formed, and Alexander Borodai, a Russian citizen, nominated as “prime minister” of the “Donetsk People’s Republic”. A call was made for Ukrainian troops to leave the region.

Casualties due to the escalation in intensity of fighting as Government aims to gain control of the territory

165. Reports illustrate that over the past month, attacks and fighting have been intensifying with an increased number of casualties. Fighting remained concentrated in the northern part of the Donetsk region and the border areas and south of the Luhansk region. In the Kharkiv region, one Ukrainian serviceman was killed in an ambush, near the city of Izyum, on the border with the Donetsk region, which serves as a basis for the security operations of the Ukrainian forces.
166. On 3 June, the Prosecutor General Oleg Mahnitsky announced that 181 people had been killed since the start of the Government’s security operations on 14 April to regain control of the eastern regions. Of those killed, 59 were Ukrainian soldiers; the others were reported to be residents. 293 were wounded as a result of these security operations in the Donetsk and Luhansk Regions. This is a considerable increase since 14 May, when the Prosecutor General had announced 68 killed (servicemen and residents).
167. The HRMMU is trying to verify these allegations and to obtain disaggregated data on the victims and perpetrators. This is, however, difficult to obtain due to either a lack of, or contradictory, information.
168. On 13 May, a Ukrainian military unit was ambushed near Kramatorsk, killing seven Ukrainian soldiers. On 22 May, 17 Ukrainian servicemen were killed and 31 injured near Volnovakha (south of Donetsk); that same day another soldier was killed and two others injured in an attack by armed men on a convoy of military vehicles near Rubizhne in the Luhansk region. On 23 May, the territorial defence battalion “Donbas” was ambushed and attacked by an armed group, reportedly controlled by Igor Bezler, near the town of Horlivka close to Donetsk. Nine soldiers were wounded and detained by Bezler’s group; one was reportedly killed. On 29 May, a Ukrainian military helicopter was shot down near Slovyansk, which killed 12 service personnel who were on board, including a General.
169. On 26 May, fighting broke out for control of the Donetsk airport between the armed groups and the Ukrainian military. Ukrainian military planes and helicopters were used against the armed groups who eventually conceded control. The airport terminal and the runway were damaged as a result of aerial bombing. According to the Interior Minister, there were no losses within the Ukrainian military but according to various sources, the

armed groups suffered over 50 casualties, of these at least 31 volunteers were reportedly from the Russian Federation, including from Chechnya and other republics in the Northern Caucasus. Out of these casualties, 30 bodies of those fighting with the armed groups have not been recovered.

170. During the fighting around Donetsk airport on 26 May, the Mayor called on the population not to leave their apartments unless absolutely necessary. Notwithstanding, residents did become victims. A woman was killed by a shell at a bus stop. A man was killed as a result of an incoming explosion near the Children's Hospital, with a further six people wounded, including a seven-year-old boy who was at home. A criminal case was opened under Article 258, Part 3 of the Criminal Code of Ukraine ("Terrorist act that led to the death of a person").
171. On 2 June, an explosion of an unknown nature took place at the occupied building of Luhansk Regional State Administration. According to various accounts, it was either a failed attempt by the local armed groups to hit a Ukrainian fighter plane, or the bombardment of the occupied building by a Ukrainian plane. Seven people in, and around, the occupied building were reported killed as a result of the shelling, including the "minister of health" of the "Luhansk People's Republic", Nataliya Arkhipova.
172. The Ukrainian National Guard took control of the town of Krasnyi Liman (20 km North-West of Slovyansk) after fierce fighting on 3 June. The town hospital was badly damaged reportedly by shelling and most patients were evacuated to the basement of the hospital. Two civilians were killed. The chief surgeon of the hospital was gravely wounded, and died on 4 June.
173. IDPs from Slovyansk have described to the HRMMU the situation they have faced for the past weeks. They claim that the Ukrainian air force was shelling the city and bombed a kindergarten. They also said that for two months they did not receive any social benefits. Some of them left male members behind, and/or their parents or grandparents. A hotline at the disposal of IDPs or people who are considering leaving the areas affected by fighting is run by a few Red Cross activists. Transport of people who come to the check points is mostly organized by "Auto-Maidan" activists. Reception centres for arriving IDPs organised the initial assistance they received, including psycho-social.

Widening protection gap and erosion of the rule of law

174. With the presence of armed groups in seized and occupied government buildings, and checkpoints, which shift hands as they are taken over by armed groups or the Ukrainian security and law enforcement units involved in the security operations, the human rights of the residents of the northern part of Donetsk region and parts of the Luhansk region are threatened.
175. With the demise of security, the rule of law and governance, the protection gap is widening. Armed groups physically occupy key public and administrative buildings in many cities and towns of the Donetsk and Luhansk regions, and have declared virtual "independence". However, they are not undertaking any governing responsibilities. In addition, the atmosphere of fear and intimidation, particularly following the abductions and killing of town councillors and public civil servants, prevent many local officials from going to work.
176. Of particular concern is the continued erosion of the rule of law and the limited capacity of the Government to protect residents from the ever increasing acts of violence. Many of the attacks and abductions by armed groups target journalists, elected representatives and civil

society activists. The number of armed robberies and shootings of residents has also been increasing.

177. The difficulty of providing public services impacts the daily life of residents of the regions, including the disruption of public transport (airports remain closed and rail services are disrupted); numerous checkpoints on the roads; lack of access to cash through banks; and earlier reports of schools and kindergartens being repeatedly closed before the summer holidays began in early June. Regional governments have endeavoured to make the necessary arrangements so that local residents are able to carry on with their daily lives. While this remains possible in the larger cities of Donetsk and Luhansk, and the less affected southern part of the Donetsk region, this is a challenge in the northern part of the Donetsk region. As a consequence, there are reportedly increased numbers of people leaving the area, in particular in the areas of Slovyansk; primarily women with children (see section B, Chapter V).
178. In the main cities, there were a few rallies supporting or opposing the self-proclaimed republics. On 13 May, hundreds of local residents of the Luhansk region addressed a petition to the Government of Ukraine, stating that they did not recognise the results of the “referendum”, and demanding more proactive and effective action to free the region from “terrorists who do not allow us to live in peace” and to pay more attention to the concerns of the population.
179. According to NGOs, the week preceding the “referendum” of 11 May, over 500 apartments were reportedly put up for sale in Donetsk in just a few days as people were seeking means to leave. Since then, an average of 20 families leave the region every day.

Presidential elections

180. After the “referendum”, representatives of the “Donetsk People’s Republic” openly declared their intention to obstruct the 25 May Presidential election. Physical attempts to disrupt the election in these two regions were stepped up, with reports of attacks against electoral commissions. As a result, the CEC stated that in 24 districts of the Donetsk and Luhansk regions the election was obstructed due to illegal acts by armed groups and supporters of the self-proclaimed “People’s Republics”. According to official CEC figures, 82 % of the voters in the Donetsk region, and 88 % of voters in Luhansk region were thus deprived of their right to vote. Elections of Mayors due to take place in Antratsyt, Lisichansk and Severodonetsk in the Luhansk region also had to be cancelled due to such illegal activities.
181. There was a similar pattern of attacks on District Election Commissions (DEC) and Precinct Election Commissions (PEC). An armed group of between five to fifteen people representing the “Donetsk People’s Republic” would come to a Commission or polling station. Claiming that the Presidential election was illegal, they would seize office equipment and DEC/PEC protocols and stamps. Generally, they would detain the head of the commission for several hours or, in some cases for several days, subjecting individuals to interrogation and reportedly at times ill-treatment and torture.
182. On 13 May, representatives of the “Donetsk People's Republic” reportedly entered a DEC in Horlivka, demanding documents and office equipment and requesting that the staff leave the premises. The electoral staff refused to obey this. Two hours later the men returned, armed with baseball bats. The staff left, grabbing the most important documents and official stamps. A similar incident occurred in a DEC in Starobeshevo (Luhansk region) on 14 May. The DEC members were ordered to leave the building with threats to their families, should they return.

183. On 7 May, unknown groups of people broke into a DEC in Kuybyshevskiy district, seizing equipment containing electoral information. Upon arrival at the scene, the police did not intervene. Other examples of attacks by armed groups on DEC and TECs include incidents in Artemivsk, Donetsk and Metalist (near Amrosiyivka) on 20, 21 and 25 May.
184. Election commission members also faced attacks, with many abducted and detained. On 9 May, an armed group abducted a member of the DEC in Kramatorsk. He was taken to the occupied City Council and released after being interrogated. On 20 May, a member of the PEC in Mariupol was detained by armed persons, beaten up and then released.
185. Skirmishes around the electoral process included an incident on 25 May, when a group of armed people of the “Luhansk People’s Republic” reportedly attacked and stole the ballots from the PEC in Novoaydarsk in the Luhansk region. Ukrainian soldiers pursued the armed group. A violent confrontation took place, during which two members of the armed group were reportedly killed and three Ukrainian army servicemen were allegedly wounded. 14 people were subsequently detained by the Ukrainian army. Other accounts claim that three people were injured and one person was killed.
186. On the election day, five election commission members from Donetsk were detained by armed persons and taken to the SBU building. Following an intervention by the HRMMU with representatives of the “Donetsk People’s Republic” at the occupied SBU building, they were released the next day.
187. Such attacks prevented DEC and PECs to continue their preparations for the Presidential election, which led to widespread limitations to exercise of the right to vote in eastern Ukraine, notably in the regions of Donetsk and Luhansk.
188. On 26 May, the “speaker” of the “Donetsk People’s Republic”, Denis Pushylin, announced that a visit of the newly-elected President Petro Poroshenko to the Donbas would “heat up” the situation in the Donetsk region, and that dialogue was possible only through mediation by the Russian Federation. According to him, the “Donetsk People’s Republic” had proclaimed “martial law” on “its” territory and that a curfew might be imposed in certain areas.

B. Right to life, liberty and security

189. On 9 May, as reported by the MoI, some 60 men armed with automatic weapons stormed and seized the Mariupol Department of the MoI. The security operations which involved the National Guard, the special unit “Azov”, the special unit “Dnepr” and the armed forces of Ukraine, tried to take back the building. As a result, nine people were killed and many were wounded, primarily residents.
190. Unidentified armed persons reportedly started firing from the second floor of the building, and the Ukrainian forces fired back. Reportedly, the National Guard servicemen who were outside started firing at the building with machine guns and rocket propelled grenades. As a result, a fire started in the building. The fire brigade arrived. Those who were inside started running out the building and dispersing in the city.
191. In the early afternoon, while retreating, the special unit “Azov” came across local “Pro-Russian” demonstrators who reportedly tried to stop them. Members of the special unit “Azov” reportedly fired warning shots, first into the air, and then at people’s legs. The HRMMU is verifying this information.

192. After the armed forces left the military base in Mariupol, it was looted by “Pro-Russian” activists, who reportedly took an unknown number of weapons, ammunitions and two armoured vehicles. The Ukrainian security and law enforcement forces were relocated outside the city in an effort to decrease tensions, and for the safety of residents.
193. According to the MoI, 20 armed persons were killed and four captured; while the Public Health Department of the Donetsk Regional State Administration asserts that three persons were killed. The Chief of the Traffic Police was confirmed killed; and the Chief of Police was abducted and illegally detained. On his release on 11 May, confirmed by the MoI, he was found to have multiple injuries. The HRMMU is trying to verify this information.
194. Human rights activists from the NGO Memorial who visited Mariupol on 11 May reported finding 15 wounded men at Mariupol City Clinic Hospital № 1. Six police officers were hospitalised and the first civilian victims were brought later to the hospital. The Mariupol Emergency Hospital received 10 wounded persons, of whom one (a police officer) died. 15 wounded people were brought to Mariupol City Clinic Hospital № 2. As reported to the HRMMU by the human rights defenders, the majority of those wounded were not involved in the fighting.
195. The HRMMU continues to highlight the need for a prompt and comprehensive investigation into these events.

Abduction and detentions

196. In the regions of Donetsk and Luhansk, a reported escalation of violence and violations of international law (abductions and acts of arbitrary detention targeting persons not involved in the fighting, intimidation and harassment, torture and killings) by armed groups illustrated the growing erosion of law and order. The HRMMU is increasingly concerned about guarantees for the protection of human rights of the general population. According to the MoI, from April to 7 June 2014, armed groups in the eastern regions abducted 387 people, among them 39 journalists.
197. Below are some of the many cases reported to the HRMMU during the period covered by the present report. The HRMMU is keeping track of reports of abductions and acts of arbitrary detention targeting persons not involved in the fighting, intimidation and harassment, torture and killings in eastern Ukraine. It is trying to verify such reports through direct contacts with the victims and/or relatives or through other reliable sources. From its own records, the HRMMU is aware of 222 cases of abductions and detentions by armed groups since 13 April. Of these, 4 were killed; 137 released; and 81 remained detained as of 7 June.
198. The pattern of abductions consists of groups of armed men taking people away and detaining them in one of the buildings they occupy on the grounds that they are members of the Right Sector and “spies”. Some are released after a few hours, some after a few days, and there are numerous accounts of allegations of ill-treatment and torture.
199. According to local activists from Kramatorsk, on 9 May, about 40 residents of the city were abducted by the “Donetsk People’s Republic”. On 10 May, three “Pro-Ukrainian” female activists not involved in any fighting were abducted and detained by armed persons in Kramatorsk. One of them was released the next day after being reportedly subjected to torture during interrogation. She was subsequently hospitalised in Sloviansk, suffering from broken ribs, a pierced liver, a head injury and multiple bruises. The other two women were released on 13 May and placed under so-called “house arrest”, reportedly prohibited from leaving Kramatorsk.

200. On 8 May, a woman went to Slovyansk to try to secure the release of her son detained by the “Donetsk People’s Republic” and was reportedly abducted by the same armed persons. She has cancer and was undergoing chemotherapy. The whereabouts of a female interpreter was unknown from 4 to 18 May. Upon her release, she reported having been detained by armed groups in Donetsk and to having being subjected to ill-treatment and sexual assault.
201. On 26 May, the OSCE Special Monitoring Mission (SMM) lost contact in the town of Antrazyt, with one of its Donetsk-based teams, consisting of four persons. On 29 May, contact was lost with another team of four in the Luhansk region. As of 7 June, the eight remained detained and their whereabouts unknown. 11 other OSCE SMM members were stopped on 28 May for a few hours at a checkpoint in Mariynka (Donetsk region) before being able to return safely to Donetsk.
202. On 25 May, two officers of the SBU were reportedly detained by the “Luhansk People’s Republic” while attempting to negotiate the release of their colleagues who were being detained. Their current location remains unknown. On 2 June, three police officers of the Amvrosievka District Department of the MoI were reportedly abducted; their whereabouts remain unknown although there are reports they might be detained by armed groups in Horlivka. Two senior police officers went to Horlivka to negotiate their release. They have not returned and their whereabouts is also unknown.
203. The HRMMU was involved in efforts to negotiate the release of individuals detained by the armed groups under the control of the “Donetsk People’s Republic and the “Luhansk People’s Republic”. Following repeated interventions, several civic activists and members of district election commissions were released from the SBU building in Donetsk on 27 May. During the night of 29-30 May, 20 civilians detained in the SBU building were released following discussions between the HRMMU and representatives of the “Donetsk People’s Republic”.
204. The HRMMU appealed to the leadership of the “Luhansk People’s Republic” on 26 May for the release of two detained journalists at the occupied building of the SBU in Luhansk. A similar release took place of a third journalist. They were all detained by armed groups for having covered the elections in the Donetsk region. While in detention, two of the journalists were badly beaten, and were hospitalised upon their release.
205. The emergence of ransom demands is a worrisome trend, following abductions of people from their homes and in some cases accompanied by looting and stealing of valuables, including cars. For example, on 9-10 May, an armed group together with police officers allegedly abducted the parents of a local activist from “Svoboda”, from their home in the village Khanzhenkovo (near Makyivka, Donetsk region). On 10 May, the home of an activist from Kramatorsk was allegedly attacked and items stolen by armed persons. Applicable international law prohibits the taking of hostages for purposes of demanding ransom or political concessions, regardless of whether the victims are of the general population or involved in the fighting.
206. On 26 May, three deputy prosecutors were abducted by armed men, but two were immediately released. The third was subsequently exchanged for three supporters of the “Donetsk People’s Republic” who were being detained in the Lukyanovskoe pre-trial detention centre in Kyiv. That same day, a traffic police officer was taken hostage by an armed group of “Cossacks” in Antratsyt in Luhansk region. The family was asked for a ransom of one million UAH (approximately 80,000 USD).

207. Although most of the persons detained are activists, journalists, and town councillors, NGOs in Donetsk have highlighted to the HRMMU a growing pattern of the systematic persecution against civil society. According to them, fear is spreading in the Donetsk and Luhansk regions, with an increasing number of acts of intimidation and violence by armed groups, targeting “ordinary” people who support Ukrainian unity or who openly oppose the either of the two “people’s republics”.
208. Among cases brought to the attention of the HRMMU, on 14 May, four armed men in camouflage reportedly abducted the principal of a school in Luhansk from the school premises. Allegedly, she had opposed holding the “referendum” on the school premises. She was released a few hours later, but refused to speak about the incident. The same day in Kramatorsk, armed men came to the apartment of an employee and reportedly abducted him. Reportedly they were looking for his 16-year old son, allegedly because of his active “Pro-Ukrainian” position, including in the social media. Since the son was not to be found, they took the father to the occupied building of the Kramatorsk City Council where he was beaten. Allegedly, they eventually found the son and took him to the city council. Both were released a few hours later, and the whole family left the region the same day.

Killings

209. Increasingly residents have been killed by armed groups. On 8 May, the burned body of Valeriy Salo, a farmer and head of a local cultural organization known as a “Pro-Maidan” activist, was found a day after he had been abducted by armed persons from his village. There have also been several reports of killings at checkpoints held by armed groups. That same day, an Orthodox priest was shot dead at a checkpoint near his hometown of Druzhivka, and a couple was also shot dead in their car at a checkpoint in the Luhansk region. Their daughter survived with head injuries. In the same region, on 23 May, a woman who allegedly did not stop at a checkpoint died when heavy gun fire was opened at her car.
210. The HRMMU is also concerned about reports of “summary executions” by representatives of the “Donetsk People’s Republic”. On 18 May, in a village near Slovyansk an elderly farmer was accused of bringing food to the Ukrainian forces, taken out of his house into the yard, where according to witnesses a “sentence” was read in the name of the “Donetsk People’s Republic” and shot dead, in front of his family and neighbours. Reportedly, on 26 May, by order of Igor Strelkov, Dmytro Slavov (“commander of a company of the people’s militia”) and Mykola Lukyanov (“commander of a platoon of the militia of ”Donetsk People’s Republic”) were “executed” in Slovyansk, after they were “sentenced” for “looting, armed robbery, kidnapping and abandoning the battle field”. The order, which was circulated widely and posted in the streets in Slovyansk, referred to a decree of the Presidium of the Supreme Council of the USSR of 22 June 1941 as the basis for the execution.

Torture

211. The HRMMU has been following cases of individuals who have been abducted and detained by armed groups in eastern Ukraine. Several interviews conducted with persons who were abducted provide vivid accounts of human rights abuses committed by representatives of the “Donetsk People’s Republic” and the “Luhansk People’s Republic”, including beatings, psychological torture and mock executions. There are instances of relatives of detained persons, including women and children, having been threatened and terrorised. Witnesses also mention having seen supporters of the “Donetsk People’s

Republic” and “Luhansk People’s Republic” being detained and subjected to harsh punishment for looting or insubordination.

212. Among the numerous cases reported to the HRMMU, a journalist from Lutsk who was abducted by armed groups in Donetsk on 25 April, stated that during 23 days of his detention, he suffered from permanent lack of drinking water. He was reportedly tortured with electric shocks, beaten repeatedly over the head with a heavy book, and his captors reportedly tried to cut off one of his fingers.
213. An activist of “Batkivschyna”, abducted on 22 May and detained by supporters of the “Donetsk People’s Republic” in Donetsk, reported being subjected to torture and forced labour while in detention. He stated that he only received food twice in the five days he was detained. He was interrogated about affiliation with the “Right Sector”, with “Euromaidan”, and trips to Kyiv. During one of the interrogations he was reportedly subjected to a mock execution.
214. Three activists of a local human rights NGO were detained in Donetsk on 27 May and released on 1 June. They were taken to the occupied building of the Makiyivka Department of Organized Crime Control, and interrogated on a daily basis, accused of being affiliated to the “Right Sector” and the Ukrainian military. Both of them allege having been tortured.

Enforced disappearances

215. The HRMMU has received credible reports of individuals being detained in conditions that amount to enforced disappearance, and has a list of 11 such cases.
216. On 10 May, units of the Ukrainian armed forces allegedly detained a streamer, who was covering the activities of armed groups, in particular, the attacks on the government buildings in Donetsk region. The HRMMU filed a request to the Ministry of Foreign Affairs (MFA), asking about the current location of the individual. On 15 May, the HRMMU was informed by the MFA that a criminal case was opened by the MoI under the Article 115 (Murder) of the Criminal Code.
217. In an earlier case of concern, working with the National Preventive Mechanism (NPM), the HRMMU was able to identify the location of an individual whose whereabouts had been unknown for nine days. The location of an activist of the “Donetsk People’s Republic” was identified on 26 May, after he had been allegedly detained by the National Guard on 17 April in the area of Amvrosiyivka. After enquiries made by the NPM, the activist was located in the pre-trial detention centre in Dnipropetrovsk. It remains unknown who exactly arrested the activist and why access was not granted to him for nine days. The NPM confirmed that he had no health complaints, besides having "a few minor bruises" on his body. It is checking on access to legal counsel for him. It is also unclear whether the activist has been officially charged.
218. This has put in motion a good practice for partnership with the NPM on such cases, which was key in drawing attention to the case of the enforced disappearance for six days of two LifeNews journalists, Oleg Sidyakin and Marat Saychenko. Both were detained on 18 May near Kramatorsk during a raid by Ukrainian forces against armed groups. The whereabouts of the two journalists was unknown until their release on the evening of 24 May, when they were flown to Moscow via Grozny. All attempts by their lawyers to be in contact with them, and gain some access to the two individuals, had failed. The HRMMU worked with the lawyers of the two journalists, and with others including the Ombudsperson, the NPM and the MFA. Through these institutions, requests were made on the case to the General Prosecutor, MoI and SBU. Upon their release, the journalists

asserted that they were beaten in the first two days of their detention, initially held in a hole, blindfolded with hands tied, and then transferred to Kyiv. For the period from 18 May to 24 May, the journalists were effectively held in conditions that amounted to enforced disappearance.

219. The HRMMU was also looking into the detention conditions of supporters of the “Donetsk People’s Republic” and “Luhansk People’s Republic” detained by the Ukrainian forces during the security operations. Regular visits to places of detention take place, including in Kyiv when persons arrested have been transferred to detention facilities in the capital. The HRMMU actively cooperates with the Ombudsperson and the NPM to make sure the human rights of detained persons are upheld, including from the point of view of access to medication and to the services of a lawyer.

Children

220. The HRMMU is particularly concerned about the impact of the situation in eastern Ukraine - especially in the area between Donetsk and Slovyansk - on the human rights of women, and the most vulnerable persons - children and persons with disabilities, including those in institutional care, older persons, and those needing medical assistance.
221. According to a rapid psychological assessment of 204 children conducted by the UNICEF¹⁷ in four cities of the region of Donetsk from 15 to 22 May, nearly every second child experienced fear, anger, sadness or problems with sleep. Other behavioural changes were also observed in a number of children.
222. According to Donetsk Regional State Administration, in the period between 9 – 30 May, seven children had been wounded as a result of the illegal activities of the armed groups. According to credible reports received by the HRMMU, 14 children from the children’s institution in Slovyansk have been evacuated from the city. An NGO in Kharkiv expressed concern that there were no evacuation plans for persons with disabilities living in closed institutions. On 7 June, the Ministry of Social Policy informed the HRMMU that out of 1,494 children who are in closed institutions (children’s institutions, shelters, and so forth) in Donetsk region, 663 have been evacuated; in Luhansk region out of 760 children, 464 have been evacuated.
223. As fighting intensifies and with the end of the school year on 30 May, parents are reportedly increasingly looking for ways to evacuate their children to safety. There is information that a group of children from Slovyansk has arrived in Crimea and most recently on 6 June to Odesa. On 30 May, various media outlets informed that a group of 148 children from Slovyansk was taken to a summer camp in Crimea. There were also reports that on 31 May, a group of 21 children crossed into the Russian Federation on foot, after having to disembark from their bus at the border. This information cannot be verified by the HRMMU.

C. Freedom of expression

224. Journalists’ safety continues to be a serious issue in the Donetsk and Luhansk regions due to fighting between the Government’s security forces and armed groups. On 24 May, an Italian photojournalist, Andrea Rocchelli, and his interpreter, Andrey Mironov, Russian citizen, were killed under mortar fire, while covering fighting between government forces and armed groups in Andreyevka near Slovyansk, Donetsk region. On 9 May, it was

¹⁷ UNICEF, Rapid Psychosocial Assessment of Children in Donetsk Oblast, 2014.

reported that a freelance cameraman of the video agency RUPTLY, which is part of the TV channel Russia Today, was wounded while filming events in Mariupol. Reportedly, he received necessary medical treatment and is in satisfactory condition.

225. The working environment for journalists has become increasingly dangerous, with the threat of abduction and illegal detention by armed groups. On 7 May, it was reported that armed groups in Luhansk offered a reward of USD 2,000-10,000 for each detained journalist. The HRMMU continues to closely monitor cases of detentions of journalists in Donetsk and Luhansk regions. Although all but one of the journalists abducted and known to the HRMMU before 6 May (cut-off date of the previous report) have been released, the HRMMU is aware of new cases abducted after that date. The HRMMU interviewed many of the released journalists, who reported ill-treatment, beatings, and sexual harassment (of women). They also confirmed the fact that other detainees were being kept in the seized administrative buildings; but the exact number and their identities remain unknown.
226. Also, journalists and editorial offices continue to be threatened and intimidated by armed groups. For instance, on 14 May, the HRMMU received credible reports that those journalists who work in the region but refuse to comply with the orders of the “Donetsk People’s Republic” are threatened and harassed. Reportedly, the state regional television is in a particularly difficult situation; its office has been practically blocked by approximately 100 heavily armed men. On 21 May, an unidentified man called the editorial office of the Public television of Donetsk region and threatened its journalists.
227. Local journalists have reported having to flee Donetsk and Luhansk regions due to such threats and intimidation. On 8 May, two journalists from Donetsk had to move to Lviv out of fear of persecution and threats. On 13 May, an internet resource in Severodonetsk (Luhansk region) announced the forced suspension of activities and advised its journalists to leave the town because of growing pressure and threats against their lives from the armed groups. On 27 May, the editorial office of another local web-based outlet was forced to relocate to a different town, reportedly, due to threats from the self-proclaimed “Army of the South-East”. On 26 May, it was reported that the publisher and editor in chief of one of the local newspapers in Kramatorsk was forced to flee the region with his family due to threats they were receiving after he had refused to publish materials armed representatives of “Donetsk People’s Republic” demanded him to publish.

Arbitrary arrests of journalists

228. In the reporting period, Ukrainian and Russian journalists have been arbitrarily arrested; this raises concerns about the possibility for journalists to conduct their professional activities safely.
 - On 10 May, a journalist of Russian TV channel Kuibishev 61, was allegedly detained by the Ukrainian security forces at a checkpoint on the road between Slovyansk and Kramatorsk. His whereabouts remain unknown to the family. On 22 May, the HRMMU sent an official inquiry to the MoI (via the MFA) about the case. On 5 June, the HRMMU was informed that as of 15 May a criminal investigation had been opened under Article 115 (Murder) of the Criminal Code. The HRMMU has requested more information on this case.
 - On 15 May, a journalist and cameraman of the ICTV Ukrainian channel were arrested on the border (Kharkiv / Belhorod) while performing editorial tasks by the Border Service and Federal Security Service of the Russian Federation,. Reportedly, after more than 15 hours of questioning without water and food and deleting all photo and video materials, the journalists were released.

- Two LifeNews journalists, Oleg Sidyakin and Marat Saychenko, were detained on 18 May near Kramatorsk during a raid by Ukrainian forces against the armed groups. They were released on 24 May (see section B, chapter V).
- The HRMMU also followed closely the case of a British journalist working for Russia Today detained by the National Guard in Mariupol on 20 May for allegedly filming military objects. He was released on 21 May and transferred to the Consulate of the United Kingdom in Kyiv. After his release he tweeted details of his detention, including that he had been treated fairly.
- On the night of 6 June, two journalists of the Russian TV station “Zvezda” were detained by the National Guard of Ukraine (NGU) at a checkpoint near Slovyansk. According to their driver, who was also initially detained and later released, the journalists were cuffed, balaclavas were put on their heads, and they were forced to kneel down in a ditch (allegedly, to protect them from possible shooting). On 7 June, the NGU issued a statement saying that journalists were suspected of monitoring and collecting information. The MFA of the Russian Federation reportedly filed a note of protest to the MFA of Ukraine. On 8 June 2014, the TV station “Zvezda” received information from the SBU that the two journalists were in good health. They were released on 9 June and transferred to the Russian Federation.

Obstruction to lawful professional journalist activities

229. On 11 May, it was reported that Ukrainian journalists were not allowed to photograph or film the voting process during the “referenda” in the Donetsk and Luhansk regions.
230. The same instances were reported prior and during the election day on 25 May. For instance, the journalists of the Voice of America were warned not to film the seizure of one of the polling stations in Donetsk.

Attacks on editorial offices and TV towers

231. In the reporting period, there has been a growing number of armed attacks on the editorial offices of the local media outlets by armed men. Some of the examples are provided below.
- On 7 May, the office of the local newspaper “Hornyak” in Torez (Donetsk Region) was reportedly attacked and its equipment was broken and damaged.
 - On 8 May, the independent newspaper “Provintsiya” in Kostyantynivka was attacked by armed, masked men, allegedly members of the “Donetsk People’s Republic”. The editors were told the paper was “closed” and taken to the “city commander’s office” situated in the occupied building of the City Council, where they were threatened and suggested to leave the town. The police was called, but did not interfere or arrested the attackers. The editors did not file a complaint because they do not trust the police will act and because they feel threatened and fear for their lives.
 - On 11, 13, 19 and 20 May, armed groups shelled the TV tower in Slovyansk, which led to interruptions in broadcasting. On 14 May, in Kramatorsk, the armed groups blocked the TV tower, which transmits the channels not only for Kramatorsk, but also Slovyansk, Horlivka and Makiivka.

Censorship / access to information

232. According to NGOs, freedom of media in the Donetsk region is severely curtailed, with Ukrainian TV channels switched off by the “Donetsk People’s Republic” and replaced by the its own media programmes and Russian TV. Some of the examples include the following:
- On 8 and 25 May, armed group stormed the office of the local TV Channel “Union” with demands to report about the activity of “Donetsk People’s Republic” and declared their intent to control the activity of journalists. The target audience of the channel is about 3 million people in nine towns of Donetsk region.
 - On 8 May, under threat of physical violence from the armed groups, the company “Vokar Holding” was forced to stop retransmission of Ukrainian TV Channels: “Inter”, “Ukraine”, “1+1”, ICTV, STB, “New Channel”, “5th Channel”, “112 Ukraine”, and “TVI” in Severodonetsk, Luhansk region. Instead the Russian channels were broadcasted. The same incidents occurred throughout May in Luhansk and its region (Krasnyi Luch, Alchevsk).
 - On 2 June, armed members of the so-called “Donbas People’s Militia” arrived at the office of the newspapers “Donbas” and “Vecherniy Donetsk” and blocked all entrances and exits. They abducted the editor-in-chief of the “Donbas” and his deputy and the editor-in-chief of “Vecherniy Donetsk”. The armed men reportedly used psychological pressure and death threats to change the editorial policy of the newspapers and ensure more positive coverage of the “Donetsk People’s Republic”. The three editors were eventually released on 3 June after which all the “Donbas” employees were sent on leave and the newspaper stopped its publication. Also, the HRMMU has noted specific hate speech on the “official” media outlet of the “Donetsk People’s Republic” “Anna Info News”. On 20 May Oleksandr Mozhayev, known as "Babai" (a fighter participating in the armed groups) referred to the on-going operations as a “Holy War” and spoke of exterminating America.
 - On 5 June, a local cable TV and Internet network provider in Donetsk terminated the broadcast of Ukrainian channels: “1+1”, “Donbas”, “UBR” and “News24” at the demand of “Donetsk People’s Republic” representatives.

Propaganda

233. The HRMMU reiterates the importance to counter misinformation, incitement to hatred, discrimination, and violence. As an example, the “Donetsk People’s Republic” denied all responsibility for the attack near Volnovakha, claiming that it was the National Guard “paid by Kolomoiskiy” which perpetrated this attack on the Ukrainian military. On 27 May, LifeNews posted a photo of a wounded child stating he was shot in the Donetsk International Airport; however the StopFake.org experts discovered that the photo was from the Syrian city of Aleppo in April 2013. Although the original publication in twitter was deleted, the photo was widely used for similar posts on alleged shootings of children. A different photo with a dead boy's body in a coffin was used for similar messages of alleged shooting of children in eastern Ukraine. The photo, however, was made in 2010, in the Crimean city Dzhankoy, of a boy killed by a local criminal.
234. Similarly, various videos became viral, allegedly showing either atrocities by the Ukrainian army, seizing of "Grad" complexes by armed groups, or of the use UN symbols on Ukrainian helicopters used in the security operations. It was also demonstrated that originals of such videos were also filmed earlier in the Russian Federation or in other countries, and had nothing to do with the current events in Ukraine.

235. Misinformation adds to the instability and fear which affect the lives of people in the region, and all sides should refrain from using it, especially to the extent that it amounts to advocacy to national hatred that constitutes incitement to discrimination, hostility or violence, which is prohibited under Article 20 of the ICCPR.

D. Freedom of religion or belief

236. On 15 May, the Ukrainian Orthodox Church of the Kyiv Patriarchy (UOC-KP) condemned the violence and threats to the life and health of the clergy and the faithful of eastern Ukraine by armed groups. The statement by the Holy Synod of the UOC-KP calls for the Moscow Patriarchate to condemn collaboration with the supporters of the self-proclaimed “people’s republics” and distance itself from it. The UOC-KP requested the Government of Ukraine to protect the clergy and congregation of the Kyiv Patriarchy in the Donetsk and Luhansk regions from the attacks and threats of the “criminals”.
237. In the statement, the Church also appeals to the international community and inter-religious social human right organizations to pay attention to the infringement of rights of the believers of UOC-KP in the eastern parts of Ukraine and in Crimea.
238. In Donetsk, numerous attacks against the inter-religious Prayer Marathon (attended by all major denominations except the Moscow Patriarchy) took place almost on a daily basis in May, including heavy beatings of participants, the destruction of property, and threats to organisers and volunteers. On 23 May, after a repeated attack by 15 representatives of the “Donetsk People’s Republic”, in an attempt to discuss security arrangements for the Prayer Marathon, its coordinator allegedly went to the occupied building of the Donetsk Regional State Administration. While there he was allegedly heavily beaten and had to seek medical assistance. The Prayer Marathon has continued gathering in June. No incidents have been reported.
239. Reports have also been received of other denominations being attacked, for example, Protestants.

E. Economic and social rights – impact of the violence

240. As background to the situation in the eastern regions and the current impact on economic and social rights being faced by the local population, the HRMMU recalls that Ukraine is a middle-income country, ranked 78 in the Human Development Index in 2013.
241. The recent evaluation of the UN Committee on Economic, Social and Cultural Rights (ESCR) published on 23 May 2014, highlighted the positive steps of the Government in ratification of, or accession to, various human rights instruments. At the same time the Committee identified major problems that have an adverse impact on the enjoyment of all human rights, including the large extent of corruption, discrimination against Roma and Crimean Tatars, a low level of social standards, unemployment among youth, around 30% gender pay gap, employment in the informal economy, a stable poverty rate of 24.7%, absence of a health insurance system, and low expenditure on health care.
242. The Committee made related recommendations to address the root causes of the aforementioned challenges.
243. The violence and security operations in the eastern regions has had a direct impact on the existing level of enjoyment of economic, social and cultural rights, and has also influenced

the State capacity to progressively realize the rights and comply with the Committee's recommendations in the areas struck by the conflict.

Right to education

244. Despite the efforts of the Donetsk Department of education and science, as well as school administrations, studies had to be suspended in several towns of the Donetsk region in May. In Slovyansk, Krasnyi Lyman and Krasnoarmiysk, 62 schools and 46 kindergartens were not functioning, which affected 21,700 students and 5,600 children, respectively. On 28 May, it was reported that during the fights in Slovyansk two school buildings have been damaged; no one was injured.
245. In other towns in the Donetsk region schools remained open, but attendance varied from 25% in Slovyansk district to 98% in Makiivka district.
246. Most schools in the Donetsk and Luhansk regions managed to complete the academic year, which finished on 30 May. The main concern had been the organisation of the "External Independent Assessment"¹⁸ for the students of these eastern regions. On 29 May, the Ministry of Education announced that testing in these regions would be postponed until 11 July to 27 July, and if necessary could be postponed again.
247. Following instructions issued by the Ministry of Education and Science, all universities in the eastern regions had to ensure that foreign students finished their studies earlier, by 20 May, so that they could leave the country.¹⁹
248. Reportedly, school administrations have faced various forms of pressure from representatives of the "Donetsk People's Republic" including in the preparation and holding of the "referendum" of 11 May, as well as establishing temporary "hideouts" in school premises.

Right to health

249. Due to the growing number of wounded, hospitals are overcrowded and understaffed. As of 28 May, in order to minimize the risk to life and security of patients, the Regional Hospital of occupational diseases in Donetsk partially discharged patients whose medical condition did not require in-ward treatment. A sanatorium for children with cerebral palsy was closed in Donetsk due to its proximity to the occupied Security Service of Ukraine building. On 26 May, Children's Hospital Nr 1 and city hospital Nr 18 had to close due to the proximity to Donetsk airport²⁰.
250. Access to medical services, treatment and supplies for residents in areas most affected by the fighting is becoming more and more challenging. This is of particular concern as more residents are caught in the crossfire between the armed groups and Ukrainian forces. The

¹⁸ A final test for the high school students to enter universities in Ukraine.

¹⁹ On 29 and 30 April, The Ministry of Education and Science issued two letters Nr 1/9 - 228 and Nr 08.01-47/12033 instructing all universities of Ukraine, particularly in the East, to terminate the studies of all foreign students by 20 May, which is much earlier than usually. Reportedly, the decision was made upon request of the embassies of foreign countries so that foreign students could complete exams and leave the country if they wish so due to the security situation. Allegedly, at the end of April there were two attacks in eastern regions on foreign students; however the HRMMU could not verify these facts.

²⁰ On 26 May 2014, approximately 20-30 armed representatives of the "Donetsk People's Republic" reportedly arrived at Donetsk International Airport. According to the Press-Secretary of the Donetsk International Airport Dmytro Kosinov, they demanded the Ukrainian Armed Forces, which were guarding the airport, to withdraw. Fighting broke out at 7.00 a.m. and at that time the airport was closed. It was reported that it will stay out of service till 30 June. According to some reports the main terminal was partially destroyed and some fighting is still on-going there.

situation is most difficult in Slovyansk. The overcrowded, understaffed and under resourced hospitals are only admitting those who are severely injured. Primary Health Care services are overloaded and at times called to provide treatments and care that are within their capacity. Patients from the Mental Health Hospital (229 persons) were evacuated from Slovyansk. All emergency services have been relocated to the nearby village of Mykolayivka, with a number of medical number units set up in Svyatohirsk (location of a large Russian Orthodox monastery - the Lavra). Some patients were transferred to Poltava region. Pharmacies are open only a few hours per day.

251. The delivery of supplies, particularly medicines, becomes more complicated every day; especially with the Donetsk airport being out of service. Reports and requests sent to the UN agencies indicate the lack of specific medications, including some antibiotics, pain-killers, vaccines and consumables. In Donetsk, insulin was distributed to various locations; however, such deliveries are becoming more difficult. Supplies of food in hospitals are running low.
252. There have been reported difficulties to ensure uninterrupted provision of opioid substitution therapy (OST)²¹. This directly affects 759 persons (56% of whom are HIV positive) in Donetsk region and 609 (13% are HIV positive) in Luhansk region. According to the HIV/AIDS Alliance and the World Health Organisation, in a number of cities, such as Slovyansk, the healthcare facilities providing OST are completely controlled by armed groups. The fact that pharmaceuticals in the healthcare facilities in the districts have fallen beyond the legitimate authorities' control, is in its essence a certain risk factor for medical staff and patients. On 30 May, OST treatment was stopped for more than 100 patients in Mariupol, due to drugs not being delivered because of the security situation. As of 2 June, HIV service organisations reported that for some patients such an interruption in treatment had resulted in people using illegal drugs. In the long run, this may lead to an increase in cases of HIV and hepatitis infections due to intravenous drug use. Due to the numerous check-points and blocked roads, as well as interruptions in public transport, the specialized hospital for HIV/AIDS patients in Yasynovata, Donetsk region, is practically inaccessible.

Conditions for treatment of patients

253. The conditions for the treatment of patients, including those who have been wounded in fighting and violence, are precarious. As the security situation deteriorates, so does the access to hospital care and the quality that can be provided by medical professionals. For example, in Slovyansk, medical personnel were already highlighting the problems with the delivery of medical supplies to the city. In the regions affected by violence and the ongoing security operations, hospitals are trying to allocate what funds they have to purchase the medical supplies they require. In early June, some hospitals in Donetsk discharged patients, except those in critical condition or those who were immobile, leaving the hospitals almost empty.
254. Due to the lack of trust regarding law enforcement, both the medical personnel and patients try to conceal the facts and nature of wounds (the standard protocol is that medical institutions have to report any gunshot and/ stab wounds to the police). The HRMMU has received credible reports that doctors are at times trying to ensure the security of the wounded.

²¹ This has been an integral part of the widespread implementation of harm reduction programmes. These programmes are an essential element in controlling HIV/AIDS and other infectious diseases among injecting drug users in Ukraine, as elsewhere in Eastern Europe.

255. Cooperation with local civil society and community volunteers is an important part of treatment of those who suffered in the recent months. The volunteers, local NGOs, political parties and priests donated money, clothes, food, and medical drugs and provided psychological support. In some cases, when expensive purchases were necessary – such as plates for head surgery – they were purchased by charitable organizations, which also provided financial support to the victims after they were discharged from the medical institutions – to receive rehabilitation treatment in sanatoria. In the local hospitals where the wounded were brought – such as after the shooting on 22 May near Volnovakha in the Donetsk region – there were instances when the local community cared and protected the wounded, bringing them medical drugs, food and clothes.
256. Security in hospitals has been reported to the HRMMU as a concern with patients having to be protected from potential abductions by armed groups. The officials from the Donetsk Regional State Administration confirmed that such kidnappings of the wounded had taken place, however there is no official record of such cases, thus no exact figure could be provided. There is also an increased risk for healthcare professionals themselves, particularly if it involves moving around in the case of ambulance medical teams.

Right to an adequate standard of living

257. Since 17 May, prices for basic commodities (including bread) have been rising by a minimum 0.73 Hryvnia (UAH) and 1-2 UAH on average due to higher risks of production and delivery of goods into the occupied towns through numerous checkpoints. Seasonal vegetables and fruits are 4-5 UAH more expensive than usual.
258. Also, due to increased cases of looting, private businesses and retailers prefer to close down, which creates scarcity of supply. Consequently, while the minimum set of products is always available, the variety is much less. Often times there are interruptions in delivery of dairy products, fruits and vegetables, and non-alcohol drinks.

Housing

259. The HRMMU is concerned when security operations take place in residential areas of towns and villages of the Donetsk and Luhansk regions. As of 30 May, there had been reports of ruined residential buildings in Slovyansk, Kramatorsk and Donetsk. Additionally, on 7 June, it was reported that nine houses were damaged by the Ukrainian army shelling in Semyonovka near Slovyansk.
260. The HRMMU will raise this and other similar issues with the Ukrainian Government, including advocating for monetary compensation to be awarded to the victims for damages to their property in the course of these security operations.

Electricity and water supply

261. As of 18 May, in the Slovyansk region, 22 electrical sub-stations stopped functioning. As a result, more than 2,000 households were left without access to electricity. According to the Press-service of the company “Donetskoblenergo”, the company has all the necessary material and human resources for reconstruction. However, repair crews are unable to access the site due to the ongoing security operations.
262. In the northern part of the Donetsk region, the supply of water supply is increasingly under threat, with regular interruptions. Moreover, as of 3 June, residents of Slovyansk, Konstyantynivka, Druzhkivka and Kramatorsk (cities in Donetsk region) had no access to running water, due to damage to the water supply reportedly as a result of the security operations.

Social security (services and benefits)

263. Due to the deteriorating security situation in the Donetsk and Luhansk regions, it is a growing challenge to ensure continuous work of State institutions. On 14 May, the Pension Fund department resumed its work (after the seizure of its building on 5 May) in Slovyansk, but the department's office hours were cut. On 15 May, it was reported that the National Bank of Ukraine suspended²² the operations of its office in Donetsk region due to the threats by the representatives of the "Donetsk People's Republic". On 15 May, the Ministry of Revenue and Duties of Ukraine also evacuated the staff of its directorate and tax inspections in the region.
264. On 7 June, the Ministry of Social Policy informed the HRMMU that all social payments had been made to the regions of Donetsk and Luhansk. However, there were major challenges in delivering cash to Antratsyt in Luhansk region and Slovyansk and Kramatorsk in Donetsk region. The Ministry has already addressed the MoI and SBU to develop a mechanism of the safe delivery of cash to these regions if the situation remains the same or aggravates.
265. On 30 May, the head of Department of Marketing Communications of the Novokramatorskiy Machine-Building Plant Volodymyr Zhuliy spoke of the imminent "humanitarian catastrophe" in Kramatorsk, due to the termination of the work of the city department of the State Treasury of Ukraine since 20 May. In particular, Mr Zhuliy mentioned that thousands of the city's pensioners, local governance workers, educators and public health workers were deprived of the means for existence. Reportedly, the Treasury's debt to the workers and pensioners in Kramatorsk for the payments due in May already amounted to UAH 61.4 million.

Increased lawlessness resulting in loss of individual property

266. On 15 May, the Parliament Commissioner for Human Rights informed the HRMMU that there are numerous incidents in Donetsk and Luhansk regions when the armed groups' members seize personal phones and especially cars from ordinary citizens. The police rarely intervene or take any action, as they are usually unarmed and thus unable to perform their functions in the current situation. Consequently, although criminality is increasing, there is nobody to apply to in case of an alleged crime, and no effective means to intervene for police. It also becomes dangerous for persons to report about such crimes, so in most cases they chose to leave the region. The increase in criminality is, in the view of some, returning the regions to the "lawlessness of the 1990s":
- For example, on 8 May, the private residence of a local activist was allegedly shot at from a car; the attackers broke into the house and looted everything of value. The police called by the neighbours, allegedly made several photos of the location, but did not even walk into the building. Reportedly, the activist left the region to Kharkiv with his family, due to previous threats to his life, including attempted arson of his home with Molotov cocktails on 4 May.
 - On 15 May, owners of car-dealerships in the cities of Donetsk and Luhansk regions formed rapid response groups to protect their businesses against attacks aimed at robbery that have multiplied since the beginning of May.
 - On 28 May, the HRMMU spoke to one of the local political leaders in the Donetsk region. He reported that his legal firm's office was ruined when attackers took his computers, documentation on the legal cases and stole the firm's car. He

²² The staff of the Bank was evacuated, and online banking in the region was reportedly suspended.

was also detained for 7-8 hours and subjected to life threats, inhumane treatment and beating. After his release he fled the region together with his family.

Labour rights

267. There are growing concerns about the ability of enterprises in Donetsk and Luhansk regions to continue functioning due to the on-going fighting, targeted attacks and intimidations by the armed groups.
268. The presence of uncontrolled armed groups and rise of criminality obstruct the business activity of entrepreneurs, which first of all affects small companies in the sphere of services and retail (banks, logistic companies, stores, petrol stations, and bakeries).
269. On 20 May, the Mayor of Donetsk, Oleksandr Lukyanchenko, stated that a wide range of enterprises do not work in full capacity and some of them suspend production, in particular, “Donetsk Metallurgical Plant” employing approximately 2,100 persons.
270. On 29 May, the Secretary of the National Security and Defence Parliamentary Committee, Sergey Kaplin, stated that due to the current events in the Donetsk and Luhansk regions, approximately 60 % industrial enterprises of companies were forced to suspend their work, leaving thousands of employees without regular income.
271. There also have been armed attacks on mining companies, which constitute the main share of the regions’ economy. On 9 May, it was reported that local miners repelled an attack by the pro-Russian supporters of the “Donetsk People’s Republic”, who attempted to take down the Ukrainian flag and threatened the miners that they would throw explosives into the mine’s shafts for their disobedience. Allegedly, the miners decided to organize their own “self-defence” to protect themselves. On 19 May, there were armed attacks on the operational and closed coal mines in Horlivka, Donetsk region. On 22 May, a group of unidentified armed individuals allegedly captured four operating mines of the JSC “Lysychanskvuhillya” in Luhansk region. All of the four attacked mines temporarily suspended production activities. Reportedly the armed men pointed guns at the mines’ workers, demanding to supply them with explosives. The Ministry of Energy of Ukraine appealed to the SBU demanding that necessary steps be taken to protect the mines. Previously, on 26-27 May, due to pressure by the armed representatives of the “Donetsk People’s Republic” on the “Donetsk Coal-Mining Company”, coal production was suspended at several mines, including “Ochyabrskiy Rudnik”, “E. Abakumov”, “A. Skochinskogo” and “Trudovskaya”.
272. On 20 May, Denys Pushylin, “speaker” of the “Donetsk People’s Republic”, announced the launch of the nationalization campaign in the region. According to their official sources, Mr. Pushylin blamed the local oligarchs’ unwillingness to pay taxes to the “republic’s” budget, and their opposition to the interests of Donbas as the reason for the adopted decision to start the nationalization. In particular, Mr Pushylin blamed Renat Akhmetov, owner of the company System Capital Management.

The broader impact of the crisis in the eastern regions of Ukraine

273. Recent developments in the country have already negatively affected the financial and banking system. In the first quarter of 2014, the national currency depreciated by 27%, dramatically reducing incomes and salaries. Whereas the average monthly wage in December stood at \$453, by March it had dropped to \$343. This also puts significant pressure on those who have loans in foreign currencies.

274. After remaining quiescent for more than two years, inflation rates have shot up with a 6.8% increase in consumer prices reported for the beginning of May being the highest year-on-year inflation rate recorded since 2011.
275. Food prices have increased by 8.2% above 2013 levels, bringing the socio-economic crisis to many households in Ukraine. Large price hikes were reported for sugar (59%), vegetables (33%), and dairy products and eggs (10%).
276. Other inflationary pressures are now gathering, for example in the form of increases in communal service tariffs. Household gas prices shot up 56% on average in May; a 40% increase in heating tariffs is scheduled for July. These higher tariffs are projected to increase the numbers of low-income households from 1.4 to 4 million during this time.
277. Should these tariff increases be accompanied by a further weakening of the UAH, Ukraine's inflation rates could dramatically accelerate. Even in the best case scenario, consumer and food price inflation rates seem likely to remain in double figures for the rest of 2014, and going into 2015. These developments will place increased pressure, and need, for Ukraine's social welfare system to cushion the impact, particularly for the most vulnerable.
278. The 63 billion UAH deficit recorded on the consolidated government budget in 2013 (some 9% of GDP) is regarded as unsustainable by both the Government and the International Monetary Fund (IMF). Fiscal austerity in 2014 is therefore required. Although a justified measure, it may do little to boost the country's long term competitiveness or development prospects. Already in the first quarter of 2014 Government expenditure²³ in the health sector declined by 5%, and in the education sector by 8%, compared to the budget allocations in 2013. At the same time, the Government has been able to increase spending on social protection by 2% (which includes expenditures on both social assistance and social insurance) for 2014, which may lessen the hardships and pressures that many Ukrainian households are now facing.
279. The economy of the eastern region has already been in decline since April 2014, and it is likely to deteriorate further in any protracted situation of violence and fighting. Business is in decline in the region; personal income is decreasing; investments are dwindling. Compared to 2013, in the first quarter of 2014 investments in the eastern regions had significantly declined. In the annual rating Donetsk region moved from third place in 2013 to twenty-second place in 2014, and the Luhansk region from ninth to twenty-third.
280. Any exacerbation of the violence will lead to the further decline of industrial production in the region and Ukraine as a whole. The industries of the Donetsk and Luhansk regions account for 18.5% and 6.1% of all production in the country respectively. Such a decline would therefore increase the imbalance between the income of the state budget from the Donbas and expenditure provided to the region. This will augment the budget deficit. One result could be that it would jeopardise compliance with the agreed parameters of the IMF loan.
281. Official statistics released in May indicate that Ukraine's GDP dropped 1% in the first quarter of 2014. The recession is expected to worsen over the course of the year: IMF and the Ministry of Economic Development and Trade forecast a 3% decline in GDP, while other, more pessimistic forecasts point to 5-10% declines in output and income. The largest decline in exports (70-85%—relative to the fourth quarter of 2013) has already

²³ Changes are given in real terms: changes in nominal expenditure amounts divided by changes in the consumer price index.

been recorded in the regions of Donetsk, Luhansk, Cherkasy, and Khmelnytskyi, as well in the Autonomous Republic of Crimea. Any collapse in exports could trigger a decline in industrial output, and subsequently in household incomes and livelihoods. These trends should be closely monitored.

282. There are concerns that if these macro-economic tendencies continue, the State will no longer be able to guarantee existing social standards, which could lead to the social unrest spreading throughout the country.

VI. PARTICULAR HUMAN RIGHTS CHALLENGES IN CRIMEA

A. Civil and political rights of Crimean residents

283. Crimean residents faced difficulties in exercising their civil and political rights. A very small number participated in the Presidential elections of 25 May. Simplified registration procedures had been put in place to ensure that residents of Crimea and persons who resettled from Crimea to other regions can take part in the vote. Ukrainian citizens living in Crimea had to register in person at any polling station on the mainland no later than five days prior to the elections. The HRMMU monitored the situation near Kherson, where most of the Crimean voters had registered. Some 20 cars had left Crimea and were welcomed by local authorities. They drove to the polling station in a column with Crimean and Ukrainian flags. Prior to the election they had been summoned by the Crimean police for “conversations” and issued ‘warnings’ about the unacceptability of ‘extremist activities’. While the cars were crossing the administrative border, representatives of the Crimean ‘self-defence’ reportedly wrote down license plates, passport numbers and driving licenses’ details. Among those who intended to vote, many allegedly did not do so because of the cost of travelling, the uncertainty linked to having to cross the administrative border and the fear of reprisals by the authorities in Crimea.
284. During its month-long monitoring of events in Crimea, the HRMMU noted a continuation of worrying trends, including instances of enforced disappearances, arbitrary detentions, violence and ill-treatment committed by the so-called ‘Crimean self-defence’, often targeting journalists, human rights defenders and political opponents, and impunity for human rights violations. Furthermore the enforcement of the Russian Federation law on the territory of Crimea, at variance with UN General Assembly resolution 68/262 and applicable bodies of international law, is creating difficulties for Crimean residents to enjoy their human rights, as there are many differences with Ukrainian laws.

Rule of law and the judiciary

285. The judicial system remains practically paralyzed. Ukrainian laws will be in effect in Crimea until 31 December 2014²⁴. Nevertheless, the judicial system is already being transformed to use Russian laws: restriction measures are implemented pursuant to the Criminal Procedural Code of the Russian Federation, and judicial decisions are adopted in the name of the Russian Federation. Pending cases that have not been decided by 18 March 2014 must be tried in accordance with the laws of the Russian Federation. This poses numerous problems in practice, especially in administrative and criminal cases, when Russian and Ukrainian legislation differs on the existence, nature and scope of rights

²⁴ Paragraph 2 of Article 23 of the Federal Constitutional Law of 21 March 2014 N 6-FCL “On Acceptance of the Republic of Crimea into the Russian Federation and the Creation of the New Constituent Entity within the Russian Federation - the Republic of Crimea and the Federal City of Sevastopol”.

and obligations; and remedies and sanctions available. The outcome of court decisions that are currently being appealed is unclear.

286. There are reports that, at least, 15,000 judicial cases are in legal limbo between Ukrainian and Russian laws. The Ukrainian “Law on the occupied territories” allows the transfer of judicial cases from the peninsula to Kyiv. However, in practice, this is unlikely to happen. The HRMMU notes that the current situation has detrimental consequences affecting access to justice, the right to fair trial and due process for Crimean residents.

Right to life, liberty and security

287. The Russian Security Service (FSB) confirmed on 30 May, the detention of four Ukrainian citizens in Simferopol (Crimea), including film-maker Oleg Sentsov. The other three are Aleksandr Kolchenko, Gennady Afanasiev and Aleksei Chyrnyi. The HRMMU spoke to Mr. Sentsov’s lawyer who stated that while his client had been arrested on 11 May, he managed to speak to him for the first time on 27 May. He also claims his client has been tortured while in detention to confess to criminal intentions he did not have. According to the FSB press release, the people detained are members of the Ukrainian ‘Right Sector’ party and were planning acts of sabotage and terrorism in Simferopol, Yalta and Sevastopol. On 6 June, Sentsov was, according to his lawyer, officially charged with terrorism and arms trafficking under Article 205, Part 2; Article 205.4, Part 2; and Article 222, Part 3 of the Criminal Code of the Russian Federation.
288. On 26 May, Timur Shaimardanov (born in 1980) left his home in Simferopol and did not return. He had participated in campaigns against Crimea becoming a part of the Russian Federation. The day before he went missing, he allegedly said that the whereabouts of one of his friends, Leonid Korzh, (born in 1990) had not been known for 3-4 days. On 30 May, Seiran Zinedinov, who had been coordinating the efforts to find Korzh and Shaimardanov also went missing.
289. Mr. Mustafa Dzhemilev, former head of the Crimean Tatar Mejlis (Assembly) who was banned from the authorities in Crimea to enter the peninsula on 3 May, informed the HRMMU that the “Crimean police” had brought to his Crimean house a summons for an interrogation related to illegal possession of weapons. Dzhemilev assumes that this could be an attempt to initiate a criminal case against him. Ms. Ella Panfilova, Ombudsperson of the Russian Federation, announced that her office has requested from the relevant Governmental bodies an explanation of the actions undertaken by officials towards Mustafa Dzhemilev, particularly regarding his ban on entering Crimea.
290. The Head of the Kurultai (Congress) of the Crimean Tatars, Zayr Smedlyaev, informed HRMMU that he had received a written “warning” from the Crimean police about the “inadmissibility of extremist activities and unlawful assemblies”, in line with Russian legislation. The notice says that on 3 May, the leaders of the Mejlis publicly spoke in support of ‘extremist statements’ by Mustafa Dzhemilev and provoked extremist manifestations from people.
291. On 15 May, three houses of Crimean Tatars in Simferopol were searched by FSB officials. Two houses belong to the head of the External Relations Department of the Mejlis, Ali Khamzin. The searches were performed at his actual place of residence (Bakhchysarai) and his place of registration (Strogonovka village, Simferopol region). FSB officials explained that these persons were suspected of preparing terrorist attacks.
292. On 15 May, the “Chairman” of the Council of Ministers of Crimea, Sergey Aksyonov, announced that the so-called “Crimean self-defence” would become regular and receive budgetary support to ensure public security. The HRMMU underlines that such an

intention raises concern as the “Crimean self-defence” has reportedly been involved in numerous human rights violations.

Accountability

293. The HRMMU is concerned that after more than two months of investigation of the murder of 39-year-old Reshat Ametov, the Crimean law-enforcement authorities have not yet established the identities of perpetrators, although a video of the attackers is available that would allow their identification. Crimean Tatar Reshat Ametov was abducted by unidentified persons wearing military uniform in the centre of Simferopol in early March during a picket near the Council of Ministers of Crimea. On 17 March, his corpse was found with traces of torture in the Zemlyanichnoye village of the Belogorsk district.
294. The acting Prosecutor General of Ukraine reported on 27 May that an interagency ‘working group for legal issues relating to the temporarily occupied territory of Crimea’ had been established. The working group will coordinate the activities of the Ukrainian authorities on a wide range of legal issues connected with the violations that took place after the March “referendum”.

Citizenship

295. The HRMMU received worrisome information that, in some cases, Crimean residents were forced to give up their Ukrainian citizenship, which may amount to arbitrary deprivation of nationality. Judges of the Crimean Commercial Court in Simferopol and the administrative staff, who were granted Russian citizenship on a priority basis, were reportedly compelled to complete application forms renouncing Ukrainian citizenship. In general, the procedure of issuing Russian passports is slow. According to different calculations, providing passports to the whole population of Crimea will take up to 15 months while Russian laws allocated only three months for this procedure. Besides, it is unclear how citizenship issues, applications for social benefits and payments and other rights and entitlements are organised for persons in closed institutions: orphanages, geriatric institutions, psycho-neurological hospitals, penitentiaries, and others.
296. The status of refugees and asylum seekers has not been regulated. Prior to the “referendum” there were 18 refugees on the territory of Crimea. It is unclear how their situation will be affected by the changed legal regime.
297. On 4 June, the President of the Russian Federation signed amendments to the law “On citizenship of the Russian Federation”, introducing criminal responsibility for concealment of dual citizenship. According to the amended law, those concealing their second citizenship will be fined up to 200,000 Rubles (\$5,700) or subjected to compulsory community service of up to 400 hours in case of a failure to notify the Federal Migration Service within two months from the date of the acquisition of the second citizenship. The new provisions will become effective on 1 January 2016.

Freedom of expression

298. The HRMMU is alarmed by excessive limitations placed on freedom of information and expression in Crimea. Journalists, human rights defenders and other individuals must be able to freely exercise their right to freedom of expression, in accordance with article 19 of the International Covenant on Civil and Political Rights. Any restrictions should comply with the strict requirements of article 19, paragraph 3 of the Covenant.
299. On 15 May, a photojournalist of the "Crimean telegraph" newspaper Maksim Vasilenko was briefly detained and ill-treated by members of the "self-defence of Crimea" in Simferopol while preparing a report about the training of the special police forces before

the commemoration of the 70th anniversary of the Crimean Tatar Deportation. A cameraman of the "FM" television channel was also attacked; his phone was taken and his equipment was broken.

300. On 18 May, Osman Pashayev, Chief Editor of "Open Crimean Channel" internet project, and his crew (correspondent, cameraman and driver) were detained by members of the "Crimean self-defence" during the mourning events related to the anniversary of the Crimean Tatar Deportation. They were deprived of their equipment, phones and personal belongings, and subjected to physical and psychological pressure for four hours. No reasons were given for the detention. After being brought to the central district police station of Simferopol, they saw their lawyers and were released. Their money and personal belongings were not returned. Russian Human Rights Ombudsperson Ella Pamfilova condemned the incident, saying that the detention and interrogation of Pashayev and his crew without the presence of a lawyer for several hours constituted a human rights violation.
301. On 19 May, the "Crimean self-defence" detained for a short period of time Petr Ruzavin, a correspondent of Russian television company "Dozhd", subjected him to violence and damaged his equipment. According to Ruzavin, camouflaged people approached him when he was filming the central square of Simferopol and they were filmed as well. They requested him to delete his records, which he did. Ruzavin said he was beaten and his equipment was damaged. After being interrogated he was released.
302. On 2 June, the "Acting Prosecutor" of Simferopol summoned the Chief Editor of the Crimean Tatar newspaper "Avdet" Shevket Kaybullayev for questioning over possible "extremist activity". According to the notice, Kaybullayev had to appear on summons to the Prosecutor's Office. As written in the summons, the Prosecutor is investigating violation of the Russian law "On counteraction to extremist activity". The 'Avdet' newspaper is a press organ of the Mejlis of the Crimean Tatar people, published since 15 June 1990.
303. On 2 June, the Editor of the "Crimean Centre for Investigative Journalism", Sergey Mokrushyn, and his cameraman Vladlen Melnikov were attacked by members of the "Crimean self-defence" in Simferopol, taken to their headquarters (on Kirova 26) and beaten. They were eventually transferred to the police station for questioning, and released without any explanation being given for their detention and or any protocol of detention having been drawn up by the police.
304. The HRMMU recalls that acts of aggression, threats and intimidation against journalists must be investigated, prosecuted and punished and victims provided with appropriate remedies.
305. In the period of 12-25 May, the Russian Ministry of Communication and Mass Media and the Federal Service for Supervision of Telecom, Information Technologies and Mass Communications held seminars for Crimean journalists to explain requirements of Russian legislation with respect to the media. The HRMMU is concerned that the imposition of Russian media legislation is already negatively impacting the conditions for journalists to freely perform their functions. There is also concern that media representatives can be subjected to criminal prosecution pursuant to Article 280 (Public calls for extremism), Article 282 (Organisation of the activities of an extremist organisation) and Article 319 (Insult of a public servant) of the Criminal Code of the Russian Federation, which are too broad and can be used to criminalize conduct that is protected under international human rights law.

Freedom of movement

306. While air connections between other parts of Ukraine and Crimea were suspended in March 2014, it still remains possible to travel by train and car. However, freedom of movement is affected by a number of factors related to the status of Crimea and different regulations - Russian Federation and Ukraine's - being applied. This creates difficulties to maintain personal and professional ties.
307. Pursuant to the Law of "On guaranteeing citizens' rights and freedoms and legal regime in the temporarily occupied territory of Ukraine", which entered into force on 10 May, foreigners and stateless persons may enter and leave Crimea through security check-points only subject to special permission. The procedure for obtaining such permission remains unclear. On 16 May, the Press Secretary of the Chairman of the State Border Service of Ukraine, Sergey Astakhov, confirmed that Ukrainian border guards around the Melitopol checkpoint (in the Kherson region bordering Crimea) obliged persons going from Crimea to continental Ukraine with Russian passports and Crimean residence permits to get off trains. He reported that the Crimean residents with Russian passports are considered as foreign citizens and, consequently, shall entry into Ukraine and leave it only through special border points. According to him, the administrative border of Kherson and established control line is not a border of Ukraine. Therefore, the foreign citizens, including Russian citizens, may not be allowed via this line. He also noted that the Crimean residents with Russian passports who wish to enter Ukraine shall go to the Russian Federation first, for example, to Rostov-on-Don, and cross the borders there.
308. The Russian Federation illegally established its State border at the northern entrance to Crimea on 25 April. Citizens of Ukraine who are not registered in Crimea are regarded as foreigners and obliged to fill out an immigration card. Such a category also comprises the people who permanently reside in Crimea, own real estate or are employed there, but whose place of registration is mainland Ukraine. The Federal Immigration Service issued warnings that foreign nationals must promptly (within 90 days) leave the territory of Crimea and re-enter it pursuant to Russian laws applicable to foreign nationals. Inter alia, such regulations will create inconveniences for students who study in other regions of Ukraine and are temporarily registered there. While returning home to the territory of Crimea during summer vacations, they will be regarded as foreigners with an admitted stay of up to 90 days.

Freedom of association

309. Since the "referendum" on 16 March, many NGOs and human rights activists left Crimea out of fear of being prosecuted, detained and subjected to ill-treatment. Legislation of the Russian Federation - the so-called "foreign agents" law - has discouraged the activities and development of NGOs. Besides, Crimea does not yet have an institution to register civil society organisations; consequently, those that have not been registered before the Crimean "referendum" are deprived of such a possibility.

Freedom of peaceful assembly

310. Dozens of Crimean Tatars have been summoned to courts for participating in protest actions against the prohibition imposed on 3 May by the Crimean authorities on their leader, Mustafa Dzhemilev, to enter the peninsula. As of 8 May, the courts of Crimea had examined 55 cases related to those events. In 52 cases, the activists were fined on the basis of Article 20.2.2 (Public disorder) of the Code on Administrative offences of the Russian Federation.

311. On 16 May, the authorities in Crimea issued a decree prohibiting all mass events until 6 June. A similar prohibition was issued in Sevastopol. The decrees were motivated by security developments in south-eastern Ukraine and the need to prevent "possible provocations of extremists which can penetrate into the Republic of Crimea". The HRMMU recalls that under Article 4 of the ICCPR, a derogation from the right to freedom of assembly and association is only permissible "in time of public emergency" and "to the extent strictly required by the exigencies of the situation" and would require immediate notification to the other State Parties to the ICCPR through the UN Secretary-General.

Freedom of religion or belief

312. The HRMMU is concerned about reports of violations of freedom of religion and belief on the territory of Crimea.
313. On 8 May, the League of Muslim Women "Insaf" informed the HRMMU that some 150 persons from Kirovskoye and Stary Krym, including women, were being called in for interrogations. Reportedly, they were being invited to the local police stations for "a conversation". They were reportedly fingerprinted and photographed.
314. On 20 May, the Head of the Ukrainian Greek Catholic Church made a statement expressing concern for the safety of the Greek Catholic priests remaining in Crimea. He reported that all five Crimean parishes had experienced pressure, allegedly from the representatives of the Orthodox Church of the Moscow Patriarchate.
315. On 1 June, men in Russian Cossack uniforms reportedly broke into the local Orthodox church of the Kyiv Patriarchate in the village of Perevalnoe (Crimea), shouting and terrorizing churchgoers. The car of the priest was allegedly damaged. The "Cossacks" said they were seizing the building for the Moscow Patriarchate. After three hours, the "Crimean self-defence" arrived with assault rifles and sided with the attackers. The police were called but reportedly did not show readiness to properly investigate the incident. On 2 June, the local authorities of the city of Evpatoriya conducted a check of the church documentation and called it an "illegal building". In addition, the authorities in Crimea significantly raised the rent for the main Ukrainian Orthodox Cathedral in Simferopol. The rent increase has not affected Crimean Tatar mosques or Russian Orthodox churches. Mosques and Russian churches on the peninsula either belong to the religious communities (mosques) or to the Moscow Patriarchate (Russian churches) or are rented for a token fee.

B. Economic, social and cultural rights

316. Crimean residents face serious challenges in realizing their rights under the International Covenant on Economic, Social and Cultural Rights (ESCR). This can be attributed, in part, to the complicated transition between two different legal systems, but also to the absence of appropriate reactions of the authorities in Crimea to human rights violations affecting certain communities. This concerns, in particular, the Ukrainian and Crimean Tatar communities who are being harassed, assaulted and prosecuted for speaking Ukrainian or Tatar languages in public places or using national symbols. Such conditions are also reflected in the diminishing possibilities to receive education in another language than Russian, particularly in Ukrainian.

Language and education

317. There are only two Ukrainian schools in Crimea: in Yalta and Simferopol. According to the head of the Department of Education in Simferopol, three out of four classes in the

Simferopol gymnasium will now use the Russian language. The decision is motivated by the decision of 86 % of the parents who reportedly decided to switch to Russian-language studies. The director of the gymnasium was allegedly forced to resign. There is information that the local authorities in Sevastopol are planning to close the only Ukrainian boarding school/orphanage.

318. On 14 May, the press service of the Ministry of Education and Science of the Russian Federation reported that teachers of the Ukrainian language and literature of general educational institutions could be re-trained to become teachers of the Russian language and literature. The Presidential Council for Civil Society Development and Human Rights of the Russian Federation recommended to keep the study in the Simferopol Ukrainian gymnasium in Ukrainian language and to resume the work of the Faculty of Ukrainian and Crimean-Tatar Philology in the Tavrida National University.
319. In light of Article 27 of the ICCPR, the HRMMU recalls that all the national communities in Crimea must be supported to preserve, develop and promote their identity, language and culture, and to use their mother tongue in education and daily life.

Property rights

320. In early March, public notaries stopped documentation of property acquisition and sale deals in Crimea, when Ukraine blocked access to the peninsula for the State Register of Real Estate and Land Plots. Crimean residents face serious difficulties in exercising their right to property due to the pending court decisions, transactions, and the privatisation process. On 10 May, the Russian Minister of Crimean Affairs stated at a press conference that the Russian authorities would deal with cases of unauthorized acquisition of land in Crimea "with full responsibility and caution". On 28 May, a draft law "On the special procedure for real estate registration in Crimea" was introduced in the Russian Parliament. The text proposes to delegate to the local authorities, during a two-year transitional period, the right to resolve land issues.
321. The HRMMU stresses that decisions concerning such important issues as land and property must be taken through an inclusive, transparent and fair process that will eliminate the risk of corruption and tensions.

Right to an adequate standard of living

322. On 13 May, the Ukrainian State Water Resources Agency stated that Ukraine shut off water supplies to Crimea via the North-Crimean Canal, which accounts for 85% of all fresh water on the peninsula. The Canal water is mostly used for irrigation purposes, and its closure could severely impact agricultural land and the upcoming harvest. This situation has reportedly had no negative implications for drinking water, according to the 'First Deputy Chairman' of the Council of Ministers of Crimea, Rustam Temirgaliyev. Having no access to Crimea, the HRMMU does not have additional information about the impact of the shut-off of water supplies on the economic and social rights of the Crimean residents.

Banking

323. Access to banking services remains complicated for Crimean residents. On 7 May, the National Bank of Ukraine (NBU) decided to suspend operations of Ukrainian banks in Crimea until 6 June. However the activities of Ukrainian banks were terminated on 2 June, by decision of the Central Bank of Russia motivated by the need to protect the interests of depositors and customers. Compensation payments will reportedly be made by a non-profit organization, the "Depositor Protection Fund", which acquired the rights to deposits.

C. The rights of indigenous peoples

324. The 18 May marked the 70th anniversary of the massive deportation of Crimean Tatars and other minorities by the Soviet authorities. A Decree of the President of the Russian Federation, in force on 21 April, had instructed the authorities in Crimea and Sevastopol to support events commemorating the deportation. However, referring to security considerations linked to the events in south-eastern Ukraine, the authorities in Crimea issued on 16 May a decree prohibiting all mass events until 6 June. Eventually, the “Council of Ministers” of Crimea decided on 17 May that the commemoration could go ahead, although not in the centre of the capital of Crimea, Simferopol. The commemorations passed without incidents, albeit with significant and sometimes intimidating police presence.
325. On 29 May, the State archive of the SBU handed over the documents on Crimean Tatar deportation from Crimea in 1944 to the representatives of the Crimean Tatar Mejlis. The head of the SBU, Valentyn Nalyvaichenko, and the former head of the Crimean Tatar Mejlis, Mustafa Dzhemilev, participated in this event.
326. On 4 June, the Crimean Parliament adopted a Decree providing for social guarantees to the people who were deported on an ethnic basis in 1941-1944 from the Crimean Autonomous Socialist Soviet Republic. The Decree will provide social benefits in the form of one-time payments to the Crimean Tatars, Armenians, Bulgarians, Greeks and Germans, along with their families and children who were born in exile. This document was adopted pursuant to a Decree signed by Russian President Vladimir Putin on 21 April 2014, rehabilitating formerly deported people from Crimea.

VI. CONCLUSIONS AND RECOMMENDATIONS

327. During the reporting period, the HRMMU identified acute human rights concerns particularly in the eastern regions, Crimea and in the aftermath of the Odesa 2 May violence. They are symptomatic of the particular local contexts, not least involving the presence of armed groups, the breakdown in law and order and on-going security operations. As highlighted in the report issued on 15 April 2014 by OHCHR, short-term human rights concerns should be addressed within the broader and longer term framework that will see institutional reform and enable change that will impact on the enjoyment of all rights – civil, cultural, economic, political, and social. The root causes of the current crisis were initially due to the systematic and structural curtailment of human rights and widespread corruption. The way out of the current crisis, to ensure reconciliation of communities through peaceful and democratic means, will be through the accountability for violations and the full respect and guarantee of all human rights for all.
328. With the election of President Poroshenko, there is the opportunity for the Government of Ukraine to prioritise addressing these systemic and structural concerns through institutional reform focusing on human rights challenges in the short-term, and progressively paving the way for the establishment of a system that promotes and protects human rights for all, ensures justice, good governance and the rule of law through inclusive, non-discriminatory and participatory means. A comprehensive national human rights action plan reflecting all recommendations from the international and regional mechanisms is highly recommended, as well as the creation by the Government of a senior level coordination mechanism of implementation open to state institutions, civil society

and having the combined support of the UN, regional organisations and the international community.

329. Recommendations have been made below on Crimea to both the authorities in Crimea and the Russian Federation, which exercises de facto control over the peninsula. With the negative impact of the current situation, including the legal uncertainty, on the full enjoyment of human rights by the residents of Crimea, the HRMMU is advocating for the legal framework of Ukraine to remain in force, considering the adverse human rights impact of legislative changes imposed and also bearing in mind UN General Assembly resolution 68/262.
330. The recommendations should be read in conjunction with - and seen as complimentary to - those outlined in the OHCHR reports on the human rights situation in Ukraine, issued on 15 April and 16 May 2014, which have not yet been fully implemented.
331. The HRMMU takes note of the joint report by the OSCE Office for Democratic Institutions and Human Rights and the OSCE High Commissioner on National Minorities issued on 12 May 2014, and calls upon all relevant parties to implement its recommendations.

To the Government of Ukraine and other stakeholders

- a) There should be constitutional inclusive and meaningful consultations with all political parties, regardless of their ideology, as well as representatives of civil society and minority (national and ethnic, linguistic, religious and other) groups and indigenous peoples in order to embrace all components of society, including women in the dialogue for the new constitution, which will reflect the new reality of the country with a full-fledged system of checks and balances. The peaceful population of the east should participate in these consultations.
- b) As a representative body of the country, the Parliament should reflect the new political and social reality of the country; therefore there is a need for new parliamentary elections.
- c) All armed groups must immediately put an end to their violent activities and lay down their arms.
- d) The Government must ensure that its armed forces refrain from using excessive force, and ensure that its ongoing security operations are at all times in line with the relevant international standards applicable to different types of operations. In all circumstances, it must ensure the protection of those who are not involved in the fighting.
- e) All people detained in the context of the security operations should be treated in line with international norms and standards and guaranteed their human rights under the International Covenant on Civil and Political Rights and other applicable bodies of international law. In order to protect its security personnel and persons not involved in the fighting, the Government should consider providing assurances that acts of abduction and detention by armed groups will not be prosecuted provided that they do not target people not involved in the fighting and the victims are treated humanely at all times.
- f) The role and position of the Ombudsperson and National Preventive Mechanism, as the main bodies / institutions working towards the strengthening of the national human rights system and the protection and guarantee of human rights for all, should be enhanced.

- g) All gaps of legislation should be brought in line with the recommendations of the international human rights mechanisms (treaty bodies, universal periodic review and special procedures); the Judiciary, Office of the Prosecutor General and the Bar Association should operate in line with relevant international norms and standards in order to ensure fair trial without which it is impossible to tackle corruption.
- h) The Constitutional Court should be enhanced – legal, social and all other guarantees need to be elaborated in order to ensure the genuine independence of the Constitutional Court.
- i) The State Migration Service should propose amendments to bring the refugee law in line with international standards, and to allocate sufficient funds to ensure due process in the asylum procedure, as well as reception conditions meeting humanitarian needs.
- j) A language law should be adopted in line with international standards that enables the promotion of the official national language as well as other languages.
- k) A central authority should be established to respond to the humanitarian needs of IDPs, including by establishing a comprehensive registration system, formulation of legislative and regulatory acts to ease access to important social and economic rights, establishing public assistance programmes, mobilization and coordination of civil society-initiated relief efforts, and cooperation with international donors and technical assistance.
- l) All stakeholders should refrain from using messages of intolerance or expressions, which may incite hatred, violence, hostility, discrimination or radicalisation.
- m) Access for international organisations to the areas affected in eastern Ukraine by the security operations (urban areas in the epicentre of the fighting) should be facilitated so that the real needs of the population can be assessed and addressed.
- n) Normative acts to ensure freedom of movement for residents of Crimea should be enacted as soon as possible.

To the authorities in Crimea and the de facto governing authority of the Russian Federation

- o) Reaffirming UN General Assembly resolution 68/262, entitled “Territorial integrity of Ukraine”, measures must be taken to protect the rights of persons affected by the changing institutional and legal framework, including on issues related to citizenship, right of residence, labour rights, property and land rights, access to health and education.
- p) Journalists, human rights defenders and individuals must be able to fully exercise their right to freedom of expression, in accordance with Article 19 of the International Covenant on Civil and Political Rights.
- q) Ukrainian legislation should remain in force, considering the adverse human rights impact of legislative changes imposed and also bearing in mind UN General Assembly resolution 68/262.
- r) Intimidation, harassment and abductions of residents must stop, with guarantees ensured for the respect for the right to life, liberty and security
- s) Criminal and administrative liability should not be used as a mechanism of intimidation against Crimean Tatars and other residents of Crimea, but used in line with international law.

- t) Human rights violations should be independently, promptly and comprehensively investigated and perpetrators brought to justice.
- u) All forms of intimidation and harassment of religious communities must be put to an end and all incidents, including those where there have been attacks on Ukrainian Orthodox Church, Greek Catholic Church and the Muslim community must be properly investigated, thus enabling the effective promotion and protection of the freedom of religion or belief.
- v) The promotion and protection of the rights of national minorities, including the Crimean Tatars and other indigenous peoples must be ensured, enabling them to participate fully and inclusively in public and political life.
- w) The deployment of independent and impartial human rights monitors, including by the HRMMU, should be agreed upon.

Annex 294

Statement of the Assistant Secretary General Ivan Šimonović at the Security Council meeting on
Ukraine (24 June 2014)

Statement of the Assistant Secretary General Ivan Šimonović at the Security Council meeting on Ukraine, New York, 24 June 2014

Mr. President,

Distinguished Members of the Security Council,

Thank you for the opportunity to brief this Council on the situation of human rights in Ukraine. The Office of the High Commissioner for Human Rights has just issued the third monthly report of the UN Human Rights Monitoring Mission in Ukraine. The report covers the period from 7 May to 7 June 2014. In this briefing I will also provide some updates since the report's 7 June cut-off date.

The report outlines some positive developments that have occurred over the period, through a number of initiatives and legislative changes. They include legislative amendments to combat discrimination and corruption. There have also been legislative developments relating to amnesty, lustration of judges, language rights, ethnic policy, torture and ill-treatment, the media and the reform of law enforcement agencies. These are important pieces of legislation that will go a long way to ensuring proper legal safeguards are put in place to address some of the root causes of this crisis.

The Government has also taken steps towards the implementation of the Geneva Statement of 17 April, through the organisation of roundtables on national unity. The outcome of these roundtables has contributed to Parliament's adoption on 20 May of a resolution entitled the "Memorandum of Concord and Peace". The Memorandum foresees the adoption of a constitutional reform package that includes the decentralization of power and a special status for the Russian language; judicial and police reform; and an amnesty law for anti-government protesters in the east who would agree to give up weapons, excluding those who have committed serious crimes against life and physical integrity.

The report notes that the Presidential election took place on 25 May, with relatively few human rights violations in most of the country. However, serious human rights violations took place in that context in the eastern regions of Donetsk and Luhansk, where attacks on election commissions and commissioners occurred throughout the pre-electoral period and during the election, disrupting the holding of elections, and depriving a large proportion of residents of their right to vote.

Progress in the ongoing accountability processes for the Maidan violence, as well as for the 2 May incidents in Odesa remain slow. Some arrests of Berkut forces have taken place, but there have been no prosecutions so far in the case of 113 persons killed during the Maidan events between November 2013 and February 2014.

With regard to the tragic events of 2 May in Odesa, no less than 6 investigations have been launched. Our report, so far, points towards grave inaction, and concerns with the conduct on the part of the police and fire brigade in taking the necessary measures to prevent the incidents and ensuing casualties. The proliferation of investigations carry a high risk of miscommunication and consequent contamination of evidence. The lack of transparency in the investigations is also of concern. It will be crucial that these investigations are carried out thoroughly, promptly and impartially.

I shall now turn to the east of the country, where we are seeing the most serious human rights challenges.

The report highlights the rapidly deteriorating situation in the east. However, the situation has deteriorated even further, since the cut-off date of the report. Estimates based on information gathered from official sources, indicate that from 15 April to 20 June, 423 people, including servicemen and civilians, have been killed.

There is an increase in arms and recruitment for the armed groups. Representatives of the self-proclaimed “Donetsk People’s Republic” have recognized the presence within their ranks of armed groups of citizens of the Russian Federation, including from Chechnya and other republics of the North Caucasus.

Abductions and detentions by the armed groups remain a worrying trend. The lawlessness continues to spread. Human rights abuses by the armed groups are increasing and common criminality is rising. The HRMMU has recorded 222 cases of abductions and detentions by armed groups since 13 April. Of these, and as at 7 June, 4 have been killed, 81 remain in detention and 137 have been released.

In the context of the Government’s security operations, there has been an increase in reports of enforced disappearances and of excessive use of force that have led to casualties among the general population. Despite security constraints, we continue to monitor these incidents and raise them with the Government. While we have not received reports of deliberate targeting of the population at large, we are verifying allegations that security forces could have taken further measures to prevent civilian casualties. The Government must ensure that its armed forces refrain from using excessive force, and ensure that its ongoing security operations are at all times in line with the relevant international human rights standards.

The population is leaving, partly due to fear, but also because to the worsening situation of economic and social rights.

Over the last two weeks, the IDP population has doubled in the country with a large movement of people - estimates of some 15,200 – within the Donetsk and Luhansk regions. As of 23 June, UNHCR has profiled more than 46,100 IDPs, 11,500 from Crimea and nearly 34,600 from the east. In the absence of a formal registration system, and given the limited access to some areas by humanitarian partners, the number of IDPs is likely to be higher. The Government is encouraged to respond to the humanitarian needs of IDPs, including by establishing a comprehensive registration system, formulation of legislative and regulatory acts to ease access to important social and economic rights and through the establishment of public assistance programmes. Mobilization and coordination of civil society-initiated relief efforts, and cooperation with international donors and technical assistance are also crucial.

The report indicates that in May studies had to be suspended in several towns in the east, affecting 21,700 pupils. Hospitals remain overcrowded and understaffed, medical supplies are low, and it is reported by the Ministry of Health that up to 10 hospitals are now closed in the eastern regions. Food prices have skyrocketed. Seasonal vegetables are now on average 4 to 5 times more expensive than before. Meanwhile, it is becoming increasingly difficult for businesses to operate and people to go to work. There have been for instance armed attacks against mining companies, which constitute the main share of the region's economy.

About half of the population of the Donetsk region experience some problems with access to water. Since last week, in Slovyansk, there is no running water and residents are resorting to using wells. Around 90% of the town is now cut off from electricity. Phones do not work most of the time and public transport does not function.

The situation of journalists is also alarming. This Council rightly condemned the recent killing of two Russian journalists by mortar fire, which follows the killing of an Italian photojournalist and his Russian interpreter on 24 May. While the perpetrators of these recent attacks are yet to be identified, it will be highly important to ensure accountability.

Mr. President,

The report describes the situation in Crimea as a "legal limbo". Although Ukrainian legislation is supposed to remain in force, also in accordance with GA resolution 68/262, legal institutions in Crimea are already being required to comply with the provisions of legislation of the Russian Federation. This has very practical effects, as some 15,000 judicial cases remain in legal limbo between Ukrainian and Russian laws and legal systems.

The Crimean Tatar population has been facing some concerning limitations on their enjoyment of freedoms of expression, peaceful assembly, association and religion.

Mr. President, distinguished members of the Council,

The UN HRMMU has so far been playing an important role in defusing tensions through its impartial reporting on the human rights situation. It can play an equally useful role through human rights and humanitarian confidence building measures. The UN HRMMU has already facilitated numerous releases of individuals detained by the armed groups. However, such measures should be based on reciprocity and individuals that are arbitrarily detained by the authorities must also be released, if there is no well-founded legal basis for them to remain in detention. As the UN HRMMU has contacts on all sides, it will continue to support and facilitate such initiatives.

President Poroshenko's recently announced peace plan and unilateral ceasefire is a positive step in the right direction. It is also encouraging to learn of yesterday's announcement by the armed groups that they will observe a ceasefire until Friday. This creates a window of opportunity for human rights and humanitarian confidence building measures.

Beyond the immediate crisis response, respect for all human rights of everyone living in Ukraine, is a prerequisite for sustainable peace. The UN HRMMU stands ready to support the Government of Ukraine, as well as civil society and various national and social groups to make this happen.

Thank you Mr. President.

Contact us

Third section

ShareThis Copy and Paste

Annex 295

OHCHR, Intensified Fighting Putting at Risk Lives of People in Donetsk and Luhansk — Pillay
(4 July 2014)



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

[WHAT ARE HUMAN RIGHTS?](#) [DONATE](#) [HOME](#)[ABOUT US](#)[ISSUES](#)[HUMAN RIGHTS
BY COUNTRY](#)[WHERE WE
WORK](#)[HUMAN RIGHTS
BODIES](#)[NEWS AND
EVENTS](#)[PUBLICATIONS AND
RESOURCES](#)[> English > News and Events > DisplayNews](#)

Intensified fighting putting at risk lives of people in Donetsk and Luhansk – Pillay

GENEVA (4 July 2014) – Following the end of the ceasefire on 30 June in Ukraine, the UN human rights monitoring mission in Ukraine has reported numerous cases of death of people in Donetsk and Luhansk who are caught in the middle of the ongoing security operations, UN human rights chief Navi Pillay warned on Friday.

“We have received numerous alarming reports of deaths in the Luhansk and Donetsk regions, including the killing of a five-year-old girl, due to the intensified security operations taking place since the ceasefire ended on Monday,” Pillay said. “There have also been reports of the use of landmines, which have allegedly led to three deaths and left several people injured.”

Pillay said she was particularly disturbed by a message on the website of one leader of the self-proclaimed ‘Donetsk People’s Republic’, which states that underage children and women are legitimate targets and that the goal is to ‘immerse them in horror’.

“Such blatant incitement to violence is utterly reprehensible and a clear violation of international human rights law,” she said. “There has been strong hate speech from all sides. I am deeply concerned about the safety of the people who remain trapped in Donetsk and Luhansk areas controlled by the armed groups and are caught in the crossfire between armed groups and the Ukrainian Government. I remind all those involved in the fighting that all measures must be taken to ensure that the fundamental human rights – including the right to life – of residents of these two regions is scrupulously respected.”

In the month of June, the human rights monitoring team has documented the killing of five children in the Donetsk and Luhansk regions. Orphaned children, many very young or with disabilities, in the two regions have faced particular difficulties and have in some cases been evacuated.

“The Ukrainian Government has a duty to investigate every alleged extrajudicial killing and to bring the perpetrators to justice,” Pillay stressed.

Pillay also noted that abductions by armed groups continue to be reported daily and that houses, schools and infrastructure, including water and electricity plants, have been damaged – in some cases severely enough to lead to power cuts. The UN human rights monitoring team in Ukraine has received reports that armed groups are using the roofs of residential buildings to install anti-aircraft systems, and that they are occupying private apartments to organise sniper positions, seriously endangering residents who are not involved in the fighting. Shelling has also been reported in residential areas held by these armed groups.

“More and more residents of Luhansk and Donetsk regions are being forced to flee their homes, while others are trapped in zones of heavy fighting, as their fundamental human rights are trampled upon and a climate of insecurity and fear becomes increasingly pervasive,” Pillay said. “I urge all sides to put down their arms, to engage in dialogue and to turn away from the destructive path towards which they are leading the east of Ukraine.”

Pillay welcomed indications of the possible imminent resumption of a ceasefire, which she called upon all sides to respect.

ENDS

For more information or media requests, please contact Ravina Shamdasani (+41 22 917 9769 / rshamdasani@ohchr.org) or Cécile Pouilly (+41 22 917 9310 / cpouilly@ohchr.org)

UN Human Rights, follow us on social media:

Facebook: <https://www.facebook.com/unitednationshumanrights>

Twitter: <http://twitter.com/UNrightswire>

Google+: [gplus.to/unitednationshumanrights](https://plus.google.com/unitednationshumanrights)

YouTube: <http://www.youtube.com/UNOHCHR>

Storify: <http://storify.com/UNrightswire>

Check the Universal Human Rights Index: <http://uhri.ohchr.org/en>

[Home](#)
[Frequently Asked Questions](#)
[OHCHR on Social Media](#)
[OHCHR Memorial](#)
[Employment](#)
[Mobile App](#)

[Site Map](#)
© OHCHR 1996-2018

[CONTACT US](#)

Annex 296

OHCHR, Report on the Human Rights Situation in Ukraine (15 July 2014)

**Office of the United Nations High Commissioner
for Human Rights**

**Report on the human rights situation in Ukraine
15 July 2014**

TABLE OF CONTENTS

| | |
|---|----|
| I. EXECUTIVE SUMMARY | 3 |
| II. RIGHTS TO LIFE, LIBERTY AND SECURITY, AND PHYSICAL INTEGRITY | 7 |
| III. RULE OF LAW | 14 |
| A. Impunity in the east | 14 |
| B. Constitutional amendments | 16 |
| C. Justice sector reforms | 17 |
| D. Legislative developments | 19 |
| IV. ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS | 20 |
| A. Investigation into human rights violations related to the Maidan protests | 21 |
| B. Investigation into human rights violations related to the violence in Odesa | 22 |
| C. Investigations into other human rights violations | 25 |
| V. INTERNALLY DISPLACED PERSONS | 26 |
| VI. FREEDOMS OF EXPRESSION, ASSOCIATION, PEACEFUL ASSEMBLY, MOVEMENT, RELIGION OR BELIEF | 29 |
| A. Peaceful assembly | 29 |
| B. Freedom of association | 30 |
| C. Freedom of expression | 30 |
| D. Freedom of movement | 31 |
| E. Freedom of religion or belief | 32 |
| VII. ECONOMIC, SOCIAL AND CULTURAL RIGHTS | 33 |
| VIII. MINORITY RIGHTS AND GROUPS FACING DISCRIMINATION | 35 |
| IX. POLITICAL RIGHTS | 36 |
| X. PARTICULAR HUMAN RIGHTS CHALLENGES IN CRIMEA | 37 |
| XI. CONCLUSIONS | 39 |
| ANNEX I. COMPILATION OF RECOMMENDATIONS BY THE UN HUMAN RIGHTS MECHANISMS AND THE UN HUMAN RIGHTS MONITORING MISSION IN UKRAINE. | 41 |

I. EXECUTIVE SUMMARY

1. The continuing deterioration of the human rights situation in eastern Ukraine, the rapid escalation of hostilities and the growing impact on the rest of the country have been the main developments during the past month¹.
2. Egregious human rights abuses have been committed in the Donetsk and Luhansk regions of eastern Ukraine, where armed groups supporting the self-proclaimed “Donetsk People’s Republic” and “Luhansk People’s Republic” (DPR and LPR respectively) have, until recently, controlled a large part of the territory, including most of the main population centres. There have been hundreds of abductions with many victims tortured.² Increasing numbers of civilians have been killed.
3. The Ukrainian security operation, referred to as an ‘anti-terrorist operation’ (ATO), aimed at regaining control of the regions of Donetsk and Luhansk held by these armed groups, involves the army, the military police (National Guard), the National Security Service (SBU) and volunteers’ battalions. In any law enforcement operation security forces must act proportionally to the threat and must at all times respect the right to life. In addition, in the conduct of hostilities all those involved in the hostilities must comply with principles of distinction, proportionality and precautions. This is particularly important in an environment in which armed groups and civilians are inter-mingled.
4. The current intense fighting using heavy weaponry in and around population areas, has devastated towns and villages, demolishing residential buildings and killing an increasing number of their inhabitants. Precautionary measures should be taken to avoid the deaths and injury of civilians.³
5. There has been deliberate targeting by the armed groups of critical public utilities like water, electricity and sewerage plants that have shut down essential supplies to the residents. Public and private properties have been illegally seized and residences destroyed. Banks have been robbed and coal mines attacked. Railways were blown up. Hospitals and clinics were forced to shut down and essential medicines and emergency medical services became scarce or totally unavailable. People were unable to leave their homes in some places, trapping older persons or persons with disabilities. The rule of law no longer existed and was replaced by the rule of violence. The increased level of fear, intimidation, harassment and fighting inflicted on the population of the region resulted in an ever growing flood of internally displaced persons fleeing, at latest count 86,609⁴ people.
6. Some regional and local officials were abducted and tortured. The regional government in effect ceased to function in the two eastern regions. Some local authorities continued to work but with greatly reduced control or were co-opted by the armed groups. Salaries, pensions and other social welfare payments stopped in some places. The police and judiciary ceased to

¹ This is the fourth report of the Office of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine, based on the work of the United Nations Human Rights Monitoring Mission in Ukraine (HRMMU). It covers the period from 8 June to 15 July 2014.

² Illegal acts committed by the armed groups include abductions, detentions, torture, murder, executions, extortion, and destruction of property.

³ On 23 July, the International Committee of the Red Cross (ICRC) issued a News Release calling the fighting in eastern Ukraine a ‘non-international armed conflict’ and urging all parties to comply with international humanitarian law. This requires to impose restrictions on the means and methods of warfare and to distinguish at all times between civilians and persons directly participating in the conflict. In particular, no attacks must be directed against civilian objects such as homes, schools, medical facilities and places of worship, among others.

⁴ UNHCR, 15 July 2014.

function. Residents were left to cope in whatever way they could. Volunteers attempted to fill the gaps.

7. In some places the situation was worse than in others. Slovyansk city (normal population about 130,000 which by early July was down to less than half) in northern Donetsk region was, since April, the stronghold and main base of operations for the armed groups. The residents were particularly badly affected due to the almost constant shelling and fighting there for weeks as the armed groups and Government forces clashed.
8. The professionalization of the armed groups fighting in the east has become openly acknowledged and self-evident. Their leadership, many of whom are nationals of the Russian Federation, are trained and hardened by experience in conflicts, such as in Chechnya (Russian Federation) and Transnistria (Republic of Moldova). What was previously something of a rag tag of armed groups with different loyalties and agendas is now being brought together under the central command of these men. Heavy weaponry including mortars and anti-aircraft guns, tanks and armoured vehicles, and landmines are now being used by them. As the 'Minister of Defence' of the armed groups told the HRMMU on 8 July: "we are in the state of war".
9. The armed groups from the Donetsk and Luhansk regions have themselves joined forces in a self-proclaimed 'People's Republic of Novorossia'. They claimed to have adopted a constitution and to be making other preparations for establishing an unlawful self-government.
10. Throughout the reporting period, the Government of Ukraine pursued its "anti-terrorist" operation (ATO), under the direction of the State Security Service, as it sought to regain control of territory in the eastern regions. This security operation has intensified in the past two weeks involving the use of heavy weaponry and airstrikes. Following the announcement of a Peace Plan by the President of Ukraine on 20 June, the Government implemented a 10-day ceasefire but this was reportedly breached at least 108 times, killing 27 Ukrainian soldiers and wounding 69. At least 9 people not involved in the fighting were also killed, including one eleven month old child. After the ceasefire ended on 30 June, the Government mounted an intense offensive, recapturing territory including the main strategic base of the armed groups in the Donetsk region - the city of Slovyansk - and stating it had regained control of the Ukraine-Russian Federation border areas that had previously been under the control of the armed groups. But the price was high with at least 30 civilian deaths, many wounded, and a great deal of destruction to the recaptured villages, towns and cities. And the control was tenuous, as evidenced by the continuing attacks by armed groups that have killed and wounded soldiers and many civilians. Neither side expressed any public willingness to come together to discuss a negotiated peace. The level of rhetoric and propaganda escalated, with allegations of deliberately targeting civilians. The President, however, stated his readiness to restore a ceasefire upon the following conditions: (i) all hostages should be released; (ii) Governmental control over the border with the Russian Federation should be restored; and (iii) armed groups should be disarmed.
11. The protection of civilians in the eastern regions has been of increasing concern. On 4 July, the United Nations High Commissioner for Human Rights expressed concern about the safety of people caught in the crossfire between Ukrainian forces and the armed groups, and reminded all those involved in the fighting of the need to scrupulously respect residents' fundamental rights, including the right to life. The Government appeared to take notice and, on 8 July, said it would give special attention to the prevention of civilian losses and would not bombard the cities of Donetsk and Luhansk, to which the armed groups had retreated. Instead it would blockade those cities in an effort to force the armed groups to surrender. A leader of one of the armed groups said it was prepared to start a full-scale guerrilla war.

12. Nevertheless people trapped in areas controlled by the armed groups continue to be killed as the heavy shelling continues from both sides. Questions arise about the conformity of these attacks with the rules governing the conduct of hostilities. It is essential that the authorities conduct full and impartial investigations of all incidents where civilians have lost their lives or been wounded.
13. Civilians continue to be abducted by the armed groups. Some people previously abducted and recently released have reported being tortured by them. New allegations of executions by the armed groups have arisen. There have also been cases reported of enforced disappearances of people detained by Government forces, including in areas where the Ukrainian authorities have regained control. The Government must guarantee accountability for all its actions, curtailing impunity and ensuring the local population do not face reprisals. There is also concern about the arbitrary detention of people who are suspected of being supportive of the armed groups.
14. Meanwhile, the situation in the east has begun to impact the rest of Ukraine. Although most people carried on their lives as normal outside the Donetsk and Luhansk regions, there are already signs that violence in the east is having an impact elsewhere.
15. One of the most obvious and immediate impacts has been the increase in the number of internally displaced persons (IDPs) – the majority of whom are women and children - having to be accommodated in the rest of the country. Initially the Government was slow to react to the growing flood of people fleeing the violence in the east, relying on volunteers and the goodwill of the local receiving communities. But as the numbers increased and the lack of coordination, planning and resources became evident, the State Service for Emergency Services stepped in. However, many problems remained to be addressed, including the need for a central registry to document the IDPs, and for the central government to ease access of the IDPs to important social and economic rights. This was partly addressed in a decision in June by the Cabinet. However, other concerns remain, including meeting the specific needs of women and children, who make up the majority of the IDPs. Most IDPs are accommodated in private homes, sanatoriums, student dormitories (that are currently vacant during the summer holidays), or in other temporary situations. If the fighting and hostilities in the east continue, there is concern about how this temporary accommodation will be maintained, especially as the weather gets colder and if the summer sanatoriums are not winterized.
16. At the same time, there is concern that there might be a new wave of IDPs from Crimea in the next few months because of tightening restrictions, the continuing harassment and discrimination against ethnic Ukrainians, Crimean Tatars, and representatives of minority groups in general, as well as stringent limitations of the rights of association, peaceful assembly and expression.
17. A second impact of the worsening situation in the east, are the instances of use of hate speech. High level public condemnations of such troubling developments are required. There are reports of Russian-owned banks and some businesses having been targeted by activists who charged them with ‘financing terrorism’ in the eastern regions. Steps have been taken to ban the Communist Party. Negativity about IDPs has begun to surface, in particular on social media, further dividing opinions between east and west.
18. Concerned about the lack of military equipment, families and local communities themselves have provided basics such as flak jackets, ammunition, and food to new troops being sent to the Government security operation. Local and regional authorities have tried to manage with the growing need to provide social protection to the increasing number of local families who

have members serving in the security operation. As the number of military deaths rise, it can be expected that there will be additional tensions.

19. In some places, tensions have risen for other reasons. In Odesa, there have been a series of bomb hoaxes and violent incidents. This has further affected communities already traumatised following the 2 May violence when 48 people were killed. Accountability for such loss of life must be guaranteed, ensuring justice for the victims as well as perpetrators. Regional and local authorities appear unwilling or unable to take steps to calm the current situation. Arrests have started to be more frequent around the country of people accused of being part of or linked to the armed groups in the east. Dissatisfaction with the lack of accountability in the appointment of regional and other high-level officials, and with the slowness of central government in effectively tackling corruption, has begun to come to a head with confrontational demonstrations.
20. The social impact of the violence and fighting should not be underestimated. It is further exacerbated by the propaganda war, alongside the rhetoric of hate speech that is fuelling further violence. On the other hand, there were some positive developments. Citizens, both individually and in groups have stepped in where their government has been unable to respond quickly enough to rapidly changing events, assisting their communities in the east, accommodating the people fleeing the fighting, and even providing support and equipment to the armed forces. Perhaps this new civic spirit will help drive the next phase of the much needed change in Ukraine.
21. On 27 June, President Poroshenko signed the trade agreement with the European Union (EU) that completes the Association process. Recognising the significance of the occasion, the President said after signing the agreement that this was the second most important event in Ukrainian history after independence. As promised, the Government published on 2 July its proposed amendments to the Constitution allowing for greater regional autonomy and for the use of their own languages. Other important legislation was passed tackling corruption and there were some institutional reforms, including the firing of staff who were found to be inept, corrupt or had committed other violations. Most notable among these, in terms of the large numbers involved, were the firing of 17,000 law enforcement officers and of 1,500 employees of the Office of the General Prosecutor, although the latter appeared to be more an austerity measure. It is essential that in undertaking such action, the rights of the individuals be fully respected.
22. With so much of its attention focused on the escalating security operation in the east and responding to the increase of violence of the armed groups, other key aspects of reform are beginning to receive less attention from the Government. Reform of the judiciary and the system of justice remain to be addressed. Initial steps have been taken to reform law enforcement with a pilot project to start in Lviv, the results from which will form the basis of a reform package. Reform also needs to address the powers of the State Security Service (SBU). The results of the investigations into the Maidan and Odesa violence are still awaited.
23. The unexpected cost of fighting an escalating security operation in the east, which could amount to many millions of dollars, will impose a heavy economic burden on Ukraine. The negative impact of this will be even greater given the current recessionary economic situation in the country, as will the damage inflicted by the armed groups on the infrastructure of the Donbas region, which houses a large part of Ukraine's heavy industry.
24. As it reclaims territory in the east that was formerly held by the armed groups, the Ukraine Government faces a daunting task of rebuilding communities ravaged by the months of fighting, instances of intense violence against protesters and the polarizing impact of the on-

going propaganda war. Humanitarian assistance is already being provided by the international community and a Donor's Conference is being organized by the EU for later in the year. This will provide resources for Ukraine to undertake necessary reform.

25. Corruption and mismanagement has existed for many years. The respect and promotion of good governance, the rule of law and human rights, including through the introduction of critical reforms, must continue as a priority as Ukraine seeks to fulfil its EU aspirations and establish a democratic, pluralistic and prosperous society.

II. RIGHTS TO LIFE, LIBERTY AND SECURITY, AND PHYSICAL INTEGRITY

26. The rights to life, liberty and physical security are usually the first to be abused during hostilities, such as that happening in eastern Ukraine. It is the responsibility of the Government to ensure that civilians are never targeted and that all precautions are taken to spare the loss of innocent lives. Detained persons must be treated humanely and provided with all due process guarantees, starting with the right to counsel and information about the reasons for the detention. Arbitrary detention and abduction, hostage taking and other human rights abuses must be promptly investigated and the perpetrators brought to justice. In addition, any allegations of extrajudicial killings and enforced disappearance must be duly investigated and perpetrators brought to account. The armed groups fighting in the east must abide by international law but unfortunately this has not been the case. Grave human rights abuses have been committed by those armed groups. And it must be remembered that these groups have taken control of Ukrainian territory and inflicted on the populations a reign of intimidation and terror to maintain their position of control. The Government is undertaking its security operation, within a legislative framework that includes anti-terrorism laws and the criminal procedure code. It also needs to ensure respect for international law and the protection of human rights for all those who live in the Donetsk and Luhansk regions.
27. All allegations of abduction, enforced disappearance, arbitrary detention, torture, ill treatment and other human rights abuses must be investigated and the perpetrators held to account. However, ensuring an impartial investigation of the multiple killings, detentions, cases of torture and enforced disappearances and other reported violations and abuses has not been possible until now because of the dangerous situation in the east and the limited control of the Ukrainian Government in the territory.

Casualties

28. The number of casualties is hard to ascertain. However, based on the best data available conservative estimates by the HRMMU and the World Health Organisation (WHO) are that at least 1,000 people have died from mid-April until 15 July. This includes military and civilians (including members of the armed groups). According to the Ministry of Health, as of 10 July, 478 civilians have been killed (441 men, 30 women and 7 children) and 1,392 injured (1,274 men, 104 women and 14 children) since the fighting began in eastern Ukraine in mid-April. However, the Ministry withdrew these figures the same day they announced them, and have issued no further data since. In addition, the Ministry's figures only include those dead who were delivered to morgues of medical establishments, or those wounded and who later died in hospital. In fact, many dead were buried without being taken to morgues. The number of casualties of the Ukraine armed forces is given as 258, with 922 wounded, according to the Council for National Security and Defence on 15 July. The number of members of armed

groups who have been killed is unknown, but some may have been counted within the numbers of civilians killed.

29. Since 10 July, there have been at least 44 more civilian casualties, including two children, for a total of 522 people, as reported by civil medical establishments and regional administrations in the Donetsk and Luhansk regions. Most of these recent have been the result of intense shelling of villages, towns and cities, the so-called 'collateral damage' to the fighting that is taking place in and around population centres.
30. In this report, the HRMMU has enumerated cases where people were killed by indiscriminate shelling. However, of the figures above, the Government has said that most of the deaths were by gunshot wounds.
31. The armed groups are locating their military assets in and conducting attacks from densely populated areas thereby putting the whole civilian population at risk. Locating military objectives within or near a densely populated area, and launching attacks from such areas may constitute a violation of international humanitarian law.
32. Human Rights Watch and Memorial, sometimes accompanied by Ukrainian human rights defenders, have visited the town of Krasny Liman, and the villages of Stanista-Luganskaya and Staraya Kondrashovka to investigate the circumstances in which civilians have been killed. In Stanista-Luganskaya and Staraya Kondrashovka, at least 11 people were killed including 2 children on 2 July; in Krasny Liman, shelling hit the Railway Hospital, killing the chief surgeon and wounding three others.
33. As the increasing number of casualties in the past few days attests, there has not been sufficient precaution taken to preventing death and injury to civilians. Recent examples include the shelling of the village of Maryinka and of the Petrovskiy district of Donetsk on 11 and 12 July when at least 16 people were killed, including one child. There was an air strike on the town of Snizhne in the Donetsk region on 15 July, and at least 11 people were killed from shrapnel wounds and eight more wounded, including one child. On 11 July, Ukrainian forces claimed to have destroyed a camp of an armed group located in the premises of an empty school in the village of Golmovsky, near Horlivka. The armed group claimed that one civilian had been killed during that air strike. On 13 July, two civilians were killed in Krasnogrovka in the Donetsk region. On 15 July, the Mayor of Luhansk announced that 17 Luhansk residents were killed in residential areas during attacks on 14 July and 73 people received shrapnel and gunshot wounds during the fighting. On 15-16 July, one civilian died and nine more were injured as a result of gunfire in Luhansk. During the hostilities, paramedics reported responding to 160 calls.
34. However, not all of the deaths and injuries can be attributed to reported shelling or air strikes of towns/villages. Some deaths had other causes. For example anti-personnel landmines have killed at least three and injured two others; people have been killed when the passenger buses they were travelling in were shot at; and people have been killed when travelling in their car. Three traffic policemen were killed at close range and without warning, according to an eyewitness, in Donetsk city on 3 July. A criminal investigation has been opened into the police killings. A motorist was killed when armed groups stole the car he was driving in Noviy Svit (Donetsk region). There have been reports of people being used as 'human shields' by the armed groups, as for example in Horlivka on 14 June. In this incident, after two people were killed and 8 injured, reportedly during an airstrike, the armed group then threatened to organise "human shields", by placing detainees on the roof of a city municipal building. The detainees, included five servicemen from the Kirovograd region and two 25th army brigade officers and their driver who were all from Dnepropetrovsk region.

Abduction and detention

35. According to the Ukrainian government⁵, since mid-April, 717 people have been abducted by armed groups in eastern Ukraine. These included: 46 journalists, 112 police officers, 26 representatives of the OSCE, 22 deputies, members of political parties and heads of district (town) councils, 5 employees of the prosecution office, 2 lawyers, 2 judges, 1 employee of the penitentiary service and 481 other people (including 392 girls and women). The armed groups also detained 91 servicemen and border guards as well as 4 Security Service officers. 437 people were released. The whereabouts of 375 people remains unknown.
36. The HRMMU has been following the cases of 400 people who were abducted since mid-April. Of these, 4 people are dead (having been found dead with visible signs of torture), 211 are still detained, and 185 have been released. Of those still detained, 202 are men and 9 are women.
37. The number of people abducted by the armed groups has significantly increased in Luhansk city during the past 2 weeks. For example, a group of 13 employees of PrivatBank were abducted on 7 July. Four were subsequently released and 9 remain in captivity.
38. Intimidation and violence by the armed groups against civilians in the east has continued, with people being abducted and detained often for purposes of hostage taking. The armed groups also carry out acts of ill-treatment, torture and murder.
39. Some of those detained by the armed groups are local politicians, public officials and employees of the local coal mining industry; the majority are ordinary citizens, including teachers, journalists, members of the clergy and students.
40. The motivation for the abductions and detentions by the armed groups appears to be: a) exchange with detainees held by the Government; b) gain some influence on the situation; c) extortion of property or money; d) source of labour for digging trenches and preparing military barricades; e) opportunistic 'arrests' of people; and f) 'internal discipline' of the armed groups themselves. With these acts, the armed groups continued to exercise their power over the population in raw and brutal ways.
41. Examples of the 400 cases that the HRMMU has been following include the following: in Donetsk, a free-lance cameraman was reportedly abducted in Slovyansk. In Soledar (Donetsk region) the chairman of a Trade Union organization at the Artyomsol Company was abducted. A professor at the Luhansk National University was abducted. A resident of Pionerske village in the Luhansk region was reported missing. The Head of a company called Agrovostok in Malarovo (Luhansk region) was abducted. According to unconfirmed reports, the police chief of Severodonetsk (Luhansk region) was detained by armed persons. Two university students were abducted in Donetsk allegedly for breaking the curfew and told they would be drafted into the DPR army. They were later found in an occupied public building and had been engaged in 'forced labour'. A university professor was abducted by armed persons 'for questioning' for allegedly taking photos and videos of the movements of armed groups and posting them online. Two senior managers of a private company were abducted at a checkpoint while driving at night near Karlivka (Donetsk region). A protestant pastor and his wife were abducted and held in Druzhkivka (Donetsk region) by the 'Donbas People's Militia'. Three drunk people driving a car in Luhansk were reported missing; two others who were drinking with friends outside a café in downtown Luhansk were 'arrested' by armed men after a fight broke out. An assistant of the Donetsk Regional Governor was abducted on 26 June and the chief of the Artemivsk pre-trial detention centre was abducted on the same

⁵ Ministry of the Interior figures as of 18 July.

day, when armed groups robbed the centre's armoury. Reportedly, armed members of the "Right Sector" abducted the Mayor of Kurakhovo and a deputy of the city council on 8 July. They later confirmed to the HRMMU that they were questioned about their collaboration with the armed groups in Maryinka, and then were released on 9 July.

42. The length of period for those detained varies considerably – some are held for a few hours, others for several months. In the majority of cases, release depends on factors such as whether there is an exchange of some sort, e.g. money. However, there have also been occasions in the past month of a number of detainees being released without any particular "exchange". Between 7-13 June, some 32 people were released by the armed groups. However, a pattern emerged that no sooner were some people released than others were detained, reinforcing the opportunistic and resource providing element to the abductions and detentions.
43. In addition to the abductions and detentions of local citizens, there were the cases of the eight monitors (in two separate teams) from the OSCE Special Monitoring Mission who were abducted by armed groups in May. All eight were released over a period of a few days in early July.
44. Other cases of detention include the former Mayor of Slovyansk, the current mayor of Mykytivka (a village near Slovyansk), and the head of the Artyomivsk city department of the Ministry of the Interior (MoI), all of whom were detained by armed groups. In a 25 June meeting in Mariupol, the HRMMU learned that the acting Head of the Mariupol city department of the MoI was conducting investigations into "pro-Russian" activities in Mariupol in connection with the 9 May incidents. In addition some activists being detained by Ukrainian law enforcement and voluntary battalions, allegedly committed crimes under Article 258 (Act of terrorism) of the Criminal Code. No clarification has been provided to the HRMMU on the exact whereabouts of those detainees. It was also reported that the Right Sector in coordination with the Ukrainian military had detained a leader of one of the armed groups in the Donetsk region on 25 June.
45. Since 5 June there have been instances when drug users (even those in remission) and people living with HIV/AIDS who, because of their status, have been detained by armed groups. Reportedly, some are being tortured and kept in basements. The relatives of the detained are frequently required to pay a "fine" (ransom) ranging from 200 to 1,000 USD. Many detainees are also forced to "work off their guilt" as forced labour or to fight on the front lines for 15 days. Those who cannot pay the ransom are given the option to "wash off their guilt with blood"; in other words, they are sent to the front lines to fight on the side of the armed groups. Evidently, the armed groups consider these actions to be "prevention measures for drug addicts". At the same time there were some cases of abduction reported in other regions of Ukraine. For example, a local leader of a Right Sector chapter in Ivano-Frankivsk region was reported abducted by unknown persons during the reporting period.

Torture and ill-treatment

46. In discussions with the HRMMU following their release, many detainees who were held by armed groups report beatings, ill-treatment, sleep deprivation and very poor conditions while in detention, and forced labour, including digging trenches on the front lines. As an "alternative" to torture and ill-treatment, it was suggested that detainees join the ranks of those fighting for the armed groups. Some, allegedly, are forced to participate in the abduction of other people. The son of a man abducted in Donetsk on 7 July reported that his father had been transferred by the armed groups to Snizhne where about 100 detainees, males aged from 14 to 60 years old, were being held. He said that during the day the detainees were forced to dig trenches near the Ukrainian-Russian Federation border, which has been on the

front lines of heavy fighting between the armed groups and the Ukraine forces. A Donetsk Regional State Administration official was released from captivity in Horlivka on 10 July. He had been held since 26 June and said he had been tortured.

Executions

47. Written records of execution orders authorized and signed personally by the ‘Commander-in-Chief’ of the armed groups, Igor Girkin (known as Strelkov), as well as protocols of hearings of a ‘military tribunal’ convicting people to death, were found in Slovyansk by a journalist on 7 July. The convictions were apparently of people associated with armed groups, and a common criminal. The HRMMU is verifying these records with relatives of the victims and a witness.

Abduction of children

48. Children face particular hazards in the conflict zones. Orphans, many very young or with disabilities, in the Donetsk and Luhansk regions have faced particular difficulties, sometimes being used as pawns in the larger geo-political dispute. For example, in Donetsk, the chief medical officer reported difficulty in evacuating children from an orphanage in Kramatorsk city, because armed groups did not want to send Donbas children “to an enemy country, Ukraine” and wanted them to go to the Russian Federation. All 32 children were eventually evacuated safely to the Kharkiv region on 28-29 June thanks to the intervention of a Moscow-based NGO. In so doing, one of their representatives faced some personal danger, including being briefly detained by local armed groups on 25 June.
49. A group of 16 children and two chaperones, who were allegedly abducted and transferred to the Russian Federation territory on 12 June by armed groups, were returned back to Ukraine on 13 June.⁶ The Ombudspersons of Ukraine and the Russian Federation actively cooperated to facilitate the return of the children.
50. On 7 July, the UN in Ukraine received an official communication from the Government of Ukraine informing the UN of possible attempts by armed groups to forcefully transport 206 orphans from the Donetsk region to the Russian Federation, saying that it had informed the Embassy of the Russian Federation in Ukraine about the above-mentioned situation and called for the implementation of international obligations to guarantee the rights of children.
51. On 13 July, 54 children from a Maryinka orphanage were taken to Donetsk by armed groups after attempts to transfer the children to the Russian Federation were unsuccessful. This was in spite of intense pressure being placed on the directors of the orphanage. The children remain in Donetsk.

Allegations of sexual violence

52. The HRMMU has received reports of allegations of sexual violence being committed against individuals by members of the armed groups. It has also received allegations concerning a National Guard in Kramatorsk. The HRMMU is trying to verify such claims.

⁶ The Ministry of Foreign Affairs (MFA) of Ukraine issued a statement on 12 June accusing the Russian Federation of having allowed the illegal transfer to its territory of 16 orphans. The children were reportedly part of a group of people abducted in the town of Snizhne by armed representatives of the “Donetsk People’s Republic”. According to the MFA, the children did not have proper permits to cross the border, and that in such conditions their transfer qualifies as an act of international abduction of children. The MFA sent a note verbale to the MFA of the Russian Federation requesting urgent measures to be taken to ensure the immediate return of the children in Ukraine and the prosecution of persons involved in the promotion of their illegal entry into the Russian Federation.

Arbitrary detentions and enforced disappearances

53. Members of the Ukrainian territorial battalions and the National Guard are alleged to have arbitrarily detained a number of suspected supporters of the armed groups and subjecting them to enforced disappearances. The HRMMU is seeking verification on a number of cases.
54. On 11 June, the HRMMU with the Head of the National Preventive Mechanism (NPM) visited the Headquarters of the Government's security operation in the eastern regions, which is based in Izyum, to gain information on the situation of those detained by the Government armed forces in the context of the security operation. According to information provided to the HRMMU, all persons detained by the Ukrainian armed forces during the security operation are sent directly to the State Security Services of Ukraine (SBU).
55. On 27 June, the HRMMU met with the head of the Investigative Department of the SBU, who said that in the current situation, detentions are often carried out in areas within close proximity to the fighting, which sometimes does not allow for entire compliance with the procedure of detention of the Criminal Procedure Code. Also, since in many towns of the two eastern regions the police was not functioning, detainees had to be transferred to Kyiv, which reportedly did not allow for timely notification of the relatives about the fact of detention. The HRMMU was also told that none of the detainees kept in Kyiv by the SBU have been tortured or ill-treated.
56. On 4 July, the Ministry of Interior stated to the HRMMU that if detentions are undertaken by battalions subordinated to the Ministry of the Interior, they are carried out in accordance with the law "On police", which obliges battalions' volunteers to fill out a protocol for detention, and then they usually transfer detainees to the authorities (mostly in Kyiv). The HRMMU is, however, concerned that such procedures are not respected, following reports it has received on the situation of individuals detained in the course of the security operation. According to the Criminal Procedure Code of Ukraine, the detaining authority must immediately take steps to ensure that a person arrested can benefit from the services of a counsel; in addition, the person must appear before a court within 60 hours following his or her arrest in order to determine the measure of restraint to be applied. The HRMMU has observed that these two requirements were often not met because the security environment did not allow securing the services of a defence lawyer and for the suspect to appear before court within the prescribed deadline. In addition, the powers granted under Ukraine's counter-terrorism legislation, place emphasis on the collection of information, including interrogation of suspects. Thus, persons detained as part of the security operation may often be victims of a protection gap, and consequently suffer a violation of their rights, due to the application of provision of the Criminal Procedure Code in a context characterized by active fighting and limitation of movements.
57. Together with the NPM, the HRMMU is following up on cases of detention by the security forces, a number of which are cause for concern, in particular those of enforced disappearance.
58. For example, a Donetsk resident was detained by the SBU in the main Kyiv train station on 13 June. Information about the detention was published on the SBU website, which mentioned that the individual was "an active member of the terrorist DPR". However, the SBU later denied having detained this individual who is currently unaccounted for. His defence lawyer has been unable to contact him since the arrest took place.
59. Reports suggested that members of the Ukraine forces have been responsible for the ill-treatment and torture of detainees. On 18 June, the editor-in-chief of the local newspaper "Vestnik Priazovya" was detained by armed men of one of the Ukraine battalions in

Mariupol. The HRMMU has received very contradictory information on this case of enforced disappearance, and is now closely cooperating with the NPM to verify it.

60. On 10 July, unknown persons reportedly opened fire on the Artemovsk Pedagogical College, in which the Ukrainian battalion “Donbass” was based. A soldier of the Battalion “Donbas” was reportedly arrested by his own battalion as of 8 July and accused of transmitting information about the deployment of the battalions to the supporters of the armed groups. Reportedly he was beaten and taken to Izyum police department (the Ukrainian security operation base in the Kharkiv region) and kept in solitary confinement. However, as of 15 July his whereabouts remain unknown.

Landmines and explosive remnants

61. The first indication of the use of landmines by the armed groups came on 2 July when Ukraine forces regained control of the border area in Luhansk. In so doing, it discovered anti-tank landmines, one of which blew up a Ukraine Border Control vehicle, wounding the six border officials inside. Anti-personnel mines killed three civilians and wounded two more in separate incidents near Luhansk and Kramatorsk; both towns were at that time controlled by armed groups.
62. Ukraine is a party to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction.
63. On 4 July, the Ministry of the Interior informed the HRMMU that the armed groups have been using two types of blast land mines. One of the types is an anti-personnel non-removable land mine complex with two wires between the mines which makes it almost impossible to safely de-activate. It was also reported that anti-tank mines are used in combination with anti-personnel mines, which make them more dangerous, not only for the armed forces, but also for the residents not involved in the fighting.
64. After Ukrainian forces regained control of Slovyansk, they discovered explosive remnants on many roads, enterprises and buildings. The Ukrainian Defence Minister reportedly said on 8 July that many highways were mined, in particular the routes from Slovyansk to Kramatorsk and from Slovyansk to Donetsk, saying “a lot of landmines and unexploded shells lie on the sides of the roads” and that they were working to dispose of them. There were reports of more civilian deaths from landmines on the outskirts of Donetsk city.

Other incidents

65. As the fighting has escalated in the east, there has been a concurrent rise in incidents and ‘preventive’ action by the authorities elsewhere in Ukraine. For example, in the Dnipropetrovsk region, a woman who is allegedly the local coordinator for the armed groups in the Marinski and Velikonovoselski districts was arrested on 20 June for allegedly inciting people to disobey the Ukrainian Government and to support the “independence” of the Donetsk region.
66. During the week of 7-13 July, the SBU in Kharkiv announced the arrest of two people it alleged to be ‘terrorists’ participating in the armed groups in the east; the SBU also announced the arrest of a resident of Dnipropetrovsk who is the alleged leader of a terrorist group commissioned by the intelligence service of the Russian Federation to undertake intelligence and subversive activities against Ukraine. According to the SBU Press centre on 6 July, in Kherson, one of the leaders of the armed groups was detained while trying to cross from the Ukraine mainland into Crimea. In Odesa, the SBU on 10 July arrested two people (including one citizen of the Russian Federation) in connection with an event at which, along with 50 other people, they were allegedly planning to create an ‘Odesa People’s Republic’.

67. Bomb threats have plagued Odesa since June targeting public buildings and facilities such as train stations and the courts. There were also a number of actual explosions and other incidents. An explosion at a military unit on the night of 3 July was called a ‘terrorist act’ by the Government. Two fires on 6 July at a bank and the office of a political party were considered suspicious. Two branches of the PrivatBank were damaged by powerful explosions on 13 July. No casualties were reported. A spokesperson of the bank said it was another attempt to de-stabilize the city. Nevertheless, a week-long international film festival in Odesa opened as planned on 11 July.
68. On 1 July the SBU blocked several streets in Odesa while arresting three individuals suspected to be “rebel fighters”. In the Kherson region, border guards and the SBU arrested two people trying to escape to Crimea who were wanted for allegedly participating in the storming of a military unit in Mariupol.
69. In Odesa, the city Department of the Ministry of Justice appealed to the Odesa District Administrative Court to ban a “pro-Russian” movement called ‘Molodizhna Ednist’ as being contrary to Ukrainian law on civil organizations. In June, one leader of the organization was arrested in March under Article 110 (Trespass against territorial integrity and inviolability of Ukraine) of the Criminal Code and is being held in Kyiv; his brother has been in hiding since the 2 May violence and is rumoured to have fled to the eastern region of Ukraine that is under the control of the armed groups.
70. On 8 July, authorities in the Russian Federation announced that the former Ukrainian military pilot, Nadiya Savchenko, who is being held in a pre-trial detention centre in Voronezh in the Russian Federation⁷, was being charged with complicity in the killing of two Russian TV journalists on 17 June near Luhansk. There has been a great deal of controversy surrounding the circumstances of the capture of Ms. Savchenko, with the Russian authorities insisting she crossed the border freely into its territory and was then arrested for having no documents and pretending to be a refugee. The Ukrainian Government insists she was abducted in Luhansk by the armed groups and was taken to the Russian Federation ‘as a result of an agreement or joint operation between the terrorists and the Russian secret services.’ The Ukrainian Government is appealing to the international community to help free Ms. Savchenko. On 19 June, the office of the Ukrainian Prosecutor General said a criminal investigation was being undertaken into the circumstances leading to the death of 10 persons, including the 2 Russian TV journalists, who were killed in a mortar attack near Luhansk on 17 June. On 10 July, the HRMMU was informed this is now an investigation under Article 258 of the Criminal Code (Terrorism) and the investigation is being handled by the SBU. On 10 July, the Luhansk Ministry of the Interior opened a criminal investigation into the abduction of Ms. Savchenko under Article 146 of the Criminal Code (Illegal confinement or abduction of a person).

III. RULE OF LAW

A. Impunity in the east

71. The armed groups do not recognize the authority of the Ukraine Government. In the areas of the east that they control the rule of law has collapsed. The police are de facto under the control of armed groups. Police investigations concerning crimes attributed to armed groups

⁷ The Government of Ukraine states that the Russian Federation did not allow a Ukrainian Consul to visit Ms. Savchenko for several days. Her lawyer said she went on a hunger strike to protest this treatment. Ms. Savchenko was allowed to see the Consul on 16 July.

are not conducted. During evening hours, the police do not respond to phone calls made on the emergency line. Some courts continue operating, but even in these there have been examples of hearings being interrupted by armed groups entering the courtroom.

72. Public buildings, such as those hosting the local or regional branches of the Ministry of the Interior, the Office of the Prosecutor, the State Security Service (SBU) and local government institutions, are occupied and are often used to detain and torture civic activists, journalists or political opponents. Criminal proceedings or other legal measures initiated by the Ministry of the Interior and the Prosecutor General of Ukraine remain a dead letter in territories controlled by the armed groups.
73. The armed groups claim that they are putting into place parallel ‘institutions’. For example, they claimed a ‘prosecution system’ had been set up, and that a ‘court martial’ temporarily carried out (unlawful) judiciary functions. They claim that a special (illegal) ‘military police’ is in the process of being created as well as a Criminal Code and Criminal Procedure Code, replicated from the Russian equivalents.
74. The Ukrainian security operation involves the army, the military police (National Guard), the National Security Service (SBU) and a number of volunteers’ battalions.⁸ The involvement of battalions of volunteers (Donbas, Azov, Aydar, Dnipro, Ukraine, etc.) raises important questions. While they nominally operate under the command of the Ministry of the Interior or the Ministry of Defence, they would appear to enjoy a large degree of autonomy in their operation. There are allegations of human rights violations committed by these battalions. Currently four types should be distinguished: operational assignment battalions, special police forces battalions (both are under the Ministry of the Interior and function according to the law “On Police”), battalions of territorial defence (under the Ministry of Defence), and self-organised battalions who do not subordinate or report to State institutions. On 3 July, the Ministry of the Interior created a special department, which will oversee the activity of its battalions. However, the legal basis for the functioning of other battalions is not as clear. The Ministry of the Interior said it was deeply concerned about these groups and planned to reach out to as many of them as possible with a view to integrating them into existing battalions. This would solve the question of their legality and would also allow for coordination of their activities. It is imperative, for purposes of accountability, to clarify the legal framework within which these battalions operate.
75. Heavy armament, including tanks, military aviation and helicopters were used in addition to artillery. The armed groups also use heavy weaponry, including missiles and tanks. Incidents involving civilian deaths have occurred without any possibility to ascertain beyond any doubt whether the casualties were caused by Ukrainian forces or armed groups. Among them: a five-year-old and his mother were killed by mortar shelling in Slovyansk on 20 June; two Russian journalists were killed on 17 June during a mortar attack near Luhansk; 2 employees of the Public Utility Company “Water of Donbas” were killed by shelling at the water canal in the village of Semenivka on 10 June.
76. The authorities of Ukraine can legitimately claim they have a duty to restore law and order, including, if necessary, by resorting to force. In any law enforcement operation security forces must act proportionally to the threat and must at all times respect the right to life. In addition, in the conduct of hostilities all those involved in the hostilities must comply with

⁸ The first volunteer battalions appeared in mid-April in the eastern regions of Ukraine as small groups of pro-Ukrainian activists who wanted to protect their neighbourhoods from the lawlessness of armed groups. Eventually more people joined. By the end of May, a number of battalions (each battalion is around 500 people) were formed. As of July, some have already been officially integrated into the structure of relevant Ministries.

principles of distinction, proportionality and precautions. This is particularly important in an environment in which armed groups and civilians are inter-mingled.

77. The use of heavy artillery and aviation, in particular, have increased the risks to civilians and caused casualties. It is essential that the authorities conduct full and impartial investigations of all incidents where civilians may have lost their lives or have been injured by the Ukrainian forces since the launch of the security operation. Remedies must be available to victims, if the damage to their property was done illegally.
78. The Ukrainian forces have regained several areas formerly controlled by armed groups since 5 July; it is essential to ensure that no reprisals are applied against civilians. The questioning of people and verification of information conducted by Ukrainian forces in areas, formerly controlled by the armed groups, must at all times uphold the presumption of innocence and respect human rights and human dignity⁹. The Government needs to provide information on how these activities are conducted and what human rights guarantees are attached to this process. The HRMMU stresses the paramount importance to uphold the right to life and ensure protection against arbitrarily deprivation of liberty, in accordance with Ukraine's obligations under the International Covenant on Civil and Political Rights (ICCPR) and other international instruments.
79. There are disturbing reports of cases, including journalists, politicians and of people allegedly supporting the armed groups, of having been arrested by the Ukrainian forces but whose whereabouts could not be ascertained for a long period of time or are still not known. These cases constitute a violation of the right to liberty and security, which implies a prohibition of arbitrary arrest or detention, and of the 'minimum guarantees', such as the right to a counsel, that every person deprived of liberty is entitled to benefit from under international human rights law.

B. Constitutional amendments

80. On 2 July, the Parliament registered a draft law (№ 4178a) initiated by the President of Ukraine, proposing to amend the Constitution of Ukraine.
81. According to this document, Ukraine is to be divided into regions, districts and communities, based on the principles of unity, integrity and decentralization. Local self-government institutions with legislative and executive functions are to be created and local state administrations abolished. Representatives of the President are to be appointed at local level and entrusted with powers to suspend local decisions deemed to be in violation of the constitution. The draft mentions that the division of power between the different levels of self-governance is based on the principle of subsidiarity and that the President can revoke the powers of the local self-government institutions. The provisions regulating self-government institutions in Ukraine also apply to Crimea, but the function of the representative of the President in Crimea is abolished. Other new provisions include the possibility to grant "special status" to the Russian language and languages of other national minorities at the level of villages, towns, districts and regions; increasing the powers of the parliament to initiate or approve appointment of ministers and heads of state institutions; and abolishing the power of the Prosecution to oversee compliance with fundamental rights and freedoms. It should also be noted that the amendments do not contain provisions strengthening the independence of the judiciary. The Venice Commission of the Council of Europe was

⁹ In accordance with Article 10 of International Covenant on Civil and Political Rights (ICCPR) for detainees as well as the prohibition of torture and ill-treatment under Article 7 of ICCPR.

requested to present an opinion on the draft law and is expected to do so in the second half of July.

82. The draft law is expected to be discussed in parliament and amendments are likely to be proposed. The HRMMU insists on the importance of reaching out to the country in all its diversity to ensure a process of transparency, and inclusive consultations. Debates must be organized to enable the participation of a wide array of constituencies. Human rights defenders, associations of legal professionals, media and other civil society organisations including those representing women, children, minorities, indigenous peoples, refugees, and stateless and displaced persons, and labour and business¹⁰ from all the regions of Ukraine should be given a voice. To facilitate this, the draft Constitutional changes should be made available in minority languages, such as Russian. Durable solutions to controversial issues will only be found through an inclusive, open dialogue and readiness for compromise.

C. Justice Sector Reforms

Law enforcement reform

83. Initial steps have been taken by the Government of Ukraine to reform the law enforcement system. An Expert Council “on the issues of human rights and reformation” was established in the Ministry of the Interior on 4 April in order to develop a concept for the reform of law enforcement bodies. On 1 July, the Minister of the Interior tasked the Expert Council to prepare and implement a pilot project in Lviv seeking to analyse the work of the police, its performance and cooperation with the local authorities, its relation to citizens, community policing practices, and issues of transparency and accountability. The results of the pilot project are expected to be presented at an Expert Council meeting in November 2014 and to form the basis of a law enforcement reform package. The HRMMU recommends that this pilot should be gender sensitive and ensure that it includes an assessment of how the police deal with domestic violence, rape and other crimes that affect women disproportionately.
84. The HRMMU stresses the importance of reforming the law enforcement system, which as a first step, should include the adoption of a new law on the police. The latter needs to move away from a militarized structure into a civilian, professional public service. Reform also needs to address the powers of the State Security Service (SBU). According to the Parliamentary Assembly of the Council of Europe Recommendation 1402 (1999) the SBU should be devoid of the authority for criminal investigation and arrest of persons¹¹.
85. Training¹² should be developed and conducted on all aspects of policing (including or e.g. arrest, pre-trial detention, use of firearms, as well as gender sensitive issues as mentioned above) and a lot remains to be done to ensure that they conform to international standards. This should be another key element of the reform of the law enforcement system.
86. Currently, internal oversight mechanisms are not effective in reviewing incidents of injury or loss of life resulting from the use of force by law enforcement personnel. In addition, the police are generally distrusted and perceived as being corrupt and lacking professionalism. For these reasons, it is important to create platforms, open to civil society and other non-police actors, including women’s groups, to discuss the work of the police and its

¹⁰http://www.unrol.org/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf

¹¹ “The control of internal security services in the member states of the Council of Europe”; para. V.iii

¹² UPR recommendations from 2012 require Ukraine to provide training for staff of law enforcement bodies on the rights of detainees.

performance and to put in place conditions for greater public accountability of law enforcement officials.

Administration of justice reforms

87. As noted in previous reports, many of the concerns that led to the Maidan events and the crisis in the east are systemic ones, rooted in a weak rule of law and the absence of effective checks and balances. The law “On the restoration of the credibility of the judiciary in Ukraine” developed a mechanism for the dismissal of judges who have discredited the judiciary institution by violating professional and ethical standards or being corrupt. A lustration procedure has been put in place to undertake a vetting of judges. However it does not follow some generally recognized requirements in the area of judicial proceedings. For example, past court decisions can be scrutinized by an ‘Interim Special Commission’, which can decide to immediately dismiss judges. The Commission held its first session on 3 July, elected its head and deputy head, but has not initiated any vetting yet. There is concern that the implementation of the law could lead to unjustified and non-motivated dismissals of judges and jeopardize the administration of justice. There is an urgent need to strengthen the institutional independence of the judiciary. This can be done by ensuring, among other things, that the appointment and dismissal of judges, as well as the initiation of disciplinary proceedings against them, leave no room for undue political or other pressure. On matters of judicial self-administration, international standards require that any decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge should be taken by an independent authority within which at least one half of those who sit are judges elected by their peers. However, the High Council of Justice, which plays a central role in the appointment judges, does not fulfil this requirement: only 3 out of 20 members are appointed by the Congress of judges. In addition, when appointed, judges serve for a 5-year trial period after which they can be elected by parliament to a lifetime position. This lengthy trial period is of concern as it opens up the possibility for undue influence on the decision-making of judges during that time. Legal and constitutional amendments should address obstacles to an independent judiciary, namely the role and composition of the High Council of Justice; the length of the trial period, and the role of Parliament in the appointment process. The authorities must also ensure that the justice system is sufficiently funded from the state budget. This would lower the dependency of the judiciary on public and private interests, and minimize the risk of corruption.
88. No progress has been made in reforming the prosecution system, which is another pillar of the justice system, and many recommendations have been made to that effect. The prosecution used to have broad powers outside the criminal justice process. Legal amendments in 2012 reduced them slightly by narrowing prosecutorial general supervision over the application of laws and abolishing the power to issue orders that have the effect of suspending an action undertaken/required. (“submissions”). In addition, the new Criminal Procedure Code, in force since November 2012, gives the Prosecution Service a greater role within the criminal justice process, which is a positive development. However, these measures are insufficient. It is important to provide the prosecution with a clearer mandate focused on leading pre-trial criminal investigations and prosecutions. Such changes can be implemented by amending the law “On the Prosecutor’s Office” and possibly the Constitution. It should also be noted that no progress has been made in establishing a State Bureau of Investigation, as required by the Criminal Procedure Code of Ukraine and recommendations from the Universal Periodic Review and the HRMMU.
89. The role of defence lawyers is critical to a well-functioning legal system and the fairness of trials. A National Bar Association exists that serves as a body of self-administration.

However, the exercise of the profession and working conditions require enhanced protection. Courts do not have any premises for defence lawyers; legislation does not regulate the right to rest or social protection for defence lawyers. The current Criminal Procedure Code limits the number of defence lawyers allowed to work on one case; in case of absence, a lawyer can be replaced by a state-appointed lawyer. A law on the legal profession was adopted in 2012 and draft amendments are under discussion. It would be necessary to ensure that the new amendments create improved conditions of work for defence lawyers and a professional environment conducive to a proper exercise of the right to defence. Equality of arms should characterize the relationship between defence lawyers and prosecutors.

D. Legislative developments

90. An important number of laws, legal amendments or regulations adopted in recent months have been dictated by the necessity to address topical issues in a difficult and evolving context, characterized by the ‘referendum’ in Crimea¹³ and a grave deterioration of the security situation in the east. They include: internally displaced persons; issues related to the rights of those taking part in the security operation and their families; sanctions for criminal actions threatening territorial integrity or aimed at overthrowing the government; the introduction of new penalties for financing illegal activities; amendments to the anti-terrorism law and others. The HRMMU is following these developments, which will be analysed and, if necessary, reflected in future recommendations.
91. In some cases, the new legislation foresees increased compliance with international instruments and recommendations of international human rights mechanisms. For example the definition of complementary protection applying to refugees was extended to include persons fleeing “international or internal armed conflict” and other serious human rights violations, in line with international and European standards. On the issue of discrimination, the definition, scope of prohibited ground, and range of sanctions have largely been aligned with relevant international norms and standards. Finally, the terms applicable to persons with disabilities in domestic legislation – such as “reasonable accommodation”, “universal design” and “discrimination on the basis of disability” - are used as defined in the Convention on the Rights of Persons with Disabilities. However, the amendments to the anti-discrimination law do not integrate the jurisprudence of the UN Human Rights Committee and the European Convention on Human Rights on the prevention of discrimination on the basis of sexual orientation.

Anti-corruption

92. The legislative basis for combating corruption has improved in recent months: bribery is now classified as an offence under the Criminal Code and corruption in all its forms is treated as a crime. Liability of companies (“legal persons”) has been introduced under the Criminal Code. Regulations have been put in place concerning confiscation and seizure of proceeds of crime. A government Commissioner for anti-corruption policy has been appointed to lead the National Anti-Corruption Committee, established in 2010. However, the latter was not given a sufficient level of independence to carry out a meaningful monitoring function of anti-corruption policies. The Government has indicated its intention to adopt a new anti-corruption strategy for 2014. Eradicating corruption is also inextricably linked to improving the functioning of other institutions. This includes amendments to the legal framework governing the powers and work of the Prosecutor’s Office, public procurement procedures and

¹³ This referendum was ruled to be unconstitutional by the Constitutional Court of Ukraine; the UN General Assembly declared the referendum to have no validity in its resolution 68/262.

reforming the public administration and civil service. In all these areas, no progress has been made during the reporting period.

Asylum

93. On 30 May 2014, the amendments to the Refugee Law of Ukraine, which brought the complementary protection and temporary protection definitions in line with international and European standards, came into force. The definition of complementary protection now includes persons fleeing armed conflict and other serious human rights violations¹⁴. Also, in May 2014, asylum seekers were granted access to emergency medical care. Another recent development is the beginning of practical implementation of the age assessment procedure for unaccompanied children seeking asylum which was adopted by the State migration service in 2013. The first age assessment committee was convened in June 2014 in the Kyiv region.
94. However, numerous gaps remain in the current refugee law particularly affecting the quality of due process in the asylum procedure and the reception conditions for asylum-seekers. Asylum-seekers frequently have to find and pay for their own interpreters; if their applications are rejected, they are not provided the reasons for rejection, yet have only five days to file an appeal; asylum-seekers are frequently left undocumented because of gaps in the asylum procedure. Without documentation, asylum-seekers cannot exercise their right to temporary employment. Since reception conditions are generally poor (few spaces available in Temporary Accommodation Centres, no social assistance available outside these centres), many are compelled to work informally in order to meet their basic needs. This places them at risk of exploitation, and given the general economic downturn in the country, their livelihoods are extremely precarious.
95. The quality of decision-making on asylum applications remains a concern, as many persons with genuine international protection needs continue to be rejected and at risk of *refoulement*. For example, in 2013, 46% of Syrian asylum applicants received refugee status or complementary protection.
96. State funding for asylum matters is inadequate. Low staffing levels and high turnover at some migration service offices means that staff is frequently unavailable to perform regular tasks, such as receiving asylum applications or renewing documents. For example, in early May, one asylum-seeker had to approach the migration service on five different days in order to file an application. This gap means that asylum-seekers are often undocumented and at risk of detention. The state does not provide language classes, so asylum-seekers struggle to adapt. Recognized refugees receive a one-time grant of only 17 UAH (less than \$2), which is clearly insufficient.

IV. ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS

97. The state has a duty towards its citizens to ensure accountability for the violations of their rights and freedoms. This is of paramount importance in the context of the situation in the east. It is also essential in relation to events in Maidan and Odesa, which have struck a deep chord within society.

¹⁴ On Amending Article 1 of the Law of Ukraine “On refugees and persons that require additional or temporary protection”, available at <http://zakon1.rada.gov.ua/laws/show/1251-18>

A. Investigation into human rights violations related to Maidan protests

98. Five months after the end of the Maidan protests, which started on 21 November 2013 and ended with the arrival of a new Government on 22 February 2014, much remains to be done to ensure accountability for human rights violations committed during this period.
99. As a result of violent clashes between demonstrators and representatives of different law enforcement agencies, and the use of arms, an estimated 103 protesters (including three women) and 20 law enforcement officers died. Hundreds more were wounded on both sides. There have been numerous reports of violence, torture and ill-treatment of protesters, mainly attributed to the 'Berkut' special police. In addition, according to a civil society organization "EuroMaidan SOS", 32 Maidan protesters (31 men and 1 woman) remain unaccounted for as of 14 July.
100. The killings on Maidan occurred during two periods: on 19-21 January 2014 and on 18-20 February 2014. To this date, nobody has been sentenced. Three 'Berkut' police officers accused of involvement in the killing of protesters have been detained under murder charges and are held in pre-trial detention. Regarding the killing of law-enforcement officers, the investigations have not led to the identification of suspects.
101. In relation to another incident, the violent dispersal of demonstrators by the riot police on the night of 30 November 2013 which triggered the Maidan protest, a Kyiv court is to decide whether two persons suspected of having ordered the dispersal are covered by an amnesty law voted in December 2013. Hearings have been postponed several times.
102. The only sentences passed so far involve 3 police officers who confessed to having ill-treated a demonstrator who had been stripped naked in the street in freezing conditions and was forced to stand in the snow while being mocked, assaulted and filmed. One of them was sentenced to three years of imprisonment with a probation period of one year, and another to two years, including a one-year probation period.
103. The Government of Ukraine submitted on 9 April a request to the International Criminal Court (ICC) to investigate the events that occurred on Maidan from 21 November 2013 to 22 February 2014. The Registrar of the ICC received a declaration lodged by Ukraine accepting the ICC jurisdiction. The declaration was lodged under article 12(3) of the Rome Statute, which enables a non-party to the Statute to accept the exercise of jurisdiction of the Court. The Prosecutor of the ICC has decided to open a preliminary examination into the situation in Ukraine in order to establish whether the Rome Statute criteria for opening an investigation are met. The government of Ukraine is currently considering the possibility to ratify the Rome statute of the ICC.
104. Various interlocutors contacted by the HRMMU expressed their concern at the slowness and inefficiency of the investigations. In particular, concerns were raised about the following: (a) the collection and preservation of evidence and forensic examinations may not have been systematic; (b) documentation related to the activities of the special police unit "Berkut" during Maidan has been destroyed; (c) it is believed that some suspects could be involved in the security operations in the east, hence the unwillingness to carry out meaningful investigations at a sensitive time; (d) corruption and general inefficiency of the judicial and law enforcement system were cited as obstacles to an impartial and comprehensive investigation; (e) some witnesses may be afraid to talk.
105. Most families of Maidan victims, who have joined in an 'initiative group', are reported to have received one-time social payments of 121,800 UAH (about USD 10,100). The allocation of payments to all families should be completed by the end of July. The initiative group is finalizing negotiations with the Ministry of Education to ensure that 52 children

from the families of people killed at Maidan will be entitled to education free of charge in all pedagogical institutions.

106. Different groups which actively participated in the Maidan demonstrations, continued to occupy buildings and facilities in central Kyiv that were taken over during the anti-government protests between December 2013 and February 2014. According to the Office of the Kyiv City Prosecutor, an estimated 950 people affiliated with the Maidan "self-defence", the Right Sector and the Social National Assembly have established themselves in and around 12 buildings, including the Ministry of Agriculture, the main post office, several cultural and business centres, shops, bars, restaurants and banks. This presence has been condemned by the Minister of Interior, the Prosecutor General of Ukraine, the Prosecutor of Kyiv, Mayor of Kyiv who have also called for the vacation of buildings. However, this has not led to the vacation of the buildings.

B. Investigation into human rights violations related to the violence in Odesa

107. The violent incidents in Odesa on 2 May resulted in the deaths of 48 people, with over 200 injured. This appears to have hardened the resolve of those opposing the Government, and deepened division between communities. There is a need for resolution to the violent events of that day. The perpetrators must be brought to justice in a fair and non-selective manner.
108. More than two months after the 2 May violence in Odesa, the incidents still divide those who live in the city. Six investigations, official and independent, have been initiated into the killings of six people by gunshot that took place during the afternoon of 2 May, and the deaths of 35 men and 7 women in the fire in the Trade Union building¹⁵. Considering the number of investigations launched by law enforcement agencies and experts, there is a high risk of miscommunication and contradictory information. The HRMMU follows these criminal investigations and has received alarming information from different sources on violations of human rights by law enforcement agencies and free legal aid incompetence. On several occasions high ranking officials have disclosed information, which has since been refuted. Overall, the communities in Odesa have no trust in the law enforcement investigation independence. This negative atmosphere is deteriorating further due to the fact that there has been little transparency within the framework of the investigations, limiting access to information for the citizens of Odesa. Both the Ministry of the Interior (MoI) Investigation Commission and the Special Parliamentary Commission have requested the assistance of foreign experts.
109. The Deputy Minister of the Interior has requested international assistance in conducting the investigation process, by written appeals to four embassies (Germany, Israel, the United Kingdom and the United States). The Independent Commission has requested the assistance of foreign experts from the Organization for Security and Cooperation in Europe and the Council of Europe. The Commission has officially requested expertise from the UN Secretary General, the High Commissioner for Human Rights, the Human Rights Monitoring Mission in Ukraine and the UN Resident Coordinator in Ukraine. It is felt that such independent international experts would be able to receive more adequate answers since witnesses would have more confidence in foreigners than in local officials. The HRMMU recommends the following: (a) in the interest of the investigation, law enforcement officials should refrain from spreading damaging rumours and disclosing information; (b) all Commissions, within their mandates, should meet on a regular basis; (c) the regional and local authorities, should work on strategies to deescalate tensions within

¹⁵ See HRMMU monthly report of 15 June 2014, paragraphs. 37 – 93.

the communities and to initiate dialogue focusing on reconciliation; (d) law enforcement agencies should ensure the protection, fulfilment and promotion of human rights within their criminal investigations; (e) the Governmental Free legal aid system should ensure the competence of lawyers providing free legal defence.

Criminal investigation by the Ministry of the Interior Investigation Unit

110. The Main Investigation Department of the MoI in Kyiv (under the control of the Deputy Minister of the Interior) is investigating the 2 May violence. According to the MoI, at the expiration of the 60 days legally granted for investigation, the investigative team requested an additional five (5) months. More time is needed to conduct the following investigative proceedings: to identify all people involved in the mass riots and identify witnesses; identify organisers of the Odesa “Euromaidan”, Right Sector, local Self-Defence, Odesa “Narodnaya Druzhyna” and other participants; identify and interrogate policemen involved with securing public order on 2nd and 4th May; identify and interrogate State Emergency Service employees who received emergency fire calls and who dispatched fire brigades to the various locations on 2 May; analyse the phone-call registry between city centre and Kulikovo Pole; conduct a full-scale analysis of the video files; question victims claiming material damage; question all Trade Union building employees present at work on 2 May.
111. The HRMMU conducted a number of meetings with defence lawyers in the 2 May violence cases, who notified that the Investigation Commission requested a prolongation of measure of restraint for all detainees (under custody or house arrest) for an additional 60 days. The HRMMU received information that the investigation process, including the interrogation of detainees, has been very limited so far. Some detainees since their apprehension on 2 May have been questioned only twice.
112. The Primorsky District Court of Odesa has favourably satisfied all petitions presented by the MoI.
113. The HRMMU has not had any obstacle in cooperating with the Commission of MoI. As of 12 July, the Investigation Commission provided the HRMMU with the following information: 12 men remain in Pre-trial detention centres under the Penitentiary Services; 41 men are placed under house arrest; 53 persons were interrogated as suspects, 83 persons were interrogated as victims; 430 persons were interrogated as witnesses; 242 forensic examinations were appointed, of which 62 are still on-going; out of 42 men and 6 women deceased, one man is still not identified; one injured man remains in hospital; five detainees (all men) are reported to be foreign citizens.
114. None of the preliminary conclusions were made public by the Investigation Commission. However, although the investigation is still ongoing, several controversial statements were made by the MoI. In May, when the forensic examinations had just started, the deputy Minister of Interior stated that people in the Trade Union building died from breathing chloroform, which has never been confirmed. Furthermore, the Head of the Regional Office for Forensic, at a public meeting with the Regional Council Investigation Commission stated that none of the deceased at Kulikovo Pole were shot or beaten to death, but that their death was caused by carbon-monoxide gas poisoning, some unidentified chemical substance or by burns. In addition, he disclosed personal private information regarding one deceased person without prior consent from the family. The Head of the Regional Office for Forensic has regularly refused to provide information regarding the cause of death, referring to the confidentiality of the investigation.
115. The Investigation Commission is in charge of investigating the actions of the Odesa Regional Emergency Service (fire brigade). The Head of the Emergency Unit was accused

of negligence, due to improper performance of his official duties (i.e. delay in deploying the fire brigade to the Trade Union building). For the purposes of the internal investigation he was temporarily dismissed. The internal and criminal investigations remain on-going.

116. The Investigation Commission has provided internal investigation documentation to families who have requested information regarding their deceased relatives. Following meetings with victims, witnesses and relatives, the HRMMU has observed a growing dissatisfaction regarding the lengthy and non-transparent investigation process. In general, witnesses shared with the HRMMU their concern about revealing information regarding the incidents. On 11 June, several claims regarding the insufficient and lengthy investigation process were brought against the Government at the Kyiv District Administrative Court.

General Prosecution Investigation Unit regarding police duty performance

117. On 3 May the General Prosecution Investigation Unit launched a criminal case against police officials based on article 365 (Excess of authority or official powers) and, article 367 (Neglect of official duty) of the Criminal Code.
118. The Regional Prosecution Office confirmed the allegation regarding the inaccessibility of high ranking officials during the 2 May violence, noting that all were at the time attending a closed meeting at the request of the Deputy General Prosecutor.
119. The investigation process into 2 May violence is challenged by the fact that the main suspect, the former Deputy Head of the Regional MoI, is currently on a “wanted” list.

Criminal investigation under the State Security Service of Ukraine (SBU)

120. As of 15 July, the SBU had initiated several criminal investigations under article 109 (Actions aimed at forceful change or overthrow of the constitutional order or take-over of government), article 110 (Trespass against territorial integrity and inviolability of Ukraine), and article 258-2 (Public incitement to commit a terrorist act) of the Criminal Code. The SBU arrested at least 35 people allegedly engaged in the above-mentioned criminal activities, mostly activists and supporters of the “pro-Federalism” movement. The HRMMU attended 6 court hearings and tried to establish contacts with the SBU investigators. The HRMMU regretfully underlines the lack of working cooperation from the Regional office of the SBU at the local level.
121. The Penitentiary Services administration fully cooperated with the HRMMU and has been granting access to detainees recently arrested. The HRMMU has also met with detainees’ lawyers and relatives. The HRMMU has the following concerns about actions committed by the SBU in the investigation, including violations of legal guarantees and ill treatment during the investigation process, which are as follows: (a) excessive use of force during arrest and house searches contravening fundamental human rights; (b) the illegal practice of disclosing personal data in relation to arrested foreign citizens, which violates the presumption of innocence; (c) the obligation to immediately inform the arrested person, in detail and in a language he/she understands, of the reasons for his/her arrest and any charges against him/her, as well as of the right to have the assistance of legal counsel, receive medical assistance free of charge, not to be compelled to testify against him/herself or confess guilt, inform promptly other persons about his/her arrest or detention and whereabouts, in accordance with the provisions of applicable international human rights law and the Ukrainian Criminal Procedure Code; (d) the failure to provide written notice of charges to the arrested person within 24 hours after the apprehension in accordance with article 278 of the Criminal Procedure Code; (e) the use of psychological intimidation and threats (in some case sexual threats) in order to obtain information.

Special Parliamentary Commission Group

122. The Special Parliamentary Commission continues to investigate the facts of mass murder. As of 15 July, it had held 9 sessions. The Head of the Commission informed the HRMMU that the members met with witnesses, victims, relatives and doctors. In addition the commission received a written statement from the former Deputy Head of the Odesa Regional MoI, who remains at large. All the collected documentation has been shared with the Office of the General Prosecutor. In addition, the request for foreign experts was raised. The Commission plans to present its preliminary findings in September.

Ukrainian Parliament Commissioner for Human Rights (Ombudsperson Office)

123. The Ombudsperson's Office has finalized its findings regarding the 2 May violence and concluded that the positive obligations of Ukraine to protect human rights (the rights to life and to liberty and security of the person and the freedom of peaceful assembly) were violated during the 2 May incidents. Moreover, the Ombudsperson concluded that the Head of the Regional MoI Odesa did not fulfil his mandatory duty to initiate the special police tactical plan "Khvyliia". This neglect resulted in a high number of victims. The Ombudsperson appealed to the Office of the General Prosecutor to investigate the law enforcement agencies performance of duty during 2-4 May, and launch a criminal investigation against responsible officials.

Independent Commission investigating the 2 May violence

124. The Independent Commission including civil society activists, journalists and experts, continued to gather information on 2 May violence. Witnesses mentioned to the HRMMU that they feel more comfortable to share information with this Commission. Several conclusions of the Commission were already broadly publicised, including the chronology of the events in the city centre, which tend to counter numerous rumours and allegations. In the course of their investigation, the Commission members requested MoI, the State Agency on Emergency Situation and the Centre of Forensic Examination for information, with no success to date. The Commission intends to take legal action against these agencies: in accordance with the law "On access to public information" (2939-17, dated 2011), information has to be shared.

Temporary Oversight Commission on the 2 May violence of Odesa Regional Council

125. The Temporary Oversight Commission on the 2 May violence has been working in close cooperation with the Special Parliamentary Commission Group. Since its establishment, this Commission held two hearings to monitor the criminal investigation process. Its conclusions were presented to the Odesa Regional Council. It deplored the fact that the SBU and the Regional Prosecution Office were not always fully cooperating. According to the statement of this Commission, based on the MoI criminal investigation there are four scenarios that triggered the 2 May violence: (1) actions committed by radical groups to destabilize the situation in the Odesa region and in other regions of Ukraine; (2) attempts by local authorities to discredit the Government; (3) uncontrolled football fans and law enforcement negligence; (4) provocation by the "pro- Unity" movement in order to intimidate the "pro-Federalism" movement.

C. Investigations into other human rights violations

126. The Parliamentary Committee investigating the events in Odesa is also in charge of investigating the violence in Mariupol, which became the theatre of heavy fighting on 9

May. Nine people died when Ukrainian security forces fired into unarmed protesters and, earlier that day, tried to dislodge armed protesters from a police station¹⁶.

127. The head of the Committee told the HRMMU that after having listened to many witnesses it was now in possession of a very detailed factual description, including information about the time and sequence of events, names of individuals who allegedly gave specific orders or took key decisions that led to the tragic outcome. The Committee will interview the persons mentioned by the witnesses and transfer the information collected to the Investigative Department of the State Security Service of Ukraine. The deadline for the Parliamentary Committee report, initially planned to be issued on 15 June, was extended until 20 October 2014.

V. INTERNALLY DISPLACED PERSONS

128. As of 15 July, UNHCR reports there are 86,609 internally displaced persons (IDPs) from Crimea and the eastern regions of Ukraine. The number of IDPs from the east has increased dramatically since mid-June with a change in the composition of the IDP population - 85% now coming from the east and 15% from Crimea. Given the large numbers of IDPs reported as having left the eastern regions, it appears that there is a significant gap in the registration of IDPs. The numbers may swell if these IDPs are registered in coming weeks. Though disaggregated statistics on the age and gender breakdown of the IDP population are not available, it is observed that the vast majority of IDPs appear to be women and children.
129. IDPs from eastern Ukraine have left home predominantly due to security concerns, including the risk of being caught in crossfire. Some IDPs express individual fear of persecution for their political views, ethnicity or fear of being forcibly recruited into the insurgent groups. IDPs also report having experienced or heard of incidents of abduction, extortion and harassment in their neighbourhoods, leading them to take preventive flight. Another reason that prompts people to flee is the material damage to housing and infrastructure in the region, where the water and electricity systems were no longer functioning. Given the insecurity in the region, delivery of basic goods is paralyzed to many towns, and IDPs say that food supplies are erratic and expensive, and medicines are frequently unavailable. With the breakdown in the banking system, many could not obtain the cash they needed to purchase basic goods, even if they did become available. Many IDPs are particularly vulnerable as they remain within the eastern regions, caught in the on-going fighting to which international humanitarian actors currently do not have access.
130. IDPs from the Donetsk and Luhansk regions report leaving the region with few personal belongings, sometimes without time for preparation, in order to disguise the purpose of their departure from the region, so they have few resources to establish themselves. IDPs who leave the eastern regions generally maintain a low profile, since they report fearing reprisals against family members who have remained at home. Many are psychologically traumatized, having witnessed violence. For example, children are afraid of loud noises and hide under furniture whenever they hear an airplane passing overhead.
131. IDPs from Crimea are mostly Tatars, but also include ethnic Ukrainians, ethnic Russians, mixed families, refugees and foreigners married to Ukrainians citizens. Many IDPs from Crimea are political activists and journalists who fear harassment, or those who have

¹⁶ A description of the case is provided in the HRMMU Monthly Report of 15 June 2014.

economic, professional or family ties within Ukraine, and, therefore, feel compelled to leave to other parts of Ukraine in order to continue a normal life. Many Crimean Tatars fear limitations on their religious and cultural expression. IDPs from Crimea live dispersed across the entire territory of the country, but with significant concentrations in Kyiv and Lviv. Ukrainian military from Crimea and their families are mainly staying in Odesa, Mykolaiv and Kherson.

132. The State's system to protect IDPs has significant gaps. Many IDPs leaving Donetsk and Luhansk regions report that they do not have information about where to go or which services are available. Despite the creation of governmental coordination mechanism, the law on IDPs has not been adopted yet and there is no central information gathering system or database on IDPs. The present registration mechanism system is ad hoc and rudimentary which does not provide the accurate number of IDPs in Ukraine or individual needs of those who approach the authorities for assistance. The government is currently developing a list of available accommodation facilities for IDPs, but, so far, has allocated financial resources only to cover the costs of accommodating those from Crimea. Owners of sanatoriums and summer camps accommodating IDPs from the Donetsk and Luhansk regions report being frustrated that they do not know when or if they will be compensated for the expenses they are incurring for taking in IDPs. Several administrative matters remain unresolved, hindering IDPs' ability to start their new lives: many IDPs cannot obtain residence registration, transfer employment record from places of displacement, register their business activities and access their personal savings in bank accounts. There are also the problems of access to day care, schools for the children and assistance for the elderly to enable women to seek employment. Also, Ukraine's legislation and policy of imposing taxes on humanitarian aid and personal income precludes tax-free provision of international aid to IDPs.
133. Many IDPs have exhausted the resources they had available. There are limited options for most IDPs to secure long-term housing arrangements, in particular those who are currently hosted by friends, family or volunteers, or placed in temporary accommodation centres provided by regional authorities. Many IDPs are temporarily housed in summer camps or hotels which are normally closed for the winter and therefore are not insulated or heated. These facilities are generally in rural areas far from schools. Thus, this accommodation is suitable only for the very short term; longer term planning is not yet underway. Furthermore, given the high cost of heating, it is likely that many temporary accommodation facilities will be unable to continue housing IDPs into the month of October unless they receive financial support. Plans should also be developed to cover shelter, clothing and heating needs, during the winter, in case a massive return to the areas currently under conflict does not materialize before or during the winter months.
134. The Government was slow to respond to the rapidly growing number of IDPs coming from the Donetsk and Luhansk regions. For many weeks the authorities relied totally on voluntary assistance and the goodwill of the receiving communities to respond to meeting the IDPs accommodation and other needs. Most IDPs were accommodated in private homes, public sanatorium or in other voluntary arrangements. By early July, many local and regional authorities began to complain that they did not have the resources to cope with the numbers of IDPs arriving. Lack of coordination, planning and resources was coupled with growing concern about the need to provide social protection to the increasing number of local families who had members fighting with the Government military and security operation in the East. In Rivne, for example, as of 1 July there were 785 people mobilized from that region to serve in the Government's security operation, while it had received 584 IDPs.

135. In June the State Service for Emergency Situations was tasked with the responsibility for coordinating the accommodation and other needs of IDPs throughout Ukraine. However, because of the involvement of civil society, in the form of volunteer groups and a loose association of concerned individuals that has provided the bulk of assistance so far to IDPs, the authorities need to coordinate with them and work systematically together. The HRMMU has been working to facilitate this.
136. Odesa became the destination of choice for IDPs with disabilities because it has a sanatorium designed to accommodate persons with disabilities. However, much of the sanatorium was already occupied by soldiers and their families from Crimea. Nevertheless, Odesa has received more than 700 IDPs with disabilities. By early July, Odesa was reporting it had reached capacity with 3,000 IDPs plus an additional 500 military and their families, all housed in summer sanatorium. There were many other unregistered IDPs staying privately with friends or family who were not reflected in that figure. IDPs continue to arrive daily in Odesa.
137. Roma IDPs have faced unique problems. Roma families tend to be large and move in groups, sometimes as large as 50 people, including many children, all of whom need to be housed together. This is often impossible because of the lack of available collective housing. Therefore some Roma camp in public parks or privately owned camping grounds which has caused additional problems. For example, in the Kharkiv region, the owners of a camping ground in Visoky, initially agreed to let a group of about 40 Roma from Slovyansk stay, but then tried to evict them when, lacking any other means to cook, the Roma families built cooking fires out in the open. The police were called to evict them and the situation escalated: the Roma threatened to block the neighbouring road and the police reportedly threatened to 'plant narcotics' on the group to make their problems harder. The HRMMU intervened after being alerted to the situation by a volunteers' group, calling the Ombudsperson and some journalists. When the media showed interest in the situation, the police left and the Roma and the camp owners worked out an agreement that the Roma could stay until a more permanent solution is found. No suitable alternative accommodation has yet been found by local authorities for this group who continue to stay in the camp.
138. In addition to the practical problems, Roma also face negative attitudes from the public, stereotyping, and bias. For example, in June, an outbreak of measles in Kharkiv, mostly among unvaccinated people, caused public animosity towards Roma (expressed in social media and publications), who accounted for about 40% of the measles cases, and who were blamed by some people for spreading the disease. The Kharkiv Deputy Governor said that the regional authorities are now working with the Roma communities in the Kharkiv region to find a systematic solution of how to assist Roma IDPs.
139. Negative information of a more general nature about IDPs has also been spreading on social media and through the internet. In Lviv, the authorities said the misinformation about IDPs was deliberately planted to cause further divisions between people from the east and west. Some of this misinformation related to the notion that male IDPs were shirking their military duty to serve back where they came from. In Rivne, the city council decided to no longer host IDP men of military conscription age. (Women make up two-thirds of all adult IDPs). On the other hand, regional authorities, as for example in Volyn, started checking male IDPs when they arrived in the west for fear that they might be 'separatists' posing as IDPs, and the local population was encouraged to report any suspicious person or object.

VI. FREEDOMS OF EXPRESSION, ASSOCIATION, PEACEFUL ASSEMBLY, MOVEMENT, RELIGION OR BELIEF

A. Peaceful assembly

140. Ukrainians with the exception of those living in the east were generally able to fully exercise their freedom to peaceful assembly in a variety of ways: by gathering in ‘flash mobs’, pickets, rallies, demonstrations and other groups to articulate publicly their concerns. Peaceful demonstrations must be permitted, as a matter of international human rights law, and also as a way for people to exercise their rights to the freedoms of expression and peaceful assembly which are the foundation for a free and democratic society. Mostly these gatherings were held without incident and without hindrance, although almost always with a large police presence.
141. In Odesa, the HRMMU noticed that since June, most of the assemblies were prohibited by court decisions. Generally the court referred to an alleged danger to public order which, in accordance with Ukrainian legislation, was among the grounds justifying interference with the right to peaceful assembly. In addition the court referred to the 2 May violence, and recent arrests of people allegedly planning terrorist acts, as grounds for the potential threat to public order.
142. No violence on the scale which occurred with the Maidan protests or in Odesa on 2 May has occurred at peaceful assemblies held during the reporting period. However, those seminal events continue to be a guiding concern for the authorities when approving demonstrations: they appeared to prefer to ban one rather than be blamed for any violence it triggered. In some places, public mass rallies were banned altogether, for example, in Odesa on 22 June, although two peaceful rallies went ahead anyway. In other places it was because the authorities thought the subject matter might incite violence. In Kyiv, for example, this justification appeared to be behind the eventual cancellation of an LGBT rights parade, to be held on 5 July, when police said they could not guarantee the safety of participants. It is the job of law enforcement officers to facilitate peaceful assemblies and to ensure the protection of the participants, irrespective of their political or other views. In order to be able to do this, law enforcement must receive adequate training to be able to handle rallies and protests, in line with international human rights standards.
143. Overall, law enforcement has managed to contain violent intent, although there have been incidents of serious damage to property and some injuries. There have also been more isolated scuffles and clashes that generally have been kept to a minimum by law enforcement. Police have been criticized for sometimes not doing enough to stop violent actions (as for example, when the trade unions meeting was violently disrupted in Kyiv on 26 June) and, conversely, for cracking down unnecessarily hard on demonstrators to prevent any kind of possible public disorder from the very beginning. This was the concern in Kharkiv on 22 June, when a large presence of law enforcement officers successfully kept opposing groups apart but was later criticized by one side for abuse of power¹⁷. There remains a need to adopt legislation and other measures to clarify the role and responsibilities of law enforcement to ensure the principles of necessity, proportionality, non-discrimination and accountability underpin the management of peaceful assemblies.
144. Currently a chilling trend has been observed where groups with different political agendas have demanded the authorities not allow peaceful assemblies of people with opposing

¹⁷ The Prosecutor’s office has started an investigation on possible criminal responsibility of the police during the two rallies held on 22 June in Kharkiv, for excessive use of force, under article 365 of the Criminal Code.

viewpoints to theirs. This illustrates once again, the need for national legislation in line with international norms and standards.

145. In Crimea, the authorities would not allow the Crimean Tatars to hold their normal celebration in the city centre of Flag Day on 26 June, but smaller gatherings took place elsewhere.
146. The subject matter of the peaceful assemblies held during the reporting period covered a broad spectrum of people's current concerns and included: protests against specific cases of alleged corruption; protesting the lack of consultation on the appointments of regional and local officials; families of soldiers protesting military service and conditions; against Russian-owned banks and business; for peace in the east; in observance of Crimean Tatar Flag Day and Constitution Day; and in support of both sides of the 'pro-Ukraine/pro-Federalism' debate (separate demonstrations). Since 8 June the Sunday 'viche' (people's assembly) has been held in Kyiv on Maidan and is now a regular weekly happening, having taken root in public consciousness as a watchdog for Government accountability.

B. Freedom of association

147. Freedom of association is an essential condition for the effective exercise of the right to vote and must be fully protected. It includes the freedom to engage in political activity individually or through political parties and other organizations. In this regard, it is noted that on 8 July the Government filed a lawsuit to ban the Communist party of Ukraine.

C. Freedom of expression

148. There were some worrying trends observed in the area of freedom of expression in both the eastern and western parts of the country. As the severity of the violence increased in the east and the crisis there dragged on, opinions became more polarized in Ukraine. As a result, the level of hate speech has escalated dramatically, especially on social media, but also in demonstrations and protests and even in Parliament¹⁸. Acts of hate speech must be publicly condemned and prohibited by law¹⁹. Political leaders should refrain from using messages of intolerance or expressions which may incite violence, hostility or discrimination; but they also have a crucial role to play in speaking out firmly and promptly against intolerance, discriminatory stereotyping and instances of hate speech.²⁰ In an indicative action, some news sites in Ukraine have started blocking comments to their stories because of the virulent comments people were posting. The increasing level of hate speech must be addressed by the country's political leaders, who have yet to speak out publicly against it.
149. There remains a need to combat intolerance and extremism and to prevent national, racial or religious hatred that constitutes incitement. As armed groups fighting in the east are no longer just local people wanting more regional autonomy or a separate autonomous state, but are being organized by professional fighters not Ukrainian citizens, there has been an increased 'anti-Russia' rhetoric with demonstrations targeting Russian-owned banks and

¹⁸ During a parliamentary session on 20 June, MP Ivan Stoyko made the following statement: 'We are now at war with the Mongoloid race, fascist Russia, which climbs on Ukraine like a locust in order to destroy our country, our nation.' Verbatim report.

¹⁹ Article 20 of the ICCPR; Article 4 of the ICERD.

²⁰ Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. A/HRC/22/17/Add.4., appendix.

business on the grounds that they are ‘financing terrorists’. Some of these demonstrations have resulted in the defacement of property.

150. Given the rise in Ukraine of instances of hate speech and other forms of intolerance expressed through social media and the internet, it is worth noting here the report on racism, the internet and social media, recently issued by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance²¹. In it he says that while the internet serves as a formidable vehicle for the exercise of free speech, it also provides a powerful platform for the rapid dissemination of racist ideas, ideologies and incitement to hatred. A comprehensive, multi-stakeholder approach is necessary to effectively counter expressions of racism on the internet and social media.
151. Journalists, media professionals and human rights defenders need protection so that they are able to do their jobs. Harassment, intimidation, manipulation and abductions of journalists have continued to occur in the east, and at least five journalists have been killed since the fighting began in April. None of these journalists was using any personal safety equipment²². The circumstances around one of the latest cases were particularly horrifying. In an operation led by an armed group on 30 June as the 10-day curfew ended, a bus of civilians, including journalists and a group of women, was sent in the middle of the night to a besieged Ukrainian military base, endangering the lives of the civilians during an attack on the base. The journalists had been told that the women on the bus were mothers of soldiers and their presence would ensure that the Ukrainian soldiers in the base would surrender peacefully. However, one of the journalists on the bus reported later that he spoke with the women and was told that none of them was a mother of any soldier. Gunfire broke out as the bus approached the military base; the bus driver was wounded and one journalist killed. The armed group has evidently ‘arrested’ one of its own activists for organizing this staged provocation.
152. In the east, attempts at manipulation of the media have been especially egregious. Many journalists previously working in the east have already fled after being abducted, harassed, intimidated or otherwise threatened. Those that remain in Luhansk have been instructed by the armed groups on how they should report the news. Words such as ‘separatist’ and ‘terrorist’ should not be used, they were told, and each Monday there would be a meeting with the editors of local media to instruct them on what to cover and how. Media outlets were threatened that if they did not cover the activities of the armed groups positively, their equipment would be destroyed and employees put in danger. In Donetsk, all media outlets are required to register with the armed groups’ ‘Ministry of Information and Communications’. This extends to online resources, including individual bloggers, as well as distributors of print media. Any outlet that does not register would be banned from all media activities. Ukrainian television channel ICTV and the local municipal TV channel 12 in Donetsk were replaced by Russian TV channel broadcasts. On the other hand, four Russian TV channels have already been banned from broadcasting in Ukraine and the process is underway to ban three more following complaints about their content in

²¹ Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. Available at: <http://www.ohchr.org/Documents/Issues/Racism/A-HRC-26-49.pdf>.

²² On 3 June, the National Journalist Union announced that in cooperation with the OSCE, a special point was opened where journalists could rent flak jackets and other personal safety equipment. On 15 July, the Ukrainian NGO Institute of Mass Information informed the HRMMU that they collect and provide flak jackets to all accredited journalists who work in the east. The accreditation is granted by the Security Service of Ukraine. So far, all journalists who applied for accreditation have received it. The IMI is deeply concerned that many Russian journalists work in Donbas without any accreditation or proper documents and without even basic security training.

compliance with the national legislation, particularly related to the use of hate speech and media.

153. The polarization and hardening of attitudes in Ukraine has resulted in some people attempting to muzzle the press or intimidate media outlets in an attempt to influence their editorial policy that they consider contrary to their own viewpoint. For example, the newspaper offices of ‘Vesti’ in Kyiv were attacked twice within a week, on 28 June and again on 5 July. In Chernivtsi, the local chapter of the National Council of Journalists has appealed to the President and others concerning a number of recent judgments which the organization says will impair journalists’ independence and force them to stop writing about important issues and which, in the organization’s view, contravene European and Ukrainian law.

D. Freedom of movement

154. Restrictions on the freedom of movement are a daily experience in areas of the east. Roadblocks and ad hoc checkpoints manned by armed groups regularly stop people who are then searched and valuables stolen or destroyed. Women and girls feel especially vulnerable because of the violence and general lawlessness and, according to the testimony of IDPs, do not go out. The ability of men to freely move in and out of areas controlled by armed groups in the eastern regions is curtailed due to abductions, which at times, lead to forced mobilisation to armed groups.
155. Ukrainian citizens continue to face restrictions and long delays crossing from Ukraine mainland to Crimea and vice versa due to the Crimean border guards.

E. Freedom of religion or belief

156. The freedom of religion or belief has come under increasing pressure in the last weeks. A disturbing number of incidents have been reported in the east and Crimea. The armed groups have declared that the main religion in Donetsk region was Orthodox Christianity (of the Moscow Patriarchate) and that sects were prohibited. This approach explains to a large extent, the increasing number of attacks on Protestant, Mormon, and Roman Catholic churches in the areas controlled by the armed groups. Religious leaders have been harassed, threatened and abducted.
157. There have been reports of incidents in other parts of the country. For example, in Odesa, law enforcement pre-emptively surrounded a synagogue that was to be a target of an anti-Jewish demonstration thereby deterring the protestors and no gathering occurred.
158. In Kyiv, on 22 June, a more violent protest targeted a religious group perceived as being affiliated with the Russian Federation. The demonstrators included men armed with baseball bats and hammers, some wearing bulletproof vests and clearly intending to do damage. However, once again a large law enforcement presence prevented any violence. The demonstrators claimed the event, being held at the Orthodox Church, was an attempt by ‘separatists’ to form a ‘Kyiv People’s Republic’.
159. This trend is particularly disturbing as Ukraine until now has demonstrated a general tolerance for different beliefs and religions.

VII. ECONOMIC, SOCIAL AND CULTURAL RIGHTS

160. The full enjoyment of social and economic rights by everyone throughout Ukraine was one of the main aims of the civil society activists, experts and journalists who united after Maidan to lobby for the necessary reforms. However, the new society that they hoped would be created by the “reanimation package of reforms” is still far from reality.
161. The country’s economy remains in recession, with a consequent adverse impact on the right to work. Unemployment increased from 8% to almost 9% in the first 6 months of this year, the inflation rate has reached 16% and utility rates have increased by an average of 30%. Meanwhile salaries and social benefits have been frozen since December 2013. The majority of the registered unemployed are women (at 52.2%) and young people aged 15 to 35 (42.3%). According to the Federation of the Trade Unions of Ukraine, every third person is employed illegally without any social guarantees or protection. There is a need to align labour legislation with international standards²³, in particular concerning the strengthening of inspections and the protection of public servants, whose mid-level salaries are 48% of the average salary in Ukraine and who lack guarantees of employment, often being the first to be fired when a new administration comes to power.²⁴
162. The trade unions are warning that because of these factors, coupled with the lack of meaningful social dialogue or transparency in government, there may be major social unrest in autumn.
163. The Government has proposed that in order to finance the security operation against the armed groups in the east, as well as the repair and revitalization of the Donetsk and Luhansk regions, the Ukraine budget would be amended. Currently the Government estimates that repair of east Ukraine will cost 8 billion UAH (about 750 million USD). Social programmes would be cut by 4.6 billion (about 420 million USD) while the defence and security sectors would grow by 8 billion UAH (about 750 million USD). The budget cuts would include a reduction of 2 billion UAH (about 180 million USD) in unemployment and disability benefits; funding for education and health would also be cut. The salaries of State employees would not be adjusted to keep pace with inflation (currently at 16%).
164. The situation in the east is dire. As of now, 104 buildings remain seized by the armed groups. Of these 24 are military premises, 16 are administrative and local authorities’ buildings, 16 are buildings of the Ministry of the Interior, 7 are Security Service buildings, 5 are prosecutor offices, 4 are of the emergency service of Ukraine, 1 is a tax administration building, and 1 is a court. With banks, the Treasury and pensions funds closed because of the violence and robberies, salaries and social security benefits have not been paid regularly for more than two months. The situation has been especially critical in Slovyansk, Kramatorsk, Snizhne and Krasnyi Luch.
165. Women have been particularly affected in this situation. They make up about 80% of those employed by the government (teachers, doctors, public servants) and were therefore hard hit by the lack of government payments of salaries and social security benefits like child support. Economically women already face a wage gender gap and discrimination in the workplace. With a scarcity of money and food coupled with their responsibility for their households and families, women in the east were further burdened by the constant fear for their lives and security.

²³ Labour Inspection Convention, 1947 (No. 81) (would strengthen the institution of inspectors and allow ad-hoc checks at enterprises) and Convention 151 - Labour Relations (Public Service) Convention (would protect rights of public servants).

²⁴ According to the Trade Union of public servants.

166. Negative impacts are also apparent on the right to health. Access to healthcare remains limited in the east, as many hospitals of the region are not operational or are working below their normal capacity, according to the Ministry of Health. The availability of health care staff has decreased, as doctors, especially specialists and surgeons have left. The lack of fuel means the Emergency Medical Service is not operating properly, especially in Slovyansk and Kramatorsk where medical help is mainly delivered by volunteer squads from Kharkiv. Delivery of medicines, including insulin and ARV therapy, has been often disrupted.
167. Due to threats and intimidation, many factories and businesses have had to shut down. For example, in the Luhansk region, four coal mines owned by the DTEK Mining Company were shut down on 10 July because of the risk to miner's lives. This followed an incident in which four miners were killed and 16 wounded, including women, when a bus they were travelling in came under fire. The company also closed its 2 coal enrichment factories. These closures affect 4,500 employees. Armed groups have also seized warehouses and factories, using the premises for such things as training camps or military repair shops. Companies that produce materials that can be used to make weapons have also been seized by the armed groups.
168. In addition, big industrial enterprises and mines are functioning under great risk of sudden power cuts, which can occur anytime as a result of damage caused by shelling. Especially in mines, such an emergency would result in miners being trapped under ground, threatening their lives and their right to safe and healthy work conditions. Numerous factories and other large enterprises use chemicals in their production and have large storage areas of containment. In situations of shelling, these could be damaged causing leakage of dangerous chemical substances, with a negative impact on the right to health and environmental safety for the residents.
169. Eastern Ukraine is the centre for the country's heavy industry. With the economic life of Donetsk and Luhansk now crippled, the impact on the rest of the country will be severe.
170. The rights to an adequate standard of living and the quality of life for residents in the east has been severely impacted and the damage to their towns and villages extensive. In some places this has reached critical levels. For example, as of 15 July, because of damage to the water systems, there was no water in Semenivka, Mykolaivka or Petrivka and residents of Slovyansk were relying on well water which was turbid and with sediment and reaching its limit. In Mykolaivka deliveries of water were being made daily but older persons and people with disabilities had no way to get into town to get the water. There were no water deliveries to Semenivka. In Luhansk, 28 villages were without electricity on 2 July; the power was also cut to 34 cities and villages in the Donetsk region on 4 July because of the fighting and repair work was in progress; according to the electricity company on 2 July, power to healthcare facilities in Kramatorsk was disrupted; 200 people were reported without gas when a gas pipe was damaged by shelling in the village of Vlasivka (Luhansk) on 3 July. Fuel was reportedly in short supply with only one petrol station remaining open to serve Kramatorsk and Slovyansk (15 miles away) on 4 July. On 27 June, the Donetsk Mayor said the sewage pumping station was not operational in Slovyansk, causing all sewage to flow untreated into the river which is relied on by people in downstream towns for drinking water. Semenivka, in the suburbs of Slovyansk, has suffered so much damage from the fighting it likely will not be repaired.
171. In the Donetsk and Luhansk regions there have been at least 24 explosions of railway lines, bridges and freight trains since 19 June. There are concerns that these acts are part of the armed group's policy to control and raise corrupt profits from trade, as train transport is

harder to control than trucks. Meanwhile, in mid-July residents of Donetsk were reported to be waiting for hours in order to catch a train to leave the area, anticipating the blockade around their city that the Government had warned it would impose. Damage to public transportation negatively affects the right to an adequate standard of living.

172. In Crimea, water supply through the North Crimean Canal was blocked by the Ukrainian Department of the North Crimean Canal on 12 May. As much as 80% of Crimea's water reserves used to come from mainland Ukraine. While this situation will not affect drinking water, the consequences of the decision to halt water supply have already started being felt on the harvest of crops, particularly rice and potatoes, which was lower than in the previous year.

VIII. MINORITY RIGHTS AND OTHER GROUPS FACING DISCRIMINATION

173. Despite the escalation of violence in the east and the rise of hate speech, particularly in social media, incidents of actual harassments or violent attacks on minorities remain isolated and rare.²⁵ Representatives of ethnic and national groups who the HRMMU have spoken to, do not report any systematic negativism or discrimination against them.
174. A few individual cases of hostility and anti-minority acts were reported to the HRMMU. For example, on 25 June in Ivano-Frankivsk region, an activist of the Ukrainian Greek Ethnic and Cultural Society had his property defaced with the Russian and armed groups' flags. He believes it was done by the local Self Defence group who have threatened him previously for questioning the lawfulness of their activities. He also believes there is a connection to his Greek ethnic origin and perceives the situation as inciting hostile attitudes in the region. On 3 July, in Mykolaiv, a monument commemorating Holocaust victims was defaced with brilliant green dye.
175. Representatives of some ethnic communities raised specific concerns about intolerant attitudes towards them. For instance, Roma activist mentioned to the HRMMU that Roma IDPs are less likely to receive help, particularly accommodation; in several towns and villages, local authorities requested Roma families to leave; some local residents were also hostile. People belonging to the Chechen minority fear that because citizens of the Russian Federation from the Republic of Chechnya are known to have participated in the fighting in the eastern regions of Ukraine, people belonging to the Chechen minority in Ukraine might eventually face threats and discrimination.
176. A few incidents of intolerance were based on sexual orientation and gender identity. On 8 June in Donetsk and on 6 July in Kyiv, LGBT clubs were attacked by armed men. The attackers insulted visitors on the basis of their sexual orientation. Although the LGBT rights parade 'March of Equality' planned for 5 July in Kyiv was cancelled, as reportedly police could not guarantee participants' safety, the organisers of the event still received threats and numerous hate comments in social media.
177. In its previous recommendations, the HRMMU stressed the importance of ensuring inclusivity and equal participation of all in public affairs and political life. The law "On Minorities" adopted in 1992 is declarative and does not provide sufficient legal basis for

²⁵ In her visit to Ukraine in April, the Special Rapporteur on minority issues reported that the country had a history of harmonious inter-ethnic and inter-faith relations and a legislative, policy and social environment that is generally conducive to the protection of their rights, including cultural and linguistic rights. Nevertheless it was noted that some grievances do exist and that minority rights had become a highly politicized issue.

the active participation of minorities in decision-making processes. Unfortunately, no particular efforts were made to develop a mechanism which could have facilitated participation of all minorities and indigenous peoples in the recent national unity round tables on the constitutional changes.

178. Among positive developments, on 18 June, the Cabinet of Ministers created a Commissioner on Ethno-National Policy. The mandate, defined by the Decree of the Cabinet of Ministers Nr. 164 as of 4 June, is to facilitate cooperation between authorities and civil society to “ensure protection of ethnic and national minorities and indigenous peoples, preserve inter-ethnic unity and concord in Ukrainian society”. The Commissioner should develop and present the Cabinet of Ministers with measures to improve ethno-national policy and to prevent inter-ethnic conflicts and acts of discrimination.

IX. POLITICAL RIGHTS

179. In the past few weeks there has been growing frustration expressed by citizens in many different regions (e.g. Ivano-Frankivsk, Ternopil and Lviv) over the way regional and local appointments are made without regard to public opinion. In numerous demonstrations and meetings, people have demanded that they be consulted before such appointments are made and that senior officials, usually appointed by central government, should be of local origin and of people well trusted by the community. Sometimes these protests have been effective in stopping a particular appointment. However, the public lack of trust in political institutions and actors - the result of years of widespread corruption and mismanagement – needs to be systematically addressed, in particular at the regional, district and local levels. It remains to be seen if changes currently being drafted to the Constitution will sufficiently address this issue.
180. Recommendations made in the previous report concerning the conduct of the Presidential election held on 25 May and about the need for inclusive consultations, are pertinent to the anticipated Parliamentary election. This election must be free, fair and transparent. Equally important is the need for political parties and their supporters to refrain from intolerance and hate speech, as well as from harassment or physical attack on candidates, all of which were factors during the Presidential election. It is hoped that a new Parliament will reflect the new political and social reality of the country.
181. Women hold less than 10% of the parliamentary seats in Ukraine and only one woman has a Cabinet position. A draft law that provided for gender quotas, requiring political parties to ensure that women comprised 30% of their party lists of candidates, languished after the first reading last year.
182. There is also a need for inclusiveness and meaningful consultations with people from all components of society (national, ethnic, linguistic, religious and other minorities, women, indigenous people, representatives of civil society, all political parties and of the ‘peaceful population’ of the east) about important government decisions. As previously reported, this did not happen sufficiently in the development of the new constitutional amendments which were finally published on 2 July.
183. Concerning consultations with the peaceful population of the east referred to above, this is particularly meaningful since there appears to have been a lack of communication with central government due in large part to the fighting and the consequent disruption of regional and local government. This has been coupled with an increase in the level of fear,

intimidation, rhetoric and propaganda aimed at the residents of the east by the armed groups that has escalated along with the fighting. As the Government regains control of areas in the east, it should make every effort to include representative voices from the peaceful population in decisions about the rebuilding and rehabilitation of their region. Only through such inclusive and participatory dialogue will there be a de-escalation of tensions and the restoration of law and order.

X. PARTICULAR HUMAN RIGHTS CHALLENGES IN CRIMEA

184. In the previous three reports, the HRMMU made 17 recommendations relating to the situation in Crimea, primarily addressed to the Russian Federation. They addressed ways the authorities could protect and enhance the enjoyment of human rights for all residents of Crimea. There has been no progress in implementing them. The HRMMU will continue monitoring the situation.
185. According to UNHCR, as of 15 July 13,381 people have moved from Crimea. A new Crimean “Ombudsperson” has been appointed, the first to occupy such a post. She was appointed after a majority vote in the so-called Crimean Parliament/State Council of Crimea on 9 July. In Lviv, a Crimean NGO warned that there could be a new wave of IDPs during August-September. This would include business people who were having serious difficulties with continuing to operate their businesses in Crimea; lecturers and teachers because they fear they will be sacked at the beginning of the new academic year for holding Ukrainian nationality or because they are Crimean Tatar; and families with sons of military age who do not want to be called for service into the Russian Federation army.
186. In contravention of General Assembly resolution 68/262 on the territorial integrity of Ukraine, the Russian Federation applies laws and regulations of the Russian Federation to the people of this territory. This continues causing confusion, legal problems and jeopardizing the rights of the residents of this region, in particular those who do not hold Russian Federation citizenship. Prisoners in Crimea are facing specific challenges: they could not leave the peninsula after the March “referendum”, as other residents chose to do. In addition, the right to reject Russian citizenship within the specified timeframe of one month from 16 March until 18 April 2014, was hampered by their deprivation of liberty.
187. All the issues previously reported on remain concerns. This is particularly true of harassment and discrimination against ethnic Ukrainians, Crimean Tatars, representatives of religious minorities, minority groups in general, and activists who opposed the 16 March ‘referendum’ in Crimea.²⁶
188. The detention of Ukrainian filmmaker Oleg Sentsov, who was arrested in Crimea and transferred to the Russian Federation on terrorism charges, was extended until 11 October. Three other activists are also detained on the same grounds. Despite the fact that Sentsov is a citizen of Ukraine, Federal Security Service (FSB) of the Russian Federation allegedly wrote in the official investigation file that “Oleg Sentsov is a Russian citizen with a Ukrainian passport”. According to Sentsov’s lawyer, his client has never applied for Russian citizenship. It would appear that since Sentsov did not explicitly renounce Ukrainian citizenship within the deadline provided under Russian legislation, he is

²⁶ The UN General Assembly in Resolution 68/262 on 27 March, 2014, declared the ‘referendum’ held in Crimea on 16 March 2014 as having no validity.

automatically considered to have become a Russian citizen²⁷. The head of the Crimean centre of business and cultural cooperation "Ukrainian House", who currently lives in Kyiv, was informed by his neighbours that his apartment in Crimea was sealed by the self-defence forces. A madrasa (Islamic religious school) in the village of Kolchugino was searched on 24 June by men in camouflage uniforms who said they were officers of the "centre for combating extremism" of the Russian FSB. During the search, several doors and windows were broken. No reason was provided for the search.

189. Representatives of religious minorities are under pressure to leave Crimea. A pastor of the Protestant Church from Simferopol and his family decided to leave Crimea after he was told by FSB officers that he could 'disappear' like the three pro-Ukrainian activists who went missing in May 2014. According to the pastor, it became dangerous even to wear clerical cloths since the "Russian Cossacks" and representatives of other 'pro-Russian' groups were very aggressive. The Bishop of the Ukrainian Orthodox Church (from the Kyiv Patriarchate) in Crimea reported about increasing pressure on believers and the church property being under threat.
190. The whereabouts of three pro-Ukrainian activists who disappeared in May 2014 are still unknown. On 23 June, the director of a Crimean human rights organization was told by an investigating officer from Crimea that the three were neither in a pre-trial detention centre nor in an FSB facility. No less critical is the situation of people living with HIV/AIDS, particularly drug addict patients and prisoners who do not have access to the substitution maintenance therapy that they previously received; several patients have reportedly died since 10 June due to the lack of necessary medication.
191. Movement to and from Crimea continued to be strictly controlled, and in some cases, prohibitions have been imposed. Representatives of the Crimean Tatar community have been targeted who opposed the March 'referendum'. Thus, the authorities of Crimea have barred on 5 July the head of the Mejlis of the Crimean Tatar People, Refat Chubarov, from entering Crimea. A similar measure had been taken against the former head of the Mejlis, Mustafa Dzhemiliev, in May 2014. In both cases, the decision was justified by alleged 'extremist' statements having been made. The Ukrainian Foreign Ministry condemned the ban and the Ombudsperson of Ukraine said it infringed international law and violated fundamental rights and freedoms of the indigenous people of Crimea.
192. Restrictions continued to be placed on the exercise of the right to peaceful assembly. The authorities in Simferopol rejected three proposals submitted by the representatives of the Crimean Tatar community concerning the location to celebrate the Crimean Tatar Flag Day, a festive event celebrated since 2009. The authorities insisted that the event be held far from the city centre and in areas mainly populated by Crimean Tatars. The official celebration, with about 500 people, eventually took place on 26 June in the district of compact settlement of the Crimean Tatars instead of the central area of the capital of Crimea. The police controlled the perimeter of the gathering and people were searched. No significant incidents were reported. Several Ukrainian and Crimean Tatar media outlets are under threat of closing. The editor's office of "Krymskaya Svetlitsa", the only Ukrainian language newspaper in Crimea, received an order from the Crimean authorities to leave the premises which they have been renting for years. The distribution network refuses to distribute the newspaper in its newsstands and it has not been included in the subscription catalogue. New laws have been rapidly introduced, without any prior consultation or notice that may have significant implications for those affected. For example, for employment

²⁷ In its second and third public reports, the HRMMU raised concerns that unclear procedures of acquiring and renouncing citizenship would cause difficulties and violations of the right to citizenship.

purposes, Ukrainian nationals resident in Crimea who rejected Russian citizenship are now considered foreigners, and may be employed only if their employer has a permit to employ foreigners. A quota system providing the number of foreigners who may be employed in Crimea is provided by the Russian Federation. Employers had very little notice of the need to apply for a permit by 15 July, and those without could be fined 800,000 RUB (more than 22,000 USD). The effects of this law on Crimean residents who are Ukrainian nationals have yet to be seen.²⁸

193. Russia and Ukraine have reached agreement on the price of electric power supplies to Crimea but no official contacts have been established as regards water supply. The current impact of water restrictions in Crimea is described earlier²⁹. The Ukrainian Ministry of Infrastructure announced the closure of its ports in Crimea (Evpatoria, Kerch, Sevastopol, Feodosia, and Yalta) for international shipping, effective 15 July.
194. On 7 July 2014, the International Civil Aviation Organization officially confirmed that the airspace over Crimea belongs to Ukraine and the organization denied that it had transferred the management of the airspace to the Russian Federation. The Ukrainian Ministry of Justice said it was seeking 1 million UAH per day (about 91,000 USD) compensation from the Russian Federation for illegally providing air navigation services over Crimea and its territorial waters (the 19-kilometer zone). Otherwise Ukraine will file a claim for the expulsion of the Russian Federation from the Convention on International Civil Aviation.
195. The situation of people living with HIV/AIDS is difficult, particularly for prisoners. Due to the differences in the approved schemes for HIV treatment in Ukraine and the Russian Federation, patients in Crimea have been forced to change their medications. Drug users have been put in a particularly vulnerable position, as they do not have access to the Opioid Substitution Therapy³⁰, which is prohibited by legislation of the Russian Federation. Since 10 June, 20 patients have reportedly died due to the lack of necessary medication and some have allegedly returned to the usage of illegal drugs.

XI. CONCLUSIONS

196. Notwithstanding the challenges the Government faces trying to restore law, order and security as well as combat armed groups in the east, it needs to address the wider systemic problems facing the country with respect to good governance, rule of law and human rights. This requires deep and badly needed reforms, especially as Ukraine seeks to fulfil its EU aspirations and establish a democratic and pluralistic society.
197. It is thus imperative for the Government to ensure priority attention to addressing comprehensively the recommendations made by international human rights mechanisms (UN treaty bodies, special procedures, and the UPR).
198. Annex 1 to this report contains recommendations from the UN Human Rights mechanisms and OHCHR based on the monitoring work of the HRMMU, which could form the basis of

²⁸ In its second and third public reports, the HRMMU warned that imposed legislative changes over such a short period of time would inevitably have an adverse impact on the possibility of residents to exercise the full scope of their rights.

²⁹ See Chapter VII.

³⁰ World Health Organisation recognizes Opioid Substitution Therapy as one of the most effective harm reduction programmes, which are widely used to control HIV/AIDS and other infectious diseases among injecting drug users.

a multi-year national human rights action plan to be developed and implemented – with clear benchmarks and timelines – through a senior coordination mechanism led by the Government of Ukraine, with the participation of key Ministries, relevant State Institutions, including the Ombudsman, and civil society organisations. The international community and the UN system stand ready to support Ukraine in the implementation of such a plan, firmly convinced that it will be essential to ensuring the success and long-term sustainability of on-going peace, security and development efforts.

**Compilation of recommendations by the UN Human Rights Mechanism
and the UN Human Rights Monitoring Mission in Ukraine**

The following recommendations are a thematic compilation of recommendations from the UN Human Rights mechanisms – treaty bodies, special procedures and the universal periodic review (UPR) – as well as from the first three reports of the UN Human Rights Monitoring Mission in Ukraine (HRMMU).

A glossary of acronyms is on the last page of this Annex.

Theme 1: Rule of law, accountability and administration of justice

Treaty Bodies

- CAT (2011) reiterated its recommendation that the reform of the Prosecutor's Office should ensure its independence and impartiality and separate the criminal prosecution functions from those of investigating alleged abuse. WGAD (2009) made similar observations.
- CRC urged the Government to put in place a juvenile justice system; ensure a restorative juvenile justice system promoting alternative measures to deprivation of liberty and strengthen the social support services. WGAD made similar recommendations.
- The HR Committee (2013) recommended the State party to take immediate and effective steps to ensure that cases of death in custody are promptly investigated by an independent and impartial body.
- The HR Committee urged the State party to adopt a law providing for clear procedures and objective criteria for the promotion, suspension and dismissal of judges.
- The HR Committee also noted that Government should ensure that prosecuting authorities are not involved in deciding on disciplinary actions against judges and that judicial disciplinary bodies are neither controlled by the executive branch nor affected by any political influence.

Special Procedures

- WGAD (2009) recommended that Ukraine provide the legal and operational framework for an independent and effective judiciary, including through appropriate recruitment.
- WGAD recommended that Ukraine amend the Criminal Procedure Code to the effect that convictions exclusively based on confessions are inadmissible.
- WGAD recommended that Ukraine: (a) ensure that in practice all detainees have recourse to lawyers from the moment of arrest and (b) legally enact a Bar Association with an independent and effective mandate.

UPR recommendations (2012)

- Speed up the work to bring the Criminal Procedure Code in line with European standards, as proposed by the Council of Europe.
- Fully implement the new Criminal Procedure Code, including necessary constitutional and statutory reforms needed to limit the powers of the Prosecutor General's office.
- Implement genuine measures ensuring truly independent judiciary, including establishing transparent procedures and criteria regarding the appointment and dismissal of judges and the use of disciplinary measures.
- Continue strengthening the independence and impartiality of the judiciary and guaranteeing greater transparency of legal procedures, through measures such as the review of the Criminal Code and of the Public Prosecutor's Office.
- Provide the legal and operational framework for an independent judiciary, inter alia, by establishing fair procedures and criteria regarding the appointment and dismissal of judges.

- Consider establishing enhanced procedures and transparent criteria regarding the appointment and dismissal of judges, and the application of disciplinary measures in order to dispel concerns of the international community regarding the independence of the judiciary.
- Provide the legal and operational framework for an independent and effective judiciary, and undertake reform of the Prosecutor's Office that ensures its independence and impartiality and separate the criminal prosecution functions from those investigating alleged abuse.
- Further strengthening of the judiciary by investigating all allegations of human rights violations by law enforcement officers and the police.
- Take concrete steps to improve the objectivity and independence of the criminal justice system by incorporating the recommendations of the Venice Commission, implementing the judgments of the European Court of Human Rights, and addressing concerns about selective justice.
- Fully implement the new Criminal Procedure Code, including necessary constitutional and statutory reforms needed to limit the powers of the Prosecutor General's office, and establish an impartial and independent criminal justice system, in line with Ukraine's obligations under the ICCPR.
- Full implementation of the new criminal procedure code, and that the independency of judges is strengthened, the role of the public prosecution is balanced and corruption in judiciary system is tackled.
- Continue to make efforts with regard to reform in criminal proceedings, including enhancing the independence and impartiality of the Prosecutor's Office, as well as the updating of pre-trial investigation procedures.
- Create an independent body to investigate cases of torture and guarantee compensation for victims. Additionally, bring conditions of detention in line with international standards and ensure respect for the judicial guarantees of detainees.
- Further pursue its effort to provide human rights training for police personnel to effectively fight hate crimes.
- Issue a comprehensive anti-discrimination law and update the national action plan in order to dedicate special attention to addressing the practices of law enforcement officials, as well as the legal and practical measures needed to combat incitement and hate crimes.
- Provide training for staff of law enforcement bodies on the rights of detainees.
- Take urgent measures to prevent cases of ill-treatment and torture by police officers.
- Protect and promote effectively the right to a fair trial in accordance with internationally established standards.
- Take the necessary steps to ensure that all allegations of mistreatment are impartially investigated.
- Ensure non-selective prosecutions on its territory and a fair trial for persons being prosecuted, in conformity with the standards as under article 14 of the ICCPR, including the right to appeal laid down in paragraph 5.
- Urgently address the problem of the acceptance by the courts of evidence obtained as a result of ill-treatment in detention.
- Consider stepping up efforts towards reform in juvenile justice.
- Strengthen and advance its efforts for establishing a juvenile justice system and promote alternative measures to deprivation of liberty for juvenile offenders.
- Ensure that the new Criminal Procedure Code respects the human rights of those held in custody, and that the statements informing migrants of the justification for their deportation is in one of the languages that the deportee understands.

HRMMU 15 April 2014 Report

- Ensure the institutional independence of the State Bureau of Investigation, under Article 216 of the new CCP, which provides for its creation within five years (as of 2012) to enable it to investigate allegations of human rights violations committed by judges, law enforcement officers

and high-ranking officials. It will be very important to ensure that this new body is independent from the Prosecutor's Office. Public accountability and sufficient resourcing is essential to enable it to function effectively, promptly, independently and impartially.

HRMMU 15 May 2014 Report

- The deterioration in the east of Ukraine – the unlawful activities of the armed groups, including the seizure and occupation of public and administrative buildings, and numerous human rights abuses, inter alia, unlawful detentions, killings, torture/ill-treatment and harassment of people – remain the major factor in causing a worsening situation for the protection of human rights. A prompt, impartial and comprehensive investigation should be undertaken into the events and violence in the east.
- The violent clashes in Odesa on 2 May resulted in the deaths of 46 people, with over 200 injured and 13 remaining missing. It appears to have hardened the resolve of those opposing the Government, and deepened division between communities. There is a need for an independent investigation into the violent events of that day. The perpetrators must be brought to justice in a fair and non-selective manner.

HRMMU 15 June 2014 Report

To the Government of Ukraine and other stakeholders:

- All gaps of legislation should be brought in line with the recommendations of the international human rights mechanisms (Treaty Bodies, Universal Periodic Review and Special Procedures); the Judiciary, Office of the Prosecutor General and the Bar Association should operate in line with relevant international norms and standards in order to ensure fair trial without which it is impossible to tackle corruption.
- The Constitutional Court should be enhanced – legal, social and all other guarantees need to be elaborated in order to ensure the genuine independence of the Constitutional Court.
- Reaffirming UN General Assembly resolution 68/262, entitled "Territorial integrity of Ukraine", measures must be taken to protect the rights of persons affected by the changing institutional and legal framework, including on issues related to citizenship, right of residence, labour rights, property and land rights, access to health and education.
- Ukrainian legislation should remain in force, considering the adverse human rights impact of legislative changes imposed and also bearing in mind UN General Assembly resolution 68/262.
- Criminal and administrative liability should not be used as a mechanism of intimidation against Crimean Tatars and other residents of Crimea, but used in line with international law.

Accountability and Rule of Law:

HRMMU 15 April 2014 Report

To the Government of Ukraine:

- Ensure accountability for all human rights violations committed during the period of unrest, through securing of evidence and thorough, independent, effective and impartial investigations, prosecutions and adequate sanctions of all those responsible for these violations; ensure remedies and adequate reparations for victims.
- Ensure that any lustration initiatives are pursued in full compliance with fundamental human rights of persons concerned, including right to individual review and right of appeal.

To the authorities in Crimea:

- Act to re-establish the rule of law, including by the effective disbandment of any and all 'self-defence forces' and/or para-military groups. Reform the administration of justice system so that it functions independently, impartially and effectively; reform the security sector so as to ensure

that it functions in full respect of international norms and standards; provide for full accountability for human rights violations.

- Strengthen rule of law institutions so that they fully comply with relevant international and regional human rights norms and recommendations of human rights mechanisms.

HRMMU 15 May 2014 Report

- All armed groups must disarm and their unlawful acts brought to an end, including the immediate release all those unlawfully detained, and the vacation of occupied public and administrative buildings, in line with the provisions of the 17 April Geneva Agreement. Those found to be arming and inciting armed groups and transforming them into paramilitary forces must be held accountable under national and international law.

HRMMU 15 June 2014 Report

To the authorities in Crimea and the de facto governing authority of the Russian Federation:

- Human rights violations should be independently, promptly and comprehensively investigated and perpetrators brought to justice.

Judiciary

Treaty Bodies

- HR Committee (2013) – urges the State party to ensure that judges are not subjected to any form of political influence in their decision-making and that the process of judicial administration is transparent. The State party should adopt a law providing for clear procedures and objective criteria for the promotion, suspension and dismissal of judges. It should ensure that prosecuting authorities are not involved in deciding on disciplinary actions against judges and that judicial disciplinary bodies are neither controlled by the executive branch nor affected by any political influence. The State party should ensure that prosecutions under article 365 of the Criminal Code fully comply with the requirements of the Covenant.

UPR Recommendations (2012)

- Take the necessary steps to ensure that all allegations of mistreatment are impartially investigated.
- Implement genuine measures ensuring truly independent judiciary, including establishing transparent procedures and criteria regarding the appointment and dismissal of judges and the use of disciplinary measures.
- Continue strengthening the independence and impartiality of the judiciary and guaranteeing greater transparency of legal procedures, through measures such as the review of the Criminal Code and of the Public Prosecutor's Office.
- Provide the legal and operational framework for an independent judiciary, inter alia by establishing fair procedures and criteria regarding the appointment and dismissal of judges.
- Consider establishing enhanced procedures and transparent criteria regarding the appointment and dismissal of judges, and the application of disciplinary measures in order to dispel concerns of the international community regarding the independence of the judiciary.
- Provide the legal and operational framework for an independent and effective judiciary, and undertake reform of the Prosecutor's Office that ensures its independence and impartiality and separate the criminal prosecution functions from those investigating alleged abuse.
- Take concrete steps to improve the objectivity and independence of the criminal justice system by incorporating the recommendations of the Venice Commission, implementing the judgments of the European Court of Human Rights, and addressing concerns about selective justice.
- Fully implement the new Criminal Procedure Code, including necessary constitutional and statutory reforms needed to establish an impartial and independent criminal justice system, in line with Ukraine's obligations under the ICCPR.

- Full implementation of the new Criminal Procedure Code, and that the independency of judges is strengthened, the role of the public prosecution is balanced and corruption in judiciary system is tackled.
- Continue to make efforts with regard to reform in criminal proceedings, including enhancing the independence and impartiality of the Prosecutor's Office as well as the updating of pre-trial investigation procedures.
- Urgently address the problem of the acceptance by the courts of evidence obtained as a result of ill-treatment in detention.

HRMMU 15 May 2014 Report

- The Law "On the restoration of the credibility of the judiciary in Ukraine" must be brought in line with international norms and standards.

Equality before the law, courts and tribunals

UPR Recommendations (2012)

- Fulfil its commitments on the use of minority language in justice, in both criminal and civil procedures.

Right to a fair trial

UPR Recommendations (2012)

- Protect and promote effectively the rights to a fair trial in accordance to the internationally established standards.
- Ensure a fair trial for persons being prosecuted, in conformity with the standards as under article 14 of the ICCPR, including the right to appeal laid down in paragraph 5.

HRMMU 15 June Report

To the Government of Ukraine and other stakeholders:

- The State Migration Service should propose amendments to bring the refugee law in line with international standards, and to allocate sufficient funds to ensure due process in the asylum procedure, as well as reception conditions meeting humanitarian needs.

Impunity

Treaty Bodies

- HR Committee (2013) - The State party should take immediate and effective steps to ensure that cases of death in custody are promptly investigated by an independent and impartial body, that sentencing practices and disciplinary sanctions against those found responsible are not overly lenient, and that appropriate compensation is provided to families of victims.

UPR Recommendations (2012)

- Improve the legislation and its application in order to combat police impunity and to increase the number of criminal investigations of suspected perpetrators accused of police brutality.
- Take sincere efforts to hold accountable those police and law enforcement officers responsible for the torture and ill-treatment of detainees.
- Ensure police officers accountability for any criminal acts.

Juvenile justice

UPR Recommendations (2012)

- Consider stepping up efforts towards reform in juvenile justice.
- Strengthen and advance its efforts for establishing a juvenile justice system and promote alternative measures to deprivation of liberty for juvenile offenders.

Law Enforcement

HRMMU 15 April 2014 Report

- Ensure that policies, practices and instructions applicable to the management of peaceful assemblies are observed through rigorous training for the personnel involved. In particular, effective internal oversight mechanisms must be put in place in order to review all incidents of injury or loss of life resulting from the use of force by law enforcement personnel as well as all cases of use of firearms during duty.

HRMMU 15 May 2014 Report

- Security and law enforcement operations must be in line with international standards and guarantee the protection of all individuals at all times. Law enforcement bodies must ensure that all detainees are registered and afforded legal review of the grounds of their detention.
- There is an increasing tendency in some critical urban areas for rallies of opposing groups to be held simultaneously, often leading to violent confrontations and clashes. This trend can be reverted by replacing incitement to hatred with the culture of tolerance and mutual respect for diverging views. Peaceful demonstrations must be permitted, as a matter of international law, and also as a way for people to express their opinion. Law enforcement agencies must facilitate peaceful assemblies, ensuring the protection of participants, irrespective of their political views. In this context, law enforcement officers must receive adequate training for handling rallies and protests in line with the international human rights standards.
- The law enforcement reform package should aim to reinforce the rule of law; to de-politicise, de-militarise, de-centralise and strengthen the structure of the law enforcement bodies through accountability, transparency, and closer cooperation with the public and local communities, as well as professionalising the staff.

Theme 2: Right to life, liberty and security of the person, torture and ill treatment

Treaty Bodies

- The HR Committee (2013) urged Ukraine to take immediate and effective steps to ensure that cases of death in custody are promptly investigated by an independent and impartial body.
- HR Committee recommended Ukraine to adopt a new legislation on prevention of domestic violence.
- CEDAW (2010) urged Ukraine to work towards a comprehensive approach to preventing and addressing all forms of violence against women; ensure effective penalties in cases of domestic violence and access of victims of domestic violence to shelters and social centres and to immediate means of redress and protection.
- CRC (2011) urged Ukraine to step up its efforts to prevent and combat all forms of abuse and neglect of children, adopt preventive measures and provide protection and services for their recovery.
- CRC urged Ukraine to end all forms of corporal punishment in the home and other settings by implementing the existing legislative prohibition.
- CRC urged Ukraine to eliminate exploitative child labour, in particular in the informal sector and ensure effective enforcement of applicable sanctions against persons violating legislation on child labour.
- CRC recommended that Ukraine develop a national strategy for the prevention of, support for and social reintegration of such children and increase the number and quality of shelters and psychosocial rehabilitation centres for children in street situations.
- CEDAW (2010) called upon Ukraine to address the root causes of trafficking, establish additional shelters for rehabilitation and social integration of victims and ensure systematic investigation,

prosecution and punishment of traffickers. CRC also recommended that Ukraine seek technical assistance from UNICEF, IOM and other partners.

Special Procedures

- WGAD (2009) recommended that Ukraine ensure a policy of zero-tolerance of torture and that any related allegation is promptly and properly investigated. CRC made similar recommendations.

UPR Recommendations (2012)

- Establish an independent national preventive mechanism in accordance with its obligations under the OPCAT.
- Consider bringing national legislation relating to trafficking in and sale of children in line with the Optional Protocol to the CRC, on the sale of children, child prostitution and child pornography.
- In the realm of the new criminal procedure code, establish an independent mechanism for the investigation of alleged cases of torture by officers of law-enforcement agencies independent from the Ministry of the Interior and the Prosecutor's Office.
- Pay due attention to the recommendations made by the Special Rapporteur on torture.
- Take further measures to ensure systematically safeguards against occurrence of torture or ill-treatment in particular in prison and detention facilities, while implementing also recommendations of the European Committee for the Prevention of Torture.
- Create an independent body to investigate cases of torture and guarantee compensation for victims.
- Ensure that the right of victims of torture or other cruel, inhuman or degrading treatment to obtain reparation is respected.
- Continue to strengthen provisions to address domestic violence, and programmes to reinforce mechanisms for the protection of women and children;
- Respect the principles and standards provided by the Council of Europe Convention on preventing and combating violence against women and domestic violence, even prior to its ratification and entry into force.
- Allocate adequate resources to ensure the effective implementation of the Combatting Trafficking in Persons Act (2011).
- Step up the national efforts in the field of trafficking in persons through a victim-oriented approach that attaches special focus on the protection of children from abuse and sexual exploitation.
- Continue efforts in combating human trafficking and provide the necessary assistance to victims of trafficking.
- Redouble its efforts in regard to combating trafficking in persons, particularly in combating the trafficking of children for sexual and labour exploitation, including through addressing the root causes of trafficking, establishing additional shelters for rehabilitation and social integration of victims and ensuring systematic investigation, prosecution and punishment of traffickers.
- Give adequate training on the Law on combating trafficking in human beings to all those involved in the fight against human trafficking, especially border guards.
- Continue its efforts aimed at fighting trafficking in persons, particularly children and women, and at ensuring compensation and rehabilitation for trafficking victims.
- Improve the legislation and its application in order to combat police impunity and increase the number of criminal investigations of suspected perpetrators accused of police brutality, as well as provide training for staff of law-enforcement bodies on the rights of detainees.
- Ensure that the right of victims of torture or other cruel, inhuman or degrading treatment to obtain reparation is respected.
- Take sincere efforts to hold accountable those police and law enforcement officers responsible for the torture and ill-treatment of detainees.

- Take urgent measures to prevent cases of ill-treatment and torture by police officers and ensure their accountability for any criminal acts.
- Strengthen the effectiveness and the independence of the mechanisms to supervise the observance of human rights of inmates and persons under police custody with the aim of preventing ill-treatment.

Treaty Bodies

- HR Committee (2013) - The State party should reinforce its measures to eradicate torture and ill-treatment, ensure that such acts are promptly, thoroughly, and independently investigated, that perpetrators of acts of torture and ill-treatment are prosecuted in a manner commensurate with the gravity of their acts, and that victims are provided with effective remedies, including appropriate compensation. As a matter of priority, the State party should establish a genuinely independent complaints mechanism to deal with cases of alleged torture or ill-treatment. It should also amend its Criminal Procedure Code to provide for mandatory video recording of interrogations, and pursue its efforts towards equipping places of deprivation of liberty with video recording devices with a view to discouraging any use of torture or ill-treatment.

HRMMU 15 June 2014 Report

To the Government of Ukraine and other stakeholders:

- All armed groups must immediately put an end to their violent activities and lay down their arms.

To the authorities in Crimea and the de facto governing authority of the Russian Federation:

- Intimidation, harassment and abductions of residents must stop, with guarantees ensured for the respect for the right to life, liberty and security.

Right to life – excessive use of force

UPR Recommendations (2012)

- In the realm of the new Criminal Procedure Code, establish an independent mechanism for the investigation of alleged cases of torture by officers of law enforcement agencies independent from the Ministry of the Interior and the Prosecutor's Office.
- Further strengthening of the judiciary by investigating all allegations of human rights violations by law enforcement officers and the police.

HRMMU 15 June 2014 Report

To the Government of Ukraine and other stakeholders:

- The Government must ensure that its armed forces refrain from using excessive force, and ensure that its on-going security operations are at all times in line with the relevant international standards applicable to different types of operations. In all circumstances, it must ensure the protection of those who are not involved in the fighting.

Arbitrary arrest and detention

UPR Recommendations (2012)

- Additionally, bring conditions of detention in line with international standards and ensure respect for the judicial guarantees of detainees.
- Strengthen the effectiveness and the independence of the mechanisms to supervise the observance of human rights of the inmates and the persons under police custody with the aim of preventing ill-treatment.
- Ensure non-selective prosecutions on its territory.
- Ensure that the new Criminal Procedure Code respects the human rights of those held in custody.

HRMMU 15 April 2014 Report

To the authorities in Crimea:

- Publicly condemn all attacks or harassment against human rights defenders, journalists or any members of the political opposition; and ensure full accountability for such acts, including arbitrary arrests and detentions, killings, torture and ill-treatment, through prompt, impartial and effective investigations and prosecutions.
- Take all measures to ensure that the human rights of Ukrainian soldiers based in Crimea are also fully respected.
- Take all needed measures to protect the rights of persons affected by the changing institutional and legal framework, including on issues related to access to citizenship, right of residence, labour rights, property and land rights, access to health and education.

HRMMU 15 May 2014 Report

To the authorities in Crimea:

- Reaffirming UN General Assembly resolution 68/262, entitled “Territorial integrity of Ukraine”, measures must be taken to protect the rights of persons affected by the changing institutional and legal framework, including on issues related to citizenship, right of residence, labour rights, property and land rights, access to health and education.

HRMMU 15 June 2014 Report

To the Government of Ukraine and other stakeholders:

- All people detained in the context of the security operations should be treated in line with international norms and standards and guaranteed their human rights under the International Covenant on Civil and Political Rights and other applicable bodies of international law. In order to protect its security personnel and persons not involved in the fighting, the Government should consider providing assurances that acts of abduction and detention by armed groups will not be prosecuted provided that they do not target people not involved in the fighting and the victims are treated humanely at all times.

Theme 3: Corruption

CESCR (2014)

- The State party should, as a matter of priority, address the root causes of corruption and adopt all necessary legislative and policy measures to effectively combat corruption and related impunity and ensure that public affairs, in law and in practice, are conducted in a transparent manner. It also recommends that the State party make politicians, members of parliament and national and local government officials aware of the economic and social costs of corruption, and make judges, prosecutors and the police aware of the need for strict enforcement of the law.

HRMMU 15 April 2014 Report

To the Government of Ukraine:

- Put in place, as a matter of priority, all legislative and policy measures needed to effectively eradicate corruption.

Theme 4: Equality and Non-Discrimination

Treaty Bodies

- The HR Committee (2013) recommended the State party to further improve its anti-discrimination legislation to ensure adequate protection against discrimination in line with the Covenant and other international human rights standards. The Committee noted that Government should

- explicitly list sexual orientation and gender identity among the prohibited grounds for discrimination and provide victims of discrimination with effective and appropriate remedies.
- The HR Committee urged the Government to state clearly and officially that it does not tolerate any form of social stigmatization of homosexuality, bisexuality or trans-sexuality, or hate speech, discrimination or violence against persons because of their sexual orientation or gender identity.
 - The HR Committee urged that State party to strengthen its efforts to combat hate speech and racist attacks, by, inter alia, instituting awareness-raising campaigns aimed at promoting respect for human rights and tolerance for diversity. The State party should also step up its efforts to ensure that alleged hate crimes are thoroughly investigated, that perpetrators are prosecuted under article 161 of the Criminal Code and, if convicted, punished with appropriate sanctions, and that victims are adequately compensated.
 - CERD (2011) urged Ukraine to accelerate the adoption of an anti-discrimination act stipulating the definition of direct/indirect and de facto/de jure discrimination.
 - CEDAW (2010) recommended that Ukraine implement temporary special measures, including quotas, to achieve gender equality in areas where women are underrepresented or disadvantaged and for women suffering from multiple forms of discrimination, such as Roma women.
 - CEDAW called upon Ukraine to amend the Equal Rights and Opportunities Act to strengthen the complaints and sanctions mechanisms and to bring the definition of discrimination against women into conformity with the Convention, by encompassing both direct and indirect discrimination. CEDAW recommended that Ukraine strengthen the national mechanism for the advancement of women by raising its authority and provide it with adequate resources. CEDAW also encouraged Ukraine to adopt a national plan of action with a comprehensive approach to gender equality and to allocate sufficient resources for its implementation.
 - Noting the adoption of the Plan of Action to Combat Xenophobia and Racial and Ethnic Discrimination (2010-2012), CERD (2011) recommended that Ukraine establish institutional mechanisms to counter racial discrimination and re-activate institutions which had ceased to be operational, particularly the Inter-departmental Working Group against Xenophobia and Ethnic and Racial Intolerance. Furthermore, it recommended that Ukraine mandate the Parliamentary Commissioner for Human Rights with specific competence in the field of racial discrimination, in particular to process complaints and take measures in response to the victims' concerns of racial discrimination and ensure their access to the Commissioner's Office at the regional, district and municipal levels.
 - CERD recommended that Ukraine establish civil and administrative liability for racial discrimination, including hateful opinions spread by the media and guarantee remedies and compensation to victims. CERD urged Ukraine to: investigate hate crimes; ensure that the police do not engage in racial or ethnic profiling and bring perpetrators to justice.
 - CERD strongly recommended that the State party closely monitor the activities of extremist organizations, and adopt legal and policy measures with the aim of preventing their registration and disbanding their activities, as necessary, and ensuring the protection of foreigners and members of "visible minorities" against all acts of violence.
 - CRC (2011) urged Ukraine to ensure that all children enjoy their rights without discrimination on any ground.
 - The HR Committee (2013) recommended the State party to strengthen its efforts to combat hate speech and racist attacks, by, inter alia, instituting awareness-raising campaigns aimed at promoting respect for human rights and tolerance for diversity. The State party should also step up its efforts to ensure that alleged hate crimes are thoroughly investigated, that perpetrators are prosecuted under article 161 of the Criminal Code and, if convicted, punished with appropriate sanctions, and that victims are adequately compensated.

Anti-discrimination legal framework

CESCR (2014)

The State party should expedite the adoption of amendments to its anti-discrimination legislation to ensure adequate protection against discrimination in line with article 2(2) of the Covenant, taking also into account the Committee's general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, inter alia by:

- (a) explicitly including all the prohibited grounds for discrimination listed in article 2(2) of the Covenant in its comprehensive anti-discrimination law;
- (b) bringing the definitions of direct and indirect discrimination in line with the State party's obligations under the Covenant;
- (c) prohibiting discrimination in both public and private spheres;
- (d) providing for a reversal of the burden of proof in civil proceedings;
- (e) adding provisions for access to redress in cases of discrimination, including through judicial and administrative procedures, and providing for effective and appropriate remedies for victims of discrimination.

Discrimination against Roma

The CESCR (2014) requests the State party to step up its efforts in combating discrimination against Roma with a view to giving full effect to their Covenant rights in practice and, to this end:

- (a) collect statistical data, on the basis of voluntary self-identification, on the number of Roma living in the country and on their situation in the areas of employment, social security, housing, healthcare and education with a view to formulating, implementing and monitoring targeted and co-ordinated programmes and policies at national and regional levels aimed at improving their socio-economic situation;
- (b) simplify the procedure and remove existing obstacles to ensure that all Roma are provided with personal documents, including birth certificates, which are necessary for the enjoyment of their rights under the Covenant;
- (c) ensure that the Action Plan for Roma provides for concrete measures aimed at addressing the problems faced by Roma in accessing employment, social security, housing, healthcare and education;
- (d) establish quantitative and qualitative indicators to monitor the implementation of the Action Plan nationwide and provide adequate financial resources for its effective implementation.

Discrimination against Crimean Tatars

- The State party should take measures to further improve the situation of Crimean Tatars and ensure their de facto access to employment, housing, health care, social services and education.

Gender pay gap

The CESCR recommends that the State party, taking into account the Committee's general comment No. 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights:

- (a) take steps to eliminate the persistent gender pay gap by combating vertical and horizontal segregation in employment that results in women occupying lower paid jobs and facing obstacles in the enjoyment of career opportunities on an equal footing with men;
- (b) take measures to change society's perception of gender roles, including through awareness-raising campaigns on shared family responsibilities for men and women and about equal career opportunities as a result of education and training in fields other than those traditionally dominated by either sex.

Special Procedures

- The Special Rapporteur on freedom of expression (2008) urged Ukraine to take action to thwart the wave of racist violence.

UPR Recommendations (2012)

- Adopt a comprehensive anti-discrimination legislation that would include also a definition of direct and indirect discrimination and a comprehensive list of grounds for discrimination.
- Enact legislation which clearly prohibits child prostitution and other forms of sexual exploitation, consistently with the international obligations undertaken by the country, bearing in mind that the Lanzarote Convention will enter into force as regards Ukraine on 1 December 2012.
- Adopt a comprehensive anti-discrimination law that addresses the worrying trend of incidents based on gender, sexual orientation, racial and ethnic discrimination.
- Step up efforts to strengthen the national mechanism for the advancement of women and to provide such mechanism with adequate resources.
- Take further measures against racism and extremism and encourage peaceful co-existence between different ethnic groups.
- Continue moving forward with the adoption of effective measures that promote tolerance and respect for foreigners and members of national, racial and ethnic minorities.
- Continue the promotion of the rights of national minorities, as well as governmental policy on combating discrimination.
- Remove from the legislation discriminatory provisions based on race, sex or sexual orientation, and adopt comprehensive anti-discrimination legislation.
- Continue its effort to combat discrimination and promote equality in accordance with international treaties establishing guarantees of fundamental human rights and freedoms, and equality in the enjoyment of such rights, without privileges or restrictions based on race, colour, political, religious or other belief, gender, sexual orientation, ethnic or social origin, property status, place of residence, language or other grounds.
- Take more effective procedures to counter discrimination and xenophobia.
- Continue efforts to combat different forms of discrimination and ensure respect for the rights of ethnic minorities.
- Take further measures against racism and extremism and encourage peaceful co-existence between different ethnic groups.
- Continue moving forward with the adoption of effective measures that promote tolerance and respect for foreigners and members of national, racial and ethnic minorities.
- In line with the observation made by CERD, ensure proper investigation and continue its actions to stop hate crimes.
- Continue its efforts to combat discrimination and ensure that manifestations of racial, ethnic and religious hatred are promptly investigated and acted upon accordingly; and in this regard, intensify its efforts in enacting anti-discrimination laws.
- Intensify its efforts to fight hate crimes and encourage senior State officials to take a clear position against these crimes and to publicly condemn racist acts of violence and other offences motivated by hatred.
- Further pursue its efforts to create appropriate institutional mechanisms to counter all forms of discrimination and further pursue its efforts to provide human rights training for police personnel to effectively fight hate crimes.
- Respect its international commitments on fundamental rights related to non-discrimination, prevent the adoption of a law prohibiting freedom of expression with regards to homosexuality and raise awareness of civil society on combating all forms of discrimination, including discrimination based on sexual orientation and gender identity.

- Study the possibility of expanding measures to combat discrimination, especially in the case of children with disabilities and HIV.
- In line with the observation made by the Committee on the Elimination of Racial Discrimination, ensure proper investigation and continue its actions to stop hate crimes.
- Intensify its efforts to fight hate crimes and encourage senior State officials to take a clear position against these crimes, and publicly condemn racist acts of violence and other offences motivated by hatred.

Theme 5: Minorities and Indigenous Peoples

Treaty Bodies

- CERD (2011) urged Ukraine to adopt special measures to preserve the language, culture, religious specificities and traditions of those communities.
- CERD recommended that Ukraine ensure the restoration of political, social and economic rights of Tatars in the Crimea, in particular the restitution of property.
- CERD recommended that Ukraine provide education to Roma children, and on Roma language and culture.
- CERD urged Ukraine to issue identification documents to all Roma to facilitate their access to the courts, legal aid, employment, housing, health care, social security, education and other public services. CRC made similar observations.
- CERD recommended that Ukraine respect the right of persons and peoples to self-identification and consider the issue of the Ruthenians' status, in consultation with their representatives.
- CERD urged Ukraine to adopt legislation to protect indigenous peoples and guarantee their economic, cultural and social development.

CESCR (2014)

Linguistic rights of national or ethnic minorities

- The Committee recommends that the State party ensure the meaningful and comprehensive participation of concerned minorities in the process of drafting the new language law with a view to giving expression to the linguistic diversity of different minorities. It should further ensure that the revised law conforms to the relevant international and regional standards for the protection of the linguistic rights of national or ethnic minorities.

Cultural rights of Crimean Tatars

- The Committee recommends that the State party, taking into account the Committee's general comment no. 21 (2009) on the right of everyone to take part in cultural life, strengthen the measures aimed at ensuring favourable conditions for Crimean Tatars to preserve, develop and promote their identity, language and culture, inter alia by providing adequate financial support to cultural organizations for their activities and creating more opportunities for Crimean Tatars to promote and use their mother tongue in education and daily life.

UPR Recommendations (2012)

- Continue efforts to combat different forms of discrimination and ensure respect for the rights of ethnic minorities.
- Take further measures against racism and extremism and encourage peaceful co-existence between different ethnic groups.
- Continue moving forward with the adoption of effective measures that promote tolerance and respect for foreigners and members of national, racial and ethnic minorities.
- Continue the promotion of the rights of national minorities, as well as governmental policy on combating discrimination.

- Take further steps to promote education in the languages of the national minorities, including in the areas where the number of students may be decreasing.
- Further ensure, in a sustainable way, the education in minority languages.
- Further improve the situation pertaining to minority issues, especially in the social and economic fields for the disadvantaged groups, and promote equal opportunities for them to have access to education and other related sectors at all levels.
- That no effort be spared for the improvement of the current status and living conditions of the Crimean Tatars along with the other minorities.
- Take further action in ensuring and preserving the political, economic, social and cultural rights of the Crimean Tatars, which would also be conducive to better inter-communal relations.
- Further improve the situation pertaining to minority issues, especially in the social and economic fields for the disadvantaged groups, and promote equal opportunities for them to have access to education and other related sectors at all levels.
- Take further steps to promote education in the languages of the national minorities, including in the areas where the number of students may be decreasing.
- Further ensure, in a sustainable way, the education in minority languages.

HRMMU 15 April 2014 Report

To the Government of Ukraine:

- Ensure that legislation on minorities, in particular on linguistic rights, is adopted following full consultation of all minorities concerned and according to relevant international and regional human rights standards.

To the authorities in Crimea:

- Ensure the protection of the rights of all minorities and indigenous peoples in Crimea, in particular Crimean Tatars.

HRMMU 15 May 2014 Report

To the Government of Ukraine:

- The announced national consultations on the discussion of the amendments to the Constitution of Ukraine on the decentralization of state powers should be advanced in accordance with the principle of equal inclusion of all, including national minorities and representatives of civil society, and ensuring equal role for women. A system of checks and balances should be fully provided. If conducted in a broad, consultative and inclusive manner, this may be a positive step leading to the de-escalation of tensions and genuine national reconciliation.
- The adoption of measures, including making official public commitments on minority protection and ensuring participatory and inclusive processes in public and political life - reassuring all members of minorities regarding respect for their right to life, equality, political participation in public affairs and public life, as well as their cultural and linguistic rights would significantly ease tensions within the Ukrainian society.

To the authorities in Crimea:

- All acts of discrimination and harassment towards members of minorities and indigenous peoples – in particular Crimean Tatars – and other residents who did not support the “referendum” must come to an end, and all their human rights must be guaranteed.

HRMMU 15 June 2014 Report

To the Government of Ukraine and other stakeholders:

- A language law should be adopted in line with international standards that enable the promotion of the official national language as well as other languages.

To the authorities in Crimea and the de facto governing authority of the Russian Federation:

- The promotion and protection of the rights of national minorities, including the Crimean Tatars and other indigenous peoples must be ensured, enabling them to participate fully and inclusively in public and political life.

Theme 6: Right to participate in public and political life

Treaty Bodies

- CEDAW (2010) urged Ukraine to increase the representation of women in elected and appointed bodies through, inter alia, the implementation of temporary special measures.

UPR Recommendations (2012)

- Take appropriate measures aimed at increasing the number of women in decision-making positions as well as address the issue of a persisting wage gap between men and women;

HRMMU 15 April 2014 Report

To the Government of Ukraine:

- Ensure inclusivity and equal participation of all in public affairs and political life, including members of all minorities and indigenous peoples and establish a mechanism to facilitate their participation.

HRMMU 15 June 2014 Report

To the Government of Ukraine and other stakeholders:

- There should be constitutional inclusive and meaningful consultations with all political parties, regardless of their ideology, as well as representatives of civil society and minority (national and ethnic, linguistic, religious and other) groups and indigenous peoples in order to embrace all components of society, including women in the dialogue for the new constitution, which will reflect the new reality of the country with a full-fledged system of checks and balances. The peaceful population of the east should participate in these consultations.

Theme 7: Freedom of expression, association, and peaceful assembly

Treaty Bodies

- Concerned about the lack of a domestic legal framework regulating peaceful events, the HR Committee (2013) urged Ukraine to adopt a law regulating freedom of assembly, imposing only restrictions that are in compliance with the strict requirements of article 21 of the Covenant.
- HR Committee recommended that State party ensure that journalists, human rights defenders and individuals are able to freely exercise their right to freedom of expression, in accordance with article 19 of the Covenant and the Committee's general comment No. 34 (2011) on the freedoms of opinion and expression. Any restrictions on the exercise of freedom of expression should comply with the strict requirements of article 19, paragraph 3, of the Covenant. Furthermore, the State party should ensure that acts of aggression, threats and intimidation against journalists are investigated, prosecuted and punished and victims provided with appropriate remedies.
- HR Committee urged the State party to ensure that individuals fully enjoy their right to freedom of assembly. The State party should adopt a law regulating the freedom of assembly, imposing only restrictions that are in compliance with the strict requirements of article 21 of the Covenant.

Special Procedures

- The Special Rapporteur on freedom of expression (2008) urged Ukraine to guarantee that crimes against media professionals and opinion-makers will not go unpunished. The Special Rapporteur also called for a broad and comprehensive revision of media legislation, especially on TV and

radio broadcasting, to increase TV and radio broadcasting bodies' independence from political lobbies.

- The Special Rapporteur urged Ukraine to ensure that human rights defenders do not face harassment or discrimination and to create a safe environment conducive to their work.

UPR Recommendations (2012)

- Further promote freedom and pluralism of the media as key elements for enabling the exercise of freedom of expression.
- Create an enabling environment for journalists and media professionals and ensure fully transparent and impartial investigation and prosecution in all cases of attacks against them.
- Further develop measures to fully guarantee freedom of expression, particularly the protection of the integrity of persons working in the media in the exercise of that right.
- Ensure better protection of journalists and combat abuse and violence to which they are subject.
- Pursue measures against State organs which attempt to limit media and journalists.
- Implement a law on freedom of assembly that complies with applicable standards under article 21 of the ICCPR.
- Adopt a law on bar association that recognizes the right of the bar to self-government and guarantees a proper representativeness by regular elections and regional representation.

HRMMU 15 April 2014 Report

To the Government of Ukraine:

- Adopt legislation and other measures needed to ensure the right to peaceful assembly in compliance with the requirements of article 21 of the International Covenant on Civil and Political Rights. In particular, ensure that the principles of necessity, proportionality, non-discrimination and accountability underpin any use of force for the management of peaceful assemblies.
- Prevent media manipulation by ensuring the dissemination of timely and accurate information. Take action against deliberate manipulation of information, in compliance with international standards of freedom of expression and in full respect of due process guarantees.
- Combat intolerance and extremism and take all measures needed to prevent advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence and punish such incitement or acts of violence, which is of fundamental importance. A careful balancing act must however be maintained, with fully respecting the right to freedom of expression.
- Take resolute steps to prevent negative stereotyping of minority communities in the media, while fully respecting the freedom of the press. Efforts to train media professionals must be increased, including by further promoting the visibility and effectiveness of the work of the national union of journalists in this regard.
- Review legislation and policies applicable to the management of peaceful assemblies, and if necessary, modify them to ensure their compliance with human rights standards. In particular, these should specify that the principles of necessity, proportionality, non-discrimination and accountability underpin any use of force for the management. In this regard, particular attention should be paid to the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

To the authorities in Crimea:

- Investigate all allegations of hate speech and media manipulation, and take appropriate measures to prevent them and take appropriate sanctions while fully ensuring and strengthening freedom of expression.

HRMMU 15 May 2014 Report

To the Government of Ukraine:

- Primarily as a result of the actions of organised armed groups, the continuation of the rhetoric of hatred and propaganda fuels the escalation of the crisis in Ukraine, with a potential of spiralling out of control. Acts of hate speech must be publicly condemned and deterred. Political leaders should refrain from using messages of intolerance or expressions which may incite violence, hostility or discrimination; but they also have a crucial role to play in speaking out firmly and promptly against intolerance, discriminatory stereotyping and instances of hate speech.
- There are increasing reports of harassment and intimidation of journalists. These should be investigated and addressed in order to ensure accountability and protect fundamental human rights and freedoms. Freedom of expression must be ensured allowing journalists the space and security to carry out their work objectively.

To the authorities in Crimea:

- At variance with UN General Assembly resolution 68/262, the legislation of the Russian Federation is being enforced on the territory. In addition, its differences in comparison with Ukrainian laws already have and will continue having serious implications for the enjoyment of human rights and fundamental freedoms, including freedom of expression and media as well as freedoms of peaceful assembly, association and religion.

HRMMU 15 June 2014 Report

To the Government of Ukraine and other stakeholders:

- All stakeholders should refrain from using messages of intolerance or expressions, which may incite hatred, violence, hostility, discrimination or radicalisation.

To the authorities in Crimea and the de facto governing authority of the Russian Federation:

- Journalists, human rights defenders and individuals must be able to fully exercise their right to freedom of expression, in accordance with Article 19 of the International Covenant on Civil and Political Rights.

Theme 8: Freedom of Movement

HRMMU 15 June 2014 Report

To the Government of Ukraine and other stakeholders:

- Normative acts to ensure freedom of movement for residents of Crimea should be enacted as soon as possible.

Theme 9: Freedom of Religion or Belief

HRMMU 15 June 2014 Report

To the authorities in Crimea and the de facto governing authority of the Russian Federation:

- All forms of intimidation and harassment of religious communities must be put to an end and all incidents, including those where there have been attacks on Ukrainian Orthodox Church, Greek Catholic Church and the Muslim community must be properly investigated, thus enabling the effective promotion and protection of the freedom of religion or belief.

Theme 10: Right to health

Treaty Bodies

- CRC (2011) recommended that Ukraine develop specialized youth-friendly drug-dependence treatment and harm-reduction services, ensure that criminal laws do not impede access to such services and address root causes of substance use and abuse among children and youth.

CESCR (2014)

Health insurance system

- The State party should expedite the process of establishing a mandatory national health insurance system in the context of ensuring a sustainable public social security system without prejudice to maintaining the guaranteed universal health care services provided free of charge.

Health care system

The Committee recommends to the State party to:

- (a) progressively increase the health care expenditure as a proportion of gross domestic product (GDP) with a view to giving practical expression to its obligation in fulfilling the right to health under the Covenant and the State party's Constitution;
- (b) take measures to further improve the infrastructure of the primary health care system, including dental care;
- (c) take concrete measures to address the problem of the high health care costs, the shortage of certain drugs and the limited availability of health care services, especially in rural areas, in order to ensure de facto access to affordable, quality and timely health care and medical treatment for all segments of the population, including disadvantaged and marginalized individuals and groups;
- (d) reverse the current negative trend in vaccination coverage.

Mortality rates

- The Committee recommends that the State party step up its efforts with a view to further reducing the high rate of infant, child and maternal mortality, including by improving the quality, availability and accessibility of medical assistance throughout the country.

Access to emergency medical care for asylum-seekers

- The Committee recommends that the State party take all the necessary measures to guarantee that asylum-seekers have full access to free emergency medical assistance.

HIV/AIDS

The State party should continue its efforts to prevent and combat HIV/AIDS, including through the effective implementation of the National HIV/AIDS Programme 2014–2018, inter alia by:

- (a) enhancing its national preventive strategy, including its awareness-raising activities, taking into account the spread of HIV infection beyond the original risk groups and providing adequate funding for its prevention activities, including for needle and syringe exchange (NSE) programmes;
- (b) improving the coverage of adequate confidential testing throughout the country;
- (c) enhancing its counselling and referral services;
- (d) addressing shortages of antiretroviral drugs;
- (e) providing for access to adequate laboratory monitoring for HIV-infected persons;
- (f) progressively increasing the antiretroviral therapy coverage, including by considering the introduction of generic-based antiretroviral drugs.

Tuberculosis

The Committee recommends that the State party step up its measures with a view to improving its policies and strategies for disease prevention and detection, ensuring sufficiency and accessibility of specialized tuberculosis treatment and medication and adequate service delivery for patients at the primary health care level.

Drug use

The Committee recommends that the State party adopt a human rights-based approach in addressing the problem of drug use, including by:

- (a) conducting awareness-raising programmes about the serious health risks associated with drug use;
- (b) addressing the discrimination against drug dependent persons;
- (c) providing appropriate health-care, psychological support services and rehabilitation to such persons, including effective drug dependence treatment such as opioid substitution therapy (OST);
- (d) allocating financial resources for the proper operation of opioid substitution therapy (OST) and needle and syringe exchange (NSE) programmes and increasing their coverage, ensuring inter alia better access to such programmes in prison settings.

UPR Recommendations (2012)

- Continue to implement measures and programmes to promote and protect the rights of children, in particular the right to education and the right to health.
- Take effective measures to increase budgetary allocation to the health sector.
- Continue to develop the national health sector, with special focus on access to health for poorer segments of the population.
- Adopt effective measures to ensure access of all categories of citizens to treatment and prevention of HIV.
- Take steps to reverse the negative trend of the decrease in vaccination coverage in Ukraine.

Theme 11: Right to social security and to an adequate standard of living

Treaty Bodies

- CEDAW (2010) recommended that Ukraine use a gender-sensitive approach in all poverty alleviation programmes.
- CRC (2011) recommended that Ukraine ensure that poverty reduction reforms focus on social assistance and benefit to low-income families and on child protection. It urged Ukraine to address poverty in families with children in the Poverty Reduction and Prevention Programme.

CESCR (2014)

Unemployment

The Committee recommends that the State party step up its efforts to further reduce unemployment, in particular youth unemployment and unemployment among persons with disabilities, Roma and Crimean Tatars, including by:

- (a) maintaining the incentives for employers who create new jobs for individuals who have been unemployed for at least two years, including persons who have difficulty competing on the job market, and ensuring that individuals so employed retain their jobs when such incentives are no longer offered;
- (b) reviewing the vocational education and training system to ensure it reflects the current labour market demands;
- (c) taking specifically targeted measures aimed at reducing youth unemployment;
- (d) ensuring effective compliance by public and private companies and institutions with the 4 per cent quota accorded to persons with disabilities, including by providing for dissuasive sanctions for employers in case of non-compliance;
- (e) ensuring equality of opportunity and treatment in employment for Roma and Crimean Tatars and providing for sustainable income-generating opportunities, including by enhancing their skills training.

Employment in the informal economy

- The Committee recommends that the State party take all appropriate measures with a view to achieving the progressive reduction of the level of informal employment and access of persons employed in the informal economy to basic services, social protection and other Covenant rights. It also recommends that the State party systematically include the informal sector in the operations of the labour inspection services, deal with regulatory obstacles to job creation in the formal economy, and raise public awareness of the fact that labour rights and social protection apply to the informal economy.

Wage arrears

The State party should step up measures to address the problem of wage arrears, including by:

- (a) ensuring effective monitoring of the payment of wages;
- (b) providing for appropriate and dissuasive sanctions in case of violations;
- (c) ensuring that a wage guarantee institution is in place in order for workers to secure payment of their wages when such payment cannot be made by the employer due to insolvency;
- (d) ensuring that mechanisms of redress provide not only for the full payment of the overdue amounts, but also for fair compensation for the losses incurred on account of delayed payment.

Social security

- The State party should take measures to progressively bring its State social standards in line with its core obligations under articles 7, 9 and 11 of the Covenant and progressively increase their amounts.

Poverty

- The Committee draws the State party's attention to its statement concerning Poverty and the International Covenant on Economic, Social and Cultural Rights (E/C.12/2001/10) and recommends that the State party strengthen its efforts to combat poverty, with a particular focus on most disadvantaged and marginalized individuals and groups, and reduce the disparities between rural and urban areas. The State party should guarantee that its social assistance system is effectively targeting the poor and ensure that adequate financial resources are allocated for the effective implementation of poverty reduction programmes and that these are adjusted accordingly when measures taken do not bring the expected positive impact.

UPR Recommendations (2012)

- Further strengthen a gender-sensitive approach in all poverty alleviation programmes.
- Use a gender sensitive approach in all poverty alleviation programmes.

Theme 12: Right to adequate housing and right to food

Treaty Bodies

CESCR (2014)

Right to adequate housing and right to food

The State party should, taking into account Committee's general comment no. 4 (1991) on the right to adequate housing, adopt all appropriate measures to ensure access to adequate housing for Roma, inter alia by ensuring that adequate resources are allocated to increase the supply of social housing units and by providing appropriate forms of financial support, such as rental subsidies. The Committee also recommends that the State party take steps to ensure that Roma communities are consulted throughout the eviction procedures, are afforded due process guarantees and are provided with alternative accommodation or compensation enabling them to acquire adequate accommodation, taking into account the guidelines adopted by the Committee in its general comment no. 7 (1997) on

forced evictions. The Committee further recommends that the State party take effective measures to secure access to adequate housing and food for asylum-seekers.

Theme 13: Right to education

Treaty Bodies

- CRC (2011) recommended that Ukraine ensure adequate funding for the public education system; improve availability, accessibility and the quality of general education in rural areas; and seek assistance from UNICEF and UNESCO.
- CRC urged Ukraine to develop a national plan of action for human rights education.

CESCR (2014)

Inclusive education for Roma

- The Committee recommends that the State party address the segregation of Roma children in schools and their overrepresentation in special education schools by ensuring the effective enforcement of its anti-discrimination legislation and by raising teachers' and the general public awareness of these laws. It further recommends that the State party adopt an inclusive approach to the education of Roma children.

UPR Recommendations (2012)

- Continue to implement measures and programmes to promote and protect the rights of children, in particular the right to education and the right to health.
- Ensure adequate funding for the public education system and improve the availability, accessibility and quality of general education in rural areas.
- Take further steps to promote education in the languages of the national minorities, including in the areas where the number of students may be decreasing.
- Further ensure, in a sustainable way, the education in minority languages.
- Further improve the situation pertaining to minority issues, especially in the social and economic fields for the disadvantaged groups, and promote equal opportunities for them to have access to education and other related sectors at all levels.

Theme 14: Cooperation with UN mechanisms

Treaty Bodies

- HR Committee (2013). The State party should reconsider its position in relation to Views adopted by the Committee under the First Optional Protocol. It should take all necessary measures to establish mechanisms and appropriate procedures, including the possibility of reopening cases, reducing prison sentences and granting ex gratia compensation, to give full effect to the Committee's Views so as to guarantee an effective remedy when there has been a violation of the Covenant, in accordance with article 2, paragraph 3, of the Covenant.

HRMMU 15 April 2014 Report

To the Government of Ukraine:

- Closely cooperate with the HRMMU and act upon its recommendations and steps needed to provide protection for persons at risk.
- Enhance cooperation with the UN human rights system, including collaboration with OHCHR, in particular through the recently deployed United Nations HRMMU.

To the authorities in Crimea:

- Actively resolve cases of missing persons, and grant access to places of detention, including the military facilities and offices in Simferopol and Sevastopol, to all international organisations requesting it.
- Grant access to independent and impartial human rights monitors, including by OHCHR.

HRMMU 15 May 2014 Report

To the Government of Ukraine:

- Welcome steps taken to support the establishment of the HRMMU and encourage further cooperation in order to support the Government in addressing human rights concerns. OHCHR assures the Government of its on-going support in its efforts to address human rights concerns in line with international standards, and within the framework of the UN General Assembly resolution 68/262 and the Geneva Agreement of 17 April 2014.

To the authorities in Crimea:

- Agree to the deployment of independent and impartial human rights monitors, including by the HRMMU.

HRMMU 15 June 2014 Report

To the Government of Ukraine and other stakeholders:

- Access for international organisations to the areas affected in eastern Ukraine by the security operations (urban areas in the epicentre of the fighting) should be facilitated so that the real needs of the population can be assessed and addressed.

To the authorities in Crimea and the de facto governing authority of the Russian Federation:

- The deployment of independent and impartial human rights monitors, including by the HRMMU, should be agreed upon.

Theme 15: Economic, Social and Cultural Rights

Treaty Bodies

CESCR (2014)

- The Committee reminds the State party of its obligation under the Covenant to respect, protect and fulfil economic, social and cultural rights progressively, using the maximum resources available to it. While acknowledging that certain adjustments are at times inevitable, the Committee draws the attention of the State party to its open letter on economic, social and cultural rights and austerity measures during economic and financial crisis, dated 16 May 2012, which outlines the requirements that any proposed policy change or adjustment by States parties in reaction to the economic crisis must meet. The State party should also ensure that any measures adopted with a view to stabilizing the current economic situation do not disproportionately affect the most disadvantaged and marginalized individuals and groups and do not lead to lowering the existing social protection standards below the minimum core content as well as that its obligations under the Covenant are duly taken into account when negotiating financial assistance projects and programmes, including with international financial institutions such as the International Monetary Fund.
- The Committee recommends that the State party establish a statistical data collection system to assess the enjoyment of economic, social and cultural rights situation by disadvantaged and marginalized individuals and groups, including but not limited to Crimean Tatars, persons with disabilities, persons living with HIV/AIDS and non-citizens, with due respect for the principles of confidentiality, informed consent and voluntary self-identification of persons as belonging to a particular group.

HRMMU 15 April 2014 Report

- Take concrete steps to redress disparities in standards of living and equal access to and quality of health, education, employment, and social support structures for all, including marginalised communities throughout the country.

HRMMU 15 June 2014 Report

To the Government of Ukraine and other stakeholders:

- A central authority should be established to respond to the humanitarian needs of IDPs, including by establishing a comprehensive registration system, formulation of legislative and regulatory acts to ease access to important social and economic rights, establishing public assistance programmes, mobilization and coordination of civil society-initiated relief efforts, and cooperation with international donors and technical assistance.

Theme 16: Additional Human Rights Instruments

Treaty Bodies

- The HR Committee (2013) recommends that the State party provide the Office of the Commissioner for Human Rights with additional financial and human resources commensurate with its expanded role, to ensure fulfilment of its current mandated activities and to enable it to carry out its new functions effectively. It should also establish regional offices of the Commissioner for Human Rights, as planned.

CESCR Report 2014

- The Committee encourages the State party to sign and ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. The Committee also encourages the State party to consider signing and ratifying the Convention on the Protection of the Rights of all Migrant Workers and Members of their Families and the International Convention for the Protection of all Persons from Enforced Disappearance, as well as the individual complaint mechanisms under various core human rights treaties which the State party has not accepted with a view to further strengthening the protection of human rights by providing rights holders with additional opportunities to claim their rights at the international level when domestic remedies have been exhausted.
- The Committee requests the State party to disseminate the present concluding observations widely among all levels of society, particularly among government officials, members of the Verkhovna Rada and judicial authorities, and to inform the Committee on all steps taken to implement them in its next periodic report. It also encourages the State party to engage non-governmental organizations and other members of civil society in the process of discussion at the national level prior to the submission of its next periodic report.
- The Committee invites the State party to submit its common core document in accordance with the harmonized guidelines on a common core document (HRI/GEN/2/Rev.6, chap. I).

HRMMU 15 April 2014 Report

- Ratify international human rights instruments to which Ukraine is not yet party. These include, the International Convention for the Protection of All Persons from Enforced Disappearance; the international Convention on the Protection of the Rights of All Migrant Workers and Members of their families; the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; the third optional Protocol to the Convention on the Rights of the Child; the Rome Statute of the International Criminal Court; the 1954 Convention relating to the Status of Stateless Persons; and the 1961 Convention on the Reduction of Statelessness.
- Implement recommendations of international human rights mechanisms. The recommendations and concerns expressed in the past few years by several human rights mechanisms continue to

be of relevance and should be taken into account by the authorities when considering various reforms that will greatly impact on the protection of human rights for all people in Ukraine:

- a. In particular, the UN Human Rights Committee issued several important recommendations in July 2013 when it considered the latest periodic report of Ukraine on the implementation of the International Covenant on Civil and Political Rights;
 - b. The recommendations adopted by the UN Human Rights Council following the Universal Periodic Review of the human rights situation in Ukraine in October 2012 should also be taken into consideration.
 - c. The report of the UN Sub-Committee on the Prevention of Torture following its visit to Ukraine in 2011 should be made public immediately and taken into consideration by the authorities when considering issues related to torture, ill-treatment, and detention related matters.
 - d. Ukraine has issued a standing invitation to special procedures. It should accommodate requests for such visits.
- Encourage the development of a national human rights action plan, with clear timelines and benchmarks, addressing every recommendation resulting from the international and regional HR systems to be implemented within a certain time-frame - with the support of the international community, regional and bilateral actors, and the UN system.

HRMMU 15 June 2014 Report

To the Government of Ukraine and other stakeholders:

- The role and position of the Ombudsperson and National Preventive Mechanism, as the main bodies / institutions working towards the strengthening of the national human rights system and the protection and guarantee of human rights for all, should be enhanced.

Theme 17: Elections

HRMMU 15 June 2014 Report

To the Government of Ukraine and other stakeholders:

- As a representative body of the country, the Parliament should reflect the new political and social reality of the country; therefore there is a need for new parliamentary elections.

Glossary

CAT – Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CCP – Criminal Code Procedure

CEDAW – Committee on the Elimination of Discrimination Against Women

CERD – Committee on the Elimination of Racial Discrimination

CESCR – Committee on Economic, Social, and Cultural Rights

CRC – Committee on the Rights of the Child

HRC – Human Rights Council

HR Committee – Human Rights Committee

HRMMU – Human Rights Monitoring Mission in Ukraine

ICCPR – International Covenant on Civil and Political Rights

IOM – International Organization for Migration

OHCHR – Office of the High Commissioner for Human Rights

OPCAT – Optional Protocol on the Convention Against Torture and Other Cruel, Inhuman or Degrading
Treatment or Punishment

UNESCO – United Nations Educational, Scientific, and Cultural Organization

UNICEF – United Nations Children’s Fund

UPR – Universal Periodic Review

WGAD – Working Group on Arbitrary Detention

Annex 297

U.N. Security Council Resolution 2166, U.N. Doc. S/RES/2166, para. 11 (21 July 2014)



Resolution 2166 (2014)**Adopted by the Security Council at its 7221st meeting, on
21 July 2014**

The Security Council,

Deploing the downing of a civilian aircraft on an international flight, Malaysia Airlines flight MH17, on 17 July in Donetsk Oblast, Ukraine, with the loss of all 298 passengers and crew on board,

Reaffirming the rules of international law that prohibit acts of violence that pose a threat to the safety of international civil aviation and emphasizing the importance of holding those responsible for violations of these rules to account,

Recalling its press statement of 18 July 2014,

Stressing the need for a full, thorough and independent international investigation into the incident in accordance with international civil aviation guidelines, *noting* in this regard the crucial role played by the International Civil Aviation Organization (ICAO) in aircraft accident and incident investigations, and *welcoming* the decision by ICAO to send a team to work in coordination with the Ukrainian National Bureau of Incidents and Accidents Investigation of Civil Aircraft in this investigation, following a request for assistance by Ukraine to ICAO and others,

Expressing serious concern that armed groups in Ukraine have impeded immediate, safe, secure and unrestricted access to the crash site and the surrounding area for the appropriate investigating authorities, the Organization for Security and Cooperation in Europe (OSCE) Special Monitoring Mission in Ukraine and representatives of other relevant international organizations assisting the investigation in accordance with ICAO and other established procedures,

1. *Condemns* in the strongest terms the downing of Malaysia Airlines flight MH17 on 17 July in Donetsk Oblast, Ukraine resulting in the tragic loss of 298 lives;

2. *Reiterates* its deepest sympathies and condolences to the families of the victims of this incident and to the people and governments of the victims' countries of origin;



3. *Supports* efforts to establish a full, thorough and independent international investigation into the incident in accordance with international civil aviation guidelines;

4. *Recognizes* the efforts under way by Ukraine, working in coordination with ICAO and other international experts and organizations, including representatives of States of Occurrence, Registry, Operator, Design and Manufacture, as well as States who have lost nationals on MH17, to institute an international investigation of the incident, and *calls on* all States to provide any requested assistance to civil and criminal investigations related to this incident;

5. *Expresses grave concern* at reports of insufficient and limited access to the crash site;

6. *Demands* that the armed groups in control of the crash site and the surrounding area refrain from any actions that may compromise the integrity of the crash site, including by refraining from destroying, moving, or disturbing wreckage, equipment, debris, personal belongings, or remains, and immediately provide safe, secure, full and unrestricted access to the site and surrounding area for the appropriate investigating authorities, the OSCE Special Monitoring Mission and representatives of other relevant international organizations according to ICAO and other established procedures;

7. *Demands* that all military activities, including by armed groups, be immediately ceased in the immediate area surrounding the crash site to allow for security and safety of the international investigation;

8. *Insists* on the dignified, respectful and professional treatment and recovery of the bodies of the victims, and *calls upon* all parties to ensure that this happens with immediate effect;

9. *Calls on* all States and actors in the region to cooperate fully in relation to the international investigation of the incident, including with respect to immediate and unrestricted access to the crash site as referred to in paragraph 6;

10. *Welcomes* in this regard the statement on 17 July 2014 by the Trilateral Contact Group of senior representatives of Ukraine, the Russian Federation and the OSCE and *demands* that the commitments outlined in that statement be implemented in full;

11. *Demands* that those responsible for this incident be held to account and that all States cooperate fully with efforts to establish accountability;

12. *Urges* all parties to the Convention on International Civil Aviation to observe to the fullest extent applicable, the international rules, standards and practices concerning the safety of civil aviation, in order to prevent the recurrence of such incidents, and *demands* that all States and other actors refrain from acts of violence directed against civilian aircraft;

13. *Welcomes* the full cooperation of the United Nations offered by the Secretary-General in this investigation, and *requests* the Secretary-General to identify possible options for United Nations support to the investigation and to report to the Security Council on relevant developments;

14. *Decides* to remain seized of the matter.

Annex 298

Statement to the Security Council by Ivan Šimonović, Assistant Secretary-General for Human Rights on the human rights situation in Ukraine (8 August 2014)

Statement to the Security Council by Ivan Šimonović, Assistant Secretary-General for Human Rights on the human rights situation in Ukraine

New York, 8 August 2014

Mr. President,
Distinguished Members of the Security Council,

Thank you for the opportunity to brief you again on the human rights situation in Ukraine. On 28 July, OHCHR issued the fourth monthly report of the UN Human Rights Monitoring Mission in Ukraine, which covered the period from 8 June to 15 July 2014. Today, I will highlight the report's key findings and I will focus on the rapidly deteriorating situation in the east of the country and provide updates since 15 July 2014.

At the outset, let me say that the shooting down of Malaysian Airlines flight MH17, killing 298 people, which occurred on 17 July, calls for our unanimous sorrow and sympathy for the victims' families, as well as our outrage. While the downing of the plane may constitute a war crime, a thorough, effective, independent and impartial investigation is needed to determine the facts and circumstances of this act. This investigation is now underway, led by the Netherlands. To that end, it is disturbing to learn that the volatile security situation at the crash site continues to hamper the investigators, despite the ceasefire zone declared by the Government of Ukraine around the area. It is urgent to stop the fighting and to secure the crash site. At the same time of course, more broadly, there needs to be accountability for those responsible for war crimes, serious violations of international humanitarian law and gross violations of human rights law, as documented by the findings of the UN Human Rights Monitoring Mission.

The intense fighting in the Donetsk and Luhansk regions of eastern Ukraine is extremely alarming and the UN Human Rights Monitoring Mission reports mounting casualties and serious damage to infrastructure. All Ukrainians are paying an increasingly high price. As you are aware, the ceasefire declared by the Government was in effect for 10 days, from 20 to 30 June. The report describes the rapid escalation of hostilities that has occurred since the end of that ceasefire – which, it notes, was violated over 100 times. It also notes the rapid professionalization of the armed groups, which are increasingly well organized and equipped with heavy weaponry. Their political and military leadership includes not only Ukrainians but also citizens of the Russian Federation.

On 2 July, constitutional proposals were made, including on decentralization, local governance structures and preservation of the use of the Russian language. These have been among the main concerns of the Russian speaking population in the east of the country. Meanwhile, the human rights situation has deteriorated significantly in pockets of territory in Luhansk and Donetsk which are still controlled by armed groups, and where the Government has been undertaking its security operations.

The report details what amounts to a reign of fear and terror in areas under control of the armed groups, twinned with the breakdown of law and order. There have been reports of egregious human rights abuses including abductions, detentions, torture and executions in these areas, all of which have increased the terror of civilians who are trapped there or held as hostages. More must be done to protect the lives of innocent people and to bring perpetrators to account. This must start with an immediate cessation of hostilities.

Since April, some 924 people have been abducted by armed groups, including 811 politicians, journalists, professionals, students and other civilians, and OSCE monitors, and 113 servicemen, military border guards and security personnel have been detained. These figures are provided by the Government. Abducted individuals have been used as an exchange currency to free members of armed groups detained by the Government; to extort money or property; and as a source of forced labour – to dig trenches or barricades close to the epicentre of the violence. Some vulnerable groups such as persons living with HIV or drug users have been made to “work off their guilt” as forced labour or to fight on the front lines for two weeks or more. Recently, as the Government of Ukraine has regained control over more of the territory in the east formerly held by the armed groups, many hostages have been freed or released through negotiations, but as of 5 August, the whereabouts of 465 people remain unknown.

The situation of children affected by the conflict is particularly worrying and required more concerted commitments by all parties to ensure the effective protection of these children. Whilst it seems that considerable efforts have been undertaken to evacuate children from the area of hostilities, according to the Ukrainian Ombudsperson, about 300 children remained in several orphanages in the areas under the control of the armed groups.. Children experience specific vulnerabilities in this context, and allegations of abductions or attempted abductions continue to persist. For example, a group of 16 children and two chaperones, who were allegedly abducted and transferred to the Russian Federation territory on 12 June by armed groups, were returned back to Ukraine on 13 June. I am pleased to report that the active cooperation between the Ombudspersons of Ukraine and the Russian Federation had successfully facilitated the safe return of the children.

On 8 July, the authorities in the Russian Federation announced that a former Ukrainian military pilot held in a pre-trial detention centre in the Russian Federation would be charged with complicity in the killing of two Russian TV journalists on 17 June near Luhansk. The circumstances of her capture have been controversial: the Russian authorities state that she freely crossed the border into the Russian Federation and was subsequently arrested because she had no documents and was masquerading as a refugee. The Ukrainian Government says

she was abducted in Luhansk by armed groups and was taken to the Russian Federation in an operation coordinated with the Russian secret services. The Ukrainian Consul was permitted to visit her on 16 July. She remains in detention.

Fighting in and around population centres has resulted in heavy loss of life and very significant damage to property and civilian infrastructure. Both sides must be reminded of the imperative that they act proportionately and take precautions to avoid deaths and injury of civilians: otherwise they will be held accountable for the casualties that could have been avoided

The UN Human Rights Monitoring Mission and the World Health Organization estimate that between the onset of fighting in mid-April and 7 August, more than 1,543 people have been killed in the east, including civilians, the military and members of the armed groups. 4,396 have been confirmed wounded – the real number is likely to be much higher.

Some internally displaced people are beginning to return to territories in the east where the Ukrainian Government has regained control. The UN Human Rights Monitoring Mission visited Slovyansk earlier this week and I am pleased to report that life in that city is returning to normal. Water, electricity and gas supplies have been restored to 95% of previous capacity and children have returned to kindergarten. The city does not need humanitarian aid any more, according to the acting Mayor. However, a disturbing discovery has been made of a mass grave in Slovyansk containing 14 bodies, at least 2 of whom have been identified as abducted members of a local evangelist church in Slovyansk. The UN Human Rights Monitoring Mission spoke to the father of these two identified individuals who said that the church had been threatened by members of the armed groups on a number of occasions before the armed men had abducted four church members on 8 June as they left their church service. Until the bodies were exhumed on 24 July, their whereabouts had been unknown.

As the Government regains more territory formerly controlled by the armed groups, it must ensure all atrocities are fully investigated under the full application of international human rights norms and guarantees. These include the avoidance of reprisals. Allegations about arbitrary detention and abuses by Government forces have to be investigated and acted upon promptly and decisively.

I wish to inform you that the UN Human Rights Office has received a “White Book” on alleged human rights violations in Ukraine that has been prepared by the Russian Federation covering the period from early April to mid-June 2014, which we are currently reviewing. Some of the cases have already been reflected in previous reports of the UN Human Rights Monitoring Mission. I would reiterate that the Government of Ukraine should investigate all alleged human rights violations, as recommended by the Mission.

In the Autonomous Republic of Crimea, harassment and discrimination has intensified against Ukrainian nationals, Crimean Tatars, representative of religious minorities, minority groups in general and activists who opposed the 16 March “referendum” in the area. UNHCR estimates that more than 15,200 people have left Crimea, while tens of thousands of people continue to

flee the fighting in the east, bringing the total number of internally displaced persons in Ukraine to more than 117,910, according to UNHCR as of 5 August. The report details a number of recommendations to the Government to address outstanding issues.

The ability of Ukrainians to exercise their freedoms of expression, association, peaceful assembly, movement and religion or belief, as well as their political rights, has been strongly affected by the current crisis. In the east, these rights have been strictly curtailed by the armed groups. In a significant moment, the UN Human Rights Monitoring Mission reported that on 1 August, residents of Severodonetsk – a city regained by Ukrainian forces on 22 July - were able to openly gather in the central square in a flash mob to express support for Ukraine. This was the first such rally allowed since March. However, worrying trends include the rise of hate speech, particularly in social media, and a number of incidents targeting Russian-owned banks and businesses on the grounds that they are allegedly "financing terrorism". Freedom of expression has also come under attack, especially in the east, where attempts at media manipulation have been especially egregious in territory under the control of armed groups.

Journalists in Luhansk were required to meet the political leadership of the armed groups every Monday to discuss what to cover and how, and those who did not comply were threatened and obstructed, and their equipment destroyed. The so-called "Defence Minister" of the self-proclaimed "Donetsk People's Republic" has prohibited journalists, cameramen and photographers from taking photos, videos and audio recordings, and banned them from working in the combat zones and from proximity with military objects. As a result, a number of journalists, including foreign media professionals, have been harassed. Ukrainian journalists are treated even more harshly. Here I note with concern the abduction of a local field producer for CNN, who was taken from a hotel in Donetsk on 22 July, held for 4 days, severely beaten and accused of being a Ukrainian spy.

It is imperative that the parties to the conflict be assisted to find a way out of this murderous and potentially even more explosive crisis. I welcome the Ukrainian President's proposal for a new round of talks to find a way to restore the ceasefire. A first meeting was held in Minsk on 31 July where important agreements were made to secure the crash site of the Malaysian Airlines plane and to release "a sizeable number" of the hostages being held by armed groups.

Moreover, even when the current crisis has been resolved, deep psychological scars will remain. The fabric of society is being torn apart by the continuous and ongoing violence and fighting; the misinformation being spread is building divisive narratives, hardening people's resolve and deepening social divides. Residents of areas in the east affected by the prolonged fighting may need psychological assistance to heal and rebuild their lives, particularly children. Many others will require help to recover, such as victims of torture and former hostages, especially those held for long periods.

There is a clear need for a multi-year human rights national plan of action for Ukraine based on the recommendations of the United Nation human rights mechanisms and the work of the Human Rights Monitoring Mission. It is critically important that the recommendations in the annex of the report be part of the wider EU reform agenda as the international community and

Ukraine prepare also for a major donor conference later in the fall. As the report notes, the Government needs to seriously address the wider systemic problems, such as corruption, facing the country with respect to good governance, the rule of law and human rights. The Office of the High Commissioner for Human Rights reiterates its readiness to work with the Government on these issues.

Civil society has played a vital role in Ukraine. The report describes how citizens have stepped in where their Government has been unable to respond quickly enough, such as accommodating people fleeing the fighting. Perhaps this new civic spirit will help drive the next phase of the much needed change in Ukraine.

Allow me to conclude by stressing the need to find a peaceful solution to the current situation. We cannot afford to wait a day longer, when at least 50 people are being killed or wounded every day. The price being paid by all Ukrainians as a result of the conflict is too high. Ukrainians and Russian Ukrainians in the east are losing their lives, but the whole country is paying the price of conflict as a result of the deterioration of social services. The political and economic consequences of the conflict spill over Ukrainian borders, negatively impacting on human rights worldwide - the civilian airplane tragedy being just the most drastic example.

I thank you for your attention.